398.

THE BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT

WITH

A TABLE OF THE CASES ARGUED
A TABLE OF THE CASES CITED
AND
A DIGEST OF THE PRINCIPAL MATTERS,

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

PETER SECORD LAMPMAN, - - BARRISTER-AT-LAW.

VOLUME IX.

VICTORIA, B. C.
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1903.

JUDGES

OF THE

SUPREME AND COUNTY COURTS OF BRITISH COLUMBIA

AND IN ADMIRALTY

During the period of this Volume.

SUPREME COURT JUDGES.

CHIEF JUSTICE.

THE HON. GORDON HUNTER.

PUISNE JUDGES.

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

LOCAL JUDGE IN ADMIRALTY.

THE HON. ARCHER MARTIN.

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

ATTORNEY-GENERAL.

THE HON DAVID MACEWEN EBERTS, K. C.

ERRATA.

Page.	Line.	For.	Read.
35	9 from bottom	5 C.C.C.	5 C.C.C. 10
62	Foot of page	*See *ante* p. 268	*See 8 B.C. 268
390	6 from bottom	62	627
513	After argument of counsel for appellant, insert "*Harold Robertson*, for respondent, was not called on."		

TABLE OF CASES REPORTED

IN THIS VOLUME.

C.

D.

E.

F.

G.

H.

TABLE OF CASES CITED.

A.

B.

C.

D.

G.

H.

I.

J.

K.

L.

M.

N.

O.

P.

Q.

R.

S.

T.

X.

Y.

Z.

Amendments to the Tariff of Costs (of 5th April, 1897), have been made by the Judges as follows:

SCHEDULE 4.

Items 71, 72 and 73 are hereby repealed, and in lieu thereof the rates set forth in sections 61 and 84 of the Jurors Act, Cap. 107, Revised Statutes, shall apply.

SCHEDULE 1.

Item 89 is hereby amended by adding the words, "or to cross-examine on affidavit," after the word "discovery," in the fourth line thereof.

Item 227 is hereby amended as follows:

Other Court motions . . . . . $5.00 to $10.00

A Judge shall have power to award a higher fee.

Dated the 23rd day of November, 1899.

(Sd.) A. J. McCOLL, *C.J.*
(Sd.) GEO. A. WALKEM, *J.*
(Sd.) M. W. TYRWHITT DRAKE, *J.*
(Sd.) P. Æ. IRVING, *J.*
(Sd.) ARCHER MARTIN, *J.*

Item 226 of the Tariff of Costs is amended by inserting after the word "cases" in the last line but three thereof, the words "mentioned in items 224, 225 and 226."

(Sd.) GORDON HUNTER, *C.J.*
(Sd.) GEO. A. WALKEM, *J.*
(Sd.) M. W. TYRWHITT DRAKE, *J.*
(Sd.) P. Æ. IRVING, *J.*
(Sd.) ARCHER MARTIN, *J.*

28th July, 1903.

RULES AS TO COSTS UNDER OVER-HOLDING TENANTS ACT, CAP. 182, REVISED STATUTES.

In pursuance of sections 8 and 14 of the above Act the costs to which parties plaintiff or defendant shall be entitled in all proceedings taken under the said Act shall be as follows:

If the annual rent of the premises is under $500, the costs allowed shall be taxed on the lower County Court scale.

If the annual rent exceeds $500, the costs shall be taxed on the higher scale.

In taxing costs under these scales, if there is no provision applicable for any particular work required to be done, the Registrar shall allow for all such work at a rate in accordance with the respective scales or as near thereto as circumstances will permit.

(Sd.) A. J. McColl, *C.J.*
(Sd.) Geo. A. Walkem, *J.*
(Sd.) M. W. Tyrwhitt Drake, *J.*

28th February, 1900.

PRINTING OF APPEAL BOOKS.

The attention of the Profession is called to the following requirements of the Supreme Court of British Columbia respecting the printing of Appeal Books:

TITLE PAGE:—This should show the name of the Court and Judge appealed from, and the style of cause, putting the plaintiff's name first, and stating the appellant and respondent. Names of solicitors and agents may also be added.

INDEX:—Should be at the beginning of the case, and show—

(*a.*) Each pleading, order, or entry, with its date.

(*b.*) Each witness by name.

(*c.*) Each exhibit or other document, with its description and date.

N.B.—Documentary evidence to be printed in order of date and not in order of Exhibit Marks.

In future the Registrar shall not accept any Appeal Books (if typewritten) unless at least two of the said Appeal Books are original, and two are first carbon copies, and all are paged alike and indexed. Pages should be printed on the right-hand side.

The pages should be numbered on the upper right-hand corner, and marginal numbers given of every tenth line on each page, but numbering not to be run on through the book.

Unless some change has been made in the style of cause, the title page will be taken as the style of cause on each pleading, proceeding, or order.

The surname of the witness whose evidence it is should be put at the top of each page, immediately under or alongside of the pagination number, and the words "discovery," "in chief," "cross-exam.," or "re-exam.," as the case may be, added immediately under the name.

When reasons for judgment are given the name of the Judge whose reasons they are should be placed at the top of each page immediately under or alongside of the pagination number, thus:—"Henry, J."

When two exhibits are almost identical, unless there is a point turning on the difference, it is unnecessary to repeat in the second all that occurs in the first, *e. g.*, the memorandum of association having been inserted, it would be unnecessary to insert at full length the certificate of the Registrar.

If counsels' arguments on admission or rejection of evidence are inserted in the Appeal Book it will be at the risk of being disallowed on taxation.

Useless inventories should be omitted, *e. g.*, in bills of sale where nothing turns upon the description of the articles.

Exact copies of cheques, notes, bills, etc., are not always necessary, and it will be generally sufficient to state briefly their effect unless something turns upon the document itself. Nor, in like manner, is it always necessary to set out formal parts of writs of summons or execution, or original pleadings for which amendments have been substituted.

EXHIBITS:—Confusion is frequently caused by using the letters of the alphabet or numbers, without more, as exhibit marks, especially where the exhibits are numerous.

The best course is to mark the exhibits with the initial of the witness's surname in the course of whose evidence the exhibit is put in, following by consecutive numbers, *e. g.*, M1, M2, M3. Exhibits otherwise put in can be numbered consecutively.

If an exhibit is used in connection with the evidence of more that one witness the exhibit mark used in the first instance should be adhered to throughout the action.

(Sd.) GORDON HUNTER, *C.J.*
(Sd.) GEO. A. WALKEM, *J.*
(Sd.) M. W. TYRWHITT DRAKE, *J.*
(Sd.) P. Æ. IRVING, *J.*
(Sd.) ARCHER MARTIN, *J.*

Law Courts, Victoria, B. C.,
February 23rd, 1903.

REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

LEAMY, CO. J.

1901.

Oct. 26.

FULL COURT At Victoria.

1902.

Jan. 10.

McGUIRE *v.* MILLER

McGUIRE v. MILLER.

County Court—Practice—Speedy judgment—Leave to defend—Appeal—Preliminary objection—Notice of.

On a motion for speedy judgment in the County Court it is open to a defendant to set up other defences than those disclosed in his dispute note.

Held, on the facts, reversing LEAMY, Co. J., that the defendant should have unconditional leave to defend.

Per IRVING, J.: Defendant should have been allowed to cross-examine plaintiff on his affidavit.

Notice of a preliminary objection to an appeal to the Full Court must be served at least one clear day before the time set for the beginning of the sittings.

Statement.

ACTION in the County Court of Yale for the return of $500.00 deposited with the defendant as stakeholder as a wager on the result of a boxing match. The defendant in his dispute note denied that plaintiff had deposited with him the said sum as stakeholder or otherwise. Plaintiff moved for speedy judgment under section 94 of the Act and verified his claim by affidavit,

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and defendant in answer filed an affidavit making as an exhibit the following:

"ARTICLES OF AGREEMENT FOR CONTEST.

"Grand Forks, B.C., 4th September, 1901.

"We the undersigned hereby agree to box the best of twenty (20) rounds, Marquis of Queensbury Rules, 5 ounce gloves, clean break away, in the evening of Saturday, the 21st of September, 1901, at Grand Forks, B.C., under the auspices of the Grand Forks Athletic Association, the Grand Forks Athletic Association agreeing to give the contestants eighty (80) per cent. of the gross receipts, to be divided, seventy-five (75) per cent. of the eighty per cent. to the winner and twenty-five (25) per cent. to the loser.

"In addition to the above the contestants agree to stake five hundred dollars ($500.00) aside on the result and herewith deposit a forfeit of one hundred dollars ($100.00) each in the hands of the stakeholder, Alexander Miller, the balance of four hundred dollars ($400.00) to be posted not later than 3 p.m. on the 20th of September next, either party failing to post the balance to forfeit the one hundred dollars ($100.00) already posted.

"Referee to be mutually agreed upon on or before the day of contest.

"Contestants to be allowed the use of bandages.

"Complimentary tickets to be issued not to exceed ten in number.

Statement.

"A. Smith.

"Witness: A. Miller. "Dal Hawkins.

"For Grand Forks Athletic Assoc.,

"Lloyd A. Manly,"

and stating that Hawkins (by his agent the plaintiff) and Smith had each deposited with him $500.00 and that was all that had been deposited with him.

The motion came before LEAMY, Co. J., who refused defendant's application to cross-examine plaintiff on his affidavit and ordered judgment entered for plaintiff.

Defendant appealed and the appeal came on for argument at Victoria on 9th January, 1902, before WALKEM, IRVING and MARTIN, JJ., when

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Duff, K.C., for respondent, said he had a preliminary objection.

Barnard, for appellant, objected as the appeal was on the list of the sittings which opened on Tuesday at eleven a.m., and notice of this preliminary objection was too late as it was only served Monday afternoon.

The Court held that notice of the preliminary objection had not been served in time.

Barnard, stated the facts, and contended defendant should have been allowed to defend citing *Jacobs* v. *Booth's Distillery Co.* (1901), 111 L.T. Jo. 320, and should have been allowed to cross-examine plaintiff on his affidavit. The Judge refused to allow us to read another affidavit besides defendant's and he was about to read an affidavit made by counsel for defendant as to what took place on the hearing of the motion, when

Duff, objected, as he had not seen the affidavit and the Judge's notes shew no such application to read any affidavit other than defendant's.

The Court refused to hear the affidavit.

Barnard: The contract is illegal, see Cr. Code, Secs. 61, 204; *Walsh* v. *Trebilcock* (1894), 23 S.C.R. 695. The terms of the agreement are sufficient to shew it was illegal: see *The Queen* v. *Coney* (1882), 8 Q.B.D. 534 at p. 539; *Reg.* v. *Orton* (1878), 14 Cox, C.C. 226 and Cr. Code, Sec. 92.

Statement.

Duff: Under the practice the dispute note shall shew the defence so the defendant was bound down to it which was a denial of fact only, but in his affidavit he sets up a new defence on which he would not be entitled to rely at the trial without amendment—see section 91. A defendant cannot be in a better position in regard to raising defences on a motion for speedy judgment than at the trial. As to cross-examination it is the practice in the Supreme Court not to allow defendant to cross-examine plaintiff on his affidavit. Illegality should have been pleaded; illegality does not appear on the face of the proceedings and the Court should presume innocence of the parties until it is otherwise established.

Barnard, in reply.

WALKEM, J.

WALKEM, J.: We are all of opinion that the defendant should

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have been let in to defend. There is no provision in the County Courts Act, and I can find no authority elsewhere, that would warrant the proposition that a defendant is limited at the trial of his action to the defence set forth in his dispute note. A dispute note, like any other pleading is, in a large majority of cases, the outcome of the pleader's idea of his client's defence and should be dealt with in that light. Had it not been for the introduction into the County Court system of procedure of Order XIV., of the Supreme Court Rules, no question such as that which is before us could have arisen, for the trial would have proceeded, and been decided on its merits, in consequence of the dispute note having been filed. Again, the learned Judge seems to have decided the case on the affidavits and counter-affidavits filed. This he had no power to do. It is alleged that the agreement which is the subject-matter of the action is illegal. Speaking for myself, I am unable to say whether it is illegal or not, as I do not understand some of what I may call the technical language that is used in it. At all events, the question of legality or illegality was eminently a matter for trial.

WALKEM, J.

The appeal must be allowed with costs, and the case referred back to the learned Judge appealed from for adjudication in the usual manner.

IRVING, J.: I think defendant should have been allowed to defend. Mr. *Duff's* contention is that defendant cannot, on an application under section 94 of the County Courts Act, go outside the line indicated in the dispute note required by section 89, without amendment. I think as the dispute note is for the purpose of regulating the trial—"at the hearing, section 91, etc.,"—that argument fails.

IRVING, J.

On the question of the affidavit I think that cross-examination should have been allowed in view of the fact that defendant set up that the money was received by him for and on account of Hawkins and not on account of plaintiff—the fact that an adjournment for the purpose of holding this cross-examination may delay the plaintiff is not sufficient reason for disallowing what natural justice demands.

MARTIN, J.: I have, also, finally come to the conclusion, not

MARTIN, J.

without some hesitation, that the defendant should have been allowed to defend. The defence is set up in a very loose and unsatisfactory manner, but in view of *Jacobs* v. *Booth's Distillery Co.* (H.L.) (1901), 111 L.T. Jo. 320; Yearly Prac. (1902), 195-6, I cannot bring myself to totally reject it.

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In regard to the point taken by Mr. *Duff* that a defendant should not be in a better position in regard to raising defences on an application for speedy judgment than at the trial, I am of the opinion that it is unfortunate that this should be the case, but the wording of section 94 seems to allow of no other construction. The language of that section is, "Where the defendant appears or files a dispute note," and I think that where it is shewn that he, in fact, "appears," even though that appearance is by means of what would at the hearing be held to be a defective dispute note under section 92, he is, nevertheless, entitled to resist an application for a speedy judgment by setting up any defence he can, even though it was not raised in the dispute note and could not be advanced at the trial without amendment. The position is, I agree, anomalous, but the language of the Act leaves no escape from it.

MARTIN, J.

I may add that, when sitting as a County Court Judge, I have always, in view of section 73, which abolishes pleadings, felt it proper to hold parties to that strict compliance with section 91 which the statute seems to contemplate. The appeal should be allowed with costs.

Appeal allowed.

DRAKE, J.

1901.

July 12.

FULL COURT At Victoria.

1902.

Jan. 13.

HAGGERTY v. LENORA

HAGGERTY v. THE LENORA MOUNT SICKER COPPER MINING COMPANY, LIMITED.

Contract—Option—First refusal.
Appeal books—Pagination of.

A contract stipulating that the first party shall have the hauling of all ore shipped up to 15,000 tons and not less than 10,000 as required by the second party, does not bind the second party to supply more than 10,000 tons.

The pages of appeal books should be numbered at the top of the pages.

APPEAL from the judgment of DRAKE, J., dated 12th July, 1901. Plaintiff and defendants entered into an agreement whereby the plaintiff was to haul ore from defendants' mine, the terms of the agreement which are material being as follows:

"The party of the first part (Haggerty) agrees to haul by teams and wagons from the Lenora Mine, Mount Sicker, B.C., all the ore that the said mine shall ship up to 15,000 tons and not less than 10,000 tons as required by the parties of the second part (the Company.)

"In case the parties of the second part wish to terminate this agreement at any time the said parties shall be able to do so upon the following terms: The said parties of the second part shall take over at a valuation to be agreed upon between the parties of the first and second parts, the plant, including horses and wagons, etc., owned by the party of the first part, and in case the parties cannot agree, then valuation is to be decided upon by a party to be chosen by the said parties of the first and second parts; also the parties of the second part are to pay the party of the first part the net profits that would accrue to the said party providing the contract was completed; the net profits per ton to be based upon the net profits that may have been made by the party of the first part up to the date that the parties of the second part notify the party of the first part that the said parties of the second part wish this agreement to cease.

Statement.

"In case on completion of this agreement the parties of the

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second part wish to ship 5,000 tons over and above this agreement, the party of the first part shall have the first refusal of a contract to haul said ore from the Lenora mine."

The remaining facts appear in the judgment.

The action was tried on 9th July, 1901.

Luxton, for plaintiff.

Bodwell, K.C., for defendants.

12th July, 1901.

DRAKE, J.: The parties entered into a contract for the hauling of ore by the plaintiff from Mount Sicker mine to a point at the foot of Mount Sicker, thence by cars on a tramway to Westholme, and also to load and unload the cars. The clauses which have given rise to this dispute are as follows: "The plaintiff agrees to haul all the ore that the mine will ship up to 15,000 tons and not less than 10,000 tons as required by the defendants." The plaintiff contends that the defendants are bound to supply 15,000. In my view that is not the meaning of the contract, the defendants can require the plaintiff to haul 15,000 but they are not bound to supply more than 10,000.

The defendants terminated the contract when only 7,169½ tons had been hauled and do not dispute the plaintiff's right to recover damages in respect of the number of tons short of 10,000 which they have not furnished for hauling. The contract provides for its termination by the defendants at any time, and in such a case the defendants are to take over the plaintiff's plant and horses at a valuation on which nothing now turns and pay the plaintiff the net profits that would accrue to him, provided the contract was completed, the plaintiff has to prove the net profits by shewing by duly audited books and vouchers what those profits are, and there is a further stipulation that if the defendants wish to ship 5,000 tons more than called for in the agreement the plaintiff is to have the first refusal of a contract to haul from the mine.

DRAKE, J.

In reading the contract as a whole I think the intention is that the defendants were bound to supply 10,000 tons of ore at the least and to pay damages in case they did not, but they were not bound to provide 15,000.

DRAKE, J.

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The language used is not very definite—the defendants in case of termination of the contract agree to pay the net profits that would accrue to the plaintiff provided the contract was completed.

The contract binding on the defendants it appears to me is limited to supplying 10,000, but the contract binding on the plaintiff is to haul 15,000 if required. It frequently happens that one party is bound but not the other, and there is nothing in the contract to compel the defendants to furnish the plaintiff with any more ore to haul than the 10,000. This being the case the plaintiff is entitled to an account of the profits which he might have made had he hauled the whole 10,000 tons, and in order to ascertain this there must be a reference to the Registrar to take an account. It was urged that the plaintiff not having had his accounts properly audited that he had no right of action until this was done. What he did was to employ a gentleman to audit and the account as audited was furnished to the defendants. This was quite a sufficient compliance with the contract, but it does not prevent the defendants from questioning the accuracy of the account. The order will be to refer it to the Registrar of this Court to take the account for the purpose of ascertaining the amount of profit which the plaintiff would have made if he had been allowed to haul 10,000 based on the profit he made on the hauling of ore carried by him under the contract, and also to ascertain the amount paid to or allowed in account with the defendants in respect of the said profit, and in taking this account the defendants are to be credited with $400.00 for two horses sold by the plaintiff for which he only returned $305.00.

DRAKE, J.

I further authorize the said Registrar to employ a skilled accountant to assist in taking these accounts in case it is requisite. The further consideration and costs will be reserved.

The plaintiff appealed on the grounds (1.) that he was entitled to be paid the profits he would have made had he completed the hauling of 15,000 tons and (2.) the defendants having terminated the contract he was entitled to the profits he would have made had he hauled a further 5,000 tons over and above the 15,000 tons.

The appeal was argued at Victoria on 13th January, 1902, before WALKEM, IRVING and MARTIN, JJ.

DRAKE, J.

1901.

July 12.

Luxton, for appellant: He cited *Manchester Ship Canal Co.* v. *Manchester Race Course Co.* (1901), 2 Ch. 37.

Duff, K.C., for respondents.

FULL COURT At Victoria.

1902.

Jan. 13.

The Court dismissed the appeal, agreeing with the reasons given by the trial Judge.

HAGGERTY *v.* LENORA

During the hearing of this appeal the Court expressed its disapproval of the pagination of the appeal books, the pages being numbered at the bottom instead of at the top.

STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY, (FOREIGN.)

FULL COURT At Victoria.

1902.

Jan. 10.

Inspection—Underground workings—Extralateral rights—Form of order—Copies of plans—Undertaking as to damages.

Costs—Of appeals—When payable.

STAR *v.* WHITE

Form of order providing for inspection of underground workings in an action for trespass to extralateral rights appurtenant to a mineral claim settled.

In interlocutory appeals when a party is allowed costs of the appeal the costs are payable forthwith.

The inspection order should contain an undertaking for damages and the practice does not require security to be given.

APPEAL from an inspection order made by MCCOLL, C.J., in an action for damages for trespass.

The plaintiffs were the owners of the Heber Fraction and Rabbit Paw mineral claims in Group One, West Kootenay District, and the defendants were the owners of the adjoining mineral claims, the Slocan Star and the Silversmith, both of which were located and recorded in October, 1891. The defendants alleged that in carrying on mining operations upon their claims they

Statement.

FULL COURT At Victoria.

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discovered a vein which had its apex on their claims and which in its course downwards departed from the perpendicular in such a way as to extend outside the vertical side lines of the surface locations of their claims and entered into and under the ground comprised within the surface locations of the Heber Fraction and Rabbit Paw claims, and that in following this vein upon its dip and pursuing lawful mining operations thereon they had entered underneath the plaintiffs' claims which they said they had a lawful right to do, and that was the alleged trespass complained of. In paragraph 5 of the statement of claim it was alleged that defendants were allowing some of their workings to cave in or filling them with waste material and were concealing different workings to the damage of the plaintiffs. On plaintiffs' application, MCCOLL, C.J., on 11th December, 1901, made an inspection order which was in part as follows:

" . . . . . and the plaintiffs by their counsel undertaking to abide by any order this Court may make as to damages in case this Court should be of the opinion that the defendants have sustained any by reason of this order or anything done thereunder by the plaintiff which the plaintiff ought to pay, and the plaintiff, by counsel aforesaid further undertaking that any information obtained by them in the course of the inspection hereinafter referred to shall be used by them for the purposes of this action only and shall not be otherwise disclosed by the plaintiffs.

Statement.

" It is ordered that the plaintiffs, by their officers or any of them, their solicitors, agents, surveyors, engineers or representatives not exceeding ten (10) in number at any one time, may be at liberty at all reasonable times upon giving twenty-four hours notice by delivering the same to the Manager or Superintendent or any other person in charge of the defendants' works at Sandon, B.C., to enter into and upon the Slocan Star, Jennie, Windsor and Silversmith mineral claims and inspect, examine, make surveys and plans of any and all tunnels, drifts, shafts, winzes, stopes, raises or other workings or mining operations whatsoever of the defendants, whether abandoned or in use upon or in any of such mineral claims above named so far as may be necessary to ascertain whether the defendants have worked or

are working into or under the surface of the Heber Fraction and Rabbit Paw mineral claims, and the nature and extent thereof and the quantity of mineral or ore (if any) removed therefrom; and also so far as may be necessary to ascertain the apex and location or position thereof as to the lodes or veins or ore deposits which may have been or are being operated or mined by the defendants under the surface of the said Heber Fraction and Rabbit Paw mineral claims; and for any and all of said purposes to enter into and upon and inspect, examine, make surveys and plans of the extensions of all of such workings or mining operations which may be into or under the surface of the Heber Fraction and Rabbit Paw mineral claims; and for any or all of said purposes to inspect and make copies of the workings or mining plans, drawings, charts or surveys of the defendants at any time made or used and in any manner connected with any and all of their said workings and mining operations in or upon any or all of the said above named mineral claims; and to take samples, make observations and try experiments as may be necessary to accomplish the purposes aforesaid or obtain full information or evidence of the matters aforesaid or any of them and for all or any of the purposes aforesaid, and in order to ascend and descend to use the defendants' machinery, plant and appliances."

Statement.

The defendants appealed and the appeal was argued at Victoria on 9th January, 1902, before WALKEM, IRVING and MARTIN, JJ.

Bodwell, K.C., for appellants, stated the facts and said a form of inspection order should be settled so as it could be used as a precedent in cases of extralateral rights. The plaintiffs are only put on an undertaking as to damages—they should give security as a party should not be left to put in force an undertaking which is a difficult thing to enforce, and besides an undertaking might prove a very poor security. The order should not allow the other side to make copies of our plans, charts, etc.; it has never been done here before. The American practice is that the parties making the inspection make their own plans. For business reasons one company's business should not be disclosed

Argument.

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to the other side—they may be rivals competing on the stock market. In *E. & N. Railway Co.* v. *New Vancouver Coal Co.* (1898), 6 B.C. 196, the order did not go nearly so far as this order. The clause allowing them to take samples should be limited to a reasonable amount and they should not be allowed to make experiments at all—anything of that sort should be on special application to the Court. Experiments might destroy property. The American practice is to make a plan and let the owners of the mine do the work. In cases of extralateral rights we are making practice and the Court is not bound by precedents as there are no cases analogous.

Argument.

Davis, K.C. (S. S. Taylor, K.C., with him), for respondents: There is an allegation that defendants are filling up some workings so we must see the plans. It is not merely a question of where the ore is but of where the apex is also. As to making experiments we don't want to work as in *Centre Star* v. *Iron Mask* (1898), 6 B.C. 355—we don't mean that and are willing to let the order so read. The order follows the wording of r. 514 and therefore there is no question as to the necessity of security —the form always is an undertaking. He referred to Daniell's Chy. Forms, 786; *Pratt* v. *Pratt* (1882), 47 L.T.N.S. 249; *Beaven* v. *Webb* (1901), 2 Ch. 74 and *Bennett* v. *Griffiths* (1861), 30 L.J., Q.B. 98.

Bodwell, in reply.

The next day the judgment of the Court was pronounced by WALKEM, J., as follows:

Judgment.

The appeal by the defendant Company is dismissed with costs; and the order appealed from is to stand, save that the phrase "try experiments" is to be struck out, as requested by counsel for the appellants, and assented to by the other side. As the presence of the phrase in the order was not one of the grounds of appeal, we consider that the above amendment should not affect the question of costs.

Bodwell, asked that the costs of the appeal should not be payable until the final disposition of the action.

The ruling on this point was reserved until the next day when the Court announced that they were all agreed that in interlocu-

tory appeals the successful party when allowed costs should get them forthwith and not have to wait until the end of the litigation.

Appeal dismissed with costs.

REX v. BROOKS.

Criminal law—Zionites—Child's death due from want of medical aid—Aiding and abetting—Cr. Code, Secs. 209 and 210.

Medical attendance and remedies are necessaries within the meaning of sections 209 and 210 of the Criminal Code and any one legally liable to provide such is criminally responsible for neglect to do so.

So also at common law.

Conscientious belief that it is against the teachings of the Bible and therefore wrong to have recourse to medical attendance and remedies is no excuse.

IN the Supreme Court of British Columbia *in banc*: Crown case reserved. The following case was reserved by DRAKE, J., the trial Judge:

In this case the prisoner was tried before me upon the following indictment:—

IN THE COUNTY COURT JUDGES CRIMINAL COURT.

CANADA,
Province of British Columbia,
County of Victoria,
City of Victoria,
TO WIT:

Eugene Brooks stands charged for that he the said Eugene Brooks at the City of Victoria, in the County of Victoria, in the Province of British Columbia on the fourth day of September in the year of our Lord one thousand nine hundred and one, unlawfully did kill and slay one Victoria Helen Rogers. Statement.

(2.) And the said Eugene Brooks stands further charged that one John Rogers on the day and year and at the place last men-

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tioned and on divers other days before said last mentioned day being in charge of another person, to wit., the said Victoria Helen Rogers, she the said Victoria Helen Rogers being then unable by reason of her age and sickness to withdraw herself from the charge of the said John Rogers, and the said Victoria Helen Rogers being then unable to provide herself with the necessaries of life, and the said John Rogers being then and there under a legal duty to provide the said Victoria Helen Rogers with the necessaries of life, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty whereupon the said John Rogers unlawfully did refuse, omit and neglect, without lawful excuse to provide the said Victoria Helen Rogers with the necessaries of life, which said refusal, omission and neglect then and there caused the death of the said Victoria Helen Rogers.

(3.) And the said Eugene Brooks stands further charged that the said John Rogers being the father of the said Victoria Helen Rogers, who was on the day and year and at the place last mentioned a member of the household of her said father, and the said Victoria Helen Rogers being then under the age of six years and the said John Rogers being then under a legal duty to provide the said Victoria Helen Rogers with necessaries, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty, whereupon the said John Rogers unlawfully did refuse, omit and neglect without lawful excuse to provide the said Victoria Helen Rogers with necessaries, which said refusal, omission and neglect then and there caused the death of the said Victoria Helen Rogers.

Statement.

(4.) And the said Eugene Brooks stands further charged that the said John Rogers being the father of the said Victoria Helen Rogers who was on the day and year and at the place last mentioned a member of the household of her said father and the

said Victoria Helen Rogers being then under the age of six years and being unable to provide herself with the necessaries of life and the said John Rogers being then under a legal duty at common law to provide the said Victoria Helen Rogers with the necessaries of life, the said Eugene Brooks on the day and year and at the place last aforesaid and on divers days before said last mentioned day was present unlawfully aiding, abetting, assisting, counselling and procuring the said John Rogers not to regard his above mentioned duty, whereupon the said John Rogers unlawfully did refuse, omit and neglect without lawful excuse to provide the said Victoria Helen Rogers with the necessaries of life, which said refusal, omission and neglect then and there caused the death of the said Victoria Helen Rogers.

(5.) Same as 1, except read 5th September, instead of 4th September, and Cecil Alexander Rogers instead of Victoria Helen Rogers.

(6.) Same as 2, except as to alterations mentioned in 5.

(7.) Same as 3, except as to alterations mentioned in 5.

(8.) Same as 4, except as to alterations mentioned in 5.

The prisoner was found guilty on counts 2, 3, 4, 6, 7, 8, and not on the charges of manslaughter.

The evidence disclosed that John Rogers mentioned in said indictment was at the time of the death of his said children a member of the sect called Catholic Christians in Zion, or shortly Zionites. One of the tenets of said sect is that it is contrary to the teachings of the Bible and therefore wrong to have recourse to medical aid and drugs in case of sickness. In consequence of his belief in said doctrine Rogers omitted to provide his said children with medical attendance and appropriate medical remedies when they were sick with diphtheria. The children were both under the age of six years, were members of their father's household and were wholly dependent upon him for support. He knew the children had diphtheria and that it was a dangerous and contagious disease. The disease proved fatal to both children. Rogers' circumstances were such that he could have paid for medical attendance and medical remedies. The medical testimony proved conclusively the nature of the disease that caused the death of these children, and that the ordinary

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remedies would have prolonged their lives, and in all probability would have resulted in their complete recovery. Under these circumstances I held that the father had omitted without lawful excuse to perform the duty in the premises imposed upon him by sections 209 and 210 of the Criminal Code and by the common law and I held upon the evidence that the prisoner Eugene Brooks was present unlawfully aiding, abetting, assisting, counselling and procuring Rogers to omit without lawful excuse to perform his said duties.

The prisoner Brooks was convicted and sentenced to three months' imprisonment. I respited the execution of said sentence, admitted Brooks to bail and at his request reserved the following questions for the Court of Crown Cases Reserved:

(1.) Does section 209 of the Criminal Code impose upon a person, who has charge of any other person unable by reason of sickness to withdraw himself from such charge and unable to provide himself with the necessaries of life, the legal duty of providing such other person with reasonable medical attendance and appropriate medical remedies when the person having charge of the other person is financially able to provide such attendance and remedies; and if the death of such person is caused, or if his life is endangered by the first-mentioned person's omission without lawful excuse to perform said duty is the said first mentioned person criminally responsible for such omission?

DRAKE, J.

(2.) Does section 210 of the Criminal Code impose upon a parent in case of sickness of his child a legal duty to provide reasonable medical attendance and appropriate medical remedies for such child, such child being under the age of sixteen years and being a member of his parent's household, and the parent being financially able to provide such attendance and remedies; and if the death of such child is caused, or if his life is endangered by the parent's omission without lawful excuse to perform said duty, is the parent criminally responsible for such omission?

(3.) Does the common law of England in a case similar to that stated in question number 1, impose upon the person having charge of the other person a legal duty to provide such other person with reasonable medical attendance and appropriate medical remedies, and is the person who omits without lawful

excuse to perform such duty criminally responsible for such omission ?

(4.) Does the common law of England in a case similar to that stated in question number 2, impose upon a parent the legal duty of providing reasonable medical attendance and appropriate medical remedies for his child and is such parent criminally responsible for omitting without lawful excuse to perform such duty ?

(5.) Is the conscientious belief that it is contrary to the teachings of the Bible and therefore wrong in case of sickness to have recourse to medical attendance and appropriate medical remedies a lawful excuse for omitting to perform the above mentioned duties ?

DRAKE, J.

Should the Court be of opinion that none of said duties is a legal duty entailing criminal responsibility, or should the Court be of opinion that the belief mentioned in question 5 is a legal excuse for omitting to perform said duties then the said conviction should be quashed.

The question was argued at Victoria on 11th January, 1902, before WALKEM, IRVING and MARTIN, JJ.

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

No one for the prisoner.

The Court answered questions numbered 1, 2, 3 and 4 in the affirmative ; affirmed the conviction and ordered and directed that the sentence imposed should be carried into execution.

Conviction affirmed.

Subsequently the following opinion was filed by

WALKEM, J.

WALKEM, J.: In affirming the conviction of the defendant, we have been guided by the judgment of the Court in *Reg.* v. *Senior* (1899), 68 L.J., Q.B. 175. In that case, the prisoner was charged with the manslaughter of his infant child, of which he had the custody. He was one of a sect that objected on religious grounds to medical aid and to the use of medicine in cases of disease, and he, therefore, purposely abstained from using either of those remedies for the benefit of his child, though he knew

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that it was suffering from pneumonia and was dangerously ill. It was proved that medical aid would have prolonged, and probably saved the child's life, and, furthermore, that the prisoner had sufficient means to procure it. Under the circumstances, it was held that he had wilfully neglected the child in a manner likely to cause injury to its health, within the meaning of section 1 of the Imperial Act, 57-58 Vict., Cap. 41, which enacts that "If any person over the age of 16 years, who has the custody, charge, or care of any child under the age of 16 years, wilfully . . . . neglects . . . . such child . . . . in a manner likely to cause . . . . unnecessary suffering, or injury to its health, ... that person shall be guilty of a misdemeanour." It will thus be seen that there is no appreciable difference between the facts which led to the prisoner's conviction and those stated in the case reserved; and, hence, one may safely conclude that had the above section been in force here, the present defendant's conviction would have been inevitable and also unassailable. Such being the case, we have only to see whether the conviction he complains of was warranted either by the common law or by sections 209 and 210 of the Criminal Code. *Reg.* v. *Instan* (1893), 17 Cox C.C. 602, would seem to warrant his conviction under the common law.

Sections 209 and 210 are set out, almost verbatim, in the second and third paragraphs of the case reserved. They appear in the Code under the heading of "Duties Tending to the Preservation of Life." As such headings have the same effect as preambles to statutes, the terms "necessaries of life," and "necessaries," which occur in the respective sections, mean, when read in connection with the heading mentioned, such necessaries as tend to preserve life, and not necessaries in their ordinary legal sense. With respect to the functions of prefixes to sections and headings of sections, or of groups of sections, see *Hammersmith Railway Co.* v. *Brand* (1869) L.R. 4 H.L. 171; *Bryan* v. *Child* (1850), 5 Ex. 368; *Eastern Counties, &c., Companies* v. *Marriage* (1860), 9 H.L. Cas. 32. This seems to me to dispose of the whole question, for the learned Judge states that the medical evidence "conclusively proved" that medical aid and remedies were necessaries that might have saved the children's lives.

WALKEM, J.

The fact that the defendant was prosecuted as an accessory before the fact is unimportant, as he might have been prosecuted as a principal by virtue of section 61 of the Code.

Although not so stated in the case reserved, Rogers, the parent of the children, has already been convicted as a principal on similar charges to those preferred against the defendant.

As a matter of practice, the above certificate has been directed in accordance with section 746 of the Code, "to the proper officer" of the Speedy Trials Court, in order that the learned trial Judge may give effect to his judgment; but as he is absent from the Province any Judge of this Court may act in his stead, as provided by section 770 of the Code. The conviction, as I have already said, is affirmed.

REX v. JACK *ET AL.*

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

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.

MOTION for *certiorari* argued before WALKEM, J., on 10th February, 1902.

Helmcken, K.C., for the motion.
Maclean, D.A.-G., contra.

13th February, 1902.

WALKEM, J.: Three Indians, named Jack, Dick, and Markwa, living in the vicinity of Kingcome Inlet in the County of Vancouver, were charged in November, 1901, with having "unlawfully and wilfully obstructed" two peace officers, named Wollacott

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and Huson, in the execution of their duty, contrary to the provisions of section 144 of the Criminal Code, and were subsequently summarily tried and convicted, and sentenced to six months' imprisonment, under that section, by Captain Walbran, a Stipendiary Magistrate for the County.

A motion is now made, on their behalf, by way of *certiorari*, to quash the conviction on the alleged grounds that the accused were neither formally charged nor allowed to defend themselves at the trial, and on the further ground that their conviction was illegal, as section 144 is, so it is said, controlled by sections 783 and 784—and, hence, as to punishment, as I assume, by section 788. After examining all the proceedings, and reading the affidavits, respectively, filed in support of, and against, the motion, I have no hesitation in saying that the proceedings were regular, and the trial conducted with fairness, and with a manifest consideration for the interests of the prisoners.

With respect to the contention that section 144 is controlled by sections 783 and 784, there is no ground for upholding it. The language of section 144, which is relied on by the prosecution is—"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 one hundred dollars, who resists or wilfully obstructs any peace officer in the execution of his duty,

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or any person acting in aid of such officer;" whereas the language of section 783 is as follows:—"Whenever any person is charged before a Magistrate (*e*) with having *assaulted*, obstructed, molested or hindered any peace officer, or any officer in the lawful performance of his duty, or with intent to prevent the performance thereof—the Magistrate may, subject to the provisions hereinafter made, hear and determine the charge in a summary way;" and (see section 788) if the charge be proved, sentence the offender to a term of imprisonment not exceeding six months, with or without hard labour, or to pay a fine not exceeding one hundred dollars, or to suffer both fine and imprisonment. It will thus be apparent that the punishment mentioned in section 788 differs materially from that mentioned in section 144, although the offence is the same. Section 783 also contains the

word "assaulted," which is absent in section 144. It must be admitted that that word is a very important one; for instance, the mere hindering of a peace officer in the discharge of his duty is a far less serious offence than assaulting him under the same circumstances. An offence can not be charged under one enactment, complete in itself, and a different punishment inflicted by virtue of another and somewhat different enactment.

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The next objection is that the consent of the prisoners to a summary trial was not given; but, sub-section 3 of section 784 dispenses with consent and makes the Magistrate's jurisdiction absolute. The summary conviction referred to in section 144 means a summary conviction under Part LVIII., of the Code, and such the present conviction is. The motion must be refused with costs.

WALKEM, J.

Note: See *Rex* v. *Nelson* (1901), 8 B.C. 110.

NICHOL v. POOLEY *ET AL.*

IRVING, J.
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Costs—Criminal libel—Taxation or action for—Stay—Cr. Code, Secs. 833-35.

N., after his acquittal in a criminal libel action, proceeded to tax his costs and moved before the trial Judge for certain costs, and on obtaining an order with which he was dissatisfied abandoned the taxation and commenced a civil action against the prosecutors for his costs.

Held, by IRVING, J., on a summons for a stay of proceedings, that plaintiff should not be allowed to pursue both remedies at once, but as in the other action there was no appeal he allowed this action to proceed on terms.

AFTER the order made by DRAKE, J., in *Rex* v. *Nichol*, reported in 8 B.C. 276, disallowing Nichol the costs of the commission evidence and of the abortive trials, Nichol commenced this action against Messrs. Pooley and Turner for all the costs of the criminal libel action brought against him by defendants and which

Statement.

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ultimately resulted in his acquittal. The defendants now applied by summons "that all proceedings be stayed and the action dismissed on the ground that same is frivolous and vexatious and an abuse of the process of the Court, or in the alternative for an order that all proceedings be stayed until the taxation of the plaintiff's costs sued for herein, already brought before the proper officer in that behalf by the plaintiff and partially completed, is completed and closed, or until the said costs sued for herein are taxed as this Court may direct."

The summons was argued on 3rd February, 1902, before IRVING, J.

Cassidy, K.C., for the summons: Costs have already been taxed and an order in a matter of taxation has been made by DRAKE, J., therefore plaintiff cannot bring present suit. There must be taxation before suit. He referred to Cr. Code, Secs. 833, 834, 835; Odgers on Libel and Slander, 643; *Richardson* v. *Willis* (1872), L.R. 8 Ex. 69; *Earl Poulett* v. *Viscount Hill* (1893), 1 Ch. 277; *The Christiansborg* (1885), 10 P.D. 152 and *Stephenson* v. *Garnett* (1898), 1 Q.B. 677.

Argument.

Davis, K.C., contra, contended that order taken out *re* taxation was taken out as if made by Court of Oyer and Terminer, but that the Court had risen at the time the order was made and therefore the order was a nullity: Annual Prac. 1902, pp. 321-23.

Application to strike out statement of claim does not take place of demurrer. This case is similar to suit for costs by solicitor against client and it is usual to have taxation after writ is issued. If order of DRAKE, J., was made by Criminal Court, there is no appeal, therefore plaintiff abandoned original proceedings and brought present suit. He cited *Dunlop* v. *Haney et al* (1899), 7 B.C. 305 and *Dunlop* v. *Haney* (1900), 7 B.C. 307.

11th February, 1902.

IRVING, J.: No authority was cited for the proposition that taxation is necessary as a condition precedent to bringing the action.

IRVING, J.

As to the second point, it is not right that the plaintiff should pursue both his remedies, one must be stayed, but which? Mr. *Cassidy* says the plaintiff ought to go on with the proceedings

already instituted; that if he is now allowed to proceed with this action and abandon the taxation proceedings already instituted by him, that all the work already performed will be thrown away.

The plaintiff, on the other hand says, that if he is bound to follow out the taxation and is not allowed to go on with this action, he will not be at liberty to discuss the very matter upon which his right to recover the greater part of his costs depends.

It seems to me that I ought not to prevent the plaintiff from obtaining a decision on the questions in dispute. If there are two ways open to a litigant, one in which he can bring up the matter for decision, and the other in which he cannot, in my opinion he ought to be at liberty to pursue the most advantageous to him, otherwise there will be a denial of justice. And certainly I ought to do this if I can do so without doing any injustice to the defendants. I think that the order which I now make will sufficiently protect them; the order will be that the proceedings in this action will be stayed unless the plaintiff is willing to undertake to abide by such order as the Judge at the trial of this action shall make, with regard to the costs of the taxation proceedings thrown away.

In the event of the plaintiff giving such undertaking then he shall be at liberty to proceed with this action, the taxation proceedings shall be stayed and the costs of this application shall be costs in the cause.

IRVING, J. (In Chambers.)

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Defendants are appealing from this judgment and on 12th February, on their application, IRVING, J. ordered that the trial of the action should not take place until after the next sittings of the Full Court.

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TANAKA *v.* RUSSELL

TANAKA *ET AL* v. RUSSELL.

Practice—Capias—Irregularity or nullity—Waiver by giving bail.

After the issue of the writ in an action a summons was taken out entitled "In the matter of an intended action."

Held, by IRVING, J., dismissing the summons, that it was wrongly entitled.

A Judge has power to direct a summons to be issued and be returnable in a Registry other than that where the writ was issued.

By the giving of special bail, a defendant arrested on a capias waives his right to object to the writ.

ACTION for the sum of $2,620.00 being the amount alleged to be due for goods sold and delivered by plaintiffs to defendant. The writ of summons was issued in the Registry at New Westminster and an order for the arrest of the defendant was obtained from BOLE, Lo. J.

The defendant was arrested by the sheriff on the 27th of January, 1902, the same date on which the writ of summons was issued. Upon his being arrested the defendant's solicitors gave an undertaking to the sheriff to put in special bail in accordance with the terms of the writ of capias.

The order for the capias was entitled "In the matter of an intended action," and defendant took out a summons entitled "In the matter of an intended action" to set aside the writ of capias on the grounds that

Statement.

(1.) The Judge had no jurisdiction to make the order for capias.

(2.) The application for the order for capias was made before the writ of summons was issued.

(3.) The affidavit used in support of application for capias was sworn before the writ of summons was issued and is not properly entitled.

(4.) The order for capias is irregular in that it is entitled in the matter of an intended action.

(5.) The order for capias does not disclose what affidavit or that any affidavit was sworn, filed or read in support of the application therefor.

(6.) The indorsement on the copy of writ of capias served on defendant does not contain the amount for which defendant is held for bail and the date of the order is omitted.

(7.) The form of writ of capias does not comply strictly with the form provided by the statute in that behalf.

(8.) In the affidavit of Hiko Tanaka filed and used on the application for order for capias the plaintiffs' cause of action does not fully appear, nor does it disclose any cause of action.

(9.) There is an alteration in the jurat to the said affidavit.

(10.) The christian and surnames of the plaintiffs and defendant in full do not appear in the affidavit nor in the writ of capias.

(11.) The sheriff has not indorsed on the writ of capias the day of execution or arrest.

(12.) The copy of writ of capias served on the defendant is not a true copy of the original.

(13.) The defendant was only leaving the Province temporarily in the ordinary course of business and his absence from the Province under the circumstances was not the quitting the Province contemplated by the Arrest and Imprisonment for Debt Act.

This summons was returnable by leave of IRVING, J., before him at Vancouver and when the application came on to be heard preliminary objections were taken that this application should be heard in Chambers at New Westminster, and further that the summons was in the matter of an intended action. The summons was dismissed on the ground that it was wrongly entitled. Statement.

A second summons, issued from and returnable at Vancouver, was then taken out by the defendant setting out the same grounds. The objection was again taken that under section 32, Cap. 56, R.S.B.C. 1897, as amended in 1901, Cap. 14, Sec. 13, there was no jurisdiction to have the summons issued and returnable at Vancouver when the Registry out of which the writ was issued was New Westminster. IRVING, J., held that under r. 52 he had power to give directions that it should be so issued and returnable. The plaintiff then objected that the undertaking to give security as set out above, was sufficient to waive all irregularities in the proceedings and that all the grounds as mentioned in the summons were merely irregularities.

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Davis, K.C., for the summons.

Gilmour, contra.

11th February, 1902.

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IRVING, J.: In this case the plaintiff caused the defendant to be arrested on a writ of capias; it is alleged that the capias was improperly granted on insufficient material and was irregular and void.

It appears, however, that after the arrest was made, the defendant's solicitor gave an undertaking in writing to give special bail to the plaintiffs if the plaintiffs would permit him to depart at once. This offer was accepted and the defendant left the jurisdiction.

It seems to me immaterial, in considering the present application, whether the writ was a nullity or not because the defendant's undertaking would be binding, even if no writ of capias had been issued at all. It is a very common practice for people to give an undertaking to enter an appearance without being served with a writ and in the Admiralty jurisdiction where nearly all proceedings are commenced by arresting the ship, it is every day practice for the proctor or solicitor acting for the ship, to notify the proctor or solicitor acting for the plaintiff that he will give bail in order to prevent the arrest of the ship, and the undertaking so given must be carried out.

IRVING, J.

The application must be refused with costs.

Summons dismissed.

MACAULAY BROTHERS v. VICTORIA YUKON TRADING COMPANY.

WALKEM, J.

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MACAULAY v. V. Y. T. Co.

Practice—Special indorsement—Foreign judgment—Interest.

In an action on a Yukon Territory judgment, the writ may be specially indorsed within Order III., r. 6, with a claim for interest on the judgment.

It is not necessary in such an indorsement to state that the interest is due by statute.

MOTION to set aside a judgment, signed in default of defence, on the ground that the writ was not specially indorsed inasmuch as the interest claimed was not a debt or a liquidated demand.

The motion was argued before WALKEM, J., on 18th February, 1902.

J. H. Lawson, Jr., for the motion.
Cassidy, K.C., contra.

21st February, 1902.

WALKEM, J.: The writ of summons in this action is indorsed as follows: "Statement of Claim. The plaintiffs' claim is for money due from the defendants to the plaintiffs on a final judgment recovered by the plaintiffs against the defendants in an action brought by the plaintiffs against the defendants in the Territorial Court of the Yukon Territory.

WALKEM, J.

"Particulars:

"The action is distinguished in the Cause Book of the said Territorial Court of the Yukon Territory as '368-1900' and the said judgment which is dated the 11th day of December, 1901, is for $3,304.35 and costs to be taxed, and the said costs, were duly taxed and allowed at $1,400.00.

"Judgment, including costs $4,704.35
Interest thereon (at the rate of 5 per cent. per annum) to date of writ 17.83

$4,722.18

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The plaintiff will also claim interest at the rate of 5 per cent. per annum on the sum of $4,704.35 from the date of the writ herein until payment or judgment in this action."

An appearance was filed on behalf of the defendant Company, and a statement of claim demanded, but none was delivered. No statement of defence having been put in within the time required by Order XXI., r. 6, the plaintiffs signed judgment. (See Order XXVII., r. 2.) A motion is now made to set aside this judgment on the alleged ground that the writ is not specially indorsed within the meaning of Order III., r. 6, inasmuch as the interest claimed is not a debt or liquidated demand.

Independently of several cases cited by both counsel, the question has, as contended by Mr. *Cassidy*, been settled by the following enactments of the Parliament of Canada. For instance, by the Revised Statutes of 1886, Cap. 127, Sec. 2, it is enacted that "Whenever interest is payable by agreement . . . or by law, and no rate of interest is fixed by agreement or by law, the rate . . . . shall be 6 per centum per annum." This statute was amended by Cap. 31 of the Acts of 1889, by the addition of certain provisions which were "made applicable to the North-West Territories only," which Territories then included the Yukon Territory. One of those provisions, as contained in section 2, was that "Every judgment debt shall bear interest at the rate of 6 per cent. per annum until the same is satisfied.'

WALKEM, J.

The Yukon District was subsequently severed from the Territories, and made a separate Territory by Cap. 6 of the Acts of 1898; and, by section 9 of that Act, it was provided that "the laws relating to civil and criminal matters, and the Ordinances" then existing in the Territories should "be and remain in force in the new Territory" in so far as they might be applicable; and, as section 2 of the Statute of 1889, which I have quoted above, was part of those laws, it would, obviously, be within this last provision. There is no need to inquire what the Ordinances which are referred to were, for they could not, constitutionally speaking, deal with the subject of interest.

The next statute on the subject is Cap. 22 of the Acts of 1894, whereby, briefly stated, judgments in this Province were to bear interest at 6 per cent. per annum, until satisfied.

These several provisions were amended by Cap. 29, Sec. 1 of the Acts of 1900, as follows:

"Section 2 of chapter 127 of the Revised Statutes, section 2 of chapter 31 of the Statutes of 1889, section 2 of chapter 22 of the Statutes of 1894, ... are amended by striking out the word "six" wherever it occurs in each of the said sections and substituting therefor the word "five": Provided that the change in the rate of interest in this Act shall not apply to liabilities existing at the time of the passing of this Act."

Thus a uniform rate of interest of 5 per cent. has been established and made payable on judgments recovered anywhere in Canada.

In *Ex parte Lewis* (1888), 36 W.R. 653, Esher, M.R., observes, at p. 654, that "Where there is a statutory duty to pay money that money is reduced to a debt, and is not a question of damages. It is not necessary to say that such interest is part of the judgment debt; it is enough to say that it is a debt necessarily and inevitably attached to the judgment, if not paid immediately."

Mr. *Lawson* makes a further objection to the effect that the claim for interest should shew that it was due by statute, but that objection is untenable. In the case of the *London and Universal Bank* v. *Earl of Clancarty* (1892), 1 Q.B. 689, which was an action on two promissory notes, the writ was specially indorsed with a claim for the sums due on the notes, and interest to date, and with a further claim for interest, in the following words:

"The plaintiffs also claim interest at the rate of 5 per cent. per annum, until payment or judgment."

Now, this last claim for interest was made by virtue of section 57 of the Bills of Exchange Act of 1882; and, although it was not so stated, the indorsement was held to be unobjectionable. Moreover, the interest being statutory, it was deemed by the Court to be liquidated damages, and such is the case with respect to the interest claimed in the present action. The motion must, therefore, be dismissed with costs.

Motion dismissed.

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WILSON BROS. v. ROBERTSON AND ROLSTON.

County Court—Garnishee—Money paid into Court—Charging order—Priorities.

Priorities amongst claimants to moneys paid into Court under garnishee process settled by HENDERSON, Co. J., in favour of parties who obtained first charging order.

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THIS was an action brought by the plaintiffs in the County Court of Vancouver for the sum of $274.54, being the amount due for goods sold and delivered. The summons was issued 9th September, 1901.

Robertson & Rolston in the same Court on 3rd September, 1901, sued Sam George for $852.46 On the same date they also sued K. Noyaki for $512.28. In both these suits the Alliance Canning Co. were garnishees and were served with garnishee summonses on 3rd September, 1901. The ordinary summonses were served on the defendant September 4th, 1901. No dispute note was put in by either of the defendants in these two latter suits and judgment was signed by default against each of them.

James Mellis sued Robertson & Rolston for $158.00 and added K. Noyaki as garnishee. The ordinary summons and the garnishee summons were served September 5th, 1901.

Statement.

George I. Wilson also sued Robertson & Rolston and added Sam George as garnishee and the ordinary summons and the garnishee summons were served September 5th, 1901.

Chas. W. Morrison, the holder of a judgment against Robertson & Rolston, recovered on January 29th, 1901, had a garnishee summons issued and served on K. Noyaki on September 5th, 1901.

Wilson Bros. on 25th September, 1901, applied before the Judge in Chambers for an order that a receiver be appointed by way of equitable execution to receive the moneys paid into Court in the actions in which Robertson & Rolston were plaintiffs, and Sam George and K. Noyaki were respectively defendants, and the Alliance Canning Co. garnishees; or in the alternative for a

charging order against the moneys paid into Court in the two above actions; and also for an order restraining the defendants from dealing in any way with the said moneys. When this application came on to be heard, an injunction order was made restraining the defendants Robertson & Rolston from in any way dealing with these moneys; but the whole matter was adjourned until all the parties in all the above named actions were before the Court. When all the parties were before the Court, all applications pending were then dealt with.

It was admitted that the garnishees the Alliance Canning Co. were indebted to Sam George and K. Noyaki, and money was paid into Court by the said garnishees in the two above actions in which they were respectively defendants. It was also admitted that Noyaki and Sam George were indebted to Robertson & Rolston, but they had not paid any moneys into Court, and counsel for the plaintiffs, G. I. Wilson, James Mellis and Chas. W. Morrison contended that the moneys which were owing the Alliance Canning Co. to Sam George and Noyaki should be attached by virtue of the garnishee summons issued by their clients against the said Noyaki and Sam George. Counsel for the plaintiffs, Wilson Bros., contended that the moneys owing by the Alliance Canning Co. to Sam George and K. Noyaki had been garnished by the plaintiffs Robertson & Rolston, and any moneys that K. Noyaki and Sam George owed defendants Robertson & Rolston might be paid into Court by them in the other suits. If it was not paid into Court they could sign judgment against the said garnishees and proceed in the ordinary way to obtain execution.

Statement.

Counsel for Robertson & Rolston contended that Robertson & Rolston were entitled to all the moneys garnished, with the exception of the moneys claimed by Wilson Bros., by virtue of their injunction order.

The Judge having reserved his decision, subsequently gave judgment by appointing A. E. Beck, Registrar of the Court, Receiver by way of equitable execution of the moneys paid into Court by the Alliance Canning Co., garnishees, and further ordered that Wilson Bros. were entitled to priority, having been the first parties receiving charging order. The balance of the

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moneys paid into Court by the Alliance Canning Co. to be divided up amongst the other creditors of Robertson & Rolston. During the argument counsel for the other creditors asked that a receiver be appointed if the other garnishee summonses were to be dismissed. The garnishee summonses of the other creditors were dismissed with costs and the costs of Robertson & Rolston in their suits against Sam George and K. Noyaki were to be a first charge on the fund before it was to be divided.

Gilmour, for Wilson Bros.
Bowser, K.C., for G. I. Wilson and Chas. W. Morrison.
Harris, for James Mellis.
E. J. Deacon, for Robertson & Rolston.

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HYLAND v. C. D. Co.

HYLAND v. CANADIAN DEVELOPMENT COMPANY.

Practice—Examination of witness de bene esse—Rule 368.

A witness who lives in a remote part of the Province is examinable under r. 368, while temporarily in Victoria.

SUMMONS to examine a witness *de bene esse*. The witness lived at Telegraph Creek, in Cassiar District, but at the time of the hearing of the summons he was in Victoria temporarily and the application was for the purpose of getting his evidence before he went back to Telegraph Creek.

The summons was heard before DRAKE, J., on 27th February, 1902.

Belyea, K.C., for the summons, referred to r. 368.

H. G. Lawson, contra, contended that the rule was only applicable where witnesses are going abroad or where from age, infirmity or some other cause they are not likely to be able to attend the trial.

DRAKE, J., held that the rule was applicable and made the order as asked.

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Summary conviction—Appeal—Notice of—Parties to be served—R. S. B. C. 1897, Cap. 176, Sec. 71.

A notice of appeal from a summary conviction (Provincial) served upon the convicting Magistrate is not invalid because it is not also addressed to and served upon the respondent.

It is not a pre-requisite to the right of appeal that the person convicted should have been taken into custody.

Quaere, whether service of notice of appeal on respondent's solicitor would not be sufficient in any event.

SUMMONS by prosecutors that HENDERSON, Co. J., be prohibited from taking any further proceedings in an appeal from a summary conviction whereby Jordan on 20th January, 1902, was convicted and fined $50.00, and in default of payment distress was to be levied, and in default of distress he was to be imprisoned for thirty days. On January 24th, Jordan deposited with the Magistrate the amount of the fine and $50.00 for security for costs. The remaining facts appear fully in the judgment.

Statement.

L. G. McPhillips, K.C., for the summons: Notice of appeal should have been addressed to and served on the prosecutors. Appeal is not a matter of right but a special provision. He cited Paley on Convictions, 7th Ed., 282-3, 292; *Reg.* v. *Keepers of Peace and Justice of County of London* (1890), 25 Q.B.D. 360; *The King* v. *Hanson* (1821), 4 B. & Ald. 519; *Reg.* v. *Gray* (1900), 5 C.C.C. 24; *Cooksley* v. *Nakashiba* (1901), 8 B.C. 117; *The King* v. *The Justices of Essex* (1826), 5 B. & C. 431; *The King* v. *The Justices of the West Riding of Yorkshire* (1828), 7 B. & C. 678; *Keohan* v. *Cook* (1887), 1 N.-W.T. Rep. 125; *Cragg* v. *Lamarsh* (1898), 4 C.C.C. 246; *Ex parte Curtis* (1877), 3 Q.B.D. 13. If notice is served on Magistrate for prosecutor it must shew on its face that it was served on the Magistrate for the prosecutor —and a verbal statement to this effect is insufficient; *Canadian Society* v. *Lauzon* (1899), 4 C.C.C. 354 and *Hostetter* v. *Thomas*

Argument.

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(1899), 5 C.C.C. 10. A proper form of notice is in Seager's Magistrates' Manual, p. 69. Security was not given in time. He referred to sections 67 and 71 of the Medical Act, 1898; Beal's Interpretation, 177. As to right to prohibition he referred to *Farquharson* v. *Morgan* (1894), 1 Q.B. 552 at p. 556; *Sherwood* v. *Cline* (1888), 17 Ont. 30 at pp. 37 and 39; Short on *Quo Warranto*, at p. 461 and *In re Brazill* v. *Johns* (1893), 24 Ont. 209 at p. 215.

Bowser, K.C., contra: The forms of notice under the Criminal Code and the Provincial Summary Convictions Act are different, the Code form assuming that both Justice and respondent should receive notice whereas our form is addressed to the Justice and his name also appears in the body of the form. The informant is not a party to the record and therefore not entitled to notice.

Argument. He referred to *Ex parte Doherty* (1885), 25 N.B.R. 38; *Reg.* v. *Justices of Essex* (1892), 1 Q.B. 490; *Gemmill* v. *Garland* (1886), 12 Ont. 142; *Reg.* v. *The Justices of Denbighshire* (1841), 9 Dowl. P.C. 509; *Jones* v. *Grace* (1889), 17 Ont. 681; *Green* v. *Hunt* (1882), 51 L.J., Q.B. 640; *Truax* v. *Dixon* (1889), 17 Ont. 366 at p. 375; *The Queen* v. *Fitzgerald* (1898), 1 C.C.C. 420 and *Re Kwong Wo* (1893), 2 B.C. 336.

McPhillips, in reply: *Reg.* v. *Justices of Essex* (1892), 1 Q.B. 490 is based on a statute different from ours and *Ex parte Doherty* (1885), 25 N.B.R. 38 is against English and Canadian authorities.

15th February, 1902.

IRVING, J.: On the 20th of January, one Jordan, was convicted by the Police Magistrate at Vancouver, of an offence against the provisions of the British Columbia Medical Act of 1898.

On the 25th of January, Jordan gave notice of his intention to appeal, addressing it to "J. A. Russell of the City of Vancouver, Police Magistrate." This notice was served upon Mr. Russell and also upon the solicitors for the informant.

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When the matter came up before the County Court Judge, Mr. *McPhillips* objected to the appeal being heard on the following grounds: (1.) That the notice of appeal was insufficient inasmuch as it was addressed only to the convicting Magistrate

and not to the prosecutor; (2.) That the security had not been furnished within the time stipulated by the said Acts as the respondent did not furnish security before being released from custody.

The learned Judge overruled these objections and proceeded to hear the appeal.

The present application is for an order that His Honour Judge Henderson, be prohibited from taking any further proceedings in the appeal.

By section 71 of the Summary Convictions Act, it is provided that the right of appeal shall be subject to the following conditions: (*a.*) (which I need not now refer to); (*b.*) "the appellant shall give to the respondent, or to the convicting Justice for him, a notice in writing (R) of such appeal, within ten days after such conviction." The form (R) given in the schedule is as follows: [Setting it out.]

In support of his first objection Mr. *McPhillips* cites three decisions in the North-West Territories. In *Keohan* v. *Cook* (1887), 1 N.-W. T. Rep. 125—a notice of appeal addressed to the Magistrate only—and not served upon the informant, was held bad. This was an appeal under the Summary Convictions Act, R.S.C. 1886, Cap. 178, Sec. 77.

The principle of that decision was extended in *Cragg* v. *Lamarsh* (1898), 4 C. C. C. 246, where the notice of appeal was not addressed to any person, and the Judges held that the notice was insufficient.

In *Ex parte Curtis* (1877), 3 Q.B.D. 13, a notice to the Justices generally, and not to the individual Justices, who sat in the case, was held bad.

In *Hostetter* v. *Thomas* (1899), 5 C.C.C. a notice of appeal addressed to one only of the two convicting Justices was held insufficient.

None of these cases are exactly like the case now under consideration.

On the other hand in *Ex parte Doherty* decided in 1885 by the Supreme Court of New Brunswick, a notice directed to and served upon the Magistrate was held sufficient under section 66 of the Dominion Statute 32 & 33 Vict., Cap. 31.

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The form of the notice of appeal given by the schedule is very tricky. The Act says notice must be given to the "respondent or (apparently in substitution for the respondent) the convicting Justice for him."

The form, however, is addressed to the Justice by name "C. D." and contains a direction that the notice shall contain the names and additions of those to whom the notice is required (*i.e.*, by the Act) to be given—that is to say the Act prescribes that the appeal shall be given to one person or a substitute; the form says the notice must be addressed to the substitute and adds a direction which may be read in two ways either (*a.*) that the notice shall be given to the respondent or the substitute, or (*b.*) that it shall be given to the substitute and also to the respondent.

This is purely a technical objection and I feel sure that the omission to add the respondent's name to this notice was not calculated to mislead; see section 10, sub-section 38, of the Interpretation Act.

The decision *Ex parte Doherty* seems to me right and more consistent with the views expressed by the late Mr. Justice Gwynne in *Reg.* v. *Nichol et al* (1876), 40 U.C.Q.B. 76 at p. 79, "we must read these notices, not with a critical eye, but literally *ut res magis valeat*, and so as to uphold, not to defeat, the right of appeal given to parties summarily convicted," and I think between the conflicting decisions, I ought to be guided by the

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decision of the Supreme Court of New Brunswick in this matter, particularly so, when so eminent a Judge as the late Mr. Justice King assented to the decision.

In this connection I would again call attention to the 38th sub-section of the Interpretation Act—"where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them." This sub-section in my opinion makes clear the grounds of the distinction between the English cases and the decision of Gwynne, J.

I am not at all satisfied that the service on the solicitors for the informant was not sufficient (see Short & Mellor p. 476), although it is not necessary to decide that point.

Another point taken before me was, that the notice did not state that Jordan was the "person aggrieved;" the Act does not,

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nor does the form in the schedule, require that to be alleged. It would be quite superfluous to state that fact, as the man does say that he was convicted and fined $50.00. The inference that he is the person aggrieved is plain.

As to the second ground taken before the Magistrate, that the security had not been furnished by the respondent before being released from custody. As a matter of fact the man was not taken into custody, how it can be argued that he is to lose his right to appeal because no one would take him into custody, is something that I cannot understand.

The order will be refused with costs.

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Trial by Judge without a jury—Findings of fact—Commission evidence—Reversal by Appellate Court.

Company incorporated in British Columbia—Contract by in Yukon—Validity of—Ultra vires.

In an action in the Yukon for damages for breach of contract tried before a Judge without a jury, the evidence for the defence being evidence taken on commission, the Court held that the contract sued on was made with defendant Company, and not with one Munn as alleged by the defence and gave judgment for plaintiffs.

On appeal, *held*, reversing the finding and allowing the appeal, that the Court had failed to appreciate said evidence.

Per DRAKE, J.: The question of *ultra vires* not having been raised in the Court below, was not open on appeal.

APPEAL from the judgment of CRAIG, J., in the Territorial Court of the Yukon. The plaintiffs sued for damages for breach of an alleged contract made with defendant Company whereby the Company was to carry certain goods from Bennett to Dawson. The Company was incorporated in British Columbia

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on 6th January, 1898, under the Companies Act, 1897. Its head office was in Victoria, B.C., and it had a mill at Bennett in charge of King, and a trading store at Dawson. The Company contended that the contract was made, not with it, but with H. A. Munn (a director of the Company), who had a contract with the Dominion Government to transport telegraph supplies and had three little steamers for that purpose and got scows from the defendant Company; he also engaged in transporting goods generally from Dawson. Munn and King in their evidence, which was taken on commission at Victoria, both swore the contract was with Munn. Before their evidence was given they had separated from the Company. The evidence of Wright and Haywood, two of the witnesses for the plaintiffs, was taken *de bene esse*. The remaining facts appear fully in the judgments.

The following is the judgment appealed from :

30th April, 1901.

CRAIG, J.: At the close of the trial of this case I expressed my views as to the facts brought out by the evidence, and on a closer and more careful perusal of the evidence, I have seen no reason to alter the views then expressed. To adopt the language of Mr. *Aikman*, counsel for the defendants, the question is, who made the contract, and is there a contract made? I think it is clear from the evidence that the contract was made with the defendant Company, and not with one Munn, as it is alleged. William McKay's evidence on this point is very clear, and the evidence of Hugh M. Wright confirms him in all the material points. Then stronger evidence than that is the dealing of the defendant Company's manager with the goods in question. McKay made this contract in Bennett in the fall of 1899 with one King, the recognized and admitted manager of the defendant Company. There was present at the same time in Bennett a Mr. Holland, who was one of the directors of the Company. In his own evidence he states he was one of the directors. Munn, also a director of the defendant Company, was present in Bennett, and, it seems, was carrying on an independent business of his own, somewhat of the same nature as that of the defendant Company. I am quite clear that the plaintiffs made the contract with King for the carrying of these goods. What-

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ever understanding there might have been with Munn I am not now in a position to determine. There was a contract with Munn, it appears, in writing, which has not been produced, but the defendants undertook to carry these goods for the plaintiffs, and to deliver them in Dawson that fall. King was active in the matter. He saw Wright, who afterwards had charge of the scows; told him to go over to see McKay to tell him that he was ready now to take the goods. McKay, upon receiving that notice, at once went to the telephone office and rang up King, and closed the bargain with him. King superintended the loading of the scows, objected to the manner of loading them, particularly as to the matter of machinery; the Company's checker was there, also Mr. Holland, who was acting in the capacity of checker or overseer of the Company, was present and assisted in the loading of the scows. Munn interfered in no way, was not upon the ground until the evening before the departure of the scows, and the scows were already loaded, to depart two or three days before they started. I, therefore, find as a fact that a contract was made with the defendant Company. I also find that it was made with them as common carriers. They carried on their business and advertised themselves as common carriers; they not only carried the goods of the plaintiffs, but carried goods of other parties on the same scow. They let sub-contracts for carrying goods to other scow-owners, and gave themselves out to be common carriers, working for hire to any one who came along. Then the orders for the loading of the scows and the bill of lading, or whatever it may be called, which was handed to Wright by Holland, who was the Company's agent, and not Munn's agent, after the departure of the scows, is further evidence that they were acting as principals in this matter and making the contract, and that they were common carriers. The document which was called a bill of lading is in the writing of the bookkeeper or party in charge of the Company's offices. Some questions of law were raised. It was objected that the contract should be in writing. I do not think it is necessary. It seems that under the law of British Columbia, where this contract was made, and where the Company was incorporated, it is expressly provided that contracts of this nature do not require to be in

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writing. However that may be, I have not had an opportunity of perusing the British Columbia Statutes. I think on the general law this contract did not require to be evidenced by writing in the first instance. The only other question of law left to be determined was the assessment of damages. I think it is quite clear upon all the authorities that the damages to be assessed is the value or market price of the goods at the point of destination at the time when they should have been delivered. I find as a fact that the goods should have been delivered the same fall, not later than the end of October. There will be no need of any reference to fix these damages, as the value of the goods at that date has been fully proven by the witnesses on the trial, particularly by the evidence of Mr. Milne, merchant in Dawson, fully familiar with the prices current at that date, and who has checked over the prices upon the statement filed, and I take his evidence to be conclusive on that point, there being no rebuttal evidence given upon that matter. I allowed an amendment, permitting the plaintiffs to add to their statement of claim the charge for hay and oats. These will also be allowed at the prices fixed by the evidence—that is, $1,210.00, less freight, $375.62, leaving a balance on those two items of $834.30. It came out in the evidence that part of the machinery was delivered, and that has also been ascertained and fixed, shewing a shortage on machinery of $516.75. The plaintiffs will be allowed the cost of bringing the machinery which was saved into Dawson, and the expenses in connection with the same, $1,237.50. I think this will dispose of the question of damages. If any other question of damages arises, it may be mentioned again, and will be definitely fixed; but, as I said before, there will be no need of any reference in this matter, as the evidence taken before me on the trial fixes the damages to be allowed.

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The appeal was argued at Vancouver in November, 1901, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

Argument.

Duff, K.C., for appellants, quoted from the evidence to shew that the plaintiffs' contract was really made with Munn and asked the Court to reverse the finding of fact. It was not the ordinary case where the Judge has the opportunity of seeing the

witnesses and observing their manner and demeanour, for the evidence of Munn and King was taken on commission. There is no presumption that the Full Court ought not to interfere with what the trial Judge has done with regard to matters of fact; but on the contrary, the Full Court in which both fact and law are open to review, is bound to pronounce such judgment as in its view, ought to have been pronounced by the lower Court. He referred to *Trimble* v. *Hill* (1879), 5 App. Cas. 342; *Canadian Pacific Railway Co.* v. *Robinson* (1887), 14 S.C.R. 105 at p. 122; *Rickmann* v. *Thierry* (1896), 14 R.P.C. 105; *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Bigsby* v. *Dickinson* (1876), 4 Ch. D. 28; *Colonial Securities Trust Co.* v. *Massey* (1896), 1 Q.B. 38 (virtually overruled); *Lefeunteum* v. *Beaudoin* (1897), 28 S.C.R. 89. He distinguished *Village of Granby* v. *Menard* (1900), 31 S.C.R. 14. The judgment is "clearly wrong" on the facts.

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Peters, K.C. and *Griffin*, for respondents, contended that King was held out by the Company as having authority to contract for it and plaintiffs dealt with him believing he was the agent of the Company. They cited Thompson on Corporations, Secs. 4,874, 4,885, 4,983-4 and 8,412 and Evans on Principal and Agency, Sec. 517.

Argument.

[The question as to whether the contract sued upon was *ultra vires* was also argued at length by counsel on both sides, but as the point was not decided by the Court, the arguments are not given.]

On 10th January, 1902, WALKEM, J., announced that it was the unanimous opinion of the Court that the contract mentioned in the pleadings was made between the plaintiffs and Munn, and not between the plaintiffs and the defendant Company; that the appeal must be allowed, the judgment appealed from set aside and judgment entered for the Company with costs, including the costs of the appeal.

Written judgments were handed down as follows:

10th January, 1902.

DRAKE, J.: Two points arise on this appeal: (1.) Whether the Company can be made responsible for a breach of contract to carry goods from Bennett to Dawson, the greater part of the

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transit being in the Yukon Territory beyond the limits of the Company's legal jurisdiction. (2.) Whether the evidence justifies the judgment appealed from, or whether in fact that one Munn was in reality the contracting party.

The contract admittedly was made in British Columbia, that is to say at Bennett, and the goods were to be carried from Bennett to Dawson, the major part of the transit being in the Yukon Territory. This point of *ultra vires* was not raised in the Yukon Court when the action was tried, but is first heard on this appeal. But if the Yukon Courts are content to recognize the liability of the Company to sue and be sued, I hardly see how the Company on appeal can set up the *ultra vires* of their transactions in order to escape from liability. If any shareholder of the Company here brought an action against the Company on the ground that they were exceeding their statutory powers, such an action would be maintainable. Lord Lindley in his book on Companies points out that the point raised here had not been decided in England, neither was our attention drawn to any decided case in the Canadian Law Reports. I think, therefore, that the question not having been raised in the Yukon Courts is not now open on this appeal. The other point is one of evidence. The decision of a Judge in first instance who has had the opportunity of seeing the witnesses and judging from their demeanour of the accuracy of their statements is, in most instances, much more competent to decide on questions as to evidence than the Court of Appeal, and his views should not be lightly disregarded. But in this case the evidence of the defendants was chiefly evidence taken on commission, therefore personal appearance and conduct of the witnesses is not a factor in the case. The whole evidence discloses a looseness and carelessness in transacting important business, which perhaps was unavoidable owing to the circumstances of the country and the absence of the ordinary facilities for transacting business of this nature. The learned Judge was apparently much impressed by the fact that King and Munn, both of whom figure prominently in the negotiations for the alleged contract, were at the time important members of the defendant Company, and were carrying on a similar business to that of the Company on their own account, and made use of the

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Company's office and telephone for their own business; and King was also the agent of the Company, and as such was advertised through the district. It may therefore be considered that the plaintiffs, if they made no inquiries, may have been led to the conclusion that it was with the Company as represented by King that they were contracting. On the other hand Munn says he was not acting for the defendant Company, but was introduced by Haywood to the plaintiffs and asked the price he would charge for freighting the plaintiffs' goods. The rate of seven and a half cents a pound was considered too high. The next day the subject was again broached by the plaintiffs, who inquired at what price Munn would charge for taking his freight down. At another meeting the same evening Munn told the plaintiff he could not get scows to take the goods down, but seeing King he asked him if he could supply scows. King eventually supplied him with two scows on which the goods in question were shipped.

Munn stated to the plaintiffs that as he was going down the river the next day he would leave instructions with King if scows were furnished in time to get men and load them up and start down. The reason of this was that the season was closing and the river might be frozen up. The plaintiffs were to pay the freight charges to Munn and the matter was to be settled with King, who was to act as Munn's agent. Then King in his evidence says when he was approached by the plaintiffs he refused on behalf of the Company to make a contract to take the goods down as he had as many contracts as he could carry out, and he told McKay the names of three or four persons who were taking freight down, including Munn. He further says that the plaintiffs agreed eventually to pay $125.00 a ton, and the goods were to be sent down river as far as possible, and that the Company had nothing to do with the contract. We have to look at this evidence as a direct acknowledgment against interest of the liability of Munn for the performance of the contract for carriage. The plaintiff says he made an arrangement with King to do the freighting, and he considered that as King was the manager of the Company he was contracting for the Company. No bill of lading or anything in the nature of one was given to

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the plaintiffs, and the Company's name does not appear anywhere, and the only exhibits put in all refer to the goods being shipped in Munn's scows. After a careful consideration of all the evidence which is no doubt contradictory in places, I think the learned Judge failed to appreciate the written testimony of the witnesses King and Munn. The plaintiffs may have thought that Munn was contracting for the Company, but that is hardly possible if Munn's evidence supported by King and Wright is to be believed. After a careful examination of the evidence I have come to the conclusion that the contract was in reality made with Munn, and not with the defendant Company, and that the appeal should be allowed and the action dismissed with costs.

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IRVING, J.: I agree with the conclusions reached by my brother DRAKE on the facts.

MARTIN, J.: It being in the first place contended by the appellants that the findings of the learned trial Judge on the question of fact should be reversed, it is desirable to ascertain how far this Court should go in that direction.

The point was lately considered by the Supreme Court of Canada in the case of *The Village of Granby* v. *Menard* (1900), 31 S.C.R. 14, wherein the five Judges who sat therein decided unanimously that where the trial Judge has, as Mr. Justice Gwynne says at p. 16, "heard all the witnesses give their evidence before him, ... no Judge sitting in review of, or in appeal from that judgment, upon matters of fact, ought to reverse that judgment, unless it is shewn to be clearly wrong upon the evidence so taken." This expresses the essence, as I understand it, of the result of the inquiry by Mr. Justice Girouard, who delivered the judgment of the Court, into the leading cases on the subject. At p. 21, after stating that in the case then under discussion, the "trial Judge alone saw and heard the witnesses," the learned Judge proceeds to say that it not being contended that the "evidence was clearly against his findings" the Appellate Court should not disturb them. But he intimates (pp. 20-1) that "where the witnesses are not seen by the trial Judge . . . . the Judges in appeal are in just as good a position as he was to weigh the evidence of record and

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arrive at a conclusion." And he states that, "so far, the Courts of England and of this country have not given to the findings of a trial Judge the effect of a verdict by a jury, because, it is argued, the latter is the result of a supposed agreement between the parties that the facts shall be tried by a jury," adding that he fails to appreciate the force of such reasoning, and that "probably we have not heard the last word from the English Courts."

So far as I am able to discover, the "last word" of the House of Lords on the point in question is the proposition laid down by the Lord Chancellor in the same year in the case of *The Gannet* v. *The Algoa* (1900), A.C. 234 (not cited to the Supreme Court) at p. 239, wherein he says in delivering the unanimous judgment of the six Judges constituting the Court: "My Lords, 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," and then proceeds to give his reasons why he could not regard the case at bar as one "in which I am to be overwhelmed by the opinion of the learned Judge who heard and saw the witnesses."

The last utterance of the Court of Appeal on the point is, I think, to be found in the very recent case of the *London General Omnibus Co., Ltd.* v. *Lavell* (1901), 1 Ch. 135, wherein Lord Justice Rigby states that before reversing the finding of a Judge on a matter of fact "we must take great care to see that there is sound ground for our differing from him."

It was argued by the appellant's counsel that the rule as laid down by the Supreme Court is not in harmony with the English decisions, and considerable reliance is placed on the case of *Rickmann* v. *Thierry*, decided by the House of Lords in December, 1896, and reported in 14 Rep. Pat. Cas. 105. This case also was not cited in *The Village of Granby* v. *Menard*, and only a note of it was before us at the argument. Since then I have obtained copies of the judgment bearing on the point and find that the Lord Chancellor, after pointing out that appeal is a rehearing, and that he thinks there should not be any presumption in favour of the Judge of first instance being right, proceeds, in reality, to recognize two exceptions, as I think they should properly be termed, as follows:

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"That one's mind may be, and ought to be, affected so as to lead one to distrust one's own judgment, if the appeal is from a very able or learned Judge, for whose judgment one may have a great respect is true; and, again, if the Judge of first instance has had an opportunity of hearing the witnesses, and testing their credit by their demeanour under examination and the like, which the appellate tribunal does not possess, I can quite understand that, under those circumstances, great weight should be attached to the finding of fact at which the learned Judge of first instance has arrived. And it may also be that where a jury has found a fact, it is not a re-hearing of such a fact, because the constitution has placed in the hands of the jury, and not in the hands of the Court, the jurisdiction to find the fact, and in such a case the Court can only disturb the verdict where, in their judgment, the jury have not done their duty; short of that, the Court is bound to accept the finding of the jury, though they may think they would have found a different verdict."

And finally the Lord Chancellor says:

"For these reasons, I have thought it right to protest against the notion that when a Judge of first instance has decided a question he has done something which is binding on the Court of Appeal, and that unless they think it very wrong, according to the language of the learned Judges, they must acquiesce in his judgment."

MARTIN, J.

While the substantial effect of the foregoing cases is, in my opinion, that the Appellate Court must not be driven to find that the trial Judge was "very" (which I understand as being, under the circumstances, really equivalent to "grossly") wrong before reversing the trial Judge, yet at the same time, bearing in mind the more recent expressions of the Lord Chancellor in *The Gannet*, *supra*, as to the "very powerful" reason for not interfering where the Judge had the opportunity of seeing the witnesses and the necessity under such circumstances of taking care to see, as Lord Justice Rigby puts it, that there is "sound ground" for differing from him, I am of the opinion that the Supreme Court exactly and happily expressed the prevailing rule, when it laid it down, *supra*, that the Appellate Court should not interfere unless satisfied that the trial Judge is "clearly wrong." And it

would be most unfortunate, I think, if any other rule were to prevail, because if such findings of fact are to be lightly disturbed it would, I am satisfied, in the great majority of cases lead to injustice, for the reason that, speaking as a trial Judge, it frequently happens that the demeanour of a witness, or some incident occurring during the trial, is the only thing by which the rays of truth are let into dark places and the scale turned between fact and fiction.

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I have gone into this matter at some length because this is the first time since I have been on the Bench that the point has been squarely before this Court, and it is one of great practical importance in the administration of justice in such a vast Province as this where witnesses have frequently to be brought great distances at corresponding expense.

The case at bar, however, does not come within the rule as above stated because all the evidence for the defence was taken by commission, and some of the evidence for the plaintiff also appears in the appeal book in the shape of depositions of Haywood and Hugh M. Wright taken *de bene esse*, consequently the remarks hereinbefore cited as to the better opportunity for discovering the truth that the trial Judge ordinarily has over the Appellate Court have here very little, if any, application. Such being the case, I have weighed the evidence to the best of my ability with the result that I also am of the opinion that the learned trial Judge has failed to give due effect to the evidence for the defence, and I agree with my learned brothers that we must find the contract to have been made with Munn and not with the defendant Company. At the same time I feel bound to say, to illustrate my understanding of the rule above considered, that had all the witnesses in this case been before the trial Judge I should not have felt justified in disturbing his findings.

MARTIN, J.

Having come to this conclusion it would be superfluous to consider the second interesting question raised on an alleged contract with the defendant Company which we have found was not entered into. The appeal should be allowed with costs.

Appeal allowed.

HUNTER, C.J. (In Chambers.)

1902.

March 28.

DIAMOND GLASS CO. v. OKELL MORRIS CO.

Costs—Summons for judgment under Order XIV—Practice.

A plaintiff who obtains judgment on a summons under Order XIV., issued after the expiration of the time for filing defence, is entitled to the costs of the summons and not only to such costs as he whould have been entitled to had he taken judgment in default of defence.

DIAMOND GLASS CO. v. OKELL MORRIS CO.

SUMMONS for judgment under Order XIV., argued before HUNTER, C.J., on 28th March, 1902.

Gilmour, for plaintiff.
Kappele, for defendant.

HUNTER, C.J.: Summons under Order XIV. to enter judgment. Mr. *Kappele* for the defendant admits that the plaintiff is entitled to judgment, but objects that he should not have any more costs than he could have got by taking judgment in default of defence as the time for filing the defence had expired before the summons was issued.

The objection fails, first, because Order XIV. does not limit the plaintiff's right to use the procedure until the time when the defence is due; secondly, because the defendant can at any time forestall the summons by notifying the plaintiff that he will consent to judgment; thirdly, because if the plaintiff, under such circumstances, could only resort to the default procedure at the risk of losing his costs, the defendant might be enabled to keep the plaintiff longer out of his money by moving to set aside the judgment, whereas, by means of this procedure the plaintiff may bring matters at once to a head; and, fourthly, because it is a well-settled principle that where there is more than one remedy open to the plaintiff, he is not bound to take the one which the defendant may regard as the least burdensome to himself.

HUNTER, C.J.

BANK OF BRITISH NORTH AMERICA v. ROBERT WARD & CO., LIMITED LIABILITY.

IRVING, J.

1902.

May 2, 6.

BANK OF B. N. A. *v.* ROBERT WARD & CO.

Jury, special—Striking—Parties allowed to take part in—Challenge—Practice.

Defendants, in the original action, counter-claimed against the plaintiff and one R. On defendants' application an order for a special jury was made, the plaintiff and R. acquiescing. On the striking of the jury the Sheriff refused to allow R. to take any part and plaintiff then applied under r. 157 to strike out the counter-claim because of the impossibility of properly striking a special jury where there are more than two parties.

Held, dismissing the summons, that plaintiff had no right to make the application.

As R. acquiesced in the order for a special jury when it was made and had not appealed, a challenge to the array by his counsel at the trial was overruled.

THE action was brought by the Bank against Robert Ward & Co., who by counter-claim set up a claim against the Bank, Arthur Robertson and others.

On 26th April, the solicitor for Robert Ward & Co., applied by summons for a trial by jury and the Bank's solicitor and A. Robertson's solicitor acquiescing, an order was made for a trial by a Judge with a special jury. The solicitors for the Bank, Robert Ward & Co., and A. Robertson attended before the Sheriff for the purpose of striking the said special jury in accordance with the provisions of the Jurors Act, and the Sheriff struck the jury refusing to allow the solicitor for A. Robertson to take part in the proceedings on the ground that there was no provision in the Act providing for a third party striking out jurors' names. A summons was then taken out on behalf of the Bank to strike out the counter-claim on the ground that it was impossible to try the counter-claim as Arthur Robertson, not being allowed to take part in the striking of the jury a fair trial could not be had.

Statement.

The summons came on before IRVING, J., on 2nd May, 1902.

Harold Robertson, for summons: It is impossible to try this case with a special jury. A. Robertson is a party and has a right

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to strike out fourteen names the same as the Bank and Robert Ward & Co. The result would be that there would be only two left to form the jury. We apply under r. 157 which allows the counter-claim to be excluded if it cannot be conveniently disposed of in the action.

White (*Eberts* and *Taylor*), for A. Robertson, agreed.

Luxton, for Robert Ward & Co., contended that the Bank had no right to take out the summons as it made no difference to it. Rule 157 refers to cases of complicated accounts, etc., and not to such a case as this.

Robertson: Under r. 157 the plaintiff must make the application.

His Lordship stated that the Bank had no right to make the application and he dismissed the summons with costs.

On the action coming on for trial on 6th May,

W. J. Taylor, K.C., for A. Robertson, moved to quash the jury panel on the ground that the jury was returned at the instance of the Bank and Robert Ward & Co., without the consent of A. Robertson who was not allowed to strike out in accordance with section 59 of the Jurors Act any names of jurors from the list.

Luxton, for Robert Ward & Co., opposed the motion.

IRVING, J., stated that as at the time the order for a special jury was made no objection was made and as the order had not been appealed he overruled the challenge.

HUNTER, C.J. (In Chambers.)

1902.

April 4.

WEHRFRITZ v. RUSSELL.

WEHRFRITZ v. RUSSELL AND SULLIVAN.

Arrest—Ca. re.—Form of writ—Summons to set aside—Appearance.

A writ of *ca. re.* must state the nature of the action.

It is not necessary for a person arrested under a writ of *ca. re.* to enter an appearance before applying for his discharge.

The defendant having asked for costs the order for his discharge provided that no action should be brought against the plaintiff or the Sheriff by reason of the *capias* or the arrest.

Statement. THIS was an action for moneys alleged to be due plaintiff as

follows: $1,700.00 on unpaid cheque drawn by defendants, $139.00 balance of salary, and $73.97 for travelling expenses paid by plaintiff for and upon account of the defendants at their request, and the defendant Sullivan was arrested on a writ of *capias ad respondendum* the material part of which so far as this report is concerned was as follows:

"We command you that you omit not by reason of any liberty in your bailiwick, but that you enter the same and take E. M. Sullivan if he shall be found in your bailiwick, and him safely keep until he shall have given you bail, or made deposit with you according to law, in an action at the suit of Benjamin Wehrfritz or until . . . ."

The defendant applied on summons to set aside the order for the writ of *capias* and the writ, and the summons was argued on 4th April, 1902, before HUNTER, C.J.

Harold Robertson, for the summons.
Bloomfield, contra.

HUNTER, C.J.: This is a summons to set aside an order giving the plaintiff leave to issue one or more writs of *ca. re.*, and also a writ of *ca. re.* issued thereunder. Among other objections raised to the regularity of the proceedings is one that the form of the writ prescribed by the Act, R.S.B.C. 1897, Cap. 10, has not been followed because of the omission to state the nature of the action. In my opinion this objection is fatal. The defendant is entitled to learn the nature of the action on account of which he is being arrested from the writ of *capias* itself, and without reference to other documents; and, in any event, strict compliance with the form is made imperative by the language of section 3 of the Act.

Judgment.

Mr. *Bloomfield* raised the preliminary objection that no appearance had been filed in the action; this is unnecessary, as the right to apply for his discharge at any time after the arrest is given a defendant without any such condition by section 7.

As the defendant asks for costs the order will be to set aside the writ of *capias* and discharge the defendant out of custody with costs, but that no action should be brought against the plaintiff or the Sheriff by reason of the *capias* or the arrest.

Order accordingly.

HUNTER, C.J. (In Chambers.)

PIKE v. COPLEY.

1902.

April 15.

Practice—Special indorsement—Interest till judgment—Order XIV.—Amendment—Re-service or re-delivery.

PIKE v. COPLEY

In an action for principal and interest due upon a covenant in a mortgage, a claim for interest until payment or judgment is not the subject of special indorsement within the meaning of Order III., r. 6.

Where on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to plaintiff to obtain amendment and proceed, but a new summons must be taken out.

Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary.

Remarks as to necessity for amending the Supreme Court Rules.

SUMMONS for judgment under Order XIV. The writ was issued 25th March, 1902, the claim indorsed being for $800.00, principal due upon a covenant in a mortgage and $620.00 interest thereon at 10 per cent. according to the covenant, computed to 28th January, 1902; a further claim was as follows: "The plaintiff also claims interest on the said sum of $800.00 from 28th January, 1902, until date of payment or judgment at the rate of 10 per cent. per annum."

Statement.

The summons came on for argument before HUNTER, C.J., on 11th April, 1902, when the objection was taken that the writ was not specially indorsed. The hearing was then adjourned and later the indorsement was amended by striking out the claim for interest until judgment. On 12th April, the matter came on again when

Prior, for plaintiff, asked for judgment.

Barnard, for defendant, contended that plaintiff must take out a new summons or re-serve the amended writ.

15th April, 1902.

HUNTER, C.J.: Summons for leave to sign judgment under Order XIV. In this case a claim for interest appears in the indorsement on the writ, which is clearly not the subject of special

Judgment.

indorsement, being a claim for unliquidated damages, and the writ is not, therefore, specially indorsed within the meaning of the rules: *B. C. L. & I. Co.* v. *Thain* (1895), 4 B.C. 321. This being so, the plaintiff takes the opportunity afforded by an adjournment to amend the writ by striking out this claim for interest, which, of course, he has a right to do, and now contends that his tackle is in order and that he should have judgment. It is urged by the defendant that the case is concluded by *Gurney* v. *Small* (1891), 2 Q.B. 584 and *Paxton* v. *Baird* (1893), 1 Q.B. 139, and that the plaintiff must take out a new summons.

I think this view is correct, and that these cases are untouched by *Roberts* v. *Plant* (1895), 1 Q.B. 597, cited by Mr. *Prior*. In *Roberts* v. *Plant* there was a specially indorsed writ, but the indorsement was not in due form by reason of there being no averment that notice of dishonour had been given, and it was held that an amendment might be made without taking out a new summons. So likewise in *Satchwell* v. *Clarke* (1892), 66 L.T.N.S. 641, and in other cases, where the cause of action was not properly set forth by reason of the omission of a material averment. The substance of the matter is that the decisions applicable to our rules make a distinction between the effect of an impossible special indorsement and a defective special indorsement, the one involving the collapse of the whole of the Order XIV. proceedings, and the other not necessarily so; and on general principles there is a vast difference between doing a thing which is not allowable, and doing a thing which is allowable badly.

Judgment.

As to the point that re-service of the amended writ is necessary. In support of this proposition, Mr. *Barnard* cited *More* v. *Paterson* (1892), 2 B.C. 302; but this case is only an authority on the old practice, and not on the present rules which came into force on the 1st of January, 1893. And here I may add that the Court in *Croft* v. *Hamlin* (1893), 2 B.C. at p. 335, in their remarks about re-service evidently overlooked the fact that they were then working under the new rules. Re-service of a writ, the indorsement of which has been amended, is unnecessary; it needs only to be re-delivered: see r. 265, and *Holland* v. *Leslie* (1894), 2 Q.B. at p. 451, per Kay, L.J., although the language

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ascribed to that learned Judge in the report of the case in 9 R. at p. 745, is evidently too wide, as in some cases an amended writ must be re-served. There is no reason for requiring re-service of a writ, the indorsement only of which is amended, as what the defendant appears to is the writ, and not the indorsement.

This case well exemplifies the necessity for renovating our rules so as to conform with the modern English rules, if it is right to put an end to really useless proceedings with their attendant costs. The summons must be dismissed with costs.

Summons dismissed.

BOLE, CO. J.

1902.

April 18.

TAYLOR v. DRAKE

TAYLOR v. DRAKE.

Jury—Special—Fees when not serving—R.S.B.C. 1897, Cap. 107, Sec. 61.

A special juror is entitled to $2.00 for each day's attendance at Court whether he serves or not, and whether in order to attend Court he travels from his place of residence or not; if he so travels he is in addition entitled to mileage.

ACTION in the County Court of Nanaimo, tried on 17th April, 1902, before BOLE, Co. J. The facts are sufficiently stated in the judgment.

Young, for plaintiff.

R. H. Pooley, for defendant.

18th April, 1902.

BOLE, Co. J.: This action is brought under the following circumstances: Mr. Taylor, a merchant, who resides in the City of Nanaimo, was at the last Nanaimo Assize, in December, 1901, summoned as a special juror in the civil case of *Booker* v. *Wellington Colliery Company*, and duly attended the Court (although

Judgment.

he did not actually serve), on five days, *i.e.*, 3rd, 4th, 5th, 6th and 19th of December, 1901. Part of section 61, Cap. 107, R.S. B.C. reads thus: "There shall also be then deposited with the Sheriff the amounts following, *viz.*, (2.) Sixteen dollars in civil cases, $20.00 in criminal cases and such further sum as may be necessary, for the payment to the jurors summoned, at the rate of $2.00 a day for every day of absence from his place of residence which attendance upon such Court actually entails upon each juror, whether he shall serve or not."

This money has been paid into the hands of the Sheriff, but the defendants having protested against his paying the plaintiff. One dollar is paid into Court as the amount admitted due. It is in evidence that the plaintiff attended the Court on five days, although occasionally absent for a short time in getting his lunch and visiting his office. Defendant contends that in order to entitle the plaintiff to succeed, he should come from such a distance as would necessitate his absence from home at night, and that as he resided in the town where the Court to which he was summoned as a special juror sat, he was not entitled to $2.00 a day. In the first place, it appears to me, applying the well-known rule of construction laid down by Lord Wensleydale in *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61 at p. 106, the grammatical and ordinary sense of the words used is to be adhered to, unless it would lead to some repugnance or inconsistency with the rest of the Act. Here, to my mind, no such difficulty arises, as I think the word "day" is used in its ordinary and popular acceptation, *i.e.*, that part of the twenty-four hours which is light, or the space of time between the rising and the setting of the sun; as a general rule, subject to certain exceptions with respect to priority of right, and other matters not now necessary to allude to, the law does not regard the fraction of a day: *vide The Queen* v. *St. Mary, Warwick* (1853), 22 L.J., M.C. 109 at p. 112. Besides, it is to be observed that sub-section 1 of section 61, provides an additional fee of ten cents per mile one way for each juryman coming a distance of five miles or upwards to the Court house, which would seem to indicate that while the juror who lived within five miles of the Court house only is entitled to claim $2.00 a day, the juryman who lives five miles away is

Judgment.

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TAYLOR v. DRAKE

entitled to $2.00, plus mileage as already mentioned. "Place of residence" has been defined in *The King* v. *North Curry* (1825), 4 B. & C. 953 at p. 959, thus, "where there is nothing to shew that the word is used in a more extensive sense, it denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep." See also *Hooper* v. *Kenshole* (1877), 46 L.J., M.C. 160 and 2 Q.B.D. 127; *Lambe* v. *Smythe* (1846), 15 L.J., Ex. 287; *Maybury* v *Mudie* (1847), 17 L.J., C.P. 95.

The Act it seems to me was passed to mitigate the hardship imposed on persons who by reason of being summoned as jurymen were in the discharge of such duties kept away from their residences or homes, and two classes of special jurors were for the purposes of remuneration created, *viz.*, those whose places of residence were within five miles from the Court house, and those whose residences were at a greater distance; *vide In re Leavesley* (1891), 2 Ch. 8; *Eastman Photographic Materials Co.* v. *Comptroller General of Patents, &c.* (1898), A.C. at p. 573. I therefore think the plaintiff is entitled to judgment for the amount claimed with costs.

Judgment.

Judgment for plaintiff.

HUNTER, C.J.

1902.

March 24.

CALDER v. THE LAW SOCIETY OF BRITISH COLUMBIA.

Barrister and solicitor—University graduate—Legal Professions Act, Sec. 37, Sub-Sec. 5.

CALDER v. THE LAW SOCIETY

To come within the exception in sub-section 5 of section 37 of the Legal Professions Act, it is not necessary that the applicant should have been a graduate at the time he commenced to study law, or that his term of study or service was shortened because he was a graduate.

An applicant who obtained his degree after call or admission would come within the exception.

Statement.

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. The plaintiff matriculated at the University of Dalhousie, Halifax, Nova Scotia, in September, 1889, and the degree of Bachelor of Laws was conferred on him by that University on 26th April, 1892. On 4th April, 1894, after a term of study and service of three and a half years under articles, he was called and admitted in Nova Scotia. The term of service under articles in Nova Scotia for call and admission is ordinarily four years, but in case of a graduate in law or arts of some recognized University, it is three years, and as part of such term of three years the student is allowed to include the time spent in actual attendance at a University while undergoing his course for graduation.

Statement.

In March, 1902, the 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 22nd March, 1902, before HUNTER, C.J.

Duff, K.C., for the applicant referred to *King* v. *The Law Society of British Columbia* (1901), 8 B.C. 356, and contended that the present plaintiff having had his term shortened in Nova Scotia because he was a graduate was clearly within the exception in sub-section 5.

Gregory (*Lampman*, with him), for the Law Society, cited *Gwillim* v. *Law Society of B.C.* (1898), 6 B.C. 147, to shew that the whole Act must be read to get the true meaning of the sub-section. Under the preceding clauses of section 37, a student or articled clerk who is a graduate may be called or admitted after a three years' term, but in order to get this shorter term he must have been a graduate at the time he commenced to study law, and

Argument.

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the graduate to come within the exception in sub-section 5 must also have been a graduate at the time he commenced to study law.

24th March, 1902.

HUNTER, C.J.: This is an application for a *mandamus* requiring the Law Society of British Columbia to enter the name of Frederick Calder on its books as an applicant for call and admission. Mr. Calder appears, by the affidavits filed, to have been duly called to the Bar, and admitted as a solicitor, in Nova Scotia on April 4th, 1894, after having served three and a half years under articles, during part of which time he was a student of law at Dalhousie, from which institution he graduated in law in April, 1892.

The contention on behalf of the Law Society is that he is not entitled to be called or admitted by reason of sub-section 5 of section 37 of the Legal Professions Act, which requires applicants, who have put in a less term than five years, to make good the unserved period before they are in a position to ask the Society to call or admit.

A graduate from one of the recognized Universities, is, however, expressly exempted from the operation of this sub-section by the terms of the sub-section itself, nor is there any limitation as to the time of graduation. If it was intended that only those who were graduates before entering on their law course were to be exempt, nothing would have been easier than to say so, but I am asked to read something into the sub-section which is not only not expressed, but as to which there is no necessary implication except, of course, that they must be barristers or solicitors, and not peradventure, veterinary surgeons, as suggested by Mr. *Gregory*. As to this, to use Lord Halsbury's language in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 34, I must decline to insert limitations in the Act which are not to be found there.

Judgment.

If, however, there is any ambiguity lurking in the word "graduate," which I do not think is the case, then it ought to be resolved in favour of the applicant on the principles set forth by Strong, C.J., in the case of the *Gas Company of St. Hyacinthe* (1895), 25 S.C.R. 168 at pp. 173, 174, where he says:

"And in Maxwell on Statutes (3) it is said that 'enactments which invest private persons or bodies, for their own benefit and profit, with privileges and powers interfering with the property or rights of others, are construed more strictly perhaps than any other kind of enactment.'

"The Courts take notice that these Acts are obtained on the petition of the promoters, and in construing them treat them as contracts between the applicants for them and the Legislature on behalf of the public, and the language in which they are expressed is treated as the language of the promoters, and the maxim *verba fortius accipiuntur contra proferentem* is applied to them; and the benefit of any ambiguity or doubt is given to those whose interests would be prejudicially affected, especially when such persons are not parties to the Act nor before the Legislature as assenting to it. And particularly is this so where exorbitant powers, such as a monopoly, are conferred."

It may, no doubt, be said that the analogy between a Gas Company and an incorporated Law Society is very remote, but I think the canons of construction, just quoted, apply equally to both cases.

Judgment.

Two cases were referred to during the argument, namely, *Gwillim* v. *Law Society of B.C.* (1898), 6 B.C. 147; and *King* v. *The Law Society of British Columbia*,* not yet reported. As to the former, the Court was not there dealing with the case of a graduate; and as to the latter, assuming the report handed to me be correct, with great respect to the late Chief Justice, I am unable to understand how a requirement as to prior graduation can be read into the sub-section in question. As the applicant has had to come to the Court to establish his right, he must have his costs.

Judgment accordingly.

*Since reported (1901), 8 B.C. 356.

IRVING, J.

1902.

May 1.

IN RE THE ASSESSMENT ACT.

Assessment—Income of locomotive engineers—Taxation—R. S. B. C. 1897, Cap. 179.

IN RE THE ASSESSMENT ACT.

The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and so liable to taxation.

QUESTION referred to a Judge of the Supreme Court for hearing and consideration by Order in Council under the provisions of section 98 of the Supreme Court Act. The question was "whether the earnings of railway locomotive engineers were income within the meaning of that term as employed in the Assessment Act prior to the amendment of the said Act by the Assessment Act Amendment Act, 1901, and whether such earnings were liable to taxation."

Statement.

Section 3 of the Assessment Act, R.S.B.C. 1897, Cap. 179, provides in effect that with certain exceptions, the annual income of every person in the Province in excess of $1,000.00 is liable to taxation at the rate set out in said Act. Before the coming into force of the amendment of said Act, made by section 2 of Cap. 56 of the Statutes of 1901, the Assessment Act contained no definition of the term "income."

Before said amendment, the Provincial Assessor at Vancouver had assessed certain railway locomotive engineers upon annual income in excess of $1,000.00. These men were not paid salaries, but received pay according to the number of miles they ran their locomotives.

The question was argued before IRVING, J., on 1st May, 1902.

Argument.

Wilson, K.C., for locomotive engineers: "Income" means profit on undertaking and not result of personal exertions—there can be no income unless there is capital. The tax in question had never been paid, and since the objections to it, the Legislature has by section 2 of Cap. 56 of the Statutes of 1901, defined

the meaning of "income." In order to arrive at what a person's income is, Sir Frederick Pollock, in (1901), 17 L.Q.R. 354, says all the necessary outgoings without which his income could not be earned, must be deducted. He cited also *Lawless* v. *Sullivan* (1881), 6 App. Cas. 373; *McCargar* v. *McKinnon* (1868), 15 Gr. 361; *Ex parte Benwell* (1884), 14 Q.B.D. 301; and referred to 5 & 6 Vict. (Imp.), Cap. 35, Sec. 100. Without a definition of "income," doctors' and lawyers' earnings being uncertain and dependent on personal exertions, are not "income."

The earnings of these engineers are not "income," and at any rate from the gross earnings deductions must be made for reasonable living expenses.

Argument.

Maclean, D.A.-G., for the Crown: No inference can be drawn from the amendment of 1901; see sub-section 55 of section 10 of the Interpretation Act. "Income" simply means what it says, and is everything that comes in. Sir George Jessel, M.R., in *Ex parte Huggins* (1882), 21 Ch. D. 85 at p. 92, says a pension is income. He referred also to *Jones* v. *Ogle* (1872), 42 L.J., Ch. 334.

Wilson, in reply, referred to *In re Jones* (1891), 2 Q.B. 231.

At the conclusion of the argument His Lordship stated that the Legislature has by section 3 declared that with certain exceptions all income is liable to taxation. As no definition is given of the word income it must receive its ordinary popular and natural meaning in the same way that people in ordinary life would use it. There is nothing in the Act to prevent it being given its full wide meaning and applying it to personal earnings. The section deals with several classes whose income arises from personal exertions, *e.g.*, the farmer and the mechanic, thus shewing that income derived from something other than capital is liable to taxation. Wages and salaries or by whatever name we may call the earnings derived from personal exertions are liable to taxation. The question must be answered in the affirmative.

Judgment.

FULL COURT At Victoria.

1902.

April 22.

McKELVEY v. LE ROI MINING COMPANY, LIMITED.

Mines (Metalliferous) Inspection Act—Accident to miner caused by falling cage—Bulkhead—Statutory duty of owner to maintain—Practice—R.S. B.C. 1897, Cap. 134, Sec. 25, r. 20 and Amendment of 1899, Sec. 12.

McKELVEY v. LE ROI MINING CO.

A cage used for lowering and hoisting men is not "falling material" within the meaning of that term as used in r. 20 of section 25 of the Metalliferous Mines Inspection Act, and the amendment of 1899 (Cap. 49, Sec. 12) does not create any duty on the mine owner to provide protection from a falling cage.

ACTION for damages for personal injuries. The plaintiff was a miner, and while at work at the bottom of a shaft in the Le Roi mine, he was injured by the cage or skip, used for lowering and hoisting men, falling on him. The place where he was working was a few feet below the 800 foot level, and the cage was operated by a machine erected at the 350 foot level. At the 800 foot level there was a bulkhead, or as some of the witnesses for the plaintiff called it, a cage platform. The cage fell, broke through the bulkhead and on to the plaintiff.

The action was tried before McCOLL, C.J., and a jury, who re-

Statement. turned 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.

On the verdict His Lordship did not see fit to enter any judgment, but left the parties to move the Full Court as they might be advised. The Full Court referred the case back,* and on motion for judgment the Chief Justice, on 17th December, 1901, gave judgment dismissing the action with costs, giving no writ-

*See *ante* p. 268.

ten reasons, but stating that he had expressed his views at the trial.

The following are extracts from his remarks made during the course of the trial:

"There is only one point in this case; the result shews plainly that whatever bulkhead there was was not strong enough, otherwise the accident could not have occurred. . . . .

"Now these words (referring to falling material) in their ordinary sense and meaning do not apply to or include the cage of the hoist. Then, coming to the amendment, it provides that no 'stope,' 'drift,' etc., as in the language of the Act, which I need not read. Now, having regard to the fact that these words are simply added to the original section of the Act and having regard to the ordinary canons of construction, I must hold that the Legislature was only defining the extent of the protection which the amended section had left undefined, that is they gave the choice of two alternatives. Either (*a.*) to leave fifteen feet of solid ground, in which case there could be no responsibility for an accident caused by falling materials, or (*b.*) the owner if he did not do this must absolutely insure against such an accident by the construction of bulkheads, or otherwise. There is another reason for holding that the amendment could not possibly be held to apply to a cage such as this, as it is simply inconceivable that any Legislature would, in giving protection to the man below the cage, leave any person who might be in the cage itself unprotected. That being so, there is nothing for the jury on this branch of the case, and as to the question of the bulkhead, it is conceded that the bulkhead was insufficient as against the cage and there is nothing, therefore, to go to the jury on that point. Now, coming to the negligence of the engineer, which was the primary cause of the accident, I do not understand that you contend that you have any claim for the negligence of a fellow-servant such as this man was.

McCOLL, C.J.

"Now, if there is anything left in the case at all, it is this, that the absence of the guide rails for some distance below the sheave wheel was a defect in the 'ways, works or machinery,' in the language of the Act, but as a matter of law I must hold that as

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it was not in use for any operation of the mine it was not a part of the 'ways, works or machinery,' within the statute."

The plaintiff appealed, and the appeal came on for argument at Victoria, on 7th January, 1902, before WALKEM, IRVING and MARTIN, JJ.

Hamilton, for respondent, took the preliminary objection that the order of McCOLL, C.J., referring the motions for judgment to the Full Court, is still in existence, and plaintiff should have appealed from it, but the time for appealing has now expired. The Court has no jurisdiction to alter a judgment which accurately expresses the opinion of the Court, and that judgment did. The Full Court has declared it had no jurisdiction to hear the motion, and therefore it had no jurisdiction to give the parties leave to move the Chief Justice for judgment: see *Preston Banking Company* v. *William Allsup & Sons* (1895), 1 Ch. 141.

Per curiam: We are bound by our prior order and the objection must be overruled.

MacNeill, K.C., for appellant: We don't rely upon Employers' Liability Act, but on defendant's statutory duty to maintain a bulkhead sufficient to stop the falling cage: see Inspection of Metalliferous Mines Act, Sec. 25, Sub-Sec. 20, and the amend-

Argument.

ment of 1899, Sec. 12. In the amendment the words "falling material" do not occur, so we do not have to shew that a cage is falling material. But to shew they do include a cage, he referred to sub-section 17, and said they must include something more than the material of the mine. The Legislature must have intended something more than natural strata, so "falling material" being wide enough to cover cage, why should it be held not to include it? For similar rules he referred to MacSwinney on Mines, 675, r. 20; 719, r. 8; Coal Mines Regulation Act, r. 16 (p. 1,509 R.S.B.C.) Similar rules in England are given a wide interpretation. He cited *Scott* v. *Midland Railway Co.* (1901), 1 Q.B. 317; *Foster* v. *North Hendre Mining Co.* (1891), 1 Q.B. 71; *James* v. *Grand Trunk Railway Co.* (1901), 1 O.L.R. 127; *Wales* v. *Thomas* (1885), 16 Q.B.D. 340 and Beal's Cardinal

Rules of Legal Interpretation, 122-3. The Act provides, inspection, etc., as protection for the man in the cage.

Hamilton, for respondent: Section 20 has no reference to cages which are dealt with under separate heading, and headings must be referred to in determining the sense: see *Hammersmith, &c., Railway Co.* v. *Brand* (1868), L.R. 4 H.L. 171; *Lang* v. *Kerr, Anderson & Co.* (1878), 3 App. Cas. 529. Timbering, when used in a mining sense, refers to the timbers used to keep the sides from coming in and not to bulkheads, and it must be given its professional meaning. The Act is in derogation of private rights and should be construed strictly: Barringer and Adams, 784. The "pentice" is not known or used in modern mining.

On 22nd April, the Court gave judgment affirming the judgment appealed from and dismissed the appeal with costs, MARTIN, J., then delivering a written judgment, and subsequently the following judgment was filed by

IRVING, J.: I am unable to say that the decision arrived at is wrong. The section is most unfortunately worded. I do not feel any great degree of confidence in the correctness of the construction placed upon it by the learned Chief Justice, but on the other hand, I cannot say he is wrong.

IRVING, J.

MARTIN, J.: On the merits, as the result of the present argument, I see no reason to depart from the views I have already expressed on the former application to this Court, and am of the opinion that this appeal should be dismissed with costs.

MARTIN, J.

Appeal dismissed.

Note:—Rule 20 with amendment is as follows: "Timbering: Each shaft, incline, stope, tunnel, level or drift, and any working place in the mine to which this Act applies, shall be, when necessary, kept securely timbered or protected to prevent injury to any person from falling material.

"'No stope or drift shall be carried on in any shaft which shall have attained a depth of two hundred feet, unless suitable provision shall have been made for the protection of workmen engaged therein, by the construction of a bulkhead of sufficient strength, or by leaving at least fifteen feet of solid ground between said stope or drift and the workmen engaged in the bottom of such shaft.'"

WALKEM, J.

1902.

Jan 29.

THE YALE HOTEL COMPANY, LIMITED v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

FULL COURT At Victoria.

March 25.

THE GRAND FORKS AND KETTLE RIVER RAILWAY COMPANY v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

YALE HOTEL CO. *v.* V. V. & E. RY. & N. CO.

GRAND FORKS AND KETTLE RIVER RY. CO. *v.* V. V. & E. RY. & N. CO.

Railway Company—Commencement of work—Omission to file plans—Forfeiture—Expropriation proceedings—Interlocutory injunction—Appeal from, where questions of importance for trial.

Full Court—Special sittings—Practice.

The defendant Company was originally incorporated in 1897, by an Act of the Legislature of British Columbia, and on 28th June, 1898, by an Act of the Parliament of Canada, its objects were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act, except section 89 thereof. Section 4 of the Dominion Act of 1898, required the railway to be commenced within two years.

In 1901, the defendant Company commenced expropriation proceedings in respect of the plaintiff Hotel Company's lands, and by consent took possession and proceeded with construction, negotiations to determine the amount of compensation by arbitration being carried on in the meantime.

The defendant Company had purchased for its line of railway land on either side of the plaintiff Railway Company's right of way, and had applied to the Railway Committee of the Privy Council for leave to make a crossing.

On the application of plaintiffs, who alleged *inter alia* that the defendant's railway was not commenced within the two years, that no map or plan and profile of the whole line of railway had been prepared and deposited in the department of the Minister of Railways, and that the work being done by the defendant Company was not authorized and was not being prosecuted in good faith by the Company under its charter, but was really for the benefit of the Great Northern Railway Company, so that it might extend its railway system, which lies south of the International Boundary, into British Columbia, injunctions were granted restraining until the trial of the action defendant Company from continuing in possession and proceeding with the expropriation of the land of the plaintiff Hotel Company, and also from taking any pro-

ceedings toward effecting the proposed crossing of the right of way of the plaintiff Railway Company. Motions to dissolve the injunctions were refused.

The Full Court (IRVING, J., dissenting), dismissed an appeal on the ground that there were several points of importance which should be decided at the trial.

Per IRVING and MARTIN, JJ. (DRAKE, J., dissenting): Special sittings of the Full Court may be held either at Victoria or Vancouver to hear appeals in actions irrespectively of where the writs of summons were issued.

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APPEALS from injunction orders.

On 29th January, 1902, WALKEM, J., made an order in the first action restraining until the trial of the action, the defendant Company from entering upon, continuing in possession of or otherwise interfering with plaintiffs' lands mentioned in the writ of summons and from proceeding with expropriation proceedings in respect of such lands under the Railway Act of Canada or otherwise. At the same time a similar injunction order was made in the second action, restraining the defendant Company from entering upon, continuing in possession of or otherwise interfering with the plaintiffs' lands mentioned in the writ of summons and from taking any proceeding or proceedings toward effecting a crossing of the plaintiffs' line of railway. The injunctions were continuations of *interim* injunctions granted on 18th December, 1901.

Statement.

The plaintiff Railway Company was incorporated by Act of the Legislature of the Province of British Columbia (Cap. 47 of 1900), and the defendant Company was originally incorporated by an Act of the same Legislature (Cap. 75 of 1897), and on 13th June, 1898, by an Act of the Parliament of Canada (61 Vict., Cap. 89), the works which by its Provincial Act of Incorporation it was empowered to undertake and operate, were declared to be works for the general advantage of Canada, and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act, except section 89 thereof. Section 4 of this last Act required the railway to be commenced within two years.

In August, 1901, the defendant Company commenced expropriation proceedings in regard to the Yale Hotel Company's

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lands and the plaintiff Company consented to defendants taking possession and going on with construction which they did, until stopped by the injunction. In the meantime each party had appointed an arbitrator and negotiations were being carried on in reference to the appointment of a third, and the only dispute between the parties up till some time in December, was over the amount of compensation. The remaining facts appear in the arguments and in the written reasons for judgment handed down on 22nd March, by

WALKEM, J.: On the 18th of December last, I granted an *interim* injunction in each of these cases, to last until the 8th of January last, on an *ex parte* application based on affidavits filed on behalf of the plaintiffs. Prior to the 8th of January, notices of motion were mutually given—one, on behalf of the plaintiffs, to continue the injunctions, and the other, on behalf of the defendant Company, to dissolve them. Owing to the sittings of the Full Court at the time, these motions did not come before me until about the end of January. Several affidavits, together with the cross-examinations which occurred upon them, were then put in on behalf of the defendants. For reasons which are now immaterial, I held that the motion to continue should have precedence, and it was accordingly proceeded with. In any event, had it failed the injunctions would have become inoperative, and the counter-motion therefore unnecessary. I mention these facts mainly for the purpose of shewing that the defendant Company had ample time to put in affidavits that would fully explain its position, and, if possible, counteract the effect of the plaintiffs' affidavits.

WALKEM, J.

The case was argued ably, and at great length, by both counsel, and, after taking time to consider the evidence and the authorities cited, I gave an oral judgment continuing the injunctions until the hearing without assigning any reasons, as counsel had been detained here an unusual time and could not wait for them.

Both cases involve important legal questions, and facts that are somewhat complicated. I, therefore, intended to give a written judgment dealing as fully as possible with the case, but have not had time to do so. I propose, however, to briefly state the

main reasons for the conclusion I arrived at. In any event, I would not be warranted at the present stage of the proceedings, in expressing any other opinion than that the case presented on behalf of the plaintiffs was properly one for the interference of the Court by injunction, with a reasonable possibility of its being made perpetual at the hearing: *Walker* v. *Jones* (1865), L.R. 1 P.C. 50, per Turner, L.J., at pp. 60 and 61; and *Preston* v. *Luck* (1884), 27 Ch. D. 497.

The question involved in the first of the present cases is the defendant Company's right, which is disputed, to compulsorily expropriate some of the Hotel Company's land for railway purposes. When such disputes occur, the rule is that if the right is doubtful, the benefit of the doubt must be given to the owner of the land, and the Company be restrained from committing further trespass, especially when the damage likely to be done is more than appreciable, as it is in this case: Kerr on Injunctions, p. 118. The intended expropriation includes a strip of land nearly two miles long, extending through the plaintiff Company's property; the breadth of the strip is not stated, but it is probably regulated by statute. The evidence shews that cutting and filling on the land will be extensive, and consequently, the value of the whole tract would be seriously impaired if that work is allowed to proceed.

In such cases, an owner is not bound to accept compensation for any damage done by expropriation. One of the principles laid down by the English authorities is that a railway company should be kept strictly within the bounds of its charter, and that the rights of those affected by its actions should, as far as possible, be protected. This principle applies with more than ordinary force to the present case, for, as I shall shew hereafter, the expropriation complained of was not made by the defendant Company, but was made, under colour of its charter, by a foreign corporation, namely, the Great Northern Railway Company, for the purpose of extending its railway system, which lies south of the International Boundary, through a portion of this Province, ostensibly with a view of reaching the mineral camp, called Republic, which is south of the boundary. It is a matter of common knowledge that such a scheme, if permitted, would have the

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effect of diverting the business of smelting in the Boundary district, and placing it in the hands of our neighbours.

The mere fact that the Railway Committee of the Privy Council approved of some of the plans before it for inspection is immaterial, because that Committee has no jurisdiction to settle legal questions. Consequently, the legal rights of the parties in these actions, have to be determined by a Judge of this Court at the trial. Meanwhile, I must express some opinion upon them as a justification for the orders I have made; and that opinion is, in view of the facts and authorities bearing upon them, that those orders were warranted, as they would tend to preserve the alleged rights of both parties in *statu quo* until judgment is pronounced upon them.

It seems to me to be worthy of observation that nearly all of the affidavits put in on behalf of the defendant Company are made by subordinates, and not by any prominent member, except perhaps Mr. Hill, of the Great Northern Railway Company. Consequently, there is no satisfactory explanation of the reason why all the persons employed in connection with the work in question—civil engineers as well as workmen—are paid by that Company. Mr. *MacNeill*, however, promised, if I recollect aright, to furnish it later on. This would, in itself, be a good reason for keeping matters in *statu quo*.

WALKEM, J.

An objection was made by Mr. *Clement* to the effect that the work on the defendant Company's projected line had been illegally commenced between Cascade and Carson before the plans connected with the whole line, that is to say, from the seaboard eastward, had been completed and deposited in the manner prescribed by the Dominion Railway Act. Mr. *MacNeill* took a different view of the effect and meaning of the provision referred to. My impression—I won't say conviction—is that Mr. *Clement's* interpretation of it is correct. Another objection was, in effect, that the terms of the charter of the defendant Company had been illegally exceeded, as its projected line touched the International Boundary at three different places instead of one. This objection is, at first sight, well founded.

The facts of the second case are, generally speaking, the same as those in the above case—the main difference being that the

defendant Company is endeavouring, without proper authority, to establish a railway crossing over the plaintiff Company's railway line, and, consequently, a perpetual easement. This is objected to by the plaintiff Company, and no good reason has been given against the objection. Hence, the injunction is, so far, warranted.

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I may state generally that the affidavits and cross-examination of the defendant Company's witnesses lead me to infer that the work complained of is done by the Great Northern Railway Company as part of its system under colour of the defendant Company's charter; and hence, that that charter is being used for purposes foreign to those intended by the Legislature.

The point has been taken by Mr. *MacNeill* that the plaintiff Company, in one, if not both cases, had acquiesced in what was being done, and is, therefore, estopped from complaining of it; but neither of the plaintiff Companies was aware of its rights at the time, and only knew of them afterwards, namely, when the Great Northern Railway Company applied to the proper authorities at Washington for leave to construct a railway connecting Marcus with Republic. From the statements contained in the affidavits upon which that application was made, I can only infer that so much of the connecting line between those two points as lies within this Province, and running, as it does, along and over the projected line of the defendant Company, is meant to be used as a part of the Great Northern Railway system.

The general observations that I have made with respect to the first action are intended to apply to both actions.

WALKEM, J.

Furthermore, it follows from the facts stated, that the intended connection of the so-called Vancouver, Victoria and Eastern line with that of the Great Northern Railway Company is illegal, in view of sub-section 10 of section 92 of the B.N.A. Act, as the Dominion Parliament has not sanctioned it.

Under all the circumstances, I consider that the injunctions should be continued until the trial.

The defendant Company appealed to the Full Court, a special sittings of which was held at Victoria, commencing on 21st March, 1902, the Court being composed of DRAKE, IRVING and MARTIN, JJ.

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Clement, for respondents, said he did not consent to the jurisdiction of the Court, as it was not properly constituted as a special sittings to hear the appeal. The power to fix a special sittings is in the Full Court, and such a sittings must be fixed by the Full Court. Secondly, the writs were issued from the Vancouver Registry and the appeal must be heard there. He referred to the Supreme Court Act (R.S.B.C. 1897, Cap. 56), Secs. 73, 74 and 75; the amendment of 1899 (Cap. 20), Secs. 14, 15 and 16; and the amendment of 1901 (Cap. 14), Sec. 2.

The Court was unanimous in holding that the Court was sitting properly constituted to hear the appeal. IRVING and MARTIN, JJ., were of the opinion that section 75 was an emergency section, and that under it the Court might sit at either of the two places, whichever was the more convenient, while DRAKE, J., was of the opinion that the hearing would have to take place in Vancouver.

The argument was then proceeded with.

MacNeill, K.C., for the appeal: So much of the order as restrains defendants from going on with expropriation proceedings must be deemed to be abandoned, as the statement of claim delivered on 23rd January, is limited and makes no claim in that respect: see Rule 184; English Rule 228; *Cargill* v. *Bower* (1878), 10 Ch. D. 502; *Wilmott* v. *Freehold House Property Co.* (1884), 51 L.T.N.S. 552. Plaintiffs acquiesced in our taking possession in August and proceeding with construction and expending on land $11,500.00 until 18th December, when injunction was granted. Their ignorance of our statutory default, if any, is no answer.

Argument.

As to the contention that we did not commence work within the time limited by the charter. Within the time limited by charter, surveys were made and the work of construction was actively carried forward Work to the value of $50,000.00 was done, and

Note:—During the hearing of these appeals applications for a special sittings to hear other appeals were made, when the Court announced that the proper practice was to apply to the Chief Justice, who would consider the urgency of the case and the necessity for a special stttings, and on a proper case being shewn some time would be fixed by him convenient to the Judges and the parties.

on 24th December, 1900, a resolution was passed at a meeting of the provisional directors of the defendant Company ordering that sum to be paid to Mackenzie and Mann for work done and expenditures made in plans, surveys and construction on defendant Company's railway, and plan of Mackenzie and Mann's surveys was approved by Minister of Railways and filed. But even if we did not do the work only the Government can object: Wood on Railroads, 2,081; Thompson on Corporations, 6,598; *Re Stratford, &c., R. W. Co.* v. *County of Perth* (1876), 38 U.C.Q.B. 112; *Re New York Elevated Railroad Co.* (1877), 70 N.Y. 327.

No penalty is attached to non-commencement within two years (see section 4 of special Act, 61 Vict., Cap. 89)—the forfeiture is limited to the second part of the section, *i.e.*, the completion alone, and any forfeiture relates only to the benefits taken under that Act and the Company's other powers would not cease: see *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884), 9 App. Cas. 480, 517; *Hardy Lumber Co.* v. *Pickerel River Improvement Co.* (1898), 29 S.C.R. 211 at p. 214.

We are entitled to go to International Boundary line: see section 22 of charter—connection either within or without British Columbia must mean a connection with United States lines. He cited *Michigan Central Railway Co.* v. *Wealleans* (1895), 24 S. C.R. 309, 317-8. We admit that the Great Northern Railway Company is behind the defendant Company and that they are the principal shareholders—there is nothing against that.

Argument.

On 22nd March,

MacNeill, continuing, dealt with the reasons of WALKEM, J., handed in since the adjournment the afternoon previous. As to the holding that the Company should be kept strictly within the bounds of its charter, he cited *Dowling* v. *Pontypool, Caerleon and Newport Railway Co.* (1874), L.R. 18 Eq. 714 at p. 746.

Section 31 of charter gives Company power to divide the work into sections, so deposit of plans of whole line not necessary.

This section was required while Company was under British Columbia General Railway Act. Under Dominion Railway Act, Sec. 123, special power to divide into sections unnecessary.

[IRVING, J., referred to history of legislation prior to section 123 of Railway Act of 1900.]

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He cited *Ontario and Sault Ste. Marie Railway Co.* v. *Canadian Pacific Railway Co.* (1887), 14 Ont. 432 and *Re Stratford, &c., R. W. Co.* v. *County of Perth, supra.*

When an owner once gives a railway company possession his general rights are gone and he can only resort to the Act for compensation: *Hudson* v. *Leeds and Bradford Railway Co.* (1857), 16 Q.B. 795; *Tower* v. *Eastern Counties Railway*, 3 Railw. Cas. 374; Fry on Specific Performance, 3rd Ed., 371; *Rankin* v. *Great Western Railway Co.* (1854), 4 U.C.C.P. 463; *Welland* v. *Buffalo and Lake Huron Railway Co.* (1870), 30 U.C.Q.B. 147 and (1871), 31 U.C.Q.B. 539; *Clarke* v. *Grand Trunk Railway Co.* (1874), 35 U.C.Q.B. 57; *Attorney-General* v. *Midland Railway Co* (1882), 3 Ont. 511; *Grimshawe* v. *Grand Trunk Railway Co.* (1860), 19 U.C.Q.B. 493.

So long as the statute has been complied with in respect to plaintiffs' own land they can complain of nothing—there is no special damage. Only after forfeiture at the suit of the Crown can a private litigant invoke the statute. He cited *Finck* v. *London and South-Western Railway Co.* (1890), 44 Ch. D. 330; *Lee* v. *Milner* (1837), 2 Y. & C. 611; *Ware* v. *Regents Canal Co.* (1858), 3 De G. & J. 212; *Parkdale* v. *West* (1887), 12 App. Cas. 602 at p. 615; *Wood* v. *The Charing Cross Railwwy Co.* (1863), 33 Beav. 294.

Argument.

Damages are a sufficient remedy and should be given in lieu of injunction: *Republic of Peru* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D. 348 at p. 362; Annual Prac. (1902), 686-7.

If there was non-compliance with the Act the appointment of the arbitrators is a submission under section 2 of the Arbitration Act and is irrevocable: see *Ex parte Harper* (1874), L.R. 18 Eq. 539.

We have never adopted the sections of line open to us under the British Columbia Act—it was optional. The sections we have adopted are under the Dominion Act, one of eighteen miles from Cascade to Carson, one from a point near Carson to Phoenix of about twenty-four miles, and one of twenty-four miles from Penticton towards Midway; these three have been approved as part of the main line and branches from these sections to smelters have been approved. In the second case he then dealt with its

distinct features. The plaintiffs complain of our crossing their line. We have purchased the land on either side of plaintiffs' right of way and the only way by which we could go on plaintiffs' land would be by leave of the Railway Committee of the Privy Council, and we disclaim any intention of crossing unless so permitted: see *Fooks* v. *Wilts, Somerset and Weymouth Railway Co.* (1846), 5 Hare 199; *Calvert* v. *Gosling* (1889), 5 T.L.R. 185.

Clement (*Cowan*, with him), for respondents: Plaintiffs are land owners and the principles laid down in Kerr on Injunctions, 118, apply. If the defendants' right to expropriate is doubtful, the Court will restrain destructive trespass pending trial. *Attorney-General* v. *Great Eastern Railway Co.* (1872), 25 L.T.N.S. 867; *Crossman* v. *Bristol and South Wales Union Railway Co.* (1863), 1 H. & M. 531; and see Brice on Ultra Vires, pp. 477-8 as to defendants' claim founded on alleged "Public Convenience;" *Carington* v. *Wycombe Railway Co.* (1866), L.R. 2 Eq. 825; affirmed on appeal (1868), 3 Chy. App. 377.

If injunction refused, plaintiffs will be forced to take damages in lieu of injunction, as the plaintiffs will, if the work is proceeded with, lose practically all beneficial interest in the land covered by defendants' grading operations. Such a result would be contrary to the principle laid down in *Shelfer* v. *City of London Electric Lighting Co.* (1895), 1 Ch. 287; *Jordenson* v. *Sutton, Southcoates and Drypool Gas Co.* (1899), 2 Ch. 217.

Argument.

As to the nature and strength of the case to be made out by plaintiffs, see *Walker* v. *Jones* (1865), L.R. 1 P.C. 50 at pp. 60 and 61; *Republic of Peru* v. *Dreyfus Brothers & Co.* (1888), 38 Ch. D. 362. Plaintiffs submit:

(1.) The work defendants have in hand is not authorized by their Act of Incorporation—B.C. Statutes 1897, Cap. 75. This is a question of interpretation, apart from the question (dealt with later) of *bona fides*. Sections 19 and 20 indicate the route and the possible branch lines. Nothing in either section to warrant three "square ends" on the International Boundary line within fifty miles. Only one branch line to boundary authorized. The provisions as to branch lines to towns, mills, smelter, etc., do not apply. Even if they do, section 121 of the Dominion

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Argument.

Railway Act, 51 Vict., Cap. 29 (1888), applies, and the requirements of that section as to advertisement, notice, etc., have not been complied with. Section 21 of Cap. 75 of the B.C. Statutes of 1897, does not authorize more than traffic arrangements, and is not a "construction" section at all.

(2.) Defendants' railway was not "commenced" within two years, as required by Dominion Statute of 1898 (61 Vict., Cap. 59, Sec. 4), and the Company's powers have therefore ceased.

(*a.*) A question of fact: The work now in hand was, admittedly, begun after the two years had expired, but defendants put forward certain survey work done by one Hill, west of the Hope Mountains, in June, 1898, and certain survey and grading work by one Kennedy, in the neighbourhood of Penticton, during the summer and fall of 1898, as a commencement of their line. The work in question was done under contracts (dated 15th June, 1898), between the British Columbia Government and Messrs. Mackenzie and Mann. These contracts were entered into under and recite the Public Loan Acts of 1897 and 1898 (B.C. Stats. of 1897, Cap. 24, Sec. 8; of 1898, Cap. 30, Sec. 3.) Up to the time (13th June, 1900), when the two years expired, Mackenzie and Mann had not acquired control of the V. V. & E. charter, and their subsequent acquisition (if such there were) cannot reinstate lapsed powers.

(*b.*) A question of law: Defendants contending that only after forfeiture declared at the suit of the Crown can a private litigant invoke the statute: It is submitted for plaintiffs that the question is one of interpretation and that the cesser of power is distinctly enacted in the event which has happened: Masten "Company Law in Canada," 270 *et seq.*; Abbott on Railways, 74; Brice on Ultra Vires, 472; *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884), 9 App. Cas. 480; *Hardy Lumber Co.* v. *Pickerel River Improvement Co.* (1898), 29 S.C.R. 211.

(3.) No map or plan and profile, etc., of defendants' line of railway—that is, of the whole line—has ever been prepared, deposited, etc., etc., under sections 124 and 125 of the Railway Act (see 63-64 Vict., Cap. 23, Secs. 6 and 8) and until this is done "the Company shall not commence the construction of the railway" (section 131 of the Railway Act as enacted by 63-64 Vict.,

Cap. 23, Sec. 8): *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602; *Kingston and Pembroke Railway Co.* v. *Murphy* (1888), 17 S.C.R. 582; *Brooke* v. *Toronto Belt Line Railway Co.* (1891), 21 Ont. 401; *Ontario and Sault Ste. Marie Railway Co.* v. *Canadian Pacific Railway Co.* (1887), 14 Ont. 432; *Re Stratford, &c., R. W. Co.* v. *County of Perth* (1876), 38 U.C.Q.B. 112.

The "commencement" referred to in section 131 is the first "turning of the sod" on the railway and does not refer to the commencement of work on any particular section, or on any particular man's land. This initial commencement is not to take place until sections 124 and 125 are "fully complied with," and a full compliance with those sections covers the entire line.

(4.) The work which defendant Company has now in hand in the Kettle River Valley is not being prosecuted in good faith under the Act of Incorporation but, *alio intuitu* and for the benefit of the Great Northern Railway Company.

(*a.*) If the work is to be taken as done by the Great Northern, it is an improper delegation by defendants of their powers: Brice, 482, 484, *et seq.*; *Richmond Water Works Co., etc.* v. *Vestry of Richmond* (1876), 3 Ch. D. 82; *Bourgoin v. La Compagnie du Chemin de Fer de Montreal, Ottawa et Occidental* (1880), 5 App. Cas. 381 at p. 404; *Michigan Central Railroad Co.* v. *Wealleans* (1895), 24 S.C.R. 309; 4 Rap. & Mack's Dig. 392; B. C. Statutes 1897, Cap. 75, Sec. 21.

Argument.

[MARTIN, J., referred to *Salomon* v. *Salomon & Co.* (1897), A.C. 22.]

(*b.*) If the work is to be taken as done by defendants, it is an improper use of their powers for a collateral object, alien to the purpose for which their powers were conferred: Brice, 467-8, 473-5; *Galloway* v. *Mayor and Commonalty of London* (1866), L.R. 1 H.L. 34, at p. 43; *Carington* v. *Wycombe Railway Co.* (1868), 3 Chy. App. 377; *Stockton and Darlington Railway Co.* v. *Brown* (1860), 9 H.L. Cas. 245.

We allege *mala fides* and no answer is made by any responsible officer of defendant Company. Contrast *Ontario and Sault Ste. Marie Railway Co.* v. *Canadian Pacific Railway Co., supra.*

(5.) Defendants allege acquiescence. What plaintiffs did in

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allowing defendants to proceed with their work, was done in ignorance of the plaintiffs' right to resist expropriation; as soon as the facts came to plaintiffs' knowledge, defendants were ordered to desist, and upon refusal plaintiffs promptly brought this action: see Kerr, 18; *Ramsden* v. *Dyson* (1865), L.R. 1 H. L. 129; *Russell* v. *Watts* (1883), 25 Ch. D. 559.

Plaintiffs' argument in the second case is the same, except that no case of acquiescence can be urged by defendants. The trespass is a threatened trespass admittedly about to be made, just as soon as the Railway Committee sanction the mode, manner and terms, and plaintiffs are entitled to an *interim* injunction pending the trial of the question as to defendants' right to a crossing. This question the Committee will not decide.

MacNeill, replied.

Judgment.

At the conclusion of the argument the Court (IRVING J., dissenting), gave judgment dismissing both appeals, as several points of importance were raised and should be decided at the trial, in regard to which the Court did not think it advisable at the present time to express its opinion.

In the second case the order appealed from was amended by making it read "without prejudice to any application now pending before the Railway Committee of the Privy Council."

Appeals dismissed, Irving J., dissenting.

WEHRFRITZ v. RUSSELL AND SULLIVAN.

MARTIN, J. (In Chambers.)

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April 9.

WEHRFRITZ v. RUSSELL

Arrest—Ca. re.—Affidavit—Practice.

The affidavits leading to an order for *ca. re.* must shew that there is a debt due from the defendant to the plaintiff.

It is not sufficient to shew that there is a debt due from the defendant to one who bears the same name as the plaintiff.

A statement in an affidavit that deponent has caused a writ of summons to be issued against defendant, without stating in what action the writ was issued, is not sufficient to shew that plaintiff and deponent are one and the same person.

SUMMONS to set aside order for *capias*, writ of *capias* and proceedings thereunder. After the release of the defendant Sullivan who was arrested under a prior *capias* (see *ante* p. 50), the plaintiff on new material, obtained from MARTIN, J., on 5th April, an order for a *ca. re.* and the writ was thereupon issued and the defendant was arrested. One of the grounds relied upon in support of the application was "the affidavits on which the said order was made were not sufficient to hold the applicant to bail, nor did they disclose any cause of action in the plaintiff against the applicant." The affidavit of Benjamin Wehrfritz used in support of the order for *capias*, contained the following clauses:

Statement.

"I, Benjamin Wehrfritz, of the City of New Whatcom, in the State of Washington, one of the United States of America, make oath and say, that the above-named defendants and each of them are justly and truly indebted to me;

That I have caused a writ of summons to be issued out of this Honourable Court in my name against the said E. M. Sullivan, and also against the said J. H. Russell."

There was nothing in any of the affidavits stating that deponent was the plaintiff in the action.

The summons was argued before MARTIN, J., on 7th April, 1902.

Harold Robertson, for the summons.

Luxton, contra.

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MARTIN, J.: I am asked to infer that the deponent and the plaintiff are one and the same person, though there is no evidence of that fact. It is not sufficient to shew that there is a debt due from the defendant to one who bears the same name as the plaintiff. The first link in the chain of proof is to shew that the person who seeks to recover is the party who is entitled to maintain the action, *i.e.*, the plaintiff. This evidence is here wanting, therefore the defendant must be released from custody, and the plaintiff must pay the costs of and occasioned by the arrest, and also of this application, forthwith after taxation.

Judgment.

Order accordingly.

IRVING, J.

1902.

May 3.

IN RE CLAYOQUOT FISHING AND TRADING CO.

IN RE CLAYOQUOT FISHING AND TRADING COMPANY, LIMITED LIABILITY.

Assignment—Wages—Priority—One month—Computation. Interpretation Act, amendment of 1902, Sec. 4.

By the Creditors' Trust Deeds Act, 1901, an assignee is required to pay in priority to the claims of ordinary creditors the wages of persons in the employ of the assignor at the time of the assignment, or "within one month before." The assignment was made on 27th November, 1901.

Held, that a workman who was in the employ of the assignor previous to and including 26th October, 1901, was not entitled to a preference.

PETITION under section 67 of the Creditors' Trust Deeds Act, 1901, by Samuel Husby, a fisherman, who previous to and including the 26th day of October, 1901, was in the employ of the Clayoquot Fishing and Trading Company, Limited Liability, which Company on 27th November, 1901, made an assignment for the benefit of its creditors, and who now asked that his wages be paid under section 36 of the Act in priority to the claims of the ordinary creditors of the Company. The assignee refused to pay in priority unless so directed by the Court.

Statement.

The petition came on before IRVING, J.

Langley, for petitioner: The Act gives the petitioner priority for wages for work done "within one month before the making" of the assignment, and where an act is required by a statute to be done so many days *at least* before a given event, the time must be reckoned excluding both the day of the act and that of the event: *The Queen* v. *The Justices of Shropshire* (1838), 8 A. & E. 173. He also referred to *Rae* v. *Gifford* (1901), 8 B.C. 272; *In re North: Ex parte Hasluck*, (1895), 2 Q.B. 264 at pp. 273 and 274.

W. J. Taylor, K.C., for the assignee.

3rd May, 1902.

IRVING, J.: The statute gives the petitioner a preference if he was in the employ of the assignor within one month before the making of the assignment, that is to say, one month before the 27th of November.

By the new Interpretation Act Amendment Act, 1902, assented to on the 22nd of April, ultimo, the time is to be calculated exclusive of the day from which the time is to be reckoned. The month began to run immediately after midnight struck on the 26th, that is, on the earliest possible moment of the morning of the 27th, and expired at twelve midnight of the 26th. The assignment was not made until the month had elapsed.

Judgment.

Note: The Interpretation Act Amendment Act, just assented to, was brought to the attention of the Court and counsel by *Maclean, D.A.-G.*, who was present during the argument.

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WILSON v. THE CANADIAN DEVELOPMENT COMPANY, LIMITED.

Carrier—Special contract—Variation of by bill of lading—Carriage of goods—Owner's risk.

The defendant Company as a common carrier, in June, 1899, contracted with the plaintiff, a Dawson merchant, to carry for him from Puget Sound and British Columbia ports general merchandise, the rates being according to tariff annexed to contract. Three of the terms of the contract were: "Date of shipment—Throughout season of 1899. Consignees—T. G. Wilson, Dawson City. Quantity—Exclusive contract for season of 1899." Annexed to the contract was the freight tariff giving the rates to be charged on the different classes of goods "with guaranteed delivery of shipments during the season of 1899."

The Company decided not to receive after 20th August, any more freight with guaranteed delivery during 1899, and so notified one Pitts, a wholesaler of Victoria, of whom the plaintiff was a customer.

Pitts afterwards shipped goods to Dawson consigned to the "Canadian Bank of Commerce, notify T. G. Wilson," and received from the Company bills of lading marked with a special condition thus: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899." The Company failed to deliver the goods, and Wilson sued for damages caused him by being deprived of the goods:—

Held, by the Full Court (reversing CRAIG, J.), that the goods were not carried under the exclusive contract for the season of 1899, by which delivery was guaranteed that same season, but that they were carried under the terms of the bills of lading, and the Company was not liable for the loss.

As the plaintiff's cause of action, if any, would be against the Company for refusing to carry under the original contract, a new trial was granted with leave to plaintiff to amend his pleadings.

APPEAL to the Full Court by defendant Company from a judgment of CRAIG, J., in the Territorial Court of the Yukon.

Statement.

On 19th June, 1899, the plaintiff and defendant Company entered into an agreement as follows:

"CANADIAN DEVELOPMENT COMPANY, LTD.

"FREIGHT CONTRACT.

"Entered into 19th June, 1899, between T. G. Wilson, of Daw-

son City, shipper, and Canadian Development Company, Limited, No. 32 Fort Street, Victoria, B.C., carriers; whereby it is agreed that the goods of class and quantity herein mentioned shall be shipped and carried between the points at the rate and on the terms herein set forth, *viz.*: from Puget Sound and British Columbia ports to Dawson City.

"Date of shipment—Throughout season of 1899. Class of goods—General merchandise. Quantity—Exclusive contract for season of 1899.

"Rates as fixed by joint tariff and classification of commodities hereunto annexed subject to payment of extra packers' charges over White Pass & Yukon Route on shipments made prior to July 10th, 1899. Shipper to have a rebate at end of season equal to seven and one-half per cent. (7½%) on the amount of business routed over our steamers.

"Terms of payment—C. O. D., Dawson City. Consignees—T. G. Wilson, Dawson City.

"Shipper to be protected in event of rate war.

"A shipping receipt in ordinary form in use by the Company to be given for the goods at time of shipment, to be carried under and pursuant to the terms of the shipping receipt.

"T. G. Wilson, shipper.

"Canadian Development Co., Limited,

"Per R. T. Elliott."

Statement.

Annexed to the contract was the freight tariff entered into between the different competing transportation companies giving the rates to be charged on the different classes of goods. This was in part as follows:

"SPECIAL JOINT THROUGH FREIGHT TARIFF.

"Applying on all ordinary articles of commerce and live stock, between British Columbia and Puget Sound Ports and Dawson City and Upper Yukon Points, via Alaska Steamship Company, White Pass & Yukon Route, Pacific and Arctic Railway & Navigation Co., British Columbia Yukon Railway Co., Miles Canyon & Lewes River Tramway Company, Canadian Development Company, Limited, effective on opening of through railway service between Skagway and Lake Bennett, with guaranteed delivery of shipments during season of navigation of 1899. In

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dollars per ton, weight or measurement ship's option, on the classes established herein. . . . . .

"RULES AND CONDITIONS.

"Minimum charge on any single shipment, based on half ton rate. Rates will apply on all shipments weighing not to exceed 2,000 lbs. per single piece; or timbers not to exceed 30 feet in length. Single articles of freight weighing 2,000 lbs., or timbers over 30 feet in length, subject to special engagement. United States and Dominion customs charges are to be paid by shipper. Articles of freight requiring two cars to transport will be subject to minimum weight of 18,000 lbs. for each car used while on White Pass & Yukon Route. Rates are subject to conditions in bill of lading covering the shipment.

"It must be distinctly understood that the time tables and schedules for the movement of White Pass & Yukon Route trains, and of steamers operated by the companies joining in this tariff, may be varied by the companies at pleasure. They do not guarantee to carry goods or live stock to arrive at any point on a particular day or hour, as the elements are beyond their control."

During the summer goods were shipped from S. J. Pitts, a wholesaler of Victoria, consigned to the Canadian Bank of Commerce in Dawson, and the goods were marked "notify T. G. Wilson." On the arrival of the goods in Dawson, the plaintiff, T. G. Wilson, would make arrangements with the Bank and receive the goods.

Statement.

In August, the transportation companies, on account of a blockade of freight on the Yukon River, decided in respect to freight received on and after 20th August, not to guarantee to effect delivery before the close of the season of navigation; and afterwards goods were received from Pitts for shipment by defendant Company for which bills of lading were given in part as follows:

"Shipped, in apparently good order, on SS. Danube by S. J. Pitts, the following goods or property said to be marked or numbered as below (weight, measure, gauge, quality, condition, quantity, brand, contents and value unknown), weight subject to correction. Consigned to Pacific & Arctic Ry. & N. Co. at Skagway, to be forwarded by them.

"To be delivered in like order and condition at port of destination above given, or so near thereunto as such delivery may safely be effected by steamer (with liberty to call at all way ports and landings), unto order Can. B. of Com., ntfy T. G. Wilson, Dawson, or his or their assigns, upon payment in cash of freight and charges due thereon, at the rates and according to the conditions and classifications of the Joint Freight Tariff and Classification of Commodities issued by the companies named therein, and as the same may be in force on the day of the signing hereof, whereunder this bill of lading is effective, particulars of such freight and charges (subject to the correction of errors), being set forth in the margin hereof, under the terms and conditions printed on the back of this bill of lading.

"Tariff: Charges collect. Victoria to Dawson. Chgs. guaranteed.

"Marks: [W] Dawson. Via Skagway.

"O. R.

Statement.

"This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899."

Certain goods shipped subsequent to August 20th, failed to arrive at Dawson, and the plaintiff brought an action for damages. A further and more detailed statement of facts will be found in the following judgment of

13th May, 1901.

CRAIG, J.: The plaintiff in this action is suing the defendants, as common carriers, for non-delivery of certain goods shipped by him from Victoria to Dawson. The plaintiff is a merchant carrying on business at Dawson, and the defendants are common carriers who are one of a number of companies that in the season in question—namely, the year 1899—worked under what is called joint tariff arrangement. These defendants, on the 19th of June, 1899, entered into a special contract with the plaintiff, which contract is fully set out in the pleadings, and which contract is annexed to and refers to the joint tariff arrangement subsisting between these various companies. What the arrangement was beyond the facts evidenced by the joint tariff paper

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we do not know, but it is clear that the defendant Company undertook to ship goods on through bills of lading from Victoria for delivery at Dawson. The special contract in question was made by them for the carriage of these goods from Puget Sound and British Columbia ports to Dawson. The contract was for shipment and carriage throughout the season of 1899, and it was an exclusive contract for that season. The rate at which the goods were to be carried was fixed by the joint tariff arrangement, and that rate by the tariff arrangement provides for guarantee of delivery of the shipments during the season of navigation of 1899. It was argued that the joint tariff arrangement or document could only be looked at to ascertain the rate, but I think that the rate is one which is based on guaranteed delivery, and that if no other portion of this document could be looked at, certainly that part of it which materially affects the rate to be charged is material to the rate, and governs it. The reason for the making of this contract is evidenced both by the witnesses called by the plaintiff and the defendants. Keen competition existed between the defendant Company and rival lines plying on the Yukon River and the ocean voyage. The plaintiff was a man known to the Company to be a shipper of large quantities of goods. His business was a desirable one to get, and the Company, with the intent of obtaining that business, made special terms and a special contract. No other reason could

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exist for the special contract given to the plaintiff but the reason which I indicate, namely, the desire of the Company to obtain the exclusive right to the carriage of his goods during the year. This contract provides that a shipping receipt in the ordinary form in use by the Company is to be given for the goods at the time of shipment, to be carried under and in pursuance of the terms of the shipping receipt. It was known to the Company, and I find as a fact, that they were perfectly aware that the plaintiff was buying the major part of his goods from one Pitts, a wholesale merchant in Victoria. They were aware that the goods were to be delivered to their Company by Pitts for carriage to Dawson under this contract. That the Company regarded the contract as the basis on which they were carrying the goods is evidenced by the fact that a copy of the contract

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was forwarded to Dawson, to be held in their local office here. No clearer recognition that the goods were carried under the contract, it seems to my mind, could be given. A copy of the contract was deposited by the plaintiff with Pitts, his shipper in Victoria. During the season a great many goods were shipped, and very many bills of lading were issued. The mode of delivery was that Pitts delivered his goods to the steamboats who were acting for the defendant Company, receiving from them a shipping receipt, which shipping receipt is exchanged for the bills of lading. The shipping receipts covering the goods in question in this action were in the ordinary form, but the bills of lading for which they were exchanged were not in the ordinary form, but were varied in two respects, namely, first, by the marking on them of the letters "O. R.," or "O. Risk," or "Owner's Risk." It is quite evident that all the parties understood that the letters "O. R." meant "Owner's Risk," and I will consider the effect of these letters and words later on in my judgment. The bills of lading were also varied by a stamped variation, to the following effect: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liabilities arising out of or occasioned by non-delivery during 1899." This indorsement was not placed upon any bills of lading until the 20th of August. The Company contends, and I find as a fact, that prior to the 20th of August, Pitts the shipper at Victoria, had notice that the defendant Company would not guarantee delivery in Dawson during the season of 1899, of any goods delivered to them for carriage after the 20th of August. I do not think any doubt can exist as to the fact of Pitts' knowledge of this condition—that is, that Pitts in a general way knew that that was the position taken by the defendant Company. Wilson, the party to the original contract, had no notice whatever of this condition. The Company took no steps to communicate it to him at all. During the season all bills of lading except four, I believe, were consigned to the Canadian Bank of Commerce or order, at Dawson, and the goods were marked, and also the bills of lading indicating the goods, were marked "W" within a diamond and "notify T. G. Wilson."

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All the goods carried by the defendant Company that year under these bills of lading were so marked, and "Diamond W" was well understood by the defendants and by all their employees and agents to be the mark of the plaintiff, Wilson. A great part of the goods in question left Victoria or were delivered to the Steamboat Company on dates between the 5th and 7th of September, and left Victoria per the steamer Danube, sailing on that date. I find as a fact that the defendant Company requested Pitts, the shipper, to have his goods shipped by the steamer leaving on the 7th, namely, the Danube. Among these goods were various perishable articles, but mainly potatoes and onions. The potatoes and onions were carried as far as Bennett, and there they were sold and converted in course of carriage, it is alleged, by the Railway Company running between Skagway and Bennett. The other goods, so far as we can learn from the evidence, were held either at Bennett or White Horse. Some small portion of the goods shipped on the 27th of August or on the 29th of August—at any rate, after the 20th of August—came through and were delivered. The practice of Pitts upon shipping, was to make out his bill of lading, bring it to the Company, hand over his shipping receipt, take the bill of lading and attach it to a bill of exchange, which he discounted, and the same was forwarded for acceptance by the plaintiff at Dawson, through the consignees, the Canadian Bank of Commerce. From the evidence

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I find that the practice on the arrival of these bills of lading and drafts at Dawson was very irregular. The Canadian Bank of Commerce allowed Wilson to take up the bills of lading, receive the goods, and pay the draft when he could. Evidently they accepted Wilson as their debtor and assumed all responsibility for the draft at Dawson, and Wilson on many occasions received the goods without accepting the draft, paying as he could, and these payments were accepted by the Bank. All the expense bills issued from the Company's office at Dawson, the point of destination, were made out addressed to the plaintiff and not to the Bank, and the Company in every instance treated Wilson as consignee in fact. The expense bills were paid by instalments, Wilson taking away the goods and the defendant Company giving him credit. Sometimes the bills of lading were produced,

sometimes they were not. The plaintiff now sues for damages for the non-delivery and conversion of his goods. It is urged and raised by the pleadings in the first place that these shipments were not made under the contract at all; that the contract provides clearly and specifically that T. G. Wilson, Dawson, shall be the consignee, that the consignees were the Canadian Bank of Commerce. I will deal with that contention first. Mr. Elliott, the manager of the Company with whom the contract was made, in his evidence taken on commission (and I understand Mr. Elliott is a lawyer), contended very strongly that as a fact these shipments were not made under this contract at all, but were made by Pitts himself to the Canadian Bank of Commerce. I am inclined to think that Mr. Elliott rather gave us a deduction of law as he viewed it, or a conclusion of legal effect, rather than the actual fact. I am convinced that the Company understood that all these goods were being shipped under that special contract. They so treated the goods in every respect, and could not have acted otherwise if the bills of lading had been directed specifically to T. G. Wilson, without the intervention of the Bank of Commerce at all. This is evidenced by the fact that they issued the expense bills to him and dealt with him in that way, and it is also evidenced by the fact that in fixing the rebate allowed to the plaintiff under the contract, they allowed the plaintiff a rebate on the very goods which they now contend were not carried under the contract at all. The special contract before referred to provides that upon all the shipments made by Wilson during the season he shall be allowed a special rebate of $7\frac{1}{2}$ per cent. on the amount of business routed over the defendant Company's steamers, and as I said before, in fixing the amount of this rebate, they allowed the $7\frac{1}{2}$ per cent. upon the total volume of business carried, and on these shipping bills which they now contend were not shipping bills of Wilson at all, but shipping bills of Pitts to the Canadian Bank of Commerce. The defendant Company contends that the bill of lading is the contract, and that it supersedes or is independent of the original contract. I cannot give effect to this contention. I do not think that the bill of lading supersedes the former contract to carry. The bill of lading is simply an evidence of title or a receipt for

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the goods—*Wagstaff* v. *Anderson* (1880), 5 C.P.D. 171 and 177. "The mere indorsement on a bill of lading as security for a loan does not pass 'the property in the goods' to the indorsee. The property does not pass so as to render the indorser of the bill of lading liable to the shipowner for the freight. *Sewell* v. *Burdick* (1884), 10 App. Cas. 74." In this case the bill of lading was not the contract. The contract was made before the bill of lading, and the contract was the one under which Wilson was acting all through. The case of *Rodoconachi* v. *Milburn Brothers* (1886), 17 Q.B.D. 316, is, I consider, a strong authority upon this question, and it is also a strong authority upon the question of damages, which I will recite later on. In this case a cargo of seed was shipped by the plaintiffs on the defendants' ship under a charter-party, which provided *inter alia*, that the master was to sign a bill of lading at any rate offered, and, as customary at the port of loading, without prejudice to the stipulations of the charter-party. The bill of lading contained an extension which was not in the charter-party, protecting the owners from liability for any neglect or default of the master. It was held that the defendants were liable, that the clause in the bill of lading limiting their liability could not control the contract contained in the charter party. Manisty, J., in giving judgment, says: "The defendants would be liable, but for the exception in the bill of lading, because the charter-party does not contain any exception which covers the negligence of the captain and crew. The defendants, however, allege that they are protected by the clause in the bill of lading, and they vouched a custom which they say exists at Alexandria for the master to introduce such a clause into a bill of lading, although there is no such clause in the charter-party. I am of opinion that both upon the true construction of these two documents, and upon authority, the defendants are liable."

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Under this head I may consider also the question of Wilson's right to sue. The defendants contended that he had no property in the goods entitling him to bring this action. I am also of opinion that this question turns upon the contract. He was the party contracting for the carriage of the freight and liable to pay the freight. The Bank was not liable for the freight. The

Company had their lien for charges, but if they were to sue for the freight, Wilson was their debtor—*Great Western Railway Co.* v. *Bagge* (1885), 15 Q.B.D. 625. No doubt the proper person to sue is the person in whom the property is vested when lost, hence the consignee is usually the proper plaintiff—*Reeves* v. *Lambert* (1825), 4 B. & C. 214 and *Fragano* v. *Long*, *idem* 219, but where there is a special contract between the consignor and carrier, the consignor may be the plaintiff, as ownership is immaterial—*Reeves* v. *Lambert*, cited above. Special property in the goods is sufficient to support an action—*Freeman* v. *Birch* (1842), 3 Q.B. 492; sections 21 and 22 of the North-West Ordinance, Cap. 29, cited to me, as also the Factors' Act. But I do not think those statutes are applicable to this case in the view which I take of the liability of the defendant Company under their special contract. It was also contended that Pitts was Wilson's agent at the port of shipment, and that he was affected by the notice which he had that the defendant Company would not carry except under the special terms. I have already at some length given what I find to be the facts in regard to this contract, that the defendant Company knew that the goods were coming from Pitts as shipper to Wilson, the buyer, and in my view of the evidence it seems to me that Pitts was no more the agent of Wilson to alter or vary this contract than if he had been a carter who carted down the goods and delivered them on the wharf for Wilson. There is no doubt that the law affects shippers with notice of all that is contained in the bill of lading which they sign, but in this case there is no stamped notice indorsed on the shipping receipt. It only appears on the bill of lading, which I have already held is nothing more than a receipt for the goods and a convenient evidence of title in their transhipment. More than that, the stamp was not on the bill of lading when Pitts signed it, but was put on by the Company on their own motion, after it was delivered to them for their signature. It might be contended—and I think perhaps rightly —that Pitts having taken away the bill of lading with that stamp on it, which is an apparent thing and not easily overlooked, had notice of it and accepted the shipment under the terms contained in it, but I hold that he had no authority or power

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to vary or alter that special contract without Wilson's consent, and Wilson certainly did not vary it or consent to any alteration. The case of *Dunlop* v. *Lambert* (1839), reported in 6 Cl. & F. 600, where the judgment of the Court is expressed in these words: "Although, generally speaking, where there is a delivery to a carrier to deliver to a consignee, the latter is the proper person to bring an action against the carrier; yet that if the consignor made a special contract with the carrier, such contract supersedes the necessity of shewing the ownership in the goods, and the consignor may maintain the action though the goods may be the property of the consignee. The question whether the goods were delivered to the carrier at risk of consignor or consignee is the question for the jury. The delivery to carrier by consignor does not necessarily vest the property in the consignee. The question seems to be who made the contract with the carrier, and at whose risk and loss were the goods carried; in short, who sustained the injury." From all these authorities I think I may sum up the conclusion of law to be that if the risk of the voyage is on the consignor, then he is the party to sue the carrier in the event of loss. The question of whether this condition is a reasonable condition or not (I refer now to the extension stamped on the bill of lading) is one which may not arise in this case, but that my finding upon the facts may be given, I will have to consider it. The conditions in this country are unusual and extraordinary. Goods shipped from what we call here the "outside"—that is, from the ocean ports to Dawson, at the time that these goods came in, were first shipped by ocean steamer from Sound ports to Skagway, thence by rail to Bennett, or some point near there, thence by steamboat across Lake Bennett to a crossing over which they were carried by a rough tram, running on wooden rails to White Horse; thence by steamboat down the Yukon River to the City of Dawson. This latter part of the voyage was over a river somewhat difficult to navigate, the currents and shoals of which were unknown to pilots up to the year 1898, very little, if any, navigation having been made over it up to that date. In the spring it is dangerous owing to low water at certain points on the river. During the months of July and August the river is in its best state for navigation.

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During the month of September, as a usual thing, and as a fact in the year in question, the water fell very rapidly. The navigation of the stream became very dangerous owing to sand bars and shallows. Some parts of the river are extremely rapid, and skilful navigation is required to avoid wreckage. As the season progresses and on towards the 1st of October the cold weather sets in, and ice forms rapidly; the river becomes very much shallower, and during the month of October, and sometimes in the latter part of September, large cakes of ice are floating on the stream. These sooner or later become very dangerous, form into solid masses, and crush vessels and scows, and in the year in question two vessels, late in October, about the 22nd and 27th, the Willie Irving and the Stratton, were caught by these ice floes and wrecked, the passengers escaping with their lives and losing their baggage. A great deal of evidence was given to shew at what date navigation should cease, and beyond what time it would be unsafe for vessels to navigate. As a matter of fact, some vessels did come down as late, and some vessels quite as large as those in operation by the defendant Company arrived as late as the 16th of October. But the consensus of opinion among those best qualified to give an opinion was that wise navigators should provide for their vessels going out of commission not later than the 5th of October; in fact, the majority were of opinion that the 1st of October was late enough, but I find as a fact that vessels could safely come in the season in question as late as the 5th of October. In this connection I may mention the fact that the witness Morgan swore that he brought in goods of the same class, actually leaving Seattle, an ocean port, on 23rd September—that is, sixteen days after the plaintiff's shipment of potatoes—and brought them through to Dawson in good condition, and that one Ellis left Seattle on the 3rd of September with a similar cargo and brought them through, namely, seven tons, also in good condition, and the contention of the defendants that they were not justified in employing scows to bring this class of freight or any class of freight through, will not hold, as they did as a matter of fact employ a large number of scows to carry their freight, and in the case of the plaintiff Wilson actually brought goods of his through in scows, without his

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knowledge or previous consent. If the special contract had not been in existence I would not consider the clause in question an unreasonable one to impose upon shippers shipping goods after the 1st day of September. Perhaps it could not be called an unreasonable condition or precaution to say the 20th of August, if the notice was brought directly to the attention of the shipper. But while the clause may be reasonable to insert in a contract of that date, I yet think that a clause reasonable in itself should be reasonably construed and reasonably imposed and acted under. Would it be reasonable for the defendant Company or any other shipper to take all the goods that could be consigned to them and deliberately store them up in any of their warehouses along the line, perfectly regardless of whether they went through that season or not? In spite of the condition, would not the shipper be expected and required to use all reasonable diligence to send those goods through in the speediest manner possible? The great bulk of the goods in question were perishable goods. The Company knew that when they accepted them. It would not be reasonable for the Company to store potatoes and onions in this northern climate for the winter, and send on ahead of them goods which were not perishable, and in answer to an action brought by a shipper for the loss of goods, to say: "We are relieved by our special condition; we didn't guarantee delivery during this season, although we took your perishable goods, which we knew would be totally lost by any delays." I think that the defendant Company are bound in the case of perishable goods to give them the preference, and the delay in shipping other goods, not perishable, would be justified if they gave perishable goods the preference. This principle is held to be sound law, and in the American and English Encyclopædia of Law, 2nd Ed., Vol. 5, p. 252, where the law is laid down in this way: "Where the goods are perishable, or are peculiarly liable to injury from delay, the carrier is bound to use more expedition than where ordinary freight is being carried. The reasonable time in such instances is a much shorter period than in other cases, owing to the special circumstances known to the parties at the time the undertaking was entered into." Several cases are there cited as authority for that conclusion of law,

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which will be found at that page. The defendants attempted to excuse themselves on the ground that the accumulation of freight caused the delay, and that goods were shipped in the order in which they arrived. I do not think that the general law applicable to blockades is applicable to this case at all; that is, I mean that this is not a case of sudden or unexpected blockade. The blockade was not caused by the season closing suddenly. The Company had experience and knowledge of the date of the closing of the river, and knew within almost to a certainty what date they could be expected to carry freight down that river. More than this, the blockade occurred and the goods were piling up on the Company's hands long before the time when they accepted these goods. The Company must have been aware that they were taking more freight than they could possibly handle by their own means of conveyance. If the Company had had in this season to rely upon their own vessels to transport freight, hundreds of tons of freight, probably thousands, would have been held up beyond the season of navigation. Somewhat late in the season they called in to their assistance other vessels, for the simple reason that this defendant Company had absorbed nearly all the freight traffic coming to Dawson, and other vessels were called to accept freight from them, but they did not utilize those means soon enough. They knew that goods were piling up on their hands before they accepted this shipment. They took large contracts after they were aware that they were not able with their own means, and probably not with any means at their command, to carry the freight offered to them. In fact, the blockade was one created by themselves and by their own greed for freight. They did not inform the shipper of this blockade. In fact the law goes so far, as I read it, that even if the blockade is caused by the act of God, and the shipper is aware of that fact and accepts goods without notifying the shipper, he is still liable. But no question of that kind can arise in this case. It cannot be contended for a moment that the closing up of navigation was the act of God. That question is very fully considered in the case of *Nugent* v. *Smith* (1876), 1 C.P.D. 423. Chief Justice Cockburn, in giving judgment in that case, at p. 434, spoke as follows: "The definition which is given by Mr. Justice

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Brett, of what is termed in our law the act of God is that it must be such a direct and violent and sudden and irresistible 'act of God' as could not by any amount of ability have been foreseen, or if foreseen, could not by any amount of human care or skill have been resisted." And at p. 435: "It must be admitted that it is not because an accident is occasioned by the agency of nature, and therefore by what may be termed the 'act of God,' that it necessarily follows that a carrier is entitled to immunity. The rain which fertilizes the earth and the wind which enables the ship to navigate the ocean are as much within the term 'act of God' as the rainfall which causes a river to burst its banks and carry destruction over a whole district, or the cyclone that drives a ship against a rock and sends it to the bottom." I do not think that the defendants contended very strongly that they would be excused in this case by saying that the closing of the river was a sudden or unexpected accident—in other words, the act of God—and I am quite satisfied that if the defendants had taken only the freight which they themselves could have handled in a reasonable way, no blockade would have been created, and that the plaintiff's goods would have arrived in due course. The time between their shipment from Victoria and the time when navigation closed was quite sufficient to enable them to have those goods carried through. As a matter of fact, those very goods in question, namely potatoes, were carried through and

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arrived in Dawson that fall in perfectly good condition. The potatoes and onions were sold, as I have said before, and converted by one of the agents of the defendant Company. The purchaser of those potatoes, after purchase, loaded them on scows and brought them to Dawson in good and perfect condition. If that could have been done by persons having no facilities, why could not the defendant Company have done the same thing? Wilson was not notified of the blockade, or that his goods would be converted by reason of it. He kept constantly wiring to the Company's agents and inquiring about his goods. He was assured by the agents at Dawson that his goods would come through. I think he was entitled to more consideration than the ordinary shipper of way freight. He had a special contract; the Company had full notice long before the shipment

that he would require the space for this shipment. They had knowledge of the quantity he intended to ship. He was canvassed. His shipper at Victoria was requested to load upon the Danube, sailing upon the 7th of September. There is evidence that the defendant Company gave preferences, that goods were shipped out of their turn, and that goods not perishable, such as hay and oats and machinery, were sent on in advance of the perishable goods of the plaintiff. It is also in evidence that the defendant Company shipped their own goods, such as lumber and other non-perishable goods, in preference to handling the goods of their customers—that is, goods they were bound to carry under special contract. The defendants took contracts for the shipment of large quantities of goods after their contract was made with the plaintiff, and after they were aware that his goods were on the road. That the defendants recognized that they owed a special obligation to the plaintiff, and that their contention that these goods were not shipped under the special contract, was wrong, is evidenced very strongly by a letter by their secretary to the person who actually made the contract with the plaintiff, R. T. Elliott, who, writing a letter from Victoria on the 30th of August, after the date upon which they contend they were to receive no more goods except under special conditions, to one of the defendant Company's agents, says: "Notwithstanding withdrawal of through rates, we have to protect several shippers for whom we have agreed to carry at tariff rates, namely, R. H. Kleinschmidt, Ross Eckhardt, A. R. Johnston & Co., H. H. Pitts, T. G. Wilson. There may be some others not now recalled, but if so we will send special advices with the shippers." This letter is to me strong evidence that the defendant Company recognized that they owed a special obligation to this plaintiff to see that his goods were delivered during the season of 1899. One cannot, of course, but feel considerable sympathy for the defendant Company, tempted as they were by the large quantity of freight which was offered to them for carriage, but I think they brought the trouble upon themselves by their desire to increase their earnings beyond the capacity of their line. The contract, as I before said, was a contract for carriage from Victoria to Dawson on a through bill of lading, and I

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take it that the defendants are liable for the acts of all the agents shipping at intermediate points or distances along that journey. In *Muschamp* v. *Lancaster Railway Co.* (1841), 8 M. & W. 421, it was held that the contract by a railway company to carry goods from a station on their railway to a place on another distinct railway with which it communicates, is evidence of contract over the whole distance, and the other railway company will be regarded as their agent, and not as contracting with their original bailor. This is the law of England, and this view was confirmed and settled by the case of *The Directors, &c., of the Bristol and Exeter Railway* v. *Collins* (1859), 7 H.L. Cas. 194. It was also contended that the words "Owner's Risk" absolves the Company from any liability under this contract for non-delivery. I do not think that either in law or mercantile custom these words will exempt from liability. According to the best evidence given, they are simply used to protect the Company from damage caused to freight from any inherent vice in the goods themselves, such as perishable goods, fruit which would spoil by its own weight, loss by leakage or imperfect cooperage, and such like losses—what is known as inherent vice in the goods, and they only exempt a company from the ordinary risk of goods going on the market, and do not cover injury from delay caused by the negligence of the company—*Robinson* v. *Great Western Railway Co.* (1865), 35 L.J., C.P. 123 and *D'Arc* v. *London and North-Western Railway Co.* (1874), L.R. 9 C.P. 325. As to the question of damages, I take it from all the authorities which I have read upon this question, that the damages in this case is the loss occasioned to the owner of the goods, who is the consignor at the point of destination. If the owner of the goods is the consignor and shipper, then his damages is the loss which he sustained by the breach of the contract to deliver at the point of destination. On the other hand, if the consignor is not the owner of the goods at the point of destination—in other words, in this case, if Pitts had been the real consignor of the goods, and he was to be paid for them according to the invoiced price billed at Victoria—then his loss would be simply the value of his goods at the point of shipment, with the interest added; but as the consignor in fact was Wilson, the real owner of the

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goods, and the goods were for use in the Dawson market that season, I am clear, upon the authorities, that the damages must be the loss which he sustained or the loss of market to him. The case which I have before recited of *Rodoconachi* v. *Milburn Brothers* (1886), 17 Q.B.D. 316 and *Rice* v. *Baxendale* (1861), 30 L.J., Ex. 371, are authorities as to this. I do not think this is a case coming within the authorities cited by the learned counsel for the defendants—that is, in the cases of shipping at sea. I have read the authorities cited by him carefully, and I do not think they are applicable to this case. As to the question of rebate, the contract is somewhat indefinite in its terms, but I find that the contract was one for through shipment, as I have before said, at a fixed rate, according to the classification of goods. The defendant Company contracted for the entire route and for the entire shipment. What arrangements they had with the parties to the joint tariff arrangement we do not know; no evidence is given of that, and from the contract that cannot be ascertained. I, therefore, hold that they are liable for 7½ per cent. rebate upon the entire rate. Another question arises as to one of the bills of lading. The plaintiff must be bound by his own shipping bill. It certainly is evidence of the destination of that shipment at Bennett, and there will be no damages in that case for the non-delivery of the flour covered by that bill of lading. It came out during the trial that some part of the goods were delivered afterwards in the following season, under some arrangement made between the parties. I do not think I have any right to consider that more than to express the opinion that if the Company are charged for those goods at the rate at which they would be brought in the fall of 1899, then they should receive credit for these goods at the market price at the date of their delivery in Dawson. As to the date at which I take it damages should be assessed, the defendant Company contend that the season of navigation closed by the 1st of October. I find the 5th was the proper date, but as vessels arrived and goods were delivered here as late as the 16th of October, I take it that the prices should be ascertained after that date. I do not mean to say by that that the season of navigation closed on that date, or that I can by this judgment say when the season of naviga-

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tion in the Yukon River closed. All I can say is this, that in my opinion no wise seaman trading on the Yukon River should undertake to navigate that river later than the 5th of October, and should provide for taking his boats out of commission about that date. There will therefore be judgment for the plaintiff, based upon the opinions I have expressed in the foregoing judgment, with a reference to ascertain the amount.

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The defendant Company appealed to the Full Court, and the appeal came on for argument in January, 1902, before WALKEM, IRVING and MARTIN, JJ.

Argument.

Bodwell, K.C., for the appeal, stated the facts and said the judgment is based on the guarantee in the printed freight tariff which was annexed to the agreement only for the purpose of shewing the rates—the original agreement was typewritten and contained all the terms except the rates. The Company absolutely refused to take the goods (in respect to which the action is brought) under the contract on account of the great rush of freight, and if the plaintiff has any right of action at all it would be based on defendants' refusal to take the goods tendered for shipment. The contract only relates to goods which were shipped by Wilson and which were consigned to Wilson.

Duff, K.C., on the same side: At common law it is open to carriers to limit their common law liability by special agreement with the consignor of goods: see *The Peninsular and Oriental Steam Navigation Co.* v. *Shand* (1865), 3 Moore, P.C. 272 at p. 293; *Carr* v. *Lancashire and Yorkshire Railway Co.* (1852), 7 Ex. 707; *Crawford* v. *Browne et al* (1853), 11 U.C.Q.B. 96; *O'Rorke* v. *The Great Western Railway Co.* (1864), 23 U.C.Q.B. 427; *Dickson* v. *Great Northern Railway Co.* (1886), 18 Q.B.D. 176 at p. 190 and Beal on Bailments, 399.

As to meaning of "notify T. G. Wilson:" It is an American expression and it is clear that the person to be notified is not the consignee: see *North Pennsylvania Railroad Co.* v. *Commercial Bank of Chicago* (1887), 123 U.S. 727 at p. 736; Elliott on Railroads, Vol. 4, p. 2,216.

"Throughout the season of 1899," means the regular shipping season during which the Company would receive goods for ship-

ment through to Dawson from ordinary shippers, and the Judge below should not have rejected evidence of office custom: see *Pattle* v. *Hornibrook* (1897), 1 Ch. 27.

On the other points he cited *The North-West Transportation Co.* v. *McKenzie* (1895), 25 S.C.R. 46; *Nelson* v. *The Hudson River Railroad Co.* (1872), 48 N.Y. 498 at p. 504; *Helliwell* v. *Grand Trunk Railway of Canada* (1881), 7 Fed. 68. Goods shipped at "owner's risk" frees the carrier from liability for negligence: see collection of cases in judgment of Osler, J.A., in *Dixon* v. *The Richelieu Navigation Co.* (1888), 15 A.R. 647.

As to damages: In the statement of claim no claim is made for loss of market. He cited *Hart* v. *Pennsylvania Railroad Co.* (1884), 112 U.S. 331 and *Robertson* v. *The Grand Trunk Railway Co.* (1894), 24 S.C.R. 616.

Peters, K.C. (*A. G. Smith*, of the Yukon Bar, with him), for respondent: The season of 1899, means the time during which the Yukon was fairly navigable and the evidence shews that the Yukon was open for a time ample to allow the defendant Company to deliver the goods in Dawson, had it not by its greed for freight accepted so much that it was incapacitated. The contract and the bill of lading must be construed so as to be consistent with each other. The contract pre-supposes that a bill of lading is to be made out and form part of the contract, but the bill of lading cannot override the contract. Pitts was the person agreed by all parties to ship the goods and to that extent only he was an agent for plaintiff, but had no power to vary the contract.

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He quoted from the evidence to shew that the findings of fact were warranted.

A carrier to escape responsibility for negligence must expressly cover it in his contract. He distinguished cases cited on this point and cited himself Leake, 604-5; Carver, 87; *Wilson, Sons & Co.* v. *Owners of cargo per the "Xantho"* (1887), 12 App. Cas. 503; *Repetto* v. *Millar's Karri and Jarrah Forests, Limited* (1901), 2 K.B. 306; *Moore* v. *Harris* (1876), 1 App. Cas. 318; *Drysdale* v. *Union Steamship Co.* (1901), 8 B.C. 228; Leggett on Charter Parties, 648-9; *Hamilton, Fraser & Co.* v. *Pandorf & Co.* (1887), 12 App. Cas. 518; Ray on Negligence, 371, 389.

As to "owner's risk" see *Robinson* v. *The Great Western*

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Railway Co. (1865), 35 L.J., C.P. 123, 126; *Mallet* v. *Great Eastern Railway Co.* (1899), 1 Q.B. 309.

As to effect of contract and bill of lading combined, see *Sewell* v. *Burdick* (1884), 10 App. Cas. 104; *Wagstaff* v. *Anderson* (1880), 5 C.P.D. 171; *Gledstanes* v. *Allen* (1852), 12 C.B. 202; *Rodoconachi* v. *Milburn Brothers* (1886), 17 Q.B.D. 316 at p. 319; *Atkinson* v. *Ritchie* (1809), 10 East 533; *Spence* v. *Chodwick* (1847), 10 Q.B. 517.

As to blockade, where delay arises from causes which the carrier could not reasonably be expected to have anticipated, the carrier is not liable in the absence of a special contract, but the carrier must inform shipper of inability to carry: see American and English Encyclopædia of Law, Vol. 5, p. 168-9, where cases are collected, and Abbott on Shipping, 478.

"Consignees, T. G. Wilson, Dawson," merely means that the goods are to be sent to Wilson, but not necessarily the consignees named in the bill of lading—simply a short description of the goods being sent to a person. The question is, were they Wilson's goods and to be carried under the contract? Wilson had a special contract, and the fact that someone else has an interest of some kind in the goods does not do away with his right of action; he must have a preference and it is the Company's fault if it took too many goods. He cited *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (1841), 8 M. & W. 421; *Dunlop* v. *Lambert* (1838), 6 Cl. & F. 600; *Great Western Railway Co.* v. *Bagge & Co.* (1885), 15 Q.B.D. 625; *Mead* v. *The South Eastern Railway Co.* (1870), 18 W.R. 735; *The Directors, &c., of the Bristol and Exeter Railway* v. *Collins* (1859), 7 H.L. Cas. 194.

Argument.

Bodwell, in reply: The clause in the bills of lading limiting liability absolves the defendants from the consequences of negligence: see *Shaw* v. *The Great Western Railway Co.* (1894), 1 Q.B. 373 at p. 382, where cases are collected, and also *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (1883), 8 App. Cas. 704.

Pitts was plaintiff's agent in Victoria to receive notice when season closed, and he was notified. Plaintiff had no property in the goods and cannot maintain the action: *Cahn* v. *Pockett's*

Bristol Channel Steam Packet Co. (1898), 2 Q.B. 61 at p. 65.

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IRVING, J.: The learned trial Judge decided that the goods in respect of which this action is brought, were being carried under the agreement of the 19th of June, 1899, and that the measure of damages was the loss which the plaintiff sustained, calculated at Dawson.

The agreement of the 19th of June, is peculiar. It speaks of the "date of shipment" being "throughout the season of 1899." Opposite "quantity" we find "exclusive contract for season 1899," under "rates" we find a reference to the tariff entered into between the competing carriers doing business in the Yukon, with a provision that the plaintiff was to receive a rebate at the end of the season equal to 7½ per cent. on the amount of business routed (by the plaintiff) over the defendants' steamers; "terms of payment," "C.O.D. at Dawson." A further stipulation for the benefit of the plaintiff is to be found in the provision "shipper to be protected in the event of a rate war." The final clause is as follows: "A shipping receipt in ordinary form in use by the Company to be given for the goods at time of shipment, to be carried under and pursuant to the terms of the shipping receipt."

Annexed to the contract was the freight tariff entered into between the competing companies, giving the rates to be charged on the different classes of goods "with guaranteed delivery of shipments during the season of 1899." Under the heading "Rules and Conditions" the following occur: "Rates are subject to conditions in bill of lading covering the shipment."

IRVING, J.

If we stop here and ask what this agreement means, we shall find plenty of subjects for discussion. Was the plaintiff bound to send any freight at all by the defendants' vessels? Did the defendants undertake to provide vessels, or to give the plaintiff any preference? When was the season to close, and who was to determine that date? And what would be the measure of damages if plaintiff determined to discontinue carrying before the season actually closed, or neglected to give sufficient notice of their intention? And what considerations were to guide in fixing that date—the actual condition of the Yukon River—or were

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they to be at liberty to determine the season by anticipating the date of closing—or could they take into consideration the blockade that would be caused at White Horse by others? And what notice of closing was to be given and to whom? What was the bill of lading to contain? And was the bill of lading to control or affect the terms of carriage in any way?

The learned trial Judge came to the conclusion that the defendants by this document agreed to guarantee delivery of all goods shipped in the year 1899, that they were not able to terminate the contract by notifying the agent at the point of shipment; that the defendants owed a special obligation to the plaintiff to see that his goods were delivered during the season, and that they ought to have given his goods a preference; that the bill of lading could not control the terms of the document of 19th June; that although the defendants notified the person shipping goods for the plaintiff that they would not after the 20th of August accept any goods "with guaranteed delivery," they were, nevertheless, liable under the document of the 19th of June, and that the conditions imposed by the defendants in their bills of lading after that date were ineffectual to protect them.

The facts are not in dispute. The question we have to decide is whether the goods were shipped under the guaranteed delivery clause or under the bill of lading.

IRVING, J.

In the first place it is to be noticed that there is not a word about the plaintiff's freight being given any preference. If the plaintiff was to be given this preference over ordinary or casual shippers, why did they not say so? Then in the next place they do agree that bills of lading shall be given at the time of shipment in ordinary form in use by the Company, and the goods shall be carried under and pursuant to the terms thereof.

The defendants' case is that the June agreement had been put an end to and that the goods in question were shipped not under that document at all, but under the bills of lading given by them.

At the time the agreement was entered into, both parties must have had in contemplation that a time would come when, owing to the difficulties of navigation, the shipping season must close and the freight tariff would be no longer applicable. These diffi-

culties would occur at the northern end of the route, and not at the shipping end. It would therefore be in contemplation of both parties to the contract, that the date of the close of the season must be determined by the condition of affairs at the northern end, and that the shipment of goods at the southern end must cease at a reasonable time before the northern end became closed. It could not have been contemplated by either party that the defendants should continue to receive freight after it was manifest that the goods could not be delivered before the river closed.

The officers of the defendant Company came to the conclusion that it would be unwise to continue to receive shipments after a certain date and they advised their agent at the southern extremity what that date was, the agent informed Mr. Pitts, the plaintiff's shipper at the southern end, of that date, and that they would not ship for him any longer under the guaranteed delivery clause.

It is said that Mr. Pitts was not the plaintiff's agent to acquiesce in the termination of this agreement, but from the evidence, I would infer that he was the proper person to be notified, but if we assume that he was not, the matter came down to this; the defendants said we will no longer ship on those terms. They committed a breach of their contract. That being so, the plaintiff's remedy would be an action against them for breach of that contract; and it would have been his duty to find other means of getting the goods delivered, but what the plaintiff, or rather Mr. Pitts for him, did, was this; he continued to ship by the defendants, and he accepted from them bills of lading marked with a special condition in the following terms: "This shipment is made and accepted at owner's risk of delivery during 1899, and the carriers are released by all parties in interest from all claims and liability arising out of or occasioned by non-delivery during 1899."

IRVING, J.

I do not see how it can be said that the defendants having elected to determine the contract, can now be made responsible for these goods as if they were shipped under the June contract. They had put an end to it. It may be that they are responsible for their action in so doing, but having refused to accept goods under that contract their responsibility for failure

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to deliver must be governed by the terms of the bill of lading and not by the terms of the June agreement. Compare the *British and South American Steamship Co.* v. *Anglo-Argentine Live Stock and Produce Agency* (1902), 18 T.L.R. 382, where there was a difference as to method of measurement between the freight contract and the bill of lading.

When Mr. Pitts found that the defendants would not carry the goods on the terms agreed to, it was open to him to hand his goods to any other transportation company, or it was open to him to hand them to the defendants, but if taken by the defendants they would be taken by the terms then imposed.

As I read the June agreement, the defendants and plaintiff merely contracted with each other for a "cut rate" during the period the tariff was in force. In consideration of the plaintiff giving the defendants his freight, the defendants were to give 7½ per cent. of the money earned; the goods were not to be carried under the June contract, but under the bill of lading which was to be given according to the form in use at the time of shipment. The action having been brought for failure to deliver the goods pursuant to the contract is, I think, misconceived. The action ought to have been determined according to the bills of lading given; these govern the carriage of the goods, and contain no provision giving the plaintiff a preferential right.

IRVING, J.

As to the minor point whether the 7½ per cent. is to be calculated upon the gross amount paid for freight or upon the amount earned by the defendants; in my opinion it is unreasonable to suppose that the defendants were dealing with anything but their own profits, and having regard to the expression "routed over our steamers," I am of opinion that the 7½ per cent. should not be calculated upon the gross amount.

The judgment should be set aside with costs here and below, but the plaintiff should have liberty to amend his pleadings.

MARTIN, J.: In reality the turning point of this case is a short and clear cut one, and is simply whether the learned trial Judge was right or no in arriving at the conclusion that the missing goods were carried under an exclusive contract for the season of 1899, by which delivery was guaranteed that same season.

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So far as any findings of fact are concerned, we are at liberty, seeing that the evidence was largely taken on commission and *de bene esse*, to draw our own conclusions—*McKay Bros.* v. *Victoria Yukon Trading Company* (1902), 9 B.C. 37.

Much was said about the position that Pitts occupied in relation to the parties. I am satisfied that under the circumstances he must be held to be the agent of the plaintiff so far as any shipping arrangements with the defendant Company are concerned, and notice to him was notice to the plaintiff.

After a review of the evidence, the learned trial Judge finds that the defendant "understood that all the goods were being shipped under that special contract." It is with reluctance that I feel constrained to differ from him on that point, but particularly in view of the positive evidence of Greer and Elliott, and what are really admissions by Pitts himself, I am forced to the conclusion that the shipment was under the bill of lading, and not otherwise.

Nothing that was done in the premises by Elliott and Greer is, when exactly considered, inconsistent with this view, and I feel it is due to them to say that they seem to have been specially careful in making their position quite clear to the plaintiff. Nor am I disposed to agree with the general contention of the plaintiff that the Company was so "greedy" for freight that it recklessly accumulated large quantities of it and knowingly created a blockade; I rather incline to the belief that even after the Company made public its inability to handle further consignments, shippers endeavoured, during that unprecedented rush to the north, to force freight upon the Company under circumstances without a parallel in the history of transportation in this country.

MARTIN, J.

Such being my view of the facts, I cite a passage from a case apparently not before the learned Judge below—I refer to the remarks of Mr. Justice King in *North-West Transportation Co.* v. *McKenzie* (1895), 25 S.C.R. 38 at p. 46:

"It is clear that if, by the tender of a bill of lading before the sailing of the vessel, it appeared that the defendant had refused to carry except upon the terms of it, the plaintiff would be put to other remedies than that resorted to in this action."

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The exemption from liability clause is sufficient to relieve the defendant from the loss herein complained of according to the principles laid down in *Manchester, Sheffield and Lincolnshire Railway Co.* v. *Brown* (1883), 8 App. Cas. 703 and *Robertson* v. *The Grand Trunk Railway Co.* (1895), 24 S.C.R. 611.

It does not of course follow from the foregoing, that the plaintiff may not have a cause of action against the defendant for refusing to carry under the original contract, but so far as concerns the shape in which the matter was dealt with at the trial, there has been a misconception of the plaintiff's remedy. Nevertheless, he should not be debarred from litigating that question by means of a new trial, which he may have with leave to amend as desired, but the costs of the former trial and useless proceedings below should be paid to the defendant forthwith after taxation and likewise the costs of this appeal.

Appeal allowed and new trial ordered.

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IN RE FLORIDA MINING CO.

IN RE THE FLORIDA MINING COMPANY, LIMITED.

Company—Winding up—"Just and equitable"—Substratum gone—Shareholder's petition—Contributory—B. C. Companies Winding-up Act, 1898.

An order for compulsory winding up may be made under section 5 of the Companies Winding-up Act, 1898 (Provincial), notwithstanding the winding up is opposed by the Company.

In winding up proceedings it appeared (1.) That shares had been unlawfully issued at a discount and at different percentages of their face value.

(2.) That the substratum was gone and that the Company was unable to carry on business.

(3.) That there was a question as to the liability of the Company to the principal shareholder who had always been in practical control of the Company:—

Held, affirming IRVING, J., that it was just and equitable that the Company should be wound up.

Statement.

APPEAL from a winding-up order made by IRVING, J., on the petition of a shareholder. The Company was incorporated on

15th July, 1899, under the Companies Act, 1897, and amendments thereto, with a nominal capital of $100,000.00, divided into one million shares of ten cents each, its objects being in short to acquire, work and sell mines in British Columbia. The petition was presented by H. L. Lindsay, a shareholder in the Company to the extent of 3,700 shares, 2,200 of which shares he subscribed for and purchased from the Company for $99.00, and the others he bought from stockholders, and alleged that the principal promoters of the Company were W. A. Davies and Frank I. Bradford, and that after the formation of the Company its money was spent in working the Florida Fraction and New Era claims in which Davies and Bradford were interested, but the Company never had any recorded interest in them; immediately after the formation of the Company 600,000 shares were immediately issued to Davies and 200,000 to Bradford without any cash payment being made for such shares, and that the directors subsequently issued shares at a discount; that commissions had been charged and paid to members of the board of directors for the sale of stock; and that on a balance being struck it would be found that Davies was indebted to the Company instead of the Company being indebted to Davies, and that the whole substratum of the Company was gone. The winding up was opposed by the Company, and Davies, who in an affidavit stated that the Company was formed for the purpose of taking over from him the Florida and New Era claims on which he held an option and that he did not claim any interest in the claims except as trustee for the Company; that the Company was indebted to him to the extent of about $6,000.00 for moneys advanced by him on his own responsibility in paying debts of the Company; and that all shares issued were issued as fully paid-up and non-assessable.

Statement.

On 21st January, 1901, the Company, Davies and one Fleutot entered into an agreement which recited that the Company was indebted to Davies and others, and that there were no funds in the treasury to meet the liability, and provided for the formation of a Company by Fleutot which would pay the liabilities of the Company and allot to the shareholders of the Florida Company 915 shares of the par value of 100 francs each in consideration

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of receiving from Davies a bill of sale of the Florida and New Era claims.

On 26th February, 1901, IRVING, J., made an order that the Company be wound up.

The Company and Davies appealed, the appeal coming on for argument at Vancouver, on 22nd April, 1902, before HUNTER, C.J., WALKEM and MARTIN, JJ.

S. S. Taylor, K.C., for the appeal.
Davis, K.C., contra.

The following cases were cited by counsel for appellants: *Coomber* v. *Justices of Berks* (1882), 9 Q.B.D. 17 at pp. 26, 32 and 33; Masten's Company Law, 580; *In re B.C. Iron Works Company* (1899), 6 B.C. 536; *Shoolbred* v. *Clarke* (1890), 17 S.C.R. 265; Hardcastle, 213-6; *In re Rica Gold Washing Company* (1879), 11 Ch. D. 36 at pp. 43 and 47; *Re Macdonald and The Noxon Brothers Manufacturing Co.* (1888), 16 Ont. 368; *In re Atlas Canning Co.* (1897), 5 B.C. 667; *Burland* v. *Earle* (1902), A.C. 83; *In re Pioneers of Mashonaland Syndicate* (1893), 1 Ch. 733; *Ex parte Barnes* (1896), A.C. 146; *In re Anglo-Greek Steam Co.* (1866), L.R. 2 Eq. 1; *In re Langham Skating Rink Co.* (1877), 5 Ch. D. 669.

Statement.

By counsel for respondent: *Higgins* v. *Walkem* (1888), 17 S.C.R. 225; *Re Ontario Forge and Bolt Co.* (1894), 25 Ont. 410; Palmer, 36-7; *Re Union Fire Insurance Co.* (1882), 7 A.R. 783; *In re Macdonald and the Noxon Brothers Manufacturing Co.* (1888), 8 C.L.T. 435; *In re Thomas Edward Brinsmead & Sons* (1897), 1 Ch. 406; *In re Diamond Fuel Company* (1879), 13 Ch. D. 400; *In re Anglesea Colliery Co.* (1866), 1 Chy. App. 555; *Welton* v. *Saffery* (1897), A.C. 299; *In re Crown Bank* (1890), 44 Ch. D. 634; *In re General Phosphate Corporation* (1893), W.N. 142; *In re Bristol Joint Stock Bank* (1890), 44 Ch. D. 703; *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 3 App. Cas. at p. 1,236; *Hirsche* v. *Sims* (1894), A.C. 654; *Dunstan* v. *Imperial Gas Light and Coke Co.* (1831), 1 L.J., K.B. 49; *Metropolitan Coal Consumers Association* v. *Scrimgeour & Co.* (1895), 65 L.J., Q.B. 22.

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HUNTER, C.J.: This is a petition for a winding-up order under the B.C. Winding-up Act of 1898, to wind up a mining company incorporated under the Companies Act, R.S.B.C. 1897, Cap. 44. The petition is presented by a shareholder who is the holder of 3,700 shares out of a total of 1,000,000 shares of capital stock, all of which have been issued except 85,846 shares, and although the Company has opposed the proceedings, a winding-up order has been made, which is the order now under appeal.

No question was, as I understand, raised by the appellants as to the constitutionality of the Act, which indeed we cannot discuss without notice to the Attorney-General of Canada (see Supreme Court Act, Sec. 100), but rather as to its scope. Mr. *Taylor* objected that no compulsory order could be made under the Act contrary to the wishes of the Company, but the case cited by Mr. *Davis* of *Re Union Fire Insurance Company* (1882), 7 A.R. 783, is against this contention, and I see no reason to doubt its correctness. It seems to me, moreover, that sections 4 and 5 are mutually exclusive; that is to say, section 4 provides for winding up where the Company, *i.e.*, the majority, are in favour of it, and section 5 for winding up, where the minority are in favour of it, and whether it is opposed by the majority, *i.e.*, the Company, or not. It is obvious that the majority do not require the assistance of the Court, and can take care of themselves by resolution, but the minority do require the assistance of the Court, and this, I think, necessarily involves the proposition that the order can be made in the face of the wishes of the majority, *i.e.*, the Company, but of course the Court must be satisfied that the wishes of the minority ought to prevail over those of the majority, or, as the section has it, that it is just and equitable that the Company should be wound up.

HUNTER, C.J.

Now, the main grounds on which it is urged that it is just and equitable that this Company should be wound up, are the following: First, because there are good reasons to believe that the shares have been unlawfully issued at a discount and the different shareholders having paid up admittedly different percentages of their face value, it is just and equitable that all

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the shareholders should be forced to pay up in full, and the moneys due from this source to the Company by statute, realized and distributed *pari passu*, after paying just debts. There can be no doubt, I think, since the decision in *Welton* v. *Saffery* (1897), A.C. 299, that if the shares have been unlawfully issued at a discount, any shareholder, whether fully paid up or not, has a right to compel the other shareholders to pay up in full, and of course, the most convenient mode of enforcing this liability is by means of a winding up. Now, it is apparent from the evidence adduced, that very loose methods were employed in the issue of these shares, and without prejudicing the question, I think there is good reason to suppose that the law has not been complied with, and therefore, on this ground, the order was well made.

The next ground obviously is, that if the shares have been unlawfully issued at a discount, the petitioner is exposed to the risk of having to defend a call at the instance of a creditor, and although no doubt the liquidator would be bound by the estoppel arising against the Company if the shares are *ex facie* regular and were taken by him without notice of any irregularity, yet I think he is entitled to be relieved from incurring such a risk arising from the Company getting deeper into debt. Then, it is next said that the substratum is gone, and I think it reasonably clear from the evidence that the cardinal object for which the Company was incorporated, namely, the working of the Florida mine, has practically come to an end by reason of the agreement for sale to Fleutot, and at any rate, it is apparent that the Company is not able to carry on its operations, and that there is no reasonable prospect that it ever will be. It was argued that the memorandum provides for other objects than that of the working of this mine, but general words in the memorandum are of little importance as compared with the name of the Company for the purpose of indicating the chief object of the incorporation: *In re Crown Bank* (1890), 44 Ch. D. 634.

HUNTER, C.J.

Then there can be no doubt that the question of the justness of the alleged liability of the Company to Davies, the principal shareholder, as well as of his and other directors' right to charge commissions, ought to be investigated, especially in view of the fact that he has always been in practical control of the affairs of

the Company, and no reasonable means have been afforded for checking or verifying the liability, and this is a good ground for making the order. See *In re West Surrey Tanning Co.* (1866), L.R. 2 Eq. 737.

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I think, without going any further into the matter, that the order was well made and should be affirmed. Perhaps it is needless to point out that under section 32 the Court retains complete control of the order.

WALKEM, J.: I wholly agree.

WALKEM, J.

MARTIN, J.: I agree that the order appealed from was rightly made, and that in view of all the unusual circumstances it is "just and equitable" that the Company should be wound up.

MARTIN, J.

Appeal dismissed.

IN RE SLOCAN MUNICIPAL ELECTION.

MARTIN, J. 1902. Feb. 17. IN RE SLOCAN MUNICIPAL ELECTION

Municipal election petition—Rules—Procedure in absence of—R.S.B.C. 1897, Cap. 68, Sec. 86.

A Judge has jurisdiction to fix a time and place for the trial of an election petition under the Municipal Elections Act, notwithstanding no rules for regulating such a trial have ever been made as provided by section 86 (*d.*) of the Act.

Remarks as to the procedure to be followed at such a trial.

It is not necessary that Judges should exercise power to make rules regulating the trial of election petitions if the ordinary machinery of the Court is sufficient for that purpose.

MOTION by petitioner to fix date and place of trial of a petition presented to the Supreme Court under section 86 of the Municipal Elections Act, R.S.B.C. 1897, Cap. 68, whereby it was sought to avoid the election of the respondent as Mayor of the City of Slocan. The motion was argued at Nelson, on the 15th and 17th of February, 1902.

Statement.

R. W. Hannington, for respondent: The Court has no juris-

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diction to entertain this application until rules have been made as required by sub-section (*d.*) of section 86.

S. S. Taylor, K.C., for petitioner: In election cases which are matters of public concern, technical preliminary objections should be disregarded. If no special rules are provided, then the Court will act by analogy to existing rules of the Supreme Court. The Court has inherent power, apart from all rules, to regulate its own procedure. Everything will be presumed in favour of the jurisdiction of the Court.

The following cases were cited by counsel or referred to by the Court during and after the argument:

Argument.

Maxwell on Interpretation of Statutes, 334-55; *The Queen* v. *The Bishop of Oxford* (1879), 48 L.J., Q.B. 609 at p. 619; *The Queen* v. *Barclay* (1881), 51 L.J., M.C. 27; *Davies* v. *Evans* (1882), 51 L.J., M.C. 132; *Beaven* v. *Countess of Mornington* (1860), 30 L.J., Ch. 663; *Short* v. *Roberts* (1866), 2 Chy. App. 13; *Macdougall* v. *Paterson* (1851), 11 C.B. 755; *Wilson* v. *West Hartlepool Railway Co.* (1865), 2 De G. J. & S. 475, 496, and 11 Jur. N.S. 126; *In re Eyre and Corporation of Leicester* (1892), 1 Q.B. 136; *In re Johannisberg Land and Gold Trust Co.* (1892), 1 Ch. 583; *Castelli* v. *Groome* (1852), 21 L.J., Q.B. 309 and *Ritz* v. *Froese* (1898), 12 Man. 346.

At the conclusion of the argument the learned Judge delivered, in effect, the following oral

JUDGMENT:

Judgment.

The circumstances of this case render it necessary that the question of jurisdiction should be determined at once.

I understand that the respondent's counsel has practically abandoned the contention first put forward, that merely because no rules have been made I was deprived of any jurisdiction which I otherwise possessed: no authority has been cited, nor I think can be cited for such a proposition. For example, the absence of rules under section 12 of the Yukon Territory Act of 1899, does not deprive the Full Court of jurisdiction in Yukon appeals.

Then as to the second contention that in the absence of rules there is no machinery for working out the Act under consideration. I am of opinion that a perusal of the whole Act shews that

it is the intention of the Legislature that municipal election petitions should be determined as speedily, inexpensively and simply as possible. The brevity and conciseness of the Act itself as compared with the elaborate provisions of the Provincial and Federal contested election Acts shew this. It is the duty of this Court to carry out this intention, not letting technicalities or difficulties which exist on paper, but which may readily be overcome in practice prevail. The section particularly in question differs materially from any other corresponding one cited. It provides for a petition being presented to a County Court or to this Court and directs that any one Judge of this Court shall try the matter thus brought into Court. The question of security for costs is specially provided for, and a motion contemplated to meet the circumstances of each case, thus differing materially from the fixed sums of $1,000.00 and $500.00 in the Provincial and Federal Acts. All essentials are fully provided for. The Court or Courts which shall be seized of the matter are specified, the time within which the presentation must be made, the security for costs which shall be furnished by the petitioner, what may be included in the petition, the grounds on which the Judge may avoid the election, the payment of costs by the respondent, and an appeal from the order of the Judge. Bearing in mind the object of the Act, I am unable to see any necessity for any further rules being made, and the fact that the petition can be tried either in this or a County Court illustrates this and shews that the Legislature did not contemplate any elaborate procedure in a County Court wherein there are at any time no pleadings. It would be strange indeed if this were not the intention of the Legislature, because unless the trial were speedily had the occupant of the office might serve his whole term of one year though really disqualified. In case of members of the Legislature who are elected for long terms, there is not the same necessity for a speedy determination of the matter.

Judgment.

Given, then, a Court seized of a petition and a Judge authorized and directed to "try" it, there need be no necessity for any rules directing how the date of trial shall be fixed: the natural and simple way would be to move the Court to fix some time which should be convenient to all concerned, having regard to

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the residence of the parties, witnesses, etc. Though the Act specifies no place of trial, yet it would naturally take place somewhere in the county or judicial district wherein the municipality is situate, and at the most convenient place that could be arranged for at the time, having regard to the sittings of the Court, the judicial circuits, etc.: this intention is shewn by giving the jurisdiction to the County Judge within whose county the municipality is situate. To carry out these simple matters no rules or regulations are necessary in my opinion—such powers are naturally incidental to any tribunal authorized to "try" a cause or matter. The existing practice of the Court itself as to length of notice would no doubt, in case of any dispute as to the time for trial, form a guide in determining what would be a reasonable period to prepare therefor.

No trouble arises as to how the evidence shall be taken: section 55 of the Supreme Court Act says it shall be *viva voce:* see the definition of the words "matter," "petitioner," "pleading," "cause" and "plaintiff." A point was taken that in the absence of special rules and regulations no witnesses could be summoned as there was no machinery for so doing. So far as this is concerned, my views have been partly given during the course of the argument. The power to command the attendance of witnesses is, I am inclined to think, something quite distinct from the "regulation of the trial and the matters and things connected therewith." This view is borne out by the fact that in the Imperial, Federal and Provincial Election Acts this power is expressly conferred in addition to that for making rules. *Cf. Wetherfield* v. *Nelson* (1869), L.R. 4 C.P. 571; *The Attorney-General* v. *Sillem* (1864), 33 L.J., Ex. 92. In the case at bar, then, if there is no power to make rules to command the attendance of witnesses and the Court has not the power otherwise, the matter will have to be "tried" as the statute directs with such witnesses as voluntarily appear before it. But this point should not be determined until it is formally raised, as it may never come up, and it may be as argued, that the Legislature having appointed a tribunal to try this matter has inferentially conferred upon it the power to compel witnesses to appear before it, even if it has not that power inherently.

Judgment.

MARTIN, J.

1902.

Feb. 17.

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The fact that Judges have the power by rule to create certain machinery, does not prevent them, if they see no reason to exercise that power, from resorting to machinery already in existence; they are not precluded from exercising any jurisdiction they otherwise possess. The result of the failure to make rules is simply that the practice continues as it is, without limitation: *Shaw* v. *Reckitt* (1893), 1 Q.B. 779; *Bernardin* v. *Municipality of North Dufferin* (1891), 19 S.C.R. 618 and 628. The power to make rules itself implies the exercise of a discretion as to how far, if at all, the circumstances require that power to be exercised in the public interest. The respondent here has no "legal right that requires to be effectuated" within the meaning of the *Bishop of Oxford Case* (1880), 5 App. Cas. 214.

Judgment.

The date of trial should be fixed, and I am prepared to hear counsel in regard to a convenient day therefor.

MECREDY v. QUANN.

FULL COURT At Vancouver.

1902.

April 29.

MECREDY v. QUANN

Practice—Extending time for perfecting appeal—How application should be made.

An appeal was not entered in time for the sittings of the Full Court for which the notice of appeal had been given, and on an application to the Full Court to extend the time for leave to enter the appeal for next sittings, it was

Held, that when the Full Court is sitting such an application is properly made to it.

THIS was an appeal from a County Court judgment. Judgment was perfected on the 25th of January, 1902. On the 18th of February, the plaintiff gave notice of appeal to the Full Court for the 1st of April. Subsequently security was given, but the appellant did not file his appeal book, nor enter the appeal, and the time for so doing had expired for the sittings of the Court

Statement.

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for which this notice had been given. He now moved by motion to the Full Court for further time and liberty to enter the appeal for the next sittings of the Court to be held in November.

A. D. Taylor, for the motion: The failure to enter the appeal and file appeal books is only an irregularity and will be relieved against under section 83 of the Supreme Court Act: see *Baker* v. *Kilpatrick* (1900), 7 B.C. 127.

Bloomfield, contra: This is not the time or place to make this motion: r. 686. It should have been made to a Judge in the first instance, and this Court will not entertain it.

Judgment.

Per curiam: When this Court is sitting the motion to the Full Court is the proper one, and leave will be granted. Section 86 of the Supreme Court Act gives this Court power notwithstanding r. 686.

* Present, HUNTER, C.J., WALKEM and MARTIN, JJ.

FULL COURT At Vancouver.

1902.

April 22.

COVERT v. PETTIJOHN *ET AL.*

Water record—Validity of—Ditch—Continuation of into United States and back into Canada—C.S.B.C. 1888, Cap. 66, Secs. 39 et seq.

COVERT v. PETTIJOHN

The fact that a ditch constructed in intended compliance with the provisions of section 41 of the Land Act (C.S.B.C. 1888), runs partly through United States territory does not of itself prevent the ditch from being a good ditch within the meaning of the Act.

Held, also, applying *Martley* v. *Carson* (1889), 20 S.C.R. 634, that the plaintiff's water record was valid.

APPEAL from judgment of SPINKS, Co. J.

Statement.

The plaintiff and defendant were owners of adjoining ranches in Yale District, the International Boundary line forming their southern boundary, and the northern boundary of the property of one Peone. To the west of defendant's ranch, itself west of

Covert's, is the Fourth of July Creek which flows in a southerly direction into the United States.

The plaintiff was the holder of a water record, which was as follows:

"THE GOVERNMENT OF
THE PROVINCE OF BRITISH COLUMBIA.

"2,283.

"Recorded this twenty-fifth day of March, 1889, in favour of W. H. Covert, 300 inches from Fourth July Creek, to be used for agricultural and other purposes.

"Government office,
"Vernon, "W. Dewdney, G. A.,
"25th March, 1889. "Per J. A. M.

"Error in not making out application on the 18th October, 1887.

"W. Dewdney,
"Asst. Commr. L. & W."

This record was obtained by plaintiff after having given notice dated 18th September, 1887, of application as follows:

"Notice is hereby given, that I intend to apply under section 43 of the Land Act, 1884, for permission to divert 300 inches of water from a tributary of Kettle River known as Fourth of July Creek. This water to be used for agricultural and other purposes."

Defendant, in 1894, also obtained a water record.

Statement.

In pursuance of his privilege, plaintiff improved what had been an old mining ditch, and thus carried the water down across what was then unoccupied land, but which is now defendant's land, into the United States and then to his ranch. By an extension of this ditch into the United States the water was run back into the bed of the creek in United States territory, and below this point Peone tapped the creek and ran water over his own land by means of a ditch. From this ditch of Peone's the plaintiff obtained water by running a ditch on to his own land in Canadian territory.

On account of an elevation on Pettijohn's land lying between the ditch and Covert's land, Covert was unable to obtain water by means of a ditch through Canadian territory, and hence this diversion around through Peone's ranch was necessary.

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The plaintiff sued defendant for damages caused by defendant's interfering with his ditch, which ran over defendant's land, and using water therefrom.

The plaintiff obtained an *interim* injunction. At the trial in the County Court, the following judgment was given by

SPINKS, Co. J.: I give judgment for the defendant. It appears to me to be beyond argument that the holder of a first record for water can do nothing to prejudice the rights of the second record holder. In this case, Mr. Covert, who claims to have the first record, has run his ditch across the American border and back again to his own land. The effect of this has been that an American citizen has had the first use of the water, and so the defendant, if Mr. Covert's contention were sustained, would be detained until both the American and Mr. Covert were supplied. In my judgment the record itself is bad as being *ultra vires* of the Assistant Commissioner of Lands and Works. His powers are limited by the Land Act then in force, and that Act as I remember it, requires the time that the water right is to run to be stated in the record. Damages $1.00. Costs on higher County Court scale.

SPINKS, CO. J.

The plaintiff appealed and the appeal came on for argument at Vancouver, on 7th November, 1901, before MCCOLL, C.J., DRAKE, IRVING and MARTIN, JJ.

S. S. Taylor, K.C., for appellant: Plaintiff's water record obtained under sections 39 *et seq.*, of the Land Act, C.S.B.C. 1888, Cap. 66, is valid. The ditch and the record are separate. Defendant is an interloper, and any remedy he might have would be under the Water Clauses Consolidation Act.

Sir C. H. Tupper, K.C., for respondent: The record is bad: (*a.*) The application was abandoned; (*b.*) The record does not comply with the statute, it does not shew the place of diversion as required by the Act. The Act contemplates a ditch wholly in British Columbia from the point of diversion to the place of user, and the ditch running into the United States, through which alone the water comes to Covert, invalidates the record. He cited *Colquhoun* v. *Heddon* (1890), 59 L.J., Q.B. 465 as to the

Argument.

legislation requiring the ditch to be wholly in British Columbia; *Madden* v. *Connell* (1899), 30 S.C.R. 109; and referred to *Carson & Eholt* v. *Clark & Martley* (1885), 1 B.C. (Pt. 2) 189; and distinguished *Martley* v. *Carson* (1889), 20 S.C.R. 634, from this case.

Before decision the Chief Justice died, and the appeal was re-argued by the same counsel, on 15th April, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

When the case was called, counsel for respondent asked that it be placed on the list so that it would come before a Bench including DRAKE, J., who was present at the previous argument and who had filed in the Registry a written opinion to the effect that the appeal should be dismissed, and which, through a misunderstanding, had been published in the newspapers.

As it seemed unlikely that DRAKE, J., would be able to be present during the present sittings, and as counsel for appellant desired to go on, the Court ordered the argument to proceed, the Court also holding that neither party had a right to insist that the Court should consist of the same Judges.

22nd April, 1902.

HUNTER, C.J.: In this case a re-hearing has taken place owing to the death of the late Chief Justice before delivering judgment.

As I understand the position, the four members of the Court who heard the former argument were unanimously of the opinion that the plaintiff's water record was valid, and consequently, re-argument as to this point was not desired by those members of the present Court who sat on the former occasion, as it was obvious that no possible dissent on my part could alter the position. HUNTER, C.J.

The plaintiff's water record having thus been considered valid as against the defendants, the re-hearing was confined to the question as to whether or not the ditch which was admittedly built by the plaintiff in order to appropriate the water for the purposes allowed by the Act, is in compliance with the Act, regard being had to the fact that it runs through United States territory after leaving the defendants' land and before reaching the plaintiff's.

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It seems to me that if the validity of the record is to be assumed, then *cadit quaestio.*

The ditch, as has already been said, was admittedly built to lead the water for the purposes allowed by the Act to the plaintiff's farm, and would do so, if not interfered with and allowed to be maintained. But it is said that the ditch is not a ditch, within the meaning of the Act, because it passes from the defendants' land to the plaintiff's, through United States territory, and that therefore it is not a ditch which the defendants are bound to respect.

The Act requires the holder of a record "to construct a ditch for conveying the water to the place where it is intended to be used." It seems to me that this ditch literally fulfils this requirement in every respect, and it is a familiar principle where a statute requires an act to be done as a condition of the acquirement of a right, that if the act has in fact been done, it is not for the Court to hold that it has not been done well enough, merely because it could have been done better, or in a different way.

But according to the defendants' contention, the plaintiff is in a dilemma. He must either take nothing by his grant or make the water run up hill. Which they would rather do if they were in his position, I leave it to them to settle. I will merely say that in my opinion, to allow the defendants to interfere with this ditch which was built in intended compliance with the statute and under a record which is in full force, would be to make a mock of the law and well calculated to cause a breach of the peace.

HUNTER, C.J.

The defendants are not without a remedy if their case is that the water is going to waste, or is being taken for unauthorized purposes, or in excess of the plaintiff's requirements, all they have to do is to read the Water Clauses Consolidation Act, and govern themselves accordingly.

So far then, as I am able to give my opinion in the matter, I think the judgment of the Court ought to enjoin the defendants from interfering with the ditch. I need hardly say that owing to Mr. Justice IRVING'S dissent, and not having had the advantage of hearing all the points argued, I have much less confidence in my conclusion than I might otherwise have had.

IRVING, J.: The plaintiff and the defendant, Dyer Pettijohn, are owners in fee of adjoining ranches. The International Boundary line forms the southern boundary of their properties and also the northern boundary of one Peone's property. The land of the defendant lies to the west of the plaintiff's farm, and to the west of the defendant's property is a creek, called the Fourth of July Creek.

As I understand the facts, this Fourth of July Creek flows from north to south (or nearly so), entering the defendant's property by crossing the defendant's western boundary. It passes out of the defendant's ranch into Peone's property by crossing the International Boundary line.

The plaintiff, who settled on his property in 1885 acquired, by virtue of a water record, dated 19th October, 1887, the right to divert from Fourth of July Creek 300 inches of water. He, in pursuance of that privilege, converted what had been an old mining ditch of a spade's width, into a ditch some three feet wide, and carried the water down, across what was then unoccupied land, but which is now the defendant's ranch, thence across the 49th parallel into the United States, and so to his ranch. This diversion of the water through the United States was necessary in order to avoid an obstacle of some sort or other.

The next person to mention is Peone. He settled on the land just south of the Boundary in about 1900. Shortly after some difficulty arose between him and the plaintiff as to the use of the water and the ditch. In these disputes the defendant, Dyer Pettijohn, who was then working for the plaintiff, acted as a go-between, and made some arrangement between the parties by which each of them was able to obtain the use of the water through Covert's ditch for certain agreed hours of each day.

In 1892, the defendant, Dyer Pettijohn, pre-empted the property he now owns, and on the 5th of July, 1894, he recorded for his own use 300 inches of water to be taken from the Fourth of July Creek. In his record, the place of diversion is stated to be at a point near where the creek crosses his northern boundary; but from the map it would appear that when the survey was made the place of diversion was altogether outside of his property. This I do not think in any way affects his record.

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The defendant in due course obtained a Crown grant to his property, which contained the following clauses:

"Provided, also, that it shall be lawful for any person duly authorized in that behalf by us, our heirs and successors, to take and occupy such water privileges, and to have and enjoy such rights of carrying water over, through, or under any parts of the hereditaments hereby granted as may be reasonably required for mining or agricultural purposes in the vicinity of the said hereditaments, paying therefor a reasonable compensation to the aforesaid....., h. ....heirs and assigns."

Between 1892 and 1894, all three, Covert, Pettijohn and Peone made use of the ditch and water, and all three assisted in keeping the ditch in repair. But in 1895, the plaintiff, having obtained a new water record, decided to build a new ditch for himself, carrying the same wholly on Canadian soil, and he actually began the construction of this ditch. Whether he did this on account of interference (actual or threatened), with the ditch by the defendant, or by Peone, or by both, is not quite clear. Certain it is, that there were disputes, and that Peone cut this ditch south of the 49th parallel, and turned the water back into the bed of the stream, in United States territory, and constructed for himself in 1895, through his own land, a ditch through which he drew water from the creek bed—this new point of diversion being at a point below the place where he had turned in the water from the old ditch and consequently in American territory.

IRVING, J.

We have, then (1.) Covert's first ditch, originally running some mile and a half from a point outside of Pettijohn's property, across Pettijohn's and Peone's ranches into Covert's ranch; and (2.) Covert's second, but unfinished, ditch starting from some point higher up than the first ditch; and (3.) Peone's ditch, which may be called an American ditch, as it is wholly situate in the United States.

This last mentioned ditch runs very nearly parallel to the lower part of Covert's ditch, and in 1897 or 1898, Covert, who had then apparently abandoned the idea of completing his second ditch, obtained water by making use of the Peone ditch.

At and after this time there seem to have been a great many disputes and constant litigation between Covert and the defend-

ant, Dyer Pettijohn, culminating in the present action instituted, as I have said, on the 21st of July, 1899.

The learned County Court Judge was of opinion that the plaintiff's record was bad in that it did not state the time. I think that he is clearly wrong on that point, as the record is very similar to Carson's record, which was upheld in *Martley* v. *Carson* (1889), 20 S.C.R. 634. I think it is our duty to uphold these records whenever possible.

The learned Judge was also of opinion that the plaintiff had lost the right to the protection by the Court to so much of his ditch as is situate in Canada in consequence of his carrying the ditch beyond the boundary line. The reason he gives is that an American citizen (Peone) has the first use of the water, and that the defendant, Dyer Pettijohn, would be delayed until both Peone and Covert were supplied. The reason will be seen to be fallacious if it is remembered that the quantity that Covert is entitled to appropriate is measured at the ditch head. If the Commissioner should be of opinion that the water was being wasted, then Covert could be reached by proceeding under section 146 of the Water Clauses Consolidation Act, Cap. 190, R.S.B.C. 1897.

The question to be decided in this appeal is whether the learned Judge was right in dismissing the plaintiff's action. It has been shewn that the plaintiff has a good water record. That he brought the water to his land and was making use of it through that ditch; that later this ditch was cut in American territory, and the water turned into another ditch outside of British territory. The user by the plaintiff would, if the place of diversion were in British Columbia, rebut the idea of abandonment, but does not the turning by Peone, in American territory, of the artificial stream back into the natural water-course, constitute such an interruption as to prevent Covert's ditch from satisfying the requirements of section 41?

IRVING, J.

In my opinion, Covert's ditch being cut, and liable to be cut, at a point outside the jurisdiction, it is not available for the purpose of satisfying section 41. Until the plaintiff is in a position to appropriate the water—the abstraction of the water by the defendant of the water flowing through his, the defendant's land, cannot injure the plaintiff.

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I do not wish to be understood as saying that section 41 cannot be satisfied except by means of the construction of an artificial water-course extending from the point of diversion to the place of user. In my opinion, that section might be satisfied by using partly a ditch and partly a natural water-course. The object of the section is to ensure the beneficial using of the water recorded, whether by using the artificial means altogether or partly by an artificial ditch and partly by using the natural conveniences, is immaterial, but when water is turned into the bed of a stream in American territory, by an adverse claimant, does it not become *publici juris?*

IRVING, J.

In this case, having regard to the circumstances as they exist, I think the plaintiff being unable to maintain the continuity of his ditch, must be regarded as having no ditch as required by section 41.

No argument was addressed to us on the ground of estoppel.

MARTIN, J.: First, it was urged on the former argument that the plaintiff's record is bad because it does not state the "place of diversion" of the water. During the course of that argument the Court intimated, without actually deciding the point, however, that this contention would not be given effect to, and it seems fitting that the reasons which influenced me in taking that view should now be stated.

Section 39 provides that the record shall specify (1.) the name of the applicant, (2.) the quantity sought to be diverted, (3.) the place of diversion, and (4.) the object thereof, etc. The record does give the place of diversion to a certain extent at least, because the Government Agent after filling in the first two requirements, gives from "Fourth of July Creek" as the third, evidently considering that to be a sufficient compliance with the statute. So the contention must be, that it is not the creek itself, but the particular point on it which must be specified. Strictly speaking, this is probably correct, but the error in the record is that of "the ministerial officer of the Government authorized by statute to make the grant:" *Martley* v. *Carson* (1889), 20 S.C.R. 634 at p. 678. The provisions of the corresponding section of the Land Ordinance of 1865, have been held in the case above

MARTIN, J.

cited to be merely directory—*vide* particularly pp. 656-8, 661-4, 667-8, and much stress was laid by the Supreme Court on the desirability of applying such a construction to the peculiar circumstances of this new Province. The additional paragraph at the end of the present section providing that "no such person shall have any exclusive right to the use of such water . . . except such record shall have been made and such fee paid," while it renders it imperative that there must be a record, does not in my opinion, invalidate it because of any irregularity therein; to hold otherwise would be contrary, I think, to the spirit of *Martley* v. *Carson*.

Then, second, it is contended that because the water diverted by the plaintiff's ditch from the creek in question under his record runs across the International Boundary line and through United States territory, the plaintiff loses all his property or interest in the water wherever situate even though it should be that by the same ditch the same water is brought back into this Province and used on the plaintiff's farm. It is a fact not to be overlooked that the creek in question in any event flows by the course of nature from this Province into the United States.

The ditch in question diverts the water some considerable distance on our side of the boundary line.

According to the evidence, the plaintiff in 1887, constructed the ditch (by repairing, considerably enlarging and extending an old miner's ditch) in compliance with the requirements of the Act, but latterly, owing to the defendant's interference with the ditch, he has had to get his water by the partial use of a ditch belonging to one Peone, who resides immediately south of the boundary line.

Now, I can well understand that if the defendant interfered with or diverted the water after it crossed the boundary, the plaintiff would not have a cause of action, but why he should have no remedy against one who appropriates his water in the Province wherein the record is operative, is difficult for me to understand. There can be no doubt that it would be lawful for the plaintiff to construct a catch basin immediately on this side of the boundary, from which he could pump the water over the hill if the expense would warrant it, and if any one interfered

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with such a course, the plaintiff would have a legal remedy. If then, he can take the water over the hill by lawful means, why not take it round? Supposing the plaintiff owned land on each side of the boundary line, in such case could it be contended that he could not lawfully use the water by running the ditch across his own land from one part of his land to another, even if in doing so he crossed United States territory? It is simply a question of making arrangements with the owner of the soil, State or individual, on the other side of the boundary, and if the plaintiff fails to make such arrangements, he is at the mercy of the first person in United States territory who chooses to tap his ditch. So far as the Crown in the right of British Columbia is concerned, the case simply is, that out of a creek, which in any event is running to waste in the United States, a right is given to a citizen of Canada to use Crown water while it is within the Crown domain.

I quite agree that the Act does not seek to control the use of Crown water in a foreign country, but here it is the use of Crown water within the jurisdiction of the Crown that is in reality complained of.

Once a record is granted all that is necessary to do to obtain an exclusive right to the water privilege is to comply with the provisions of section 41, which requires the holder of the record to "construct a ditch for conveying the water to the place where it is intended to be used." It is admitted that the plaintiff did this, and when he did it the statute was satisfied, and I am unable to see why, after being for many years in the undisturbed enjoyment of his rights, they should now be questioned.

MARTIN, J.

There is no suggestion that the plaintiff is wasting, improperly using, or does not require the water, in which case the Gold Commissioner has special power under sections 18 and 28 of the Water Clauses Consolidation Act, to cancel or otherwise deal with the record. Nor is it alleged that he is in any way in conflict with the laws of the other side of the boundary line, and even if he were in such conflict, that is a matter for those there interested to concern themselves about. The appeal should be allowed with costs.

Appeal allowed, Irving J., dissenting.

McCUNE v. BOTSFORD AND MACQUILLAN (TWO SUITS.)

IRVING, J.
1901.
Dec. 17.

FULL COURT.
1902.
June 14.

McCUNE v. BOTSFORD ET AL

Practice—"No order as to costs"—Meaning of.

The statement "no order as to costs," means that each party must pay his own costs.

APPEAL from an order of IRVING, J., dismissing an appeal by the defendant Botsford for a review of the taxation of the costs of the actions. The facts appear in the following memorandum of judgment of

IRVING, J.: I am asked by the solicitor for the defendant to make a memorandum in order that he may go to the Full Court on my refusal to interfere with the decision of Mr. Registrar Beck in the matter of taxation of a bill of costs.

This action was to adverse the defendant's application for a mineral grant. At the sitting of the Full Court here in November, an appeal from the decision in this case was on the list to be heard. When it was reached, the defendant's solicitor suggested that the plaintiff had lost all interest in the case by reason of his having allowed the mineral claim in respect of which he had brought this action to lapse, and the appeal was ordered to stand over. It came on at a later date when the Court upon being satisfied of the correctness of the defendant's statement, struck out the appeal, but refused to make any order as to the costs of the appeal.* Some days after the Court of Appeal was adjourned an order was made by me in Chambers dismissing the plaintiff's action, with costs, on the ground that the plaintiff had no longer any interest in the suit.

IRVING, J.

The defendant thereupon made up his bill of costs including therein the costs of the appeal; these costs the Registrar refused to allow, and by consent of both parties, the matter was brought before me.

I refused to interfere with the Registrar's decision, and gave leave to appeal from my decision, and for that purpose ordered that the proceedings be carried on in the Victoria Registry.

*See note 8 B. C. at p. 219.

IRVING, J.

1901.

Dec. 17.

The defendant, Botsford, appealed to the Full Court and the appeal was argued at Victoria, on 14th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

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1902.

June 14.

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Peters, K.C., for appellant: The question is whether the costs of a pending appeal, when the action is dismissed, are costs in the cause. An interlocutory appeal is a step in the cause and as the actions were dismissed with costs, we are entitled to the costs of the appeal. He cited *Hawkins Hill Consolidated Gold Mining Co.* v. *Want, Johnson & Co.* (1893), 69 L.T.N.S. 297; *Hately* v. *Merchants' Despatch Co.* (1886), 12 A.R. 648; *Woolley* v. *Colman* (1886), W.N. 36 and *Stevens* v. *Keating* (1850), 1 Mac. & G. 658, where the costs of an unsuccessful motion were allowed.

[DRAKE, J.: When "no order as to costs" is made in reference to an appeal, doesn't it mean that neither party shall get any costs of the appeal? He referred to *In re Hodgkinson* (1895), W.N. 85.

MARTIN, J., referred to *Fawcett* v. *Canadian Pacific Railway Co.* (1901), 8 B.C. 219.]

Argument.

The Full Court did not make the technical order of "no order as to costs" but simply did nothing in regard to costs, and no order was taken out. I was counsel and did not ask for costs, and the mind of the Court was never directed to the question of costs. He cited also *Harrison* v. *Leutner* (1881), 16 Ch. D. 559 and *Conybeare* v. *Lewis* (1880), 13 Ch. D. 469.

Martin, K.C., for respondent, referred to the judgment appealed from which stated that the Full Court refused to make an order as to the costs of the appeal.

[DRAKE, J., read from his note book, and said that it appeared that the order of the Full Court was "no order as to costs," following *Fawcett* v. *Canadian Pacific Railway Co.*]

Judgment.

HUNTER, C.J., in delivering the judgment of the Court, that the appeal should be dismissed with costs, said that it appeared that the Full Court had passed on the question of the costs of the appeal, and had said that there would be no order as to costs, which paradoxical as it might seem, meant that there was an order as to costs, *i.e.*, that neither party should get any costs.

Appeal dismissed with costs.

McNAUGHT v. VAN NORMAN *ET AL.*

FULL COURT.

1902.

June 25.

McNAUGHT v. VAN NORMAN

Mineral claim—Seizure by Sheriff of the interest of a co-owner—Lapse of debtor's mining license—Sheriff's right to renew—Mineral Act, Sec. 9 and Amendment of 1899, Sec. 4.

A Sheriff in possession of a free miner's interest in a mineral claim has no power to take out a special free miner's certificate under section 4 of the Mineral Act Amendment Act of 1899, in the name of the judgment debtor: neither has the Sheriff power to renew a certificate before lapse.

Where one or more of the co-owners of a mineral claim allow their free miners' certificates to lapse, their interests at once vest *pro rata* in their former co-owners.

APPEAL from judgment of IRVING, J., on an interpleader issue. Writs of *fieri facias* against the goods of one J. A. McKinnon were issued at the suit of the defendants and placed in the Sheriff's hands. On the 29th of March, 1901, the Sheriff seized, under such writs, the one-quarter interest in the mineral claims Hampton, Camp Fire, Ethel K. and Plunger, of which McKinnon was the recorded owner, the plaintiff McNaught being the recorded owner of a three-quarters' interest in the claims. On 31st May, 1901, before sale by the Sheriff of the interest seized, McKinnon allowed his free miner's license to expire, without renewing it. With the purpose of reviving the interest of McKinnon under seizure, the Sheriff on behalf of the creditors applied for, and obtained the issuance in McKinnon's name, but without his authority, of a special free miner's certificate, under the authority of section 4 of the Mineral Act Amendment Act, 1899. This special certificate was issued on the 5th of June, 1901. Prior to the expiry of McKinnon's free miner's certificate, the plaintiff was a co-owner with McKinnon in the mineral claims in question and claimed the interest seized, under section 9 of the Mineral Act, and an interpleader issue was tried at Nelson, on 18th October, 1901, before IRVING, J.

Statement.

S. S. Taylor, K.C., for plaintiff: The special free miner's certificate obtained by the execution creditors was issued without

Argument.

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authority, and is of no effect. Section 4 of the Act of 1899, gives no privileges or rights to any one, other than the person whose certificate has lapsed. Even if the special certificate was properly issued, it has no effect in reviving the lapsed interest, as a third party, *viz.*, the plaintiff has, by virtue of section 9 of the Mineral Act, acquired an intervening title.

John Elliot (*Lennie* and *Wragge*, with him), for defendants: The special certificate was issued by the authority of the Sheriff, who must be regarded as the agent of the execution debtor, for the purpose of obtaining this special certificate, besides McNaught admits practically that he is holding McKinnon's interest for him. The Sheriff's duty is to protect the interests of the execution creditors, and he is therefore justified in issuing the certificate for the purpose of protecting the property under seizure.

[IRVING, J.: It seems to me that neither the Sheriff nor any one else, other than McKinnon, had a right to take out the special certificate. Section 4 of the Act of 1899 confers a merely personal privilege.]

Argument.

In any event the case is not covered by the sections of the Mineral Act under discussion at all. Upon the delivery of the writ of execution to the Sheriff, or at least upon seizure, the chattel interest of McKinnon in these mineral claims became charged with the execution debt: R.S.B.C. 1897, Cap. 56, Sec. 16, Sub-Sec. 16. Execution is an entire thing, and whenever consummated, is regarded as executed from the time when the charge attaches: *Clerk* v. *Withers* (1704), 1 Salk. 322; *Osborne* v. *Kerr* (1859), 17 U.C.Q.B. 144. Upon seizure the interest is in *custodia legis*, and cannot be affected by any voluntary act of the debtor, whether of omission or commission: *Giles* v. *Grover* (1832), 9 Bing. 128; *Woodland* v. *Fuller* (1840), 11 A. & E. 859.

Taylor, in reply: The Sheriff on seizure obtains no property in the matter seized, but only the right to sell: *Woodland* v. *Fuller* (1840), 11 A. & E. 859 at p. 866; *Giles* v. *Grover* (1832), 9 Bing. 128 at pp. 137, 138, 139 and 141. A mineral claim cannot be in *custodia legis*, as it is a chattel real: *Playfair v. Musgrove* (1845), 15 L.J., Ex. 26.

IRVING, J.

His Lordship held that while the Sheriff could have sold McKinnon's interest as long as it remained alive, the moment he

allowed his license to expire his interest disappeared, and he gave judgment in favour of the plaintiff.

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The defendants appealed, and the appeal was argued at Vancouver on 1st May, 1902, before HUNTER, C.J., WALKEM and MARTIN, JJ.

Sir C. H. Tupper, K.C., and *John Elliot*, for appellants.
S. S. Taylor, K.C., for respondent.

25th June, 1902.

HUNTER, C.J.: Interpleader issue to try the question whether an undivided one-quarter interest in certain mineral claims belongs to the claimant, or to the execution creditors of one McKinnon. McKinnon being the recorded owner of the interest, allowed his free miner's certificate to expire on May 31st, 1901, without renewing it, and the Sheriff, who had seized on the 29th of March, took out a special free miner's certificate in McKinnon's name on the 5th of June on behalf of the creditors.

There can be no doubt, I think, that on the lapse of McKinnon's certificate, his interest vested *ipso facto* in McNaught by virtue of section 9 of the Mineral Act, unless the effect of that section is cut down by section 4 of the Mineral Act, 1899. This latter section provides, in effect, that if any person allows his certificate to expire, he may obtain a special certificate which shall revive his title to all claims owned by him, either wholly or in part, at the time of the lapse, except such as had previously passed to some one else.

HUNTER, C.J.

There appears to be no real difficulty in reconciling the sections, as the words "or in part" may be satisfied by supposing that the Legislature had in view the possible case of two or more co-owners allowing their certificates to lapse simultaneously, which could easily enough occur by reason of the change in the law made by the previous section making all certificates expire on every 31st day of May. It is worthy of notice that the words "either wholly or in part" have been dropped out of the re-enactment of 1901, which does not, however, affect this case, but the circumstance is perhaps an additional reason for thinking that the Legislature did not intend to interfere with section 9.

In the next place, the Act of 1899, in terms confers the right

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to take out the special certificate on the person whose certificate has lapsed, and not on him and his assigns by operation of law or otherwise, and by section 3 of the principal Act the certificate is not transferable.

Moreover, the Sheriff acquires no title to the interest of the execution debtor: he is in possession, actual or constructive, as the case may be, and is merely the instrument of the law by which the title is transferred to the purchaser, as is plain from the fact that in the event of his being paid out by the debtor before sale no re-assignment to him from the Sheriff is necessary:

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Giles v. *Grover* (1832), 1 Cl. & F., *per* Patteson, J., at pp. 76-7; *per* Taunton, J., at p. 114; *per* Vaughan, B., at p. 143; *per* Tindall, C.J., at pp. 204-5; *per* Lord Tenterden at p. 218; *Playfair* v. *Musgrove* (1845), 15 L.J., Ex. 26.

I think the judgment should be affirmed with costs.

WALKEM, J.: I agree with the learned Chief Justice that the appeal should be dismissed with costs.

No person, except he is specially authorized to do so, has the right to take out a free miner's licence in any other person's name. The same rule applies to the special licence taken out by the execution creditor in McKinnon's name, as there is no evidence that McKinnon gave him authority to use his name.

Under the Mineral Act, a miner's licence is not transferable, yet the execution creditor by his unauthorized act, has, in effect,

WALKEM, J.

endeavoured to defeat this regulation of the statute by securing the licence for his own purpose, and in McKinnon's name. The fact that McKinnon did not take out the special licence makes that licence, as it seems to me, nugatory. According to a well-known principle of law, the creditor mentioned can obtain no advantage from the licence, as his act, in obtaining it, was illegal.

The phrase "wholly or in part" in section 9 of the Mineral Act of 1899, means, as I read the context, the whole or any part of, or interest in, a mineral claim which a miner may happen to own.

McNaught's title to the ground in dispute has been conferred upon him by section 9 of the Mineral Act, and, obviously, cannot be defeated by the illegal act which I have mentioned. The appeal must be dismissed with costs.

MARTIN, J.: It is first contended for the respondent that the effect of the proper construction of section 4 of the Mineral Act Amendment Act, 1899, is to confirm in him the interest of McKinnon in the mineral claims set out in the interpleader issue. When McKinnon's certificate expired, he, by virtue of section 9 of the Mineral Act, absolutely forfeited all his interest in said claims, and that interest, *ipso facto*, became vested in his co-owner, the respondent, who at and from the moment of expiration of the said certificate became the sole and absolute owner of the claims, unless it is possible to revive as against him the interest of his former co-owner, McKinnon. According to said section 4, a special certificate may be obtained under certain conditions, and "it shall have the effect of reviving the title of the person to whom it is issued to all mineral claims which such person owned, either wholly or in part, at the time of the lapse of his former certificate, except such as under the provisions of the Mineral Act had become the property of some other person at the time of the issue of such special certificate. . . ." Now, as has been noticed, the fact is that under the provisions of said Mineral Act the three claims in question had become the sole property of the respondent before the special certificate relied upon was obtained, so I see no escape from the conclusion that the exception in section 4 is, on the facts of this case, a bar to the revival of McKinnon's interest in the claims in question. It may possibly be, as suggested, that it was not the intention of the Legislature to go to that length, but the language being clear and unambiguous I am unable to take any other view of the matter. It is consequently unnecessary to discuss the other points which were argued except to say that after a perusal of the evidence I cannot see anything that would point to the conclusion that McNaught should in any way be regarded as trustee for McKinnon. The appeal should be dismissed with costs.

MARTIN, J.

Appeal dismissed.

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MACAULAY BROTHERS v. VICTORIA YUKON TRADING COMPANY.

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Practice—Special indorsement—Action on judgment—Interest till judgment—Liquidated demand.

A claim for interest "until payment or judgment" is not a claim for a liquidated demand, within the meaning of Order III., r. 6, except for example, where the cause of action is in respect to negotiable instruments, in which case the interest is by section 57 of the Bills of Exchange Act, deemed to be liquidated damages.

Interest claimed under a statute cannot be the subject of special indorsement unless it is stated in the indorsement under what Act the interest is claimed.

A specially indorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated.

Decision of WALKEM, J., reported *ante* at p. 27 reversed, MARTIN, J., dissenting.

Statement.

APPEAL by defendant Company from the judgment of WALKEM, J., reported *ante* at p. 27, refusing to set aside a judgment signed in default of defence.

The appeal was argued at Vancouver, on 17th April, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Note:—The indorsement was as follows:

"The plaintiffs' claim is for money due from the defendants to the plaintiffs on a final judgment recovered by the plaintiffs against the defendants in an action brought by the plaintiffs against the defendants in the Territorial Court of the Yukon Territory.

"Particulars:

"The action is distinguished in the Cause Book of the said Territorial Court of the Yukon Territory as 368-1900, and the said judgment which is dated the 11th day of December, 1901, is for $3,304.35 and costs to be taxed, and the said costs were duly taxed and allowed at $1,400.00.

"Judgment, including costs $4,704 35

"Interest thereon at the rate of five per cent. per annum to date of writ 17 83

$4,722 18"

"The plaintiffs will also claim interest at the rate of five per cent. per

Duff, K.C., for appellant: The writ is not specially indorsed. The claim for interest from the date of the writ till judgment is not a liquidated demand and cannot be so described apart from some statute declaring it to be a liquidated demand. Cap. 31 of 52 Vict., amending the Interest Act, applies only to the North-West Territories, and is the only statute bearing on the question, as in 1898, the Yukon Territory was severed from the North-West Territories, but the laws then in force remained in force in the new Territory; in 1900, by Cap. 29, Sec. 1, the rate of interest was reduced from six per cent. to five per cent.

Interest payable by agreement or fixed by statute may be claimed, if properly set out, up to the date of the writ, but not "till payment or judgment." The case of a negotiable instrument is an exception governed by a special statute. A definite sum must be claimed. He cited *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674 and 61 L.J., Q.B. 219; *London and Universal Bank* v. *Earl of Clancarty* (1892), 1 Q.B. 689; Odgers on Pleading, 4th Ed., p. 50; *British Columbia Land and Investment Company* v. *Thain* (1895), 4 B.C. 321, a strong case in our favour which has been standing for seven years, and as a rule of procedure should not be departed from: see *Fraser* v. *Ehrensperger* (1883), 12 Q.B.D. 318. Argument.

The claim for interest is one on costs, but it is not alleged when the costs were taxed, and it is not alleged that the interest is claimed under the Dominion Act relating to the Yukon.

Cassidy, K.C., for the respondents: Any claim for damages liquidated by the act of the parties, or by statute, can be specially indorsed, and when constituting a continuing cause of action can be claimed by special indorsement and assessed down to the date

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annum on the said sum of $4,704.35 from the date of the writ herein until payment or judgment in this action.

"Place of trial, Victoria.

"Delivered this ninth day of January, A.D. 1902.

"Robert Cassidy,

"Plaintiffs' Solicitor.

"And the sum of $30.00 (or such sum as may be allowed on taxation) for costs. If the amount be paid to the plaintiffs, or their solicitor or agent, within four days from the service hereof, further proceedings will be stayed."

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of judgment by r. 364. One instance of a claim for damages in their nature unliquidated, being held by the Courts to be a subject of special indorsement, is a claim for damages for the dishonour of a bill of exchange or promissory note, and that by reason alone of the language of section 57 of the Bills of Exchange Act, which says that interest on a dishonoured bill till payment shall be deemed to be liquidated damages, is taken to be the equivalent of saying that it shall also be considered as capable of special indorsement, and such interest on an overdue bill is therefore put on precisely the same basis as interest due by contract or by statute. It is certainly not put any higher. It is not to be dealt with exceptionally to, but in the same manner in all respects as interest due by contract or statute, it is merely brought by the Act within the rule affecting the latter. In an action on a bill of exchange, a claim for interest till judgment may be specially indorsed: see *London and Universal Bank* v. *Clancarty* (1892), 1 Q.B. at p. 695, where A. L. Smith, J., says, "It is clear that the meaning of sub-s. 1 is that the amount of the bill, the interest, and the expenses of noting or protest, are all to be recovered as liquidated damages. It is argued that that does not cover interest down to judgment, but only interest to the date of the writ. Why should that be so? By Order XXXVI., r. 58, 'where damages are to be assessed in respect of any continuing cause of action, they shall be assessed down to the time of the assessment'—that is to say, down to the date of judgment." That is a decision that all interest recoverable as liquidated damages can be claimed down to judgment, because and only because, it is to be "deemed to be liquidated damages."

Argument.

The common form of special indorsement for a claim under a judgment of the High Court in England is found at p. 253 of Bullen and Leake's precedents, 1897 edition. It does not plead or refer to the statute providing for interest on judgments since domestic statutes need not be, and ought not to be, pleaded, but it claims interest at the statutory rate, that interest is calculated and the sum computed is claimed, up to the date of the writ. Calculation to an uncertain date beyond that is from the nature of the case impossible; and the indorsement in the form there-

fore concludes with a claim for interest at the same rate until judgment. *Id certum est quod certum reddi potest.* As to the claim for interest, we are in exactly the same situation as if the interest was claimed under a judgment of our own Court, instead of the Yukon Court, as the interest in both cases is recoverable under the Dominion Statute, therefore, the form in Bullen and Leake is applicable to this case. The defendant can either pay the amount indorsed and the lump costs indorsed, or he can refuse to pay and leave the computation of the additional interest and taxation of the costs to the officer of the Court who enters the judgment. Lord Coleridge's judgment in *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674, does not say that when interest accrues at a rate fixed by contract or statute that it cannot be claimed down to judgment in a special indorsement: See at p. 682, "we think that a statement of claim which demands interest, but shews no legal liability to pay it, is upon general principles defective. Again, all the forms claiming interest mention the specific sum claimed. We think this is as it should be. It is important that a man, who is to be proceeded against summarily for judgment, should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risk of calculation." The forms which Lord Coleridge spoke of were not forms abandoning interest from the date of the writ, but were forms claiming interest duly calculated to the date of the writ and claiming at the same rate till judgment. In all the cases cited *contra* the special indorsement contained a claim for interest down to judgment, and in none was it held that such a claim was improper if the interest was due by contract or statute, and in none was the contention advanced that in no case could a special indorsement claim interest down to judgment, except in *London, &c.*, v. *Clancarty*, when the point was disposed of by A. L. Smith, J., as already indicated.

Argument.

The report of *British Columbia Land & Investment Co.* v. *Thain* (1895), 4 B.C. 321 does not shew the contract under which the interest was claimed. If the meaning of that judgment is that in no case can a special indorsement claim interest till judgment, it is wrong. In *Wilks* v. *Wood* (1892), 1 Q.B. 684 the

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action was on an open account for goods sold and delivered and interest from the date of the writ was claimed till payment or judgment—there was no objection, (and this was after *Sheba* v. *Trubshawe* was decided), that in no case can interest from the date of the writ be claimed, but only that in the absence of contract the interest so claimed was unliquidated damages: See language of Fry, L.J., and Lopes, L.J., at p. 687.

In *Hollender* v. *Ffoulkes* (1894), 16 P.R. 175, the action was on a foreign judgment, and a claim for interest to judgment was specially indorsed. No foundation for that claim was alleged, *i.e.*, the foreign statute was not pleaded. It was properly held to be a bad special indorsement, but see language of Street, J., at p. 176.

Duff, replied.

30th April, 1902.

HUNTER, C.J.: In this case an action is commenced on a judgment recovered between the same parties in the Yukon Territorial Court, the writ being indorsed as follows: [Setting out the indorsement.]

The defendants appeared and demanded a statement of claim, but having filed no defence the plaintiffs took judgment by default under r. 242 (Order XXVII., r. 2.) The defendants moved to set aside this judgment on the ground that they were entitled to have a statement of claim delivered inasmuch as the writ was not specially indorsed, which motion was refused, the learned Judge holding that the writ is specially indorsed.

HUNTER, C.J.

Mr. *Duff's* first contention is that the writ is not specially indorsed because of the claim for interest from the date of the writ until payment or judgment and in my opinion, this contention is sound.

To look first at the Rules and the Forms. The right to specially indorse the writ exists in the words of r. 15 (Order III, r. 6) "where the defendant seeks merely to recover a debt or liquidated demand in money payable by the defendant, with or without interest." The word "liquidated" primarily means ascertained, not ascertainable; and so, giving the word its natural meaning, the rule would appear to imply that only a specific

ascertained sum can be made the subject of special indorsement.

The forms of special indorsement in the Appendix all shew that only specific sums are claimed, and any one looking at an indorsement cast in one of these forms knows instantly what the defendant is called upon to pay and no computation is called for. Then as to the decisions.

In *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. at p. 682, Lord Coleridge, C.J., in delivering the judgment of five Judges (who, according to the report in the Law Journal, were summoned specially in order to settle the question, there being contrary rulings at Chambers) says: "So regarded, we think that the claim in the present case departs from the requirements of a special indorsement in two respects: (1.) it does not shew that the interest is claimed as being due by contract; (2.) no definite sum is claimed. All the forms given in Appendix C, s. IV., in which interest is claimed are cases of interest due either by express covenant, or upon bills or notes. By s. 57 of the Bills of Exchange Act, 1882, (45 & 46 Vict. c. 61), the last mentioned interest is to be deemed liquidated damages; and we think that a statement of claim which demands interest, but shews no legal liability to pay it, is upon general principles defective. Again, all the forms claiming interest mention the specific sum claimed. We think this is as it should be. It is important that a man, who is to be proceeded against summarily for judgment, should know exactly how much he has to pay if he wishes to stay the action, and should not be called upon to take the risks of calculation. A claim for interest which is not thus specific departs in a material and important respect from the forms to which a special indorsement is required to conform."

In *Wilks* v. *Wood*, in the same volume at p. 687, Fry, L.J., says: "One of the objects of a special indorsement is that the sum may be an ascertained one, so that the defendant may know what amount he has to pay to stay further proceedings. To my mind, the obvious intention of the Legislature would be defeated if we held that such a claim for interest as that in the present case, where a claim for an unliquidated amount is added to a liquidated demand could be treated as a special indorsement.

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"I quite agree with the decision that was arrived at by the Judges of the Queen's Bench Division in *Sheba Gold Mining Co.* v. *Trubshawe* and with the grounds given for that judgment." And Lopes, L.J., says at p. 688: "The object plainly is that the defendant may be able to look to the writ and see without any assistance what sum he must pay in order to stay the action," or as the report in *Wilks* v. *Wood* (1892), 61 L.J., Q.B. at p. 518 has it: "(Rule 7, of Order III.) therefore shews how important it is that the exact sum claimed should be clearly made known to the defendant, so that he may be able to look at the writ, and without any assistance see what sum he has to pay in order to stay the action," and I need not add that there are many people who can read writs but who cannot compute interest.

In both these cases there was a claim for interest from the date of the writ until payment or judgment, and in the first case, the rate was mentioned, so that we have I think the clear decision of five Judges approved by the Court of Appeal, that a claim for interest at a specific rate from the date of the writ until payment or judgment, is not a claim for a specific sum and therefore not susceptible of special indorsement.

Then came *London and Universal Bank* v. *Earl of Clancarty* (1892), 1 Q.B. 689, and *Lawrence & Sons* v. *Willcocks, ib.*, p. 696, which decided that in the case of specially indorsed writs to recover on a negotiable instrument under the Bills of Exchange Act a claim for interest until payment is a liquidated demand within the meaning of the rule by reason of section 57 of the Act. Denman, J., says at p. 693, "The principle laid down in *Sheba Gold Mining Co.* v. *Trubshawe* and its companion case, is applicable to a different state of things to that contemplated by subsection 3, which may be so construed and worked as to consider interest up to payment or judgment as being in the nature of liquidated damages," and Smith, J., says at p. 695, "interest down to judgment is recovered as liquidated damages, and all the Judges in the last mentioned case, say that the decision is based wholly on section 57 of the Act."

HUNTER, C.J.

A glance at the section shews that a claim for accruing interest is the only claim included which is not for a specific ascertained

sum, the others being for the amount of note and the expenses of noting and protest.

The only reason for the existence of the stipulation about liquidated damages was to bring a claim for accruing interest until an unascertained date within the rule, as it cannot be reasonably contended that if the Act allowed the interest only until the date of the writ, there would be any necessity for the stipulation, as this would be liquidated damages without any such stipulation. All then that these cases decide is this, that such a claim is permissible in the case of negotiable instruments by reason of the stipulation about liquidated damages.

We have then, *Sheba Gold Mining Co.* v. *Trubshawe* and *Wilks* v. *Wood*, laying down the general rule that a claim to be a liquidated demand within the meaning of the rule, must be for a specific ascertained sum, and the last two cases deciding that section 57 of the Bills of Exchange Act created an exception to the rule.

Mr. *Cassidy* argued that the Interest Act and Amending Acts have the same potency as the Bills of Exchange Act, to bring a claim for interest until payment or judgment within the rule, but there is nothing in the Interest Acts enacting that such a claim shall be deemed to be liquidated damages as there is in the Bills of Exchange Act.

Some discussions about the nature of interest on judgments and claims therefor in specially indorsed writs are to be found in the cases of *Solmes* v. *Stafford* (1893-4), 16 P.R. 78, 264 and *Hollender* v. *Ffoulkes* (1894), *ib.*, 175 and in the latter case there was a claim for interest until judgment, but it is evident from the remarks of Street, J., that his mind was not directed to the exact point that we are now dealing with.

And generally, in regard to authorities, it has been said over and over again that a decision is valueless as a guide unless it discloses some principle. Jessel, M.R., says in *In re Hallett's Estate* (1880), 13 Ch. D. at p. 729, "we must remember that the law ascertained in the decision or judgment which guides a future Judge or another Judge in applying it, is simply the expression of principle, which is to be ascertained from the judgment." The same learned Judge says in *Talbot* v. *Frere* (1878), 9 Ch. D. at

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p. 574, "Then, the argument being exhausted—or for lack of argument—recourse is had to authority, and three cases have been cited. All I can say is, I do not understand them. It is no use my commenting on them, I cannot make out any principle on which they are decided, and I confess I do not understand them. As I have often said, I cannot follow an authority unless I understand its principle. If a case lays down a principle it is a guide to other Judges, but a mere decision where you cannot find out the principle, is of no use at all. The only use in citing an authority is as an illustration of some principle or rule of law, but where none is to be found and none to be extracted from the case cited, it is utterly useless for the purpose of a Judge, however desirous he may be of following it." And Parke, B., says in *Watson* v. *Pearson* (1848), 2 Ex. 581 at p. 594, "The only authority at variance with the view to be taken on this subject is that of *Hawker* v. *Hawker* (1820), 3 B. & Ald. 537. But in the facts of that case there were some peculiarities, and, no reasons being given for the certificate, we are unable to ascertain the principle on which the Court proceeded."

Now, the only principle bearing on this question that I have been able to collect from the decisions is the one laid down in *Sheba Gold Mining Co.* v. *Trubshawe*, which is, that there must be a specific sum claimed, and this principle is manifestly the one present throughout all the forms.

HUNTER, C.J. I think, having regard to the nature of the machinery, which it is the office of a special indorsement to set in motion, that we should cleave to the principle and not undermine it by creating exceptions unless unmistakably told by the Legislature to do so, as in the case of Bills of Exchange Act, and that we should accordingly hold that while a claim for interest accruing up to an unascertained date may possibly be a liquidated demand within the ordinary meaning of the phrase, it is not so, within the meaning of the phrase as used in Order III., r. 6.

In this view I find I am supported by Mr. Odgers in his work on Pleading, 4th edition, in which he says, at p. 50, "In the absence of any express enactment enabling him so to do, a plaintiff has no right to indorse his writ with any claim that has not at that moment arisen," and by the statement in the Yearly Practice for

1902, at p. 145, where it is said that the principle seems equivalent to saying that interest can only be claimed up to the date of the writ.

Mr. *Cassidy* sought refuge in the maxim *id certum est quod certum reddi potest*, but there is little confidence to be placed in a maxim which is in reality a contradiction of the logical truth that a thing cannot both be and not be, and to my mind there is a solid distinction between a thing which is ascertained and one which is ascertainable.

Another objection raised was that the indorsement does not shew how or under what Act the interest is payable. I think this objection is also fatal, especially when the enactment giving the interest is of local application and will content myself with quoting from the Yearly Practice, 1902, p. 143, "If interest is claimed the writ must shew that it is payable either under an agreement (express or implied) or as an amount fixed by statute: *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674; *Wilks* v. *Woods*, *ib.*, 683, C.A.; *Paxton* v. *Baird* (1893), 1 Q.B. 139; and this must be shewn by the writ itself, and it is not sufficient if it appears only in the affidavit required by Order XIV. (*Gold Ores Reduction Company* v. *Parr* (1892), 2 Q.B. 14.)"

Another was that there was to shew nothing when the costs were taxed, and therefore nothing to shew when the interest began to run on the costs. When the amount of the costs is stated to be $1,400.00 this is enough to shew that the objection is not a purely captious one. In any event, I think it also is well founded. But I think there are other objections which I may as well point out.

In the first place, when the Interest Acts are examined the interest is found to be given, not absolutely, but *si non* and it seems to me that where a thing is given *si non*, the *si non* is part of the gift and ought to be negatived in claiming the gift. This being so, after stating the claim for interest at the rate allowed by statute, and under the statute there ought to have been an allegation that "the said interest is calculated from the giving of the said judgment, it not being otherwise ordered by the said Court."

And this brings me to point out that only the date of judgment

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is alleged, and not when the judgment was "given," which is the time fixed by the Act from which the interest may run. It is obvious, without saying more, that the judgment may have been "given" on some other date, but I do not lay much stress on this, as perhaps we may assume that it was given on the day of its date. But there is the more formidable objection that there are not enough particulars stated so as to enable the defendants to know in the words of Cockburn, C.J., in *Walker* v. *Hicks* (1877), 3 Q.B.D. 8, whether they should pay or resist.

It is quite consistent with everything stated, that there may be a set-off or award on a counter-claim contained in the judgment, as there is no statement that any specified sum is due which, I may remark, is required to be stated in all the forms. The amount is here left to inference, and certainly I think that a special indorsement ought not to be so meagre as to omit to state

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plainly what amount or balance is due from the defendant.

It may be said that the defendants ought to know all this, but it may very easily be, that no officer of the defendant Company who is cognizant of all the facts, resides in this jurisdiction, or it may be that he has left the Company, but without speculating further, I think the defendants are entitled to the positive statement.

I may add that this case vindicates the wisdom of the saying that the working of the special indorsement machinery ought to be carefully watched.

For these reasons I think the appeal should be allowed with costs.

IRVING, J.

IRVING, J., concurred with HUNTER, C.J.

MARTIN, J.

MARTIN, J.: By the statute of Canada, 52 Vict., Cap. 31, Sec. 2, 1889, the Act Respecting Interest, R.S.C. 1886, Cap. 127, is amended by providing that in the North-West Territories "every judgment debt shall bear interest at the rate of six per cent. per annum until the same is satisfied." By 61 Vict., Sec. 9, the Yukon Territory Act, the said provision is extended to the Yukon, but by 63-4 Vict., Cap. 29, Sec. 1, the rate of interest is reduced to five per cent.

In addition to the claim for interest on the judgment recovered

in the Yukon up to the date of the writ there is indorsed a further claim for "interest at the rate of five per cent. per annum on the said sum of $4,704.35, from the date of the writ herein until payment or judgment in this action."

It is contended for the defendant Company that interest, subject to one exception, can only be claimed up to the date of the writ: *Sheba Gold Mining Co.* v. *Trubshawe* (1892), 1 Q.B. 674. The exception mentioned occurs in a case decided less than a month afterwards in the same division, *London and Universal Bank* v. *Earl of Clancarty*, *Ib.*, 683; 61 L.J., Q.B. 225, affirming Mr. Baron Pollock, and distinguishing the *Sheba* case, and it is that in an action within section 57 of the Bills of Exchange Act interest till payment or judgment may be claimed as a good special indorsement, for the reason that said section provides that the measure of damages, which shall be deemed to be liquidated damages, shall be the amount of the bill, interest thereon from the maturity of the bill, the expenses of noting and, where necessary, the expense of protest.

The *Sheba* case, though not a decision of the Court of Appeal, was, from the importance of the questions involved, decided by a very strong bench of five Judges, and therefore carries much weight so far as the point actually decided is concerned, but not otherwise. In this relation, I think it desirable to cite two observations of the Lord Chancellor in the late very important case of *Quinn* v. *Leathem* (1901), A.C. 495, at p. 506:

"Every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other (observation) is that a case is only an authority for what it actually decides."

What then did the *Sheba* case (and *Ryley* v. *Master*, determined with it) actually decide? Mr. Justice A. L. Smith, in *London and Universal Bank* v. *Earl of Clancarty* answers that question by saying: "In my opinion they apply to this, and to this only—namely, that where the plaintiff has to resort to the statute 3 & 4 Will. IV., Cap. 42, Sec. 28, to get interest in the

FULL COURT. nature of damages, he cannot claim it on a specially indorsed writ." I quote from the Law Journal report at p. 227.

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Twelve days after *London* v. *Clancarty* the *Sheba* case was affirmed by the Court of Appeal in *Wilks* v. *Wood* (1892), 1 Q. B. 684, and a few days later, on April 4th, the same Court in *Lawrence & Sons* v. *Willcocks*, *Ib.*, 696, on appeal from the Divisional Court (composed of Denman and A. L. Smith, JJ.), affirmed its ruling, followed the decision in *London* v. *Clancarty*, and unanimously declared that the question there whether the demand was a liquidated demand in money turned solely on the 57th section of the Bills of Exchange Act, and if it were such a liquidated demand, then the case was within Order III., r. 6, as being a special indorsement. And it was unanimously decided, affirming the two Judges below, that it was a liquidated demand because the liquidated damages given by that section are included in that term.

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Since that case "the law has been completely settled" on the point, as Mr. Justice A. L. Smith said the following month in the Queen's Bench Division in *Gold Ores Reduction Company* v. *Parr* (1892), 2 Q.B. 14, where he goes on to state "it is established beyond doubt that where interest is claimed by a specially indorsed writ, it must either be payable by agreement, or fixed by statute." I may mention that in this case the two Judges composing the Court both treat certain observations in the judgment in the *Sheba* case relating to looking at the affidavits as *obiter dicta*.

MARTIN, J.

It requires a close perusal of the above cited cases to ascertain the real point decided in each, because undoubtedly there are loose expressions in some of them which are apt to mislead. But there is no mistaking the principle finally laid down by the Court of Appeal in *Lawrence & Sons* v. *Willcocks*, and if there is anything in the other cases not in harmony with that principle, *Lawrence & Sons* v. *Willcocks* as the latest binding authority, must prevail.

Applying the foregoing to the case at bar, there is here, as there was in the case last mentioned, a statute fixing interest as a liquidated demand, which is the reduction of it to a debt, and furthermore, the enactment relied on here is in two importan

particulars stronger in a plaintiff's favour than section 57 of the English Bills of Exchange Act would be, because (1.) our act definitely fixes the rate at five per cent. while no rate is mentioned in section 57, and (2.) our act is absolute in its terms and gives interest unconditionally, whereas sub-section 3 of section 57 provides that "such interest may, if justice require it, be withheld wholly or in part, etc." But notwithstanding the elements of uncertainty as to the recovery of interest thus apparently introduced, the English Courts, as has been seen, have held that as the statute declares that all those things therein mentioned were "to be deemed to be liquidated damages," they were equivalent to a liquidated demand, and so were the subject of a special indorsement.

It cannot, it seems to me, be doubted that if the statute now before us were before the English Courts the same construction would be placed upon it as upon said section 57, so far as the present point is concerned, and we should do the same here.

Such being the case, I proceed to consider the contention that the indorsement should have contained an allegation that interest was claimed under the said Act Respecting Interest and amendments.

It is certain from the cases above cited, and the further case of *Dando* v. *Boden* (1893), 1 Q.B. 318, that in claiming interest or expense of noting or protest, under said section 57 of the Bills of Exchange Act, it is not necessary to mention that statute. Why, then, should it be necessary to do so under this one? In *McVicar* v. *McLaughlin* (1895), 16 P.R. 450, the Court of Appeal, and in *Clarkson* v. *Dwan* (1896), 17 P.R. 206, the Divisional Court in Ontario have held that a claim for "interest" simply, when interest is payable by statute, is sufficient and that it is not even necessary to specify the rate because that must be assumed to be the rate fixed by law; in the case at bar the proper rate is set out—five per cent.

As a matter of pleading, there is no necessity for the plaintiff to plead the statute on which he founds his claim, and by section 7, sub-section 54 of the Interpretation Act, this Court must judicially notice all public acts without their being specially pleaded. The Act Respecting Interest is a public act dealing

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with a matter which is exclusively within federal control; two sections of it were declared to apply to the Provinces of Ontario and Quebec, five others to Nova Scotia, five others to New Brunswick, three others to this Province, two others to Prince Edward Island, and by the said amendments of 1889, three others to the North-West Territories, since extended to the Yukon. Under such circumstances it cannot be binding on the public piece-meal—it must operate as a whole, or not at all. Though the judgment sued on is a foreign judgment so far as this Province and Court are concerned, nevertheless the statute which declares the rights in question is a federal one, and the case differs essentially from an action which might be brought on a foreign judgment recovered in a Province which had the right to pass an act respecting interest; and since under our constitution such a thing is impossible, the present situation is therefore exceptional.

The result is, consequently, that in my opinion it is unnecessary to set out the statute in the indorsement.

I wish to add that I have not overlooked the case of *British Columbia Land and Investment Co.* v. *Thain* (1895), 4 B.C. 321, decided by Mr. Justice DRAKE, nor the prior case of *McClary Manufacturing Co.* v. *Corbett* (1892), 2 B.C. 212, decided by the Divisional Court, but they are quite as distinguishable from this case as *London* v. *Clancarty* and *Lawrence & Sons* v. *Willcocks* are distinguishable from the *Sheba* case.

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A further objection was taken that interest is also claimed on the costs as taxed, though the time when such interest began to run is not stated, nor even the date of taxation. According to the indorsement "the said judgment which is dated the 11th day of December, 1901, is for $3,304.35, and costs to be taxed, and the said costs were duly taxed and allowed at $1,400.00." Though at first this certainly seems an indefinite allegation, yet sections 3 and 4 of the said Act of 1889, provide that interest on "every judgment debt," unless otherwise ordered by the Court, "be calculated from the time of the rendering of the verdict or of giving the judgment as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment shall have been suspended by any proceedings either in the same Court or in appeal." And it must, I think,

in the absence of anything to point to another conclusion, be presumed that the date mentioned is that on which judgment was given, and though the costs were not then taxed, yet they had been incurred, and when the exact amount thereof had been ascertained they would be added to and form part of the judgment debt and bear interest in the same manner.

Though a critical examination of the indorsement may suggest other questions for discussion, yet since the foregoing are the only points argued below, or before us, I do not think it advisable to consider them.

The appeal should be dismissed with costs.

Appeal allowed, Martin, J., dissenting.

OKELL MORRIS & CO. v. DICKSON *ET AL.*

Assignment of debt—Notice—Cause of action.

Where a debt has been assigned by way of mortgage, but no notice in writing of the assignment has been given to the debtor, the cause of action still remains in assignor.

ACTION in the County Court for a debt which had been assigned by way of mortgage to the Bank of Montreal. The amount claimed was for the price of goods sold and delivered.

Fell, for defendant, contended that the plaintiff Company had no cause of action.

Harold Robertson, for plaintiff.

10th June, 1902.

HUNTER, C.J.: This is an action by bankrupt assignors for a debt assigned by them to the Bank of Montreal by the usual all-enveloping mortgage. The mortgage assigns the debt *inter alia*

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to the Bank with the common proviso for redemption, and is therefore an absolute assignment within the meaning of sub-section 17 of section 16 of the Supreme Court Act, R.S.B.C. 1897, Cap. 56: *Tancred* v. *Delagoa Bay and East Africa Railway Co.* (1889), 23 Q.B.D. 239; but no notice in writing of the assignment has been given by the Bank to the defendants. Mr. *Fell* objects that the assignors have no cause of action on the ground that it became vested in the Bank by virtue of the mortgage. As no notice has been given, the case is obviously without the purview of the Act, and is therefore governed by the law as it stands unaffected by the Act. I think there is no doubt that the cause of action *quoad* the defendant is still vested in the assignors, for until the notice is given the assignee would have to make the assignors parties to the proceedings: *Walker* v. *Bradford Old Bank* (1884), 12 Q.B.D. 511 at p. 517; *Hudson* v. *Fernyhough* (1890), 61 L.T.N.S. 722; and of course there would be no object in this if the cause of action was completely vested in the assignee. The defendants are not damnified as the assignee cannot sue without bringing in the assignors until after the notice is given, and all equities against the assignors arising up to the receipt of the notice are available against the assignee. The objection is overruled.

IN RE OKELL & MORRIS FRUIT PRESERVING COMPANY, LIMITED.

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RE OKELL & MORRIS CO.

Winding up—Right of creditor to ex debito justitiae—No available assets—Examination of officers—R.S.C. 1886, Cap. 129.

The Court has a discretion to grant or withhold a winding-up order under section 9 of R. S. Canada, 1886, Cap. 129.

Re Maple Leaf Dairy Co. (1901), 2 O.L.R. 590, followed.

A company will not be compulsorily wound up at the instance of unsecured creditors where it is shewn that nothing can be gained by a winding up, as for example, where there would not be any assets to pay liquidation expenses.

On the hearing of a winding-up petition which was dismissed, the petitioner did not avail himself of an opportunity to examine the officers of the Company:—

Held, on appeal, that it was too late then to grant an inquiry.

APPEAL from the order of HUNTER, C.J., dismissing a winding-up petition presented pursuant to the provisions of the Winding-Up Act, Cap. 129, R.S.C. 1886, and amending Acts.

The petition which was presented by Arthur Robinson, of Duncan's, a fruit grower, was filed on 25th March, 1902, and alleged that the Company was duly incorporated under the Companies Act, 1890, and that after its incorporation carried on business until January, 1902, and it incurred an indebtedness amounting to about $73,000.00 and was insolvent; that in March, 1898, the Company made a bill of sale by way of mortgage to Turner, Beeton & Co., to secure them against liability on promissory notes of the Company to the amount of about $19,138.58 alleged to have been indorsed for the accommodation of the Company by Turner, Beeton & Co., the mortgage covering practically all personal property of the Company, including the book debts; the said bill of sale was assigned to the Bank of Montreal, and on or about 8th January, 1902, the Bank took possession and were carrying on the business at the time of the presentation of the petition; on 7th March the peti-

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tioner recovered a judgment against the Company in the Supreme Court of British Columbia for $781.91, and $242.69 taxed costs, and on 13th March a writ of execution against the goods and chattels of the Company was issued and placed in the hands of the Sheriff and remained unpaid and unsatisfied; other creditors of the Company, amongst them being Turner, Beeton & Co., had recovered judgments against the Company and executions against its goods remained unpaid and unsatisfied, the amount called for by Turner, Beeton & Co's execution being $47,004.02, and that other actions were being threatened by other creditors. The affidavit of the Deputy Sheriff of Victoria shewed that on or about the 5th of March, 1902, acting under Turner, Beeton & Co's execution he had seized certain goods and chattels of the Company at its factory, and that the execution still remained unsatisfied.

The winding up was opposed by the Company, the Bank of Montreal and Turner, Beeton & Co. The affidavit of Wm. H. Price, the manager of the Company, alleged that the sole assets of the Company consisted of the land, buildings and machinery where the Company carried on its business, and the stock-in-trade and fixtures upon the said premises, and certain book debts, and that the land, machinery and buildings were subject to a mortgage given in 1894 to Joan Olive Dunsmuir, to secure the sum of $8,000.00 and interest, and that there was now due on the mortgage $9,680.00 for principal and interest; that the lands, buildings and machinery could not be sold for a sum exceeding the amount due on the mortgage; that the remaining assets of the Company were subject to a bill of sale already mentioned and were not more than sufficient to satisfy the amount due under it; the shares of the Company which had been subscribed for had been fully paid up; that there was no person who could be made a contributory of the Company in the event of a winding-up order being made; that in the event of a winding-up order being made there would not be any available assets for the payment of the expenses of the liquidation or for the payment of any dividends to the unsecured creditors of the Company, and that the debt of the petitioner was incurred since

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May, 1901, after the registration of both mortgages before referred to.

The affidavit of J. J. Shallcross stated that he was in possession on behalf of the Bank of Montreal, the mortgagees of the goods, chattels and choses in action mentioned in the petition and which when sold would be insufficient to satisfy the claim of the said Bank of Montreal, which amounted to the sum of $14,250.00; and that he had examined the books of the Company to ascertain what amount of the capital stock of the Company had been issued and what amount thereof had been paid up, and had found that 2,727 shares of the capital stock of the Company had been issued at their par value of $10.00, and that each of the said shares was fully paid up.

The affidavit of Thomas Allice stated that the value of the said stock-in-trade, goods, chattels and book debts was less than $14,000.00.

The petition came on for hearing before HUNTER, C.J., on the 8th day of April, and after argument it was adjourned at the request of the petitioner for the purpose of allowing the petitioner to examine the past and present officers of the Company, and the petitioner not having availed himself of the opportunity to examine the said officers of the said Company, the petition came on again for hearing on the 10th day of April, when leave was again given to the petitioner to examine the past and present officers of the Company, which leave the petitioner did not avail himself of, and then after further argument, His Lordship dismissed the petition without costs.

Statement.

The petitioner appealed to the Full Court on the grounds, that the insolvency of the Company and the petitioner's claim, which is for an amount in excess of $200.00, having been proved and admitted and the Company not having paid the petitioner the amount of his claim, the petitioner was entitled to a winding-up order *ex debito justitiae;* that the Chief Justice erred in holding that the petitioner was not entitled to a winding-up order for the purpose of attacking the chattel mortgage given by the said Company to Turner, Beeton & Co., and assigned to the Bank of Montreal; that under the Winding-Up Act the grounds for attacking and setting aside a chattel mortgage given by a company

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are different from those which can be taken advantage of in any other mode of procedure and the petitioner is entitled to the full benefit of the Winding-Up Act to enforce payment of his claim against the Company; and that the Chief Justice erred in accepting the affidavits of William Henry Price and John James Shallcross filed as any evidence or any sufficient evidence that in the event of the winding up of the said Company there would be no contributories.

The appeal was argued at Victoria on 25th and 26th June, 1902, before WALKEM, DRAKE and MARTIN, JJ.

Peters, K.C., for appellant: I refrained from cross-examination as it is not the proper course. Under our statute, where insolvency is clearly shewn, we have an absolute right for a winding up. We want to attack the chattel mortgage under section 71 of the Act. He cited Masten's Company Law, 582, 586, 588, 595, and cases there cited; *Re William Lamb Manufacturing Co. of Ottawa* (1900), 32 Ont. 243; *The Wakefield Rattan Co.* v. *The Hamilton Whip Co., Ltd.* (1893), 24 Ont. 107; *In re Krasnapolsky Restaurant and Winter Garden Co.* (1892), 3 Ch. 174; *Bowes* v. *Hope Life Insurance, &c., Co.* (1865), 11 H.L. Cas. 403; *Re Isle of Wight Ferry Co.* (1865), 2 H. & M. 597; *Re The International Commercial Co., Ltd.* (1897), 75 L.T.N.S. 639; *Re International Contract Co.* (1866), 14 L.T.N.S. 726; *In re J. H. Evans & Co.* (1892), W.N. 126; *In re Chapel House Colliery Co.* (1883), 24 Ch. D. 266; *Re The London Health Electrical Institute, Limited* (1897), 76 L.T.N.S. 98; *In re Florida Mining Co.* (1902), 9 B.C. 108. He distinguished *Re Maple Leaf Dairy Co.* (1902), 2 O.L.R. 590, as there there was an assignment for the benefit of creditors.

Argument.

Duff, K.C., for the Company and the Bank of Montreal: As to the conflicting decisions in Ontario, the judgment of Chancellor Boyd in *Re Maple Leaf Dairy Co., supra*, is a considered judgment and should be followed.

No good could result here from a winding up and so it will not be ordered: see *In re The Company or Fraternity of Free Fishermen of Faversham* (1887), 36 Ch. D. 329; *In re Ilfracombe Permanent Mutual Benefit Building Society* (1901), 1 Ch. 111.

By failing to take advantage of the privilege of cross-examining it is too late now for the petitioner to ask for an inquiry: see *Re The London Health Electrical Institute, Limited, supra,* at p. 99.

Higgins, for Turner, Beeton & Co., said he adopted the argument of *Duff.*

Peters, in reply, cited *In re General Phosphate Corporation* (1893), W.N. 142.

WALKEM, J. [after stating the facts] said: We are all agreed that the appeal should be dismissed. In regard to the conflicting decisions in *Re William Lamb Manufacturing Co. of Ottawa* (1900), 32 Ont. 243 and *Re Maple Leaf Dairy Co.* (1901), 2 O. L.R. 590, I prefer to adopt the opinion of Chancellor Boyd. I see nothing to be gained by a winding-up order.

WALKEM, J.

DRAKE, J.: On an application for a winding up the petitioner must shew insolvency or some improper transactions and some benefit to be derived by the creditors. Here I see no reason to interfere with the discretion exercised by the Chief Justice in respect of the facts shewn. The petitioner has not shewn any benefit that can possibly be derived from a winding up, as there are no assets and the securities which are held by the mortgagees are not alleged to be open to question. At all events the petitioner has not taken advantage of the leave given to him to examine the officers of the Company in support of his petition.

I think *In re Chapel House Colliery Co.* (1883), 24 Ch. D. 259 and *In re The Company or Fraternity of Free Fishermen of Faversham* (1887), 36 Ch. D. 340, apply.

DRAKE, J.

MARTIN, J., agreed that the appeal should be dismissed.

MARTIN, J.

Appeal dismissed.

Note: See (1902), W.N. 77 where Buckley, J., held that a petition for a winding up order must state that the Company has some unpaid capital or assets employed in its business, 'stock-in-trade, book debts, or something on which the order can operate.

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MERCHANTS BANK v. HOUSTON AND WARD

MERCHANTS BANK OF HALIFAX v. HOUSTON AND WARD.

Costs—When allowed by Supreme Court of Canada—No power to stay taxation.

The Full Court allowed plaintiff's appeal. On appeal the Supreme Court of Canada allowed the appeal of the defendant Ward and ordered plaintiff to pay him the costs of that appeal, and also all costs in the Court below, except in so far as Ward was to be regarded as the representative of the mortgagor in an action to realize a mortgage security which costs were reserved until final decree:—

Held, reversing IRVING, J., who made an order staying the taxation of Ward's costs of appeal to the Full Court until final decree, that there was no jurisdiction to make the order staying taxation. The application should have been made to a Judge of the Supreme Court of Canada instead.

APPEAL from the order of IRVING, J.

At the trial of the action before MARTIN, J., the plaintiff's action was dismissed and the plaintiff appealed to the Full Court and the appeal was allowed. For full statement of facts see the report in 7 B.C. 465. The defendants appealed to the Supreme Court of Canada, and the appeal of the defendant Houston was dismissed and the appeal of the defendant Ward was allowed: see (1901), 31 S.C.R. 361.

The following are the operative clauses of the judgment of the Supreme Court of Canada:

Statement.

"This Court did order and adjudge that the said judgment of the Full Court of the Supreme Court of British Columbia should be and the same was affirmed, in so far as the appeal of the said Houston was concerned; and that said appeal of the said Houston should be, and the same was dismissed, with costs to be paid by the said appellant Houston to the said respondents.

"And this Court did further order and adjudge that the appeal of the said appellant Ward should be and the same was allowed, that the said judgment of the Full Court of the Supreme Court of British Columbia as against him should be and the same was reversed and set aside and the action dismissed against him

except in so far as it is considered to be in the nature of a mortgage action for the purpose of enforcing a security.

"And this Court did further order and adjudge that the said respondents should and do pay to the said appellant Ward the costs incurred by the said appellant Ward in this appeal, and also all costs in the Court below, except (as regards the costs below) in so far as the said appellant Ward is to be regarded as the representative of the mortgagor in an action to realize a mortgage security, and as to those latter costs it is ordered and adjudged that they be reserved until the final decree, to be disposed of by the Court below."

In pursuance of this judgment Ward's costs of appeal to the Full Court were taxed on 15th January, 1902, at $599.86 by the District Registrar at Vancouver, who issued a certificate or allocatur stating the amount. On an application by the plaintiff, IRVING, J., then made an order, the operative parts of which were as follows:

"It is ordered that the certificate or allocatur of the Registrar herein, stating the amount of the defendant Ward's costs in connection with the appeal to the Full Court of the Supreme Court of British Columbia, be set aside and discharged.

"And it is further ordered that all the proceedings in connection with the taxation of the defendant Ward's costs of proceedings in this Court, including the costs in connection with the appeal to the Full Court of the Supreme Court of British Columbia be stayed until the final settlement of the decree herein.

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"It is further ordered that the defendant Ward do pay to the plaintiff the costs of this application and of and incidental to the above taxation to be taxed."

The defendant Ward appealed from this order to the Full Court on the grounds *inter alia*, that the learned Judge had no jurisdiction to make the said order; the costs of the appeal to the Supreme Court of British Columbia could not contain any of that portion of the costs of the Supreme Court of British Columbia in connection with which the defendant Ward is to be regarded as the representative of the mortgagor in an action to realize a mortgage security; that the District Registrar at Van-

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couver in taxing said costs decided that the costs of the Full Court could not include such costs, and it is submitted that he was right in his decision; only those costs of the Supreme Court of British Columbia, in so far as the said Ward is to be regarded as the representative of the mortgagor in an action to realize a mortgage security, were reserved until the final decree.

The appeal was argued at Victoria, on 11th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Duff, K.C., for appellant.
Sir C. H. Tupper, K.C., for respondents.

Judgment.

Per curiam: The order of the Supreme Court of Canada is plain and gives Ward his costs unconditionally, with the exception of those specified. A Judge of this Court has no jurisdiction to stop the operation of the judgment of the Supreme Court of Canada, and any application for a stay of taxation should have been made to a Judge of that Court. The appeal is allowed with costs.

Appeal allowed.

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UNION BANK OF HALIFAX v. WURZBURG AND COMPANY, LIMITED.

Special indorsement—Note payable at particular place—Duly presented.

The statement of claim indorsed on the writ alleged that the note sued on was payable at a particular place named, and in the same paragraph that the note was duly presented and dishonoured:—

Held, a good special indorsement.

Cunard et al v. Symon-Kaye Syndicate (1894), 27 N.S. 340, distinguished.

Statement.

APPEAL from an order of IRVING, J., giving the plaintiffs leave to sign final judgment under Order XIV. The statement of claim indorsed on the writ was as follows:

"The plaintiffs' claim is against the defendants as makers of a promissory note for $1,250.00, dated at Vancouver, B.C., April 8th, 1901, payable four months after date to the order of M. L. Wurzburg & Company, at their office, Halifax, N.S., indorsed to the order of the said plaintiffs by the said M. L. Wurzburg & Company and held by the said plaintiffs in due course, which said note was duly presented for payment and was dishonoured.

"Particulars, etc. . . . . ."

The appeal was argued at Victoria, on 11th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Sir C. H. Tupper, K.C., for the appeal: The writ is not specially indorsed within Order III., r. 6. Presentment at the particular place where the note is payable should be alleged: *i.e.*, "duly presented there" would be sufficient, Bullen & Leake, 5th Ed., 156-7; Maclaren, 413, Sec. 86 of the Bills of Exchange Act; *Cunard et al* v. *Symon-Kaye Syndicate* (1894), 27 N.S. 340; *Croft* v. *Hamlin* (1893), 2 B.C. 333; *Clayton* v. *McDonald* (1893), 25 N.S. 446; *Pigeon* v. *Moore* (1890), 23 N.S. 246; *Regina* v. *Lewis* (1844), 1 Dowl. & L. 822 as to meaning of duly; *May* v. *Chidley* (1894), 1 Q.B. 451; *Fruhauf* v. *Grosvenor and Company* (1892), 61 L.J., Q.B. 717; *Spindler* v. *Grellett* (1847), 1 Ex. 384.

The practice in our own Courts is to construe all Order XIV proceedings strictly: see *Vancouver Agency* v. *Quigley* (1901), 8 B.C. 143; *Oppenheimer* v. *Oppenheimer*, *ib.*, 145; *B. C. Land and Investment Agency, Limited* v. *Cum Yow et al*, *ib.*, 2 and *Boyle* v. *Victoria Yukon Trading Co.*, *ib.*, 352. Argument.

Davis, K.C., for respondents: The idea of a special indorsement is to state facts as shortly and concisely as possible: *Satchwell* v. *Clarke* (1892), 66 L.T.N.S. 641. This is a question really of interpretation of English, and when the place where the note should be presented is mentioned, and in the same paragraph it is alleged the note was duly presented, it is sufficient.

[MARTIN, J., referred to Chitty's Forms, 1866, p. 86.]

In *Cunard et al* v. *Symon-Kaye Syndicate*, *supra*, no place of payment at all was alleged. He referred to Bullen & Leake, 141; Cunningham & Mattinson, 2nd Ed., 172-3.

He was stopped.

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June 11.
UNION BANK OF HALIFAX v. WURZBURG & Co.

Sir C. H. Tupper, in reply: As to the old forms given in the English practice books he referred to Byles on Bills of Exchange, 284, to the effect that it was formerly a point much disputed whether the presentment at a particular place in the case of a bill made payable at a particular place was necessary. It was decided in the House of Lords that in the case of a Bill of Exchange, it was necessary, in order to charge the acceptor. This decision was followed by 1 and 2 Geo. IV., Cap. 78, now repealed, by which it was enacted that an acceptance at a particular place was a general acceptance unless express to be payable at that place only. This statute did not extend to promissory notes. He relied particularly on the language of the Bills of Exchange Act, Canada, Sec. 86 and the case of *Cunard et al* v. *Symon-Kaye Syndicate, supra.*

Judgment.

Per curiam: The writ is specially indorsed. *Cunard et al* v. *Symon-Kaye Syndicate* (1894), 27 N.S. 340, is distinguishable as there no place of payment at all was alleged. In Chitty's Forms and the other practice books, as well as in the forms in the Appendix, "duly presented" is a standard expression, meaning presented at the time and place alleged. The appeal must be dismissed.

Appeal dismissed.

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1899
Jan. 20.
E. & N. RY. CO. v. NEW VANCOUVER COAL CO.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. NEW VANCOUVER COAL COMPANY.

Practice—Pleading—Embarrassing statement of defence—General allegation of defendants' title—Rule 210.

Statement of defence traversed allegations in the claim to the effect that plaintiffs were entitled to mine certain coal under the sea, without shewing the defendants' title in the defence, and further set up laches as an alternative defence:—

Held, that the defendants were bound to set forth their title in their statement of defence.

Decision of IRVING, J., reported in 6 B.C. 306, reversed.

FULL COURT

1899

Jan. 20.

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

APPEAL from order of IRVING, J., reported in 6 B.C. 306, refusing to strike out as embarrassing, paragraphs 6 and 7 of the statement of defence, which were:

(6.) "The defendants further say that the plaintiffs neither own, nor are they entitled to mine for, any coal under the sea, either opposite the lands known as Newcastle Townsite as alleged or elsewhere, at or near the City of Nanaimo, and the defendants further say that all coals heretofore mined by them or now being mined by them were and are the property of the defendants and not the property of the plaintiffs.

(7.) "The defendants further say that if the plaintiffs ever had any right to the coal in question in this action (which the defendants deny), that the plaintiffs ought not to be allowed to assert any claim thereto by reason of the plaintiffs' laches."

Statement.

The appeal was argued at Victoria, on 11th January, 1899, before MCCOLL, C.J., WALKEM and DRAKE, JJ.

Bodwell, and *Luxton*, for appellants.

Helmcken, Q.C., and *Hunter*, for respondents.

Cur. adv. vult.

20th January, 1899.

MCCOLL, C.J.

MCCOLL, C.J.: This is an action brought (1.) to establish the plaintiffs' title to coal in a certain locality; (2.) for an account of the coal taken thence; (3.) an inquiry as to other damages caused by the taking; (4.) payment; and (5.) an injunction.

The defendants, besides denying the allegations in the statement of claim, allege (par. 6): "And the defendants further say that all coals heretofore mined by them, or now being mined by them, were and are the property of the defendants, and not the property of the plaintiffs."

The plaintiffs applied to have this part of the defence struck out as embarrassing. The application was refused, and leave was given to amend. The plaintiffs appeal from the refusal.

Mr. *Hunter* urged that the action if brought in respect of coal

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in place is an action for the recovery of land, and if not so brought, that the statement of claim is bad in not asserting an exclusive right to the coal.

According to the rule laid down by Jessel, M.R., in *Gledhill* v. *Hunter* (1880), 14 Ch. D. 492, no action is an action for the recovery of land unless the plaintiffs ask for possession, which these plaintiffs do not.

The rule as to particulars being in general terms, I am unable to understand why the defendants, having chosen to claim property in themselves, should not give the particulars which the plaintiffs, if claiming title in the same way, would be ordered to give as of course according to the case of *Palmer* v. *Palmer* (1892), 1 Q.B. 319.

That a defendant will in a proper case be required to give particulars in similar circumstances is shewn by the case of *Spedding* v. *Fitzpatrick* (1888), 38 Ch. D. 410. As remarked by Cotton, L.J., in that case, "The old system of pleading at common law was to conceal as much as possible what was going to be proved at the trial, but under the present system it is our duty to see that a party so states his case that his opponent will not be taken by surprise."

McCOLL, C.J.

If the defendants are not content with traversing, but think it material to plead title in themselves, it is surely necessary that the plaintiffs should be informed in what way (without the defendants' evidence being disclosed) the claim is made.

I think that the defendants should give reasonable particulars, or in default, that the allegation in question ought to be struck out.

WALKEM and DRAKE, JJ., concurred in allowing the appeal.

Appeal allowed with costs;
liberty to defendants to amend.

FRY *ET AL* v. BOTSFORD AND MACQUILLAN.

FULL COURT

1902

June 28.

FRY
v.
BOTSFORD

Costs—Abandoned Appeals—Practice.

The production of the notice of the abandonment of an appeal will be sufficient authority for the taxing officer to tax the respondent's costs of the appeal and hereafter it will not be necessary to apply for an order for costs.

MOTIONS to the Full Court for the costs of an abandoned appeal. On 20th May, 1902, notice of appeal by plaintiffs from an order made by IRVING, J., on 12th May, 1902, was served. On 3rd June, the solicitors for the plaintiffs wrote to the solicitors for each of the defendants abandoning the appeal. Defendants' solicitors then demanded payment of the costs of the appeal, but no agreement was reached as to the amounts, the sums offered being refused. The defendants now moved the Full Court for an order dismissing the plaintiffs' appeal, and that they do pay the defendants the costs of the appeal. Statement.

The motion came on at Victoria, on 28th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Duncan, for defendant MacQuillan, cited *Griffin* v. *Allen* (1879), 11 Ch. D. 913.

Griffin, for defendant Botsford.

Joseph Martin, K.C., for plaintiffs.

Per curiam: This Court will not decide a question as to the amount of costs that have been incurred—that is for the taxing officer. If necessary to lay down a rule for future guidance, the practice will be that on one party giving an unequivocal notice of abandonment of appeal the production of that notice will be sufficient authority for the taxing officer to tax. Judgment.

Motions dismissed without costs.

FULL COURT 1902 June 12.

OPPENHEIMER *ET AL* v. SPERLING *ET AL* (TWO SUITS.)

Practice—Writ of summons—Action against foreign firm.

OPPENHEIMER v. SPERLING

Sperling, Garbutt, and Horne-Payne, were residents of England and members of the firm of Sperling & Co., which firm carried on business in England only. Plaintiffs issued two writs (neither of which was for service out of the jurisdiction) in respect of the same cause of action, one being addressed against the firm and also against Sperling, Garbutt, and Horne-Payne individually and the other against the three individuals only. The writs were served on Horne-Payne while on a visit to British Columbia and he entered conditional appearances and applied to have both writs set aside and (in the alternative) as to the second action that it be dismissed as vexatious:—

Held, by the Full Court that (1.) the name of the firm was wrongly inserted and should be struck out of the first writ.

(2.) That the plaintiffs should elect as to which action they would proceed with.

Before the hearing of the appeal the respondents gave notice that they were content that the name of Sperling & Co. should be struck out of the writ:—

Held, that the appellants were entitled to the costs of the appeal up to the time of the service of the notice, and the respondents to the costs subsequent.

SUMMONSES to set aside writs. The plaintiffs were the same in two actions, each brought in respect of the same cause of action. The defendants in the action first dealt with, the writ in which was issued 24th August, 1901, were H. R. Sperling, R. W. Garbutt, R. M. Horne-Payne and Sperling & Co.

Statement.

Sperling, Garbutt, and Horne-Payne, were residents of and domiciled in England and were members of the firm of Sperling & Co., which firm carried on business in London, England, and there only. The defendant, Horne-Payne, while on a trip to British Columbia for his health, was served with a copy of the writ. He entered an appearance under protest, and applied on summons to set aside the writ and the service thereof on him.

In the second action, the writ in which was issued 9th September, 1901, the defendants were the same except that Sperling

& Co. were omitted. The defendant, Horne-Payne applied on summons to set aside the writ, or in the alternative, that the action be dismissed as being frivolous and vexatious.

The summonses were argued together before IRVING, J., on 2nd December, 1901.

A. E. McPhillips, K.C., for the summonses.
Wilson, K.C., contra.

(First action.)

IRVING, J.: The plaintiffs issued this writ against a firm suing it in the firm name, and against three individuals who are members of that firm, suing them in their individual names, in respect of a cause of action not within Order XI.

The firm is an English firm, not carrying on business in British Columbia, and not having any place of business in British Columbia. The partners are all resident and domiciled in England.

The writ was served in British Columbia on Mr. Horne-Payne, one of the individuals named as a defendant, who was casually in British Columbia. Mr. Horne-Payne now applies under Order XII., r. 19, to set aside the writ on the following grounds:

(1.) The firm of Sperling & Co., being a foreign firm, the rules of procedure as applicable to partnerships cannot be used against it.

(2.) That the writ is irregularly issued and could not be issued in the firm name.

IRVING, J.

(3.) That the service upon the defendant, Robert Montgomery Horne-Payne, was irregular; foreign partners cannot be served with a writ by serving one of them who is temporarily in British Columbia.

(4.) That the writ is irregular, even against the defendant, Robert Montgomery Horne-Payne, served in British Columbia, because of no leave to serve his partners abroad.

By Order IX., r. 6, a general provision is made for what I may call, for want of a better expression, the substitutional service upon the partnership, but that rule has no application to foreign firms. Any judgment signed against a foreign firm upon a writ so served, would not be valid.

For service on a foreign firm, without the jurisdiction (substi-

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tutional or otherwise), leave must be obtained under Order XI. Neither Order IX., r. 6, nor Order XI., can be invoked in this case. That being so, the plaintiff must fall back on the old practice which remains as to individual members, the same as it was before the Judicature Rules—you insert the names of the partners whom it is desired to sue, and such writ so framed may be served on any of the partners who are found within the jurisdiction: *per* Bowen, L.J., in *Western National Bank of New York* v. *Perez, Triana & Co.* (1891), 1 Q.B. 304 at p. 316.

The service of the writ will bind him individually and the action will proceed against him exactly as it would proceed against any person resident in this Province—but as Order IX., r. 6 is not applicable to foreign firms, it will not bind the foreign firm, nor will the individual so served have any status to represent that foreign firm unless he causes an appearance to be entered for it.

It was said in argument that the addition of the name of the foreign firm as a party defendant made the writ bad—and reliance was placed upon the language used by Lord Esher in *Heinemann & Co.* v. *Hale & Co.* (1891), 2 Q.B. 83 at p. 90. The Master of the Rolls was there speaking of a writ issued against a firm in the firm name, but apart from that, as Mr. Horne-Payne was not served as a partner under Order IX., r. 6 nor entered an appearance for the firm, I do not see how he can raise the question. The summons must be dismissed with costs.

IRVING, J.

(Second action.)

The summons is connected with the one just dealt with. Mr. Horne-Payne applies to set aside the writ in this action on the following grounds:

(1.) That in the said writ of summons the address of all the defendants is stated as being at places in England, and out of the jurisdiction of this honourable Court, and the leave of this honourable Court has not been obtained to issue the said writ.

(2.) The said writ is not in the form prescribed by r. 7 of the rules of this honourable Court for writs for service out of the jurisdiction.

(3.) That the plaintiff, Sol. Oppenheimer, does not and did

not at the time of the issue of the said writ reside at the Hotel Vancouver, Vancouver, B. C., as indorsed upon the said writ.

Or in the alternative for an order that this action may be dismissed out of this Court as being frivolous and vexatious upon the grounds that the plaintiffs have already commenced against the defendants and Sperling & Company, and there is now pending in this honourable Court an action wherein the subject-matter is the same as the subject-matter of this action.

Or in the alternative, for an order that the plaintiffs may be ordered to give security for the defendants' costs of this action upon the grounds hereinbefore stated.

The writ in this case is identical with the writ in the case just decided, except that the firm name has been omitted in the style of cause.

IRVING, J.

The third objection raised and the two alternatives cannot be raised by the defendant before appearance.

As to the first and second objections, the writ is in the form No. 1, Appendix A, and states the address of the defendants as being in England. This seems to me to be quite regular. The *nota bene* at the foot of the writ, Forms 3 and 4, Appendix A, must refer to the defendants being out of the jurisdiction at the time of service of the writ. Summons dismissed with costs.

The defendant, R. M. Horne-Payne, appealed from both orders, and the appeals were argued at Victoria, on 12th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

A. E. McPhillips, K.C., for appellant: An appearance was filed under protest, the procedure being based on *Mayer* v. *Claretie* (1890), 7 T.L.R. 40. The writ is improperly issued in not having the words "not for service out of jurisdiction" indorsed on it: see Annual Prac. 5, 6; *The W. A. Sholten* (1887), 13 P.D. 8; B.C. Rules, Appendix A, Nos. 3 and 4.

Argument.

Davis, K.C., for respondents: This irregularity is not mentioned in the notice of appeal, and is not now open.

McPhillips: The writ shews that Sperling & Co., are resident in London, England, and service on the firm cannot be effected by serving in British Columbia, a member of the firm: see *Russell* v. *Cambefort* (1889), 23 Q.B.D. 526.

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Davis: I admit that the rules as to service on a firm by serving a partner do not extend to foreign partnerships.

McPhillips: The writ was improperly issued and should be set aside; it cannot be addressed against the firm and it is irregular in being addressed against the partners, other than Horne-Payne, who are outside the jurisdiction. He cited *Western National Bank of New York* v. *Perez, Triana & Co.* (1891), 1 Q.B. 304; *Indigo Company* v. *Ogilvy* (1891), 2 Ch. 31; Annual Prac. 650, 652.

Davis: A writ may be issued in the ordinary form against an individual who is outside the jurisdiction, and be kept for service within the jurisdiction: see *Fry* v. *Moore* (1889), 23 Q.B. D. 395. In Horne-Payne's case the presumption would be that he was served in his individual capacity and not as a member of the firm, and the affidavit of service shews that such was the case. [*McPhillips:* The contents of the affidavit of service would not be known to the defendant.] On 14th April, 1902, the solicitor for the plaintiffs served on defendant's solicitor a notice that the plaintiffs were content that the name of Sperling & Co., should be struck out as defendants in the action.

Argument.

McPhillips: At the time of the service of the notice the brief had been delivered, and it was at a date later than that fixed for the sitting of the Full Court.

Per curiam: The name of Sperling & Co., should now be struck out of the writ as it never should have been inserted in it, but the names of the other defendants will remain. The appellant should have the costs of the appeal up to the service of the notice of the 14th of April, and the respondents should have the costs of the appeal subsequent to that date.

Judgment.

Order accordingly.

In the second appeal

A. E. McPhillips, K.C., for appellant, said this was a second action in respect of the same cause of action, the parties being the same except that Sperling & Co., were omitted. The action is vexatious as it is not open to plaintiffs in the same country and

Argument.

Note:—See *Lysaght L'd.* v. *Clark & Co.* (1891), 1 Q.B. 552.

in the same Court to bring two actions in respect of the same cause of action. The concurrent proceedings are *prima facie* vexatious.

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June 12.
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Davis, K.C., for respondents, said that in the Court below the appellant did not ask for a stay.

McPhillips: The Judge below gave us no relief. He cited *McHenry* v. *Lewis* (1882), 22 Ch. D. 397 and *The Christiansborg* (1885), 10 P.D. 141 at p. 146.

The Court dismissed the appeal, but called upon counsel for respondents to elect as to which action would be proceeded with, and counsel thereupon undertook to discontinue one of the actions. Judgment.

TROWBRIDGE v. McMILLAN.

FULL COURT
1902
June 12.
TROWBRIDGE v. McMILLAN

Practice—Adding parties—Litigation between agents—Principals added.

T. sued McM. as the drawer of a bill of exchange payable to T's order, with an alternative claim against McM. on a guarantee that the bill would be paid. T. was the manager of the P. C. Line, of Seattle, which owned the steamer Mexico, and the defendant was the agent of the D. & W. H. N. Co., and these two principals had through T. and McM. entered into a charter-party providing that the steamer Mexico should carry certain freight for which the D. & W. H. N. Co. agreed to pay. McM. alleged he gave the bill of exchange sued on along with the guarantee to T. as the balance of the freight moneys due under the charter-party and the Company set up a claim for demurrage and advised McM. not to pay.

On an application made by McM. and the Company an order was made adding the Company as a defendant and giving leave to counter-claim against the P. C. Line:—

Held, on appeal, that the order was properly made as the real parties in interest should be brought before the Court.

APPEAL from order of IRVING, J., made 13th March, 1902, adding the Dawson & White Horse Navigation Company as a party defendant in the action and granting liberty to the Statement.

FULL COURT
1902
June 12.

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v.
MCMILLAN

defendant McMillan and the added defendant Company to deliver a counter-claim and serve it upon the Pacific Clipper Line as a defendant to said counter-claim.

The plaintiff's action was against the defendant McMillan as the drawer of a bill of exchange for $2,501.75, dated at Vancouver 22nd August, 1901, drawn upon the Dawson & White Horse Navigation Company, payable at sight to the order of the plaintiff. The plaintiff claimed alternatively upon the following guarantee signed by defendant:

"Vancouver, B.C., Aug. 22nd, 1901.

"In consideration of one dollar in hand paid I hereby guarantee payment of draft made by me on Dawson & White Horse Navigation Company for ($2,501.75-100) Twenty-five hundred and one 75-100 Dollars at sight payable in Dawson."

The plaintiff was the manager of the Pacific Clipper Line, a Seattle Company which owned the steamer Mexico, and the defendant was the agent of the Dawson & White Horse Navigation Company, composed of three men living in Dawson and owning boats plying between Dawson, Y.T., and St. Michaels, Alaska. These two Companies through their respective manager (Trowbridge) and agent (McMillan) entered into a charter-party on 14th August, 1901, whereby it was agreed that the steamer Mexico should proceed from Seattle to Vancouver and from there take 1,000 tons of freight to St. Michaels, for which the Navigation Company agreed to pay the Clipper Line a freight rate of $10.00 per ton. The defendant McMillan in an affidavit swore that one payment ($10,000.00) on account of the charter-party was paid, and that he acting on behalf of the Navigation Company drew a bill of exchange (being the one sued on in the action) and gave it along with the guarantee to the plaintiff for the balance of the freight moneys due under the charter-party.

Statement.

The Navigation Company set up a claim for damages sustained on account of the unseaworthiness of the Mexico, and through which it was alleged there was great delay in the receipt of the goods at St. Michaels, and advised McMillan not to pay.

On the application of defendant McMillan and of the Navi-

gation Company the order was made adding the Navigation Company as a defendant and giving leave to counter-claim against the Pacific Clipper Line.

The plaintiff appealed, and the appeal was argued at Victoria on 11th and 12th June, 1902, before the Full Court, composed of HUNTER, C.J., DRAKE and MARTIN, JJ.

A. E. McPhillips, K.C., for appellant, said it was a case for a third party notice and not for adding parties. It is a cardinal rule that a defendant will not be added against whom the plaintiff has no cause of action.

The Court called on

Sir C. H. Tupper, K.C. (*Peters, K.C.*, with him), for respondent: Trowbridge and McMillan have no personal interest, but each represents his Company. The real parties are the Companies, between whom the real fight must eventually be. The Court has jurisdiction and will bring the real parties before it. He cited *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. 321, where parties were added so as to allow a counter-claim.

[DRAKE, J., referred to *McCheane* v. *Gyles* (1902), 86 L.T.N.S. 217]. *Bryce* v. *Jenkins: Ex parte Levy* (1901), 8 B.C. 32; *Bennetts & Co.* v. *McIlwraith & Co.* (1896), 2 Q.B. 264, and *Tagart & Co.* v. *Marcus & Co.* (1888), 36 W.R. 469.

McPhillips, in reply: *Motgomery* v. *Foy, Morgan & Co.* is a decision founded on the Merchants' Shipping Act, and is distinguishable, as here we have a new defendant with no claim against the plaintiff. All these new parties are outside the jurisdiction. There were two transactions (1.) as shewn by the charter-party for the carriage of 1,000 tons of freight at $10.00 per ton, making $10,000.00 which the respondent paid appellant, and (2.) a further transaction outside the charter-party and in respect to which the bill of exchange and guarantee were given. The charter-party is at an end, and we are entitled to a personal judgment against McMillan on proving the note. This is the case of an agent who has made himself personally liable, and we could sue either the principal or the agent—we have sued one and we cannot be forced to sue the other. He cited *Randall* v. *Robertson* (1896), 16 C.L.T. 203; *Faulds* v. *Faulds*

Argument.

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1902
June 12.

TROWBRIDGE v. McMILLAN

et al (1897), 17 P.R. 480; *In re Harrison* (1891), 2 Ch. 349; *Henley* v. *Reco Mining & Milling Co.* (1900), 7 B.C. 449; *Fraser River Mining Co.* v. *Gallagher* (1895), 5 B.C. 82, and *Wilson, Sons & Co.* v. *Balcarres Brook Steamship Co.* (1893), 1 Q.B. 422. By bringing in a party at each end of the action in this way the Court is going further than any other Court has ever gone as appears from the cases.

Judgment.

Per curiam: The appeal should be dismissed with costs. The real parties should be before the Court, but here only the shadows have been litigating. Under such circumstances the Court would be remiss if it did not permit the real parties in interest to be brought before it, and thereby avoid multiplicity of suits.

Appeal dismissed.

FULL COURT
1902
July 29.

RE SUCCESSION DUTY ACT

IN RE SUCCESSION DUTY ACT AND *IN RE* THE ESTATE OF SCOTT McDONALD.

Succession duty—Money on deposit in Bank by foreigner—Revenue—B. C. Stat. 1899, Cap. 68, Sec. 4.

Succession duty is payable upon money, on deposit in a Bank in this Province, belonging to a person domiciled in a foreign country at the time of his death.

APPEAL from judgment of WALKEM, J.

Statement.

In April, 1900, one Scott McDonald, being domiciled in the State of Washington, died at Spokane, leaving *inter alia* the sum of $375,759.73 on deposit in the Bank of Montreal, Nelson, which he had disposed of by will. The will was probated at Spokane, in May, 1900, and in British Columbia, in July, 1900. By his will McDonald directed his executors to collect and convert into money all debts due to him and to sell his real estate

and personal property not disposed of by the will and convert the same into money, and as the money was obtained, to pay it into the Savings Department of the Bank of Montreal, in Nelson, and let it remain there on interest until paid out in settlement of legacies. The Registrar of the County Court at Rossland fixed the sum of $12,412.98 as the amount of the succession duty payable. The executrix and executors and the legatees appealed and WALKEM, J., dismissed the appeal.

An appeal was then taken to the Full Court, and the appeal was argued at Victoria, on 12th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Bodwell, K.C., for appellants: The property of persons not domiciled in the Province is left to be interpreted by the general law, and a chose in action is property where its owner is domiciled. See *Railroad Company* v. *Pennsylvania* (1872), 15 Wallace, 300, judgment of Field, J., at pp. 319-20, which shews that in this case there was no property in the Province.

There is a wide distinction between probate duty and succession duty. Personal property in respect to succession duty depends on domicile: see *Thomson* v. *Advocate General* (1842), 12 Cl. & F. 1, at p. 28, Lord Campbell's judgment. He cited also *In re Badart's Trusts* (1870), L.R. 10 Eq. 288; *Wallace* v. *Attorney-General* (1865), 1 Chy. App. 1; *Attorney-General* v. *Campbell* (1872), L.R. 5 H.L. 524; *Lyall* v. *Lyall* (1872), 15 Eq. 1 at p. 9; *In re Goodman's Trusts* (1881), 18 Ch. D. 286; *Colquhoun* v. *Brooks* (1887), 19 Q.B.D. 400 at p. 408. If any other construction is given to the meaning of the Act, then the Act is *ultra vires*.

Argument.

In *Attorney-General of Ontario* v. *Newman* (1901), 1 O.L.R. 511, the point of *ultra vires* was not raised, and not decided, but there the Court in holding that succession duty was payable went upon the ground that it was administration, but there I submit the Court went fundamentally wrong, as that would change the whole substantive law. It is not a settled point whether an administrator could sue without administration, but the practice is to take out administration to protect creditors. He cited Dicey on the Conflict of Laws, 462; *Harper* v. *Butler*

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(1829), 2 Peters, 239 and *Wilkins* v. *Ellett* (1882), 108 U.S. 256.

The English Courts have held that a duty is imposed on property in the country, and our Act has not gone beyond the Imperial Act in respect to property except only as to such property as is situate within the Province. Debts owing to persons outside the Province are outside the section. The Legislature cannot bring inside the Province property which is outside, *MacLeod* v. *Attorney-General of New South Wales* (1891), A. C. 255. By the interpretation clause in the section the property of persons domiciled outside the Province is excluded except the classes of property specially mentioned.

MacNeill, K.C., on the same side: Money in a Bank is a chose in action. He cited *Harding* v. *Commissioners of Stamps for Queensland* (1898), A.C. 769.

Maclean, D. A.-G., for the Crown: It is only by a fiction that a chose in action is deemed to follow the domicile of its owner, and this fiction should not be invoked to defeat the provisions of the Succession Duty Act as this property is receiving the protection of our laws, and title to it can be conferred only by a grant of probate issued by our Courts. All the cases in point were carefully considered by Chancellor Boyd in *Attorney-General of Ontario* v. *Newman* (1900), 31 Ont. 340, affirmed on appeal, (1901), 1 O.L.R. 511. He referred especially to *Pullman's Palace Car Co.* v. *Pennsylvania* (1890), 141 U.S. at pp. 18, 36; *The People ex rel. Hoyt* v. *Commissioners of Taxes* (1861), 23 N.Y. at p. 228; *In the Will of Currie* (1899), 25 V.L.R. 224 and *In re Estate of James T. Swift* (1893), 137 N.Y. 77.

Argument.

The interpretation clause in our statute is not exhaustive.

Bodwell, in reply, cited *Ruckgaber* v. *Moore* (1900), 104 Fed. 947.

Cur. adv. vult.

29th July, 1902.

HUNTER, C.J.

HUNTER, C.J.: Scott McDonald, being domiciled in the State of Washington, died at Spokane, April 4th, 1900, leaving *inter alia*, the sum of $375,759.73 on deposit at the Bank of Montreal, Nelson, which he had disposed of by will. The will was duly probated at Spokane, May 26th, 1900, and in British Columbia, July 11th, 1900, and a contest has arisen between the executors

and the Crown on the question of the payment of succession duty, which was fixed by the Registrar at $12,412.98, and affirmed by Mr. Justice WALKEM on appeal.

In *Harding* v. *Commissioners of Stamps for Queensland* (1898), A C. 769, the Privy Council had occasion to consider an enactment declaring "succession duty chargeable in respect of all property within Queensland although the testator or intestate may not have had his domicil in Queensland." And the judgment says, "that enactment is calculated to meet such cases as the present one, and if retrospective would be conclusive in favour of the respondents," that is, the estate would have been liable to pay the duty. The property in question consisted of choses in action belonging to a testator domiciled out of Queensland at the time of death, and, concerning the property, the judgment says, "and as regards locality it is clear that the assets now in question have locality in Queensland, but that does not affect the beneficial interest to which succession duty is attached, and which devolves according to the law of the owner's domicil." The Privy Council decided that the enactment was not retrospective, and therefore that the estate was not liable, but it is clear from the judgment that under such an enactment it would have been liable had the death taken place after the statute came in force.

On a similar enactment in Ontario, the Courts there have held that choses in action belonging to a testator domiciled without the jurisdiction are liable to succession duty: *Attorney-General of Ontario* v. *Newman* (1900), 31 Ont. 340, affirmed by the Court of Appeal (1901), 1 O.L.R. 511; so that if there is nothing in the statute now to be considered which has the effect of modifying the otherwise sweeping character of the enactment imposing the duty, the decision must be in favour of the Crown.

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A difficulty, however, arises from the fact that an interpretation clause has been added to the enactment. The section (1899, Cap. 68, Sec. 4) imposes succession duty on "(*a.*) All property situate within this Province, and any interest therein or income therefrom, whether the deceased person owning or entitled thereto was domiciled in British Columbia at the time of his death, or was domiciled elsewhere, passing either by will or intestacy."

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So far identical with the Ontario enactment, and practically with that of Queensland. But the following is added: "The words 'all property situate within this Province' shall include all policies of insurance, wherever entered into, or wherever payable, and all mortgages upon property of any kind situate or partly situate in this Province, and all choses in action of whatever kind soever, wherever entered into or wherever payable, all shares, stocks, bonds, debentures and other securities for money, no matter where the corporation or other body issuing the same may be located, belonging to the estate of any person dying in this Province, who was at the time of his death domiciled in this Province." This clause is inartistically framed, as the words "choses in action" would obviously embrace most, if not all, of the classes of property specifically mentioned, but we must, if possible, assign some construction to the whole enactment as will avoid the necessity of holding any of it useless surplusage.

It is evident at the outset that the expression "who was at the time of his death domiciled in this Province" must be taken to qualify the whole of the interpretation clause, and not merely the words "shares, stocks, bonds," etc., because it could not have been intended to tax "all policies of insurance and all choses in action wherever entered into or wherever payable," belonging to persons domiciled without the jurisdiction, which would of course, be *ultra vires.*

HUNTER, C.J.

This being so, I was at first inclined to think that when the Legislature used the words "shall include," it meant that the section was to embrace certain classes of property belonging to persons domiciled in the Province which, in its opinion, would not otherwise necessarily fall within the ambit of the Act, and that therefore by implication it meant to exclude such property belonging to persons domiciled elsewhere. In this view the Act would render liable to duty practically all personal property belonging to persons domiciled within the Province, and all personal property, save such as is mentioned in the clause, belonging to persons domiciled without the jurisdiction. And I was disposed so to think the more readily, as even with this limited construction a large class of mobilia would have been brought within the Act which would not otherwise have been liable to

succession duty under the decisions: see *Thomson* v. *Advocate-General* (1842), 12 Cl. & F. 1; *Wallace* v. *Attorney-General* (1865), 1 Chy. App. 1; yet all portions of the enactment would be in this way assigned a substantial meaning, and no part of it would become mere surplusage; and then it would only have remained to examine whether there was anything in the other parts of the Act which would negative or support this view.

But on further reflection I think that the true view of the matter is that this interpretation clause was not intended to have any exclusive effect as regards any property belonging to persons domiciled without the Province, but was intended to have inclusive effect as regards certain mobilia belonging to persons domiciled within the Province.

For the purposes of taxation, personal property, or, to use a shorter expression, moveables, may be divided into four classes, namely:

(1.) Moveables locally situate in British Columbia, belonging to persons domiciled in British Columbia.

(2.) Moveables locally situate in British Columbia belonging to persons domiciled elsewhere.

(3.) Moveables locally situate elsewhere belonging to persons domiciled in British Columbia.

(4.) Moveables locally situate elsewhere belonging to persons domiciled elsewhere.

The first two classes are obviously made liable to the duty; the fourth could not be, as such legislation would be *brutum fulmen* and I think it is the office of the interpretation clause to remove any doubt as to the third; at all events, with regard to the different kinds of moveables specified in the clause. The Legislature could not possibly imagine that any one could entertain any doubt as to its intention in respect of class 1, nor as to class 2 in view of *Harding* v. *Commissioner of Stamps for Queensland*, *supra*, but it did evidently consider that there might be some doubt as to its intention with regard to class 3, as although such moveables have been heretofore subjected to legacy duty, as appears by *Attorney-General* v. *Napier* (1851), 6 Ex. 217; and *Wallace* v. *Attorney-General* (1865), 1 Chy. App. at p. 6, there

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were no decisions shewing that they had ever been made liable to succession duty.

Now, it cannot be said that a clause, whose office is to remove doubts, is superfluous, and this being so, I think it is more in consonance with the recognized rules of construction to hold that this clause was inserted to remove doubts as to a large class of property, and thereby give the expression "or was domiciled elsewhere" its full legitimate meaning, than to hold that the only real effect of the insertion of the clause was to honeycomb the phrase in question.

No doubt it may be said that as there are two possible constructions of the section, the rule commonly invoked in relation to taxing Acts, *viz.*: that the burden should clearly appear to be imposed, ought to be applied. But the rule does not go so far as to require us to adopt a construction which would have the effect of cutting down the plain language of the operative parts of the Act, when this can be fairly avoided by adopting, as commanded by the Interpretation Act, such construction "as will best ensure the attainment of the object of the Act according to its true meaning, intent and spirit."

HUNTER, C.J.

As the only question argued was as to whether the statute applied to the property in question, it is unnecessary to deal with the other points raised in the notice of appeal.

The judgment should be affirmed.

DRAKE, J.: The deceased died on the 4th of April, 1900, a resident and domiciled in the United States. At the time of his death he had on deposit with the Bank of Montreal, at Nelson, B.C., a large sum of money, over $300,000.00. His will was probated in the Superior Court of Spokane County, State of Washington, on 26th May, 1900, and a copy of the said will was sealed for probate in the Supreme Court of British Columbia, on the 11th of July, 1900.

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The Crown claims that this estate is liable to succession duty under section 2 of Cap. 68 of 1899, which enacts that all property situate within the Province, whether the deceased owner was domiciled in British Columbia at the time of his death, or was domiciled elsewhere shall be subject to succession duty; and

property was declared to include choses in action belonging to any person dying in this Province who was at the time of his death domiciled in this Province.

This latter part of the section apparently limits the property on which the duty is payable to a person dying in the Province, and domiciled there at his death.

The first part of the section, however, refers to property belonging to the deceased, whether he was domiciled in the Province or not. This section is apparently intended to include all property belonging to the deceased in the Province, and all property belonging to the deceased out of the Province, if he dies within or was domiciled in the Province. The latter part of the section is not a limitation of the first part, but an expansion of the general term used to property outside the Province.

The contention of the appellants is, first, that this sum is a debt due by the Bank to the deceased, and is therefore legally located at the place where the deceased was domiciled. It does not appear whether the money was on deposit or only a drawing account; in either case it would be a chose in action and, as such, recoverable by action at law in the Provincial Courts.

Mr. *Bodwell* cited in support of his contention that the personal assets of a foreigner were assets at the place of his domicil, and not assets in the Province, the case of *Wallace* v. *Attorney-General* (1872), 1 Chy. App. 1. That case was decided on the English Statute, and Lord Cranworth held that the English Statute did not authorize the imposition of succession duty in such a case, but said that Parliament had no doubt power to tax the succession of foreigners to personal property, but such an intention should not be presumed unless clearly stated. But a case very similar to this, *Attorney-General of Ontario* v. *Newman* (1901), 1 O.L.R. 511, was relied on by the Crown. The language of the Act under which that case was decided is in substance the same as ours; and in that case it was contended that the situs of the property was that of its owner a foreigner domiciled abroad; but the Court held that the Act of the Ontario Legislature covered that ground the same as ours does, and therefore the legal fiction of situs being that of the foreign owner could not be invoked. Dicey in his Conflict of Laws, p.

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318, says that property which consists of debts or choses in action must be held to be situate at the place where it can be effectually dealt with, or where the debtor or other person against whom a claim exists resides, or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable, or can be enforced. The money or chose in action in the present case is only recoverable in our Provincial Courts by the legal personal representative here, and not in the Court of the State where the deceased was domiciled. The rule in England is clear that moveable property wherever situate which a successor claims under a will, or under the intestacy of a deceased person dying domiciled out of the United Kingdom, is not liable to succession duty.

This leaves the only other question to be discussed, which is that it was *ultra vires* the Legislature to impose a duty on property which, by a fiction of law, is claimed to be existing at the foreign domicile of the deceased. The maxim *mobilia sequenter personam* is not of universal application, but is subject to legislative restriction. Debts and choses in action have to be

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recovered in the Provincial Courts, and by the legal personal representative of the deceased, who is responsible for probate as well as succession duty. It is perfectly true that there are and must be many cases when it may be difficult to ascertain the legal status of the legatees, or persons claiming as next of kin. Some of those cases were mentioned by Lord Cranworth in the above case of *Wallace* v. *Attorney-General*, but it will be sufficient to deal with these cases when they arise. I think that on the particular case we have to deal with, the Act is not *ultra vires*, though some other classes of cases covered by section 2 may in the future raise such questions. I am therefore of the opinion that the appeal should be dismissed.

MARTIN, J.: In construing the section under consideration, it is well to bear in mind the following rule of construction laid down by the Interpretation Act, Sec. 10, Sub-Sec. 49:

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"Every Act and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport be to direct the doing of any thing which the Legislature deems to be for the

public good, or to prevent or punish the doing of any thing which it deems contrary to the public good,—and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning, and spirit."

In Ontario there is a clause of the Succession Duty Act of that Province, R.S.O. (1897), Cap. 24, Sec. 4, Sub-Sec. 2, similar to ours, which has lately been discussed in the case of the *Attorney-General of Ontario* v. *Newman* (1900), 31 Ont. 340; (1901), 1 O.L.R. 511; and the six Judges who sat on the case above and below were unanimous in deciding it in favour of the contention of the Crown as herein advanced, and after perusing the judgments in that case, wherein the authorities are exhaustively examined, I am wholly in accord with the view there taken.

But it is suggested that we should come to a different conclusion in the case at bar because there are in our section certain additional words not in the corresponding Ontario section. The first part of our section, which is the same as that of Ontario, covers all cases of property passing by will or intestacy irrespective of domicile. If the additional words are to be taken as a definition of the expression "all properties situate within this Province," I am of the opinion that it is not an exhaustive one, but an enumeration of various classes of property as a matter of precaution. But on the other hand if they are to be construed as a definition of property belonging to an estate, they must be restricted to the estate of a "person dying in this Province who was, at the time of his death, domiciled in this Province," and in such case they do not apply to the estate now in question, because at the time of his death the testator was domiciled at Spokane, in the State of Washington, U. S. A.

Further, I take the precaution of mentioning the fact, so that it may not be deemed to have been overlooked, that the will itself contains some remarkable illustrations of the testator's wish to keep the bulk of his estate within the control of the laws of this country, and in support of the principle of construction first above cited it would appear to be in conformity to the spirit of a broad public policy to hold that anyone so seeking to derive

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benefit from the stability of the institutions of this country by putting his estate under its protection, should not be taken as having in contemplation an objection to contribute to the revenue of such country.

In my opinion the appeal should be dismissed with costs.

Appeal dismissed.

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PAULSON v. BEAMAN

PAULSON v. BEAMAN *ET AL.*

Mining law—Adverse claim—Affidavit and plan—Condition precedent to right to proceed—Plan must be based on actual survey.

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In an adverse action the plan to be filed pursuant to section 37 of the Mineral Act must be based on a survey made by a Provincial Land Surveyor.

The filing of the affidavit and plan pursuant to said section is a condition precedent to the plaintiff's right to proceed with his action.

Decision of MARTIN, J., reversed, HUNTER, C.J., dissenting.

APPEAL from order of MARTIN, J.

During the course of the trial of an adverse action under the Mineral Act, a question arose over the admissibility and validity of the affidavit and plan which the plaintiff had filed in intended compliance with section 37 of the Mineral Act. It appeared that the map or plan filed had been drawn by a Provincial Land Surveyor from measurements furnished him by the plaintiff. The jurat of the affidavit made by the plaintiff asserting his adverse claim did not set out the date on which the affidavit was sworn.

Statement

His Lordship held that the affidavit and plan were admissible and that the plan was *prima facie* in compliance with the Act, and he granted the plaintiff an adjournment for the purpose of having a survey made of his adverse claim. The defendants

appealed, and the appeal was argued at Vancouver on 17th April, 1902, before HUNTER, C.J., WALKEM and IRVING, JJ.

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Davis, K.C., for appellants: The plan must be based on an actual survey made by a Provincial Land Surveyor; and the affidavit was defective.

S. S. Taylor, K.C., for respondent: The filing of the affidavit and plan is not a condition precedent to the right of action—they do not go on the Court records, but are for the information of the Mining Recorder and the public.

WALKEM and IRVING, JJ., being of the opinion that the plan must be made by a Provincial Land Surveyor, from the notes of a Provincial Land Surveyor, and that the filing of such a plan was a condition precedent to the plaintiff's right to proceed with the action, the appeal was allowed with costs, and the action dismissed with costs, HUNTER, C.J., dissenting.

Subsequently the following judgments were handed down:

HUNTER, C.J.: In this case the trial was proceeding before Mr. Justice MARTIN, when difficulties arose over the question of the admissibility and validity of the affidavit and plan which the plaintiff had filed in purported compliance with the provisions of section 37 of the Mineral Act, which resulted in the learned Judge holding that the affidavit and plan were admissible and were *prima facie* in compliance with the Act, and the plaintiff was granted an adjournment for the purpose of having a survey made of his adverse claim, and it is this adjudication and order that are complained of.

HUNTER, C.J.

Mr. *Davis* takes the ground that on it being made to appear that the plan was not based upon the survey made by the Provincial Land Surveyor, but was made from notes supplied him by the plaintiff, the learned Judge should have thereupon dismissed the action, because, as he contends, the statute requires the plan to be based on a survey made by a Provincial Land Surveyor, and makes the filing of such affidavit and plan a *sine qua non* of the plaintiff's right to litigate his claim, and this is the view, as I understand it, that is accepted by the other members of the Court, with the result that the appeal is allowed and

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the action dismissed, the judgment of the Court to be the final judgment in the action.

Assuming that we are entitled to consider these matters, coming up the way they do in this appeal, as to which I feel very much doubt, but which I do not think it necessary to stop to discuss, I am of opinion that it is not correct to say either that the plan must be based on a survey by a Provincial Land Surveyor, or that the filing of the affidavit and plan is a *sine qua non* of the right to prosecute the action.

To deal with the last point first. The section as it stands on the statute book is section 37 of R.S.B.C. 1897, Cap. 135, as amended by 1898, Cap. 33, Sec. 9, and 1899, Cap. 45, Sec. 13, the latter amendment being immaterial for the present purposes.

The Revised Statute required the plaintiff to commence his action within the sixty days, to file the copy of the writ with the Mining Recorder within twenty days after the issue thereof, and to prosecute the action with reasonable diligence, and failure to so commence or prosecute, was to be deemed a waiver of his claim. It is manifest, I think, that the provision requiring the filing of a copy of the writ is not for any purpose connected with the litigation, but to inform the Mining Recorder and the public that the litigation is going on. So likewise at the termination of the litigation, the successful party may and

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generally does file with the Mining Recorder a certified copy of the judgment.

By the Amending Act of 1898, the information thus required to be given to the Mining Recorder and the public is supplemented by requiring the plaintiff to also file an affidavit setting forth the nature, boundaries and extent of his claim, together with a plan made and signed by a Provincial Land Surveyor, and obviously this is an improvement on the former Act, as a sworn statement respecting the *locus in quo*, accompanied by a surveyor's plan capable of that ocular inspection which always aids much in such matters, is required to be filed for the use of the Mining Recorder and the public.

It is clear, I think, from the wording of the section, that the filing of the copy of the writ and of the affidavit and plan all

stand on the same footing, and the juxtaposition of the requirements to my mind implies that they are all for the same purpose, and, as I have already said, it is plain that the filing of the copy of the writ cannot be required for the purposes of the litigation.

The statute, moreover, makes a failure to commence or prosecute the action in the required manner a waiver of the plaintiff's claim, that is, such failure automatically puts an end to the adverse claim in favour of the defendant, but not so in the case of a failure to file the copy of the writ or the affidavit and plan.

Again, if the proceedings other than the filing of the copy of the writ are required for the purposes of the litigation, why is it that they are not required to be filed in Court or delivered to the opposite party? It is, moreover, clear that the filing of these documents cannot be a condition precedent to the right to commence the litigation, as they are to be filed after action brought, and it is, I think, doing violence to reason to hold that such filing is a condition precedent to the right to continue the litigation, although I see no reason to doubt that the defendant may invoke the general jurisdiction to stay proceedings in the event of non-compliance. The truth of the matter is, that we find an enactment relating to ancillary proceedings in the office of the Mining Recorder set in the middle of an enactment relating to legal proceedings like a boulder in a bed of conglomerate, which will not surprise anyone who is aware that any member of the House may initiate legislation of this sort without its having undergone any previous supervision by some law officer of the Crown.

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But, if I am wrong in this view, I am of opinion that in any event there is nothing in the Act that requires the plan to be based on an actual survey. All that is required is that the plan should be, in the words of the section, "made and signed by a Provincial Land Surveyor." Now, it seems to me, that as Mr. *Taylor* pointed out, the word "made" is interpreted for us in sub-section (*c.*) of the previous section, and it is evident that there it is not used in the sense contended for by Mr. *Davis*, and it is a rule that a given word shall be assigned the same

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meaning, as far as possible, throughout the statute as regards the same subject matter: see *Hardcastle*, p. 186, *Courtauld* v. *Legh* (1869), L.R. 4 Ex. at p. 130; *In re National Savings Bank Association* (1866), 1 Chy. App. at pp. 549-550; *Dover Gaslight Company* v. *Dover* (1855), 1 Jur. N.S. at p. 813.

If it had been the intention of the Legislature to require the survey then nothing would have been easier than to have said so, but it seems to me that this was advisedly not required, as the adverse claimant might thereby have been put to needless expense in the event of the other party quitting the contest. For these reasons, I think the appeal should be dismissed with costs.

IRVING, J.: Within the last few years the Legislature has insisted upon the person claiming an adverse right filing in the Recorder's Office an affidavit setting forth the nature, boundaries and extent of his adverse claim; together with a map or plan thereof made and signed by a Provincial Land Surveyor.

The affidavit and plan must be filed within twenty days after the issue of the writ. Whether the object of the Legislature in requiring this to be filed was to pin the claimant down to a statement of his claim at an early date, and so prevent fraud, or to enable the defendant to elect whether he would abandon the part claimed, or merely for the information of the Department, or as a notice to the public, or for accelerating the trial, it is unnecessary to discuss.

IRVING, J.

The affidavit and plan must be filed within that time, or within such extended time as may be allowed by the Court. We have had numerous applications, under this section, for an extension of time, which has been granted in many cases, and in other cases the extension refused; and in all cases where the time was not extended the action was supposed to be at an end. The usual ground put forward on an application for an extension, is that the snow on the ground prevents the surveyor from making his survey.

A map, to be made by a Provincial Land Surveyor, in my opinion, must be something more than a picture prepared by a Provincial Land Surveyor from data supplied to him by one of

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the parties to the action. The filing of such document is not, in my opinion, within the spirit or letter of the Act. At the trial of the action, it was made to appear that the map filed had been drawn by a Provincial Land Surveyor from measurements furnished him by the plaintiff.

The statute ought, I think, to be construed as requiring the filing of the plan within twenty days as a condition precedent to carrying on the prosecution of the action after that period. Had no plan at all been filed, the defendant would have been at liberty to apply to dismiss the action, and the same application could have been made if it were known that the plan filed was a mere dummy plan.

When it was made apparent at the trial that the statute had not been complied with, I think the Judge should have dealt then and there, and dismissed the action. This course, however, was not adopted; but, instead, the trial was adjourned in order that the plaintiff might complete his evidence. This adjournment was quite unnecessary. It delayed the defendant in getting his certificate. It prevented him from giving affirmative evidence of his title, if such evidence was necessary. I think we should now make the order that the learned Judge ought to have made, namely, dismiss the action on the ground above stated. The appeal will be allowed, and the action dismissed.

IRVING, J.

Appeal allowed, Hunter, C.J., dissenting.

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CENTRE STAR v. ROSSLAND MINERS UNION

CENTRE STAR MINING CO., LTD. v. ROSSLAND MINERS UNION *ET AL.*

Discovery—Miners' Union—Witness in dual capacities—One subpœna—Conduct money—Objection as to sufficiency of—When to be taken.

A Miners' Union entered an appearance in an action and by statement of defence raised the objection that it was not shewn that the defendant was a legal entity capable of being sued:—

Held, that defendant by so pleading must be deemed, before the trial of the action to be a corporation for the purposes of the litigation, and so compellable to make discovery.

Where it is sought to examine for discovery in his dual capacity, one of the defendants in an action, who is also secretary of another defendant, two subpœnas are not necessary.

On an examination for discovery, if the witness has an objection, such as the payment of insufficient conduct money, he should take the objection before the examiner, and he will not be allowed to raise it on an application to compel his attendance to answer questions which he has refused to answer.

Statement

THIS was a summons in Chambers on the part of the plaintiff for an order to compel certain defendants to make discovery, and for further examination of the financial secretary of the defendant Union. The action was for damages for conspiracy, in unlawfully procuring a strike of the plaintiff's employees. The order sought by the application, so far as this report is concerned, was: (1.) To require the defendants, the Rossland Miners Union, to forthwith file an affidavit of documents in their possession in the custody of their secretary; (2.) and that the defendant, Frank Woodside, as financial secretary of the defendant Union, attend at his own expense before the special examiner and submit to examination for discovery. The summons was heard at Nelson, before MARTIN, J., 13th February, 1902.

Argument

S. S. Taylor, K.C., for defendants: With regard to the application to compel the Miners Union to make discovery of documents, it is not shewn that the Union is a company, corporation, partnership or individual, which are the only entities known to

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the law as capable of being sued; neither is it shewn to be registered as a trade union under the provisions of the Trades Union Act; it cannot therefore be called upon to make discovery. As to compelling the attendance of Woodside for examination, Woodside, besides being secretary of the Union is sued as an individual. Only one subpœna was issued to him for his examination, although it was intended to examine him in the dual capacity. Two subpœnas were necessary and double conduct money.

Galt, for plaintiff: In answer to the first objection, an appearance has been entered for the Union to this action, in the usual form, and a notice changing solicitor, signed on behalf of the Union by its secretary has been served. By pleading over, and raising this objection as an issue in the action, instead of moving to strike out the Union's name from the proceedings, the plaintiff is thereby entitled to enforce discovery for the purpose of establishing this issue in its favour. The Union has submitted to the jurisdiction of the Court, and no presumption can be made against its being a legal party. Then, as to Woodside, it is quite proper to include more than one person in one subpœna, and therefore one person may be subpœnaed in two capacities. With regard to the conduct money, no objection was taken on that score before the examiner.

Argument

MARTIN, J.: Upon the facts disclosed and for the purposes of this application the Miners' Union should be deemed to be a corporation, and so should make discovery.

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The subpœna was valid for the witness in both capacities. The objection as to conduct money (if a good one) should have been taken on the examination.

Order that witness attend again at his own expense for examination—Costs to the plaintiff in any event as against all defendants in default.

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1902

June 17.

RAE v. GIFFORD.

Election petition—Presentation of—Time—Computation of.

RAE *v.* GIFFORD

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.

Decision of MARTIN, J., reported in (1901), 8 B.C. 273, affirmed, IRVING, J., dissenting.

APPEAL from the judgment of MARTIN, J., reported in 8 B.C. 273, by which the petition against the return of the defendant as a member of the Legislative Assembly of British Columbia for New Westminster Electoral District was dismissed on a preliminary objection.

By section 214 of the Provincial Elections Act, an election petition "shall be presented within twenty-one days after the return has been made, to the Registrar of the Supreme Court."

The evidence of the Deputy Provincial Secretary, Mr. Reddie, as to the receipt of the return from the Returning Officer was in part as follows:

"When did you receive this? (indicating return). On the 21st; the date is on the back of the document . . . .

"You received it on the date stamped there? Yes, the 21st of September, 1901.

Statement

"Now, Mr. Reddie, who opened the letter addressed to you? I did, as far as I can remember.

"You have nothing to impress it on your memory as to whether you opened it or not? Still, it is addressed to you personally? Oh yes, it could have been opened by the first clerk as it is an official document. I was in the office the day it was received, and so far as I know I opened it on that day, because I was present at my office.

"Now, about what time of the day did you open that letter? Well, the office opens at 9 o'clock, and I would have opened it between 9 and 9.30 on the 21st of September, 1901. I believe the mail is as a rule distributed by that time."

The petition was filed with the Registrar on 12th October, sometime between 11.30 a.m. and 1 p.m.

MARTIN, J., dismissed the petition, holding that it was presented too late.

The appeal was argued at Victoria, on 16th June, before HUNTER, C.J., DRAKE and IRVING, JJ.

Joseph Martin, K.C., for appellant: Fractions of a day are not taken into account in the computation of time unless there are some special reasons. At p. 147 of Vol. 12, Encyclopædia of the Laws of England, the rule (which is borne out by the cases) is stated to be that "time should be so computed that the day 'from' or 'after' which the time is fixed is excluded from such computation, and the day on which the act is to be done, or 'until' which some act is prohibited or protection afforded, is included therein." Time as used in the Act is very inaccurate, and it would seem that twenty-one whole or clear days are given for filing a petition. He cited: *In re North: Ex parte Hasluck* (1895), 2 Q.B. 264; *Pugh* v. *Duke of Leeds* (1777), 2 Cowp. 714; Elphinstone on Deeds, 124; *Ex parte Fallon and Wife* (1793), 5 Term Rep. 283; *Lester* v. *Garland* (1808), 15 Ves. 248; *Watson* v. *Pears* (1809), Camp. 294; *Dowling* v. *Foxall* (1809), 1 Ball & B. 193; *Hardy* v. *Ryle* (1829), 9 B. & C. 603; *Webb* v. *Fairmaner* (1838), 3 M. & W. 473 at p. 477; The *King* v. *Adderley* (1780), 2 Dougl. 463, overruled in *Young* v. *Higgon* (1840), 6 M. & W. 49, also overruling *Castle* v. *Burditt* (1790), 3 Term Rep. 623; *Thomson* v. *Quirk* (1889), 18 S.C.R. 695; *The King* v. *The Inhabitants of Skiplam* (1786), 1 Term Rep. 490; *Field* v. *Jones* (1807), 9 East 151; *Blunt* v. *Harwood* (1838), 8 A. & E. 610; *Chick* v. *Smith* (1840), 8 Dowl. 337; *Wright* v. *Mills* (1859), 4 H. & N. 488; *Isaacs* v. *Royal Insurance Co.* (1870), L.R. 5 Ex. 296 at p. 300; *McCrea* v. *Waterloo Mutual Fire Insurance Co.* (1876), 26 U.C.C.P. 431; *Edgar* v. *Magee* (1882), 1 Ont. 287; *In re Railway Sleepers Supply Co.* (1885), 29 Ch. D. 204; *Broderick* v. *Broatch* (1888), 12 P.R. 561; *Cole* v. *Porteous* (1892), 19 A.R. 111; *Clarke* v. *Bradlaugh* (1881), 8 Q.B.D. 63 and Beal, 41. *Hurdle* v. *Waring* (1874), L.R. 9 C.P. 435 is on all fours with this case and is conclusively in favour of my contention.

Argument

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A. E. McPhillips, K.C., for respondent: The Judge below has held that the return was made to the Deputy Provincial Secretary not later than 9.30 a.m., on 21st September, and we are counting from the time when an act was done, and so the day on which the act is performed is included: see *Pearpoint et al* v. *Graham* (1818), 19 Fed. Cas. 61 at p. 65 and *Reg.* v. *O'Brien* (1880), 6 V.L.R. 429.

Duff, K.C., on the same side: The statute confers a right to present a petition from a certain point of time, *viz.*: the time of the return, so the time must begin to run from that point: see *Pugh* v. *Duke of Leeds, supra*; *Arnold* v. *United States* (1815), 9 Cranch, 103 at pp. 119-20; *Taylor* v. *Brown* (1893), 147 U.S. 640. The man whose seat is attacked is the party most interested, as he may be disfranchised, and this brings the case within the principle laid down in *In re North: Ex parte Hasluck, supra.* The Court should not spell out *Hurdle* v. *Waring* as against us, as holidays may have intervened; the point was not discussed there and consequently it is not binding. The petition must be filed during office hours—between 10 a.m. and 4 p.m.—and the petitioner had twenty-one periods of time between ten and four within which to file the petition. *Clarke* v. *Bradlaugh, supra,* shews that fractions of a day are taken into account except as to judicial acts: see also *Williams* v. *Mayor of Tenby* (1879), 5 C. P.D. 135. The policy of the law is to prevent delays in election petitions. See *Purcell* v. *Kennedy: Glengarry Election Case* (1888), 14 S.C.R. 453 at p. 477.

Argument

Martin, K.C., in reply: The facts of *Hurdle* v. *Waring* are that the 5th of February, 1874, fell on Thursday, therefore the 8th, 15th and 22nd of February, and the 1st of March were Sundays. Under the English Act, Sundays, Good Friday and Bank Holidays are not reckoned in counting the twenty-one days. As neither Good Friday nor a Bank Holiday could come in at that time of year, the days to be counted out in the *Poole* case were the four Sundays. This makes the 6th of February, the first day counted, and the 2nd of March (the day on which the petition was filed) the 21st day; so that the case is exactly parallel with ours.

HUNTER, C.J.: In my opinion the appeal should be dismissed. I think the language of the section itself shews that the exact time of the return is the *terminus a quo*. The petition is to be presented within twenty-one days, unless corrupt practices are alleged, and a money payment is stated to have been made since the *time* of the return, in which case it may be presented within three months after the *date* of the payment. It is reasonable to suppose that the Legislature used the words *time* and *date diverso intuitu*: the word *time* is more exact than if hour and minute were stipulated for, and the *time* of the return can be easily learned on enquiry, but not so the *time* of the corrupt payment, *aliter* with the *date* of such payment.

HUNTER, C.J.

Hurdle v. *Waring* (1874), L.R. 9 C.P. 435, is not a decision to the contrary, as even assuming that no special *dies non* there intervened the point was not taken; in fact counsel may have thought it useless to attack the doctrine which was afterwards exploded in *In re North*.

DRAKE, J.: There does not appear to be any hard and fast rule as to the computation of time and the Act seems to contemplate that the period of twenty-one days shall begin to run from the exact time of the return. The appeal should be dismissed.

DRAKE, J.

IRVING, J., was of the opinion that the facts in *Hurdle* v. *Waring* were conclusive in favour of the appellant, and that by applying the same system of calculation and working it out, it shewed that the petition was filed in time. He was of the opinion that the appeal should be allowed.

IRVING, J.

Appeal dismissed, Irving, J., dissenting.

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DOWLER v. UNION ASSURANCE SOCIETY

DOWLER v. UNION ASSURANCE SOCIETY OF LONDON.

Fire Insurance Company—Agent of—Tax—Victoria City—Fire Companies' Aid Ordinance, 1869 (No. 121) and Fire Companies' Aid Amendment Act, 1871 (No. 154).

In an action against defendant Company under the Fire Companies' Aid Amendment Act of 1871, which applies only to Victoria, for taxes due by it as a Company issuing policies within the City limits, it was held by MARTIN, J., at the trial, dismissing the action, that the plaintiff had failed to establish agency:—

Held, by the Full Court, dismissing plaintiff's appeal, that the action was misconceived; that the tax sought to be recovered was not on the Company directly, but in respect of a special form of agency described in the statute; and the evidence negatived the existence of such an agency.

APPEAL from the judgment of MARTIN, J., at the trial. The action was brought by the plaintiff, as Clerk of the Municipal Council of the Corporation of the City of Victoria, against the defendant as a Fire Insurance Company issuing policies of insurance against fires within the City limits upon properties situate within the City limits, between 1st July, 1897, and 31st December, 1898, for arrears of rates or taxes claimed to be due under the provisions of the Fire Companies' Aid Amendment Act, 1871. The facts appear in the following judgment of

Statement

MARTIN, J.: By Statute No. 82 of the Unconsolidated Acts of 1888, after reciting that "it is expedient that further provision should be made for the raising of funds for the support of the fire establishment," it is enacted that "In addition to the rates levied and collected, or hereafter to be levied and collected, upon and from all agents and *Fire Insurance Companies issuing policies of insurance against fires within the limits of the City of Victoria, upon property situate within such limits, there shall be payable to the Municipal Council thereof by the agent or agents of each and every such Fire Insurance Company so carrying on business within the said limits, the annual sum of three

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* The learned Judge was misled by a misprint of the word "and" for "of" in the second line of section 1 of No. 82, Unconsolidated Acts of 1888: see Ordinance No. 154, R.L. 1871. Compare sections 1 and 4 of the Act respecting the Consolidation of the Statutes, assented to 7th February, 1889.

hundred dollars; such sum to be payable by four quarterly payments . . . ."

It is clear that this language only renders the agent liable for the tax—no additional obligation is so far imposed on the Company, and the section, which is inartistically drawn and awkwardly worded, is incomplete, assuming that it was aimed to make the Company primarily liable.

Then section 2 directs that "Every such quarterly payment shall be made when due, as aforesaid, by the agent or agents of every such Fire Insurance Company, to the Clerk of the said Council, etc. . . . . and if any such quarterly payments shall be in arrear for a period of thirty days, the same shall be recoverable by action, to be brought against such agent or agents, or the Company which he or they represent, at the election of the said Clerk, as a debt due to him in his name, in any Court of competent jurisdiction. . . . . ."

In my opinion, the combined effect of the two sections is that to bring a company within the scope of the enactment it must have an agent in Victoria. It may be that the object of the enactment was to make the companies primarily liable, in view of the benefits they would derive from the application, by section 2, of the proceeds of the tax to the preservation from fire of the risks they underwrote; but however laudable the intention, or however niggardly the spirit of any company that would accept the benefit and refuse contribution, yet if the language is, as here, so loose as to be inoperative, or otherwise fail to positively fix the liability, the tax cannot be collected from it.

The next question, then, to be determined is—had the Company an agent "so carrying on business" within the meaning of section 1? If so, this action is maintainable under section 2, as a debt due to the plaintiff as Clerk of the Council, from either the agent or the Company which he represents.

In this case the circumstances are unusual, and the way in which it came about that the defendant Company issued policies upon property in Victoria is thus stated by the manager of the defendant Company at p. 8 of his evidence:

"The policies were issued under an arrangement between the Union Assurance Company and the Law Union and Crown

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Insurance Co. The Law Union and Crown Insurance Company were interested in various properties in different cities of the Dominion, either as owners or mortgagees, and under the arrangement made between the two Companies the Union Assurance Society was to take over the fire insurance on the properties that I have mentioned, held by the Law Union and Crown as mortgagees, and issue policies. The Law Union and Crown had agents at these different points, and they stipulated that their agents should be allowed the usual brokerage on such business, and, in compliance with that arrangement, Robert Ward & Company, who were their agents in Victoria, forwarded the applications to us as the different risks expired, and remitted us the premiums, less the brokerage.

"What was the brokerage? Fifteen per cent.

"Where was that arrangement made? The arrangement was discussed between the general manager of the Law Union Assurance Company at Montreal originally, and after, subsequently confirmed by the two head offices in London, England."

And at p. 10:

"After carrying it out, what was the practice between you and Robert Ward & Company? They were supplied with these application forms (indicating papers), and filled in the particulars on the form, which was simply a copy of the policies expiring in other companies, forwarding these forms to us in Montreal; the policies were issued in Montreal and sent to Robert Ward & Company, and the premiums were charged to their accounts—they remitted the premiums direct."

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And at p. 13:

"The nine policies issued to Robert Ward & Company were in accordance with the arrangement made between the Law Union and Crown Insurance Company and ourselves, and there was no personal solicitation for these risks in Victoria, and in our dealings with Robert Ward & Company we treated them as agents of the assured, or the payees under the policies."

And at p. 16:

"Had you not a person authorized to receive premiums for you in Victoria? No.

"Did not Robert Ward & Company collect premiums for you? I don't know; they remitted premiums for us.

"Did they not collect premiums for you? No, according to my understanding of it; they were agents for the Law Union and Crown, and the Law Union and Crown were responsible to us for the premiums. If they paid premiums and collected from the property owners, it was to reimburse them for the premiums advanced.

"Were there not some premiums collected which were not anything to do with either of these two Companies, the Crown or the Union? No."

And at p. 32:

"Were not Robert Ward & Company made your agents because they were already insuring the property for the Law Union Company? I have already said they were not our agents."

"Were they not appointed for the purpose of collecting these premiums? I say Robert Ward & Company have never been appointed our agents for any purpose whatever.

"Were not Robert Ward & Company interested in the collection of these premiums because they had previously collected the premiums for some other office? Any collections of Robert Ward & Company in connection with these premiums they did on behalf of the Law Union Insurance Co., and I have no doubt they paid premiums before they were collected and then reimbursed the Law Union Insurance Company.

"You cannot swear to that? I know from things we heard afterwards; I know in this Duck business; I know they paid premiums and never collected it; that was the reason for their repudiating. They paid that premium, paid it to us, and after some months they said, 'We haven't been able to collect.' I said, 'That is a matter for the Law Union and Crown.' They did not see it in that light; I wrote to the Law Union and Crown, and they did see it in that light—the Law Union and Crown were responsible to us."

And see also pp. 17, 19, 31, 37-8.

The witness further stated that the policies were issued in the names of the people who owned the property, but payable to the Law Union and Crown Insurance Co.

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Reference was made to the fact that the words "Agency, Victoria," or "Victoria Agency," appeared in the application forms and policy register of the defendant. The manager explains, p. 30, that this was simply a matter of convenience in keeping accounts:

"There was no objection from our point of view to the words 'Victoria Agency' appearing on the application, or in the policy register, consequently I took no precautions to prevent the words appearing, but the word 'Victoria' was put on or entered wherever it was necessary for the purpose of directing the account to which the premiums were to be charged, and it was simply—

. . . "And the commission paid? And the commission paid; it was simply following the forms of the Company throughout."

And see also at p. 11:

"The words 'Victoria Agency' is not written, but the word 'Victoria' is filled in the policy column. This is a sheet from what we call our Policy Register, to bring out certain particulars with regard to the business to enable us to write out and keep track of it. From this column—the Agency column—the business is posted into the ledgers, and this would be into Robert Ward & Company's account. I did not know it was filled in to the Victoria Agency there, but the clerk who wrote it in followed the usual practice of filling in the Agency from which the business came, the source the business came from. I was going to say all the other policies were issued under similar circumstances."

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The evidence of the manager is corroborated by that of the managing partner of Robert Ward & Co., Ltd., Thomas R. Smith, who produced a letter of December 3rd, 1897, from the defendants to his firm informing them of the fact that the Victoria Agency of Messrs. Munn, Holland & Co. had been withdrawn: it did not state that other agents had been appointed, but proceeded thus:

"To enable you to give effect to the wishes of the Law Union and Crown in regard to these insurances, we have decided to issue the policies from here, and we would thank you to let us have

the particulars in good time so as to enable us to write the policies and have same in your hands before due time. We shall of course have pleasure in allowing you the usual 15 per cent. commission on this business. We are sending you a supply of application forms, which kindly complete for each risk as it comes round."

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Robert Ward & Company had instructions from the Law Union and Crown to place all their risks with the defendant Company; prior to that they had been placing them where they thought fit; the risks were kept up by Robert Ward & Company as agents for the Law Union and Crown, whether the mortgagors paid the premiums or not. The premiums they forwarded to the defendant Company, and received from it the policies which were placed with the Law Union and Crown papers.

After a consideration of all the evidence, I find myself unable to say that Robert Ward & Company were the agents of the defendant. It is true that they rendered certain services for which they were remunerated by the defendant, but those services were of a nature which could be, and were, rendered exclusive of any relationship of principal and agent. While the remuneration was that usually paid to agents, yet it was probably so allowed in view of the fact that Robert Ward & Company had up to that time been in the habit of placing these risks in their own companies, and doubtless that was why the Law Union and Crown stipulated that the defendant was to allow Robert Ward & Company the same rate, since it would have been a harsh proceeding to have deprived them of business without cause and made no compensation.

MARTIN, J.

I find that the defendant Company had no agent in Victoria and therefore the statute does not apply to it. If it is desired to extend the scope of the Act a very simple amendment will stop the loop-hole, but in the meantime the statute must be construed as it comes before the Court.

The action is dismissed with costs.

The plaintiff appealed, and the appeal was argued at Victoria on 16th June, 1902, before HUNTER, C.J., DRAKE and IRVING, JJ.

W. J. Taylor, K.C. (*Bradburn,* with him), for appellant.

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Joseph Martin, K.C., for respondent.

During the argument *Xenos* v. *Wickham* (1867), L.R. 2 H.L. 296; *Attorney-General* v. *Birkbeck* (1884), 12 Q.B.D. 605 at p. 611 and *Armstrong* v. *Provident Savings Life Assurance Society* (1901), 2 O.L.R. 771, were cited by counsel or referred to by the Court.

On 29th July, the judgment of the Court dismissing the appeal with costs was pronounced, and the following judgments were handed down:

29th July, 1902.

HUNTER, C.J.: In this case the facts appear *in extenso* in the judgment under appeal, so that I need not repeat them.

It may be noticed that section 1 of the statute, as it appears in the Unconsolidated Acts, being No. 82, contains a misprint in using the word "and" in the second line of the section, instead of the word "of," as will appear by reference to the original Act, R.L. 1871, No. 154, and also by reference to section 3, of No. 81, of the Unconsolidated Acts, being R.L. 1871, No. 121, of which statute the one under consideration is an amendment.

It is, therefore, plain, when the misprint is cleared up, that the tax is primarily imposed on the agent and not on the Company, although section 2 gives a remedy for its collection against either agent or Company.

HUNTER, C.J.

Again, comparison of the provisions of section 3 of the principal Act, and of section 1 of the amending Act makes it clear, that the tax is imposed only on those agents who issue policies within the City limits on property within the limits.

As pointed out by Mr. Justice DRAKE, the action is brought against the Company as the issuer of the policies within the limits, whereas it is clear, as already stated, that the tax is imposed only on the agent. Therefore, in order to found an action against the Company under section 3 of the Act, the statement of claim should have alleged that Ward & Co. were the agents of the Company to issue fire policies in the City limits on property therein situate, that they had so issued such policies, and had not paid the tax. But, although the action is misconceived, and should in strictness be dismissed on this ground, I think

that even if it had been properly launched it must have failed on the facts.

The evidence shews beyond doubt that the policies in question here were not issued in Victoria, but in Montreal, by agreement between the Insurance Society and the Loan Company, and were transmitted to and retained by Ward & Co., as agents for the Loan Company. The fact that Ward & Co. filled in the mortgagors' applications and forwarded them to Montreal does not make them the agents for the Assurance Society to issue their policies, and only those agents who issue policies are liable for the tax. Nor does the fact that by agreement, made between the two Companies at Montreal, Ward & Co. received a commission of 15 per cent. directly from the Assurance Society, instead of from their principals, the Loan Company, make them agents of the Society. It is obvious that a request by A. to B. to pay C. does not without more make C. the agent of B.

The appeal should be dismissed.

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DRAKE, J.: The question to be decided here is on the construction and meaning of the Fire Companies' Aid Amendment Act, 1871. This Act was an amendment to the Companies' Aid Ordinance, 1869. By that Act, Sec. 3, all agents of Fire Insurance Companies carrying on business in the City of Victoria were to pay a rate not exceeding one-eighth of one per cent. on the amount of insurance effected on property in Victoria insured by them. By the Act of 1871, in addition to the rates then levied and collected, it was enacted that there should be payable by the agents of each and every such Fire Insurance Company, carrying on business in Victoria, the annual sum of $300.00, payable in quarterly payments; and by section 2, if any quarterly payment should be in arrears for thirty days, the same should be recoverable by action to be brought against such agent, or the Company, at the election of the Clerk of the Council.

DRAKE J.

The plaintiff's statement of claim alleges a claim against the defendants as a Fire Insurance Company, issuing policies against fire within the limits of Victoria, for arrears of rates or taxes payable to the plaintiff by virtue of the Act of 1871. No tax has been imposed on Fire Insurance Companies either by the

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Act of 1869 or 1871. What the Act of 1871 purports to do is to make the Company suable for the amount of $300.00 due to the Corporation from persons acting as their agents in insuring property and issuing policies within the limits of the City of Victoria.

The Act of 1871 is wrongly printed in the volume of Unconsolidated Acts. Section 1 enacts, "In addition to the rates levied and collected upon all agents of Fire Insurance Companies," not "and Fire Insurance Companies," and this has doubtless misled the parties somewhat, as a considerable argument was addressed to the Court on the effect of the misprinted language.

Section 2 gives only the right to the Corporation to recover the $300.00 from the agent or the Company. Now, as this tax is not imposed on the Company, the sum to be recovered is the money due by the agent as such agent, and not due by the Company as taxee. All tax Acts are construed strictly, and nothing left to intendment: see *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842 at p. 856. The intention to impose a tax on the subject must be shewn in clear and unambiguous language; and in *Cox* v. *Rabbits* (1878), 3 App. Cas. 473 and *Pryce* v. *Monmouthshire Canal and Railway Companies* (1879), 4 App. Cas. 203; in a taxing Act you must find words to impose the tax, and if they are not there no tax is imposed. I fail to find any words imposing this tax on the defendants, and therefore they are not liable on this statement of claim, which alleges that the Corporation claim $450.00 against the defendants as a Fire Insurance Company issuing policies within the limits of the City between 1st July, 1897, and 31st December, 1898, for arrears of rates or taxes which have become due and payable to the plaintiff as such Clerk, at the annual rate of $300.00, payable by the defendants to the plaintiff by virtue of the provisions of the Fire Amendment Act, 1871.

DRAKE, J.

In the view I take it is not necessary to discuss the other point, whether or not Robert Ward & Co. were agents of the defendant Company as contemplated by the Acts in question, bacause they are not parties to this action. Action should be dismissed with costs.

Appeal dismissed.

MOWAT v. NORTH VANCOUVER.

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MOWAT v. NORTH VANCOUVER

Municipal boundaries—North Vancouver—Itala or Eagle Island—"Shore" line or "coast" line.

Itala or Eagle Island is within the boundaries of the Municipality of North Vancouver.

The meaning of "coast" line and "shore" line, considered.

APPEAL from the assessment by the Municipality of North Vancouver of a certain island as being part of the Municipality. The plaintiff contended that the island was not included within the boundaries of the said Municipality.

Statement

H. O. Alexander, for the appellant.

Bowser, K.C., for the Municipality.

5th April, 1902.

IRVING, J.: This appeal is brought for the purpose of determining the question whether the island, known as Itala Island or Eagle Island, is included within the boundaries of the Municipality of North Vancouver.

The letters patent creating the Municipality, state that the boundary shall run from a point on the coast southerly along the coast line to Point Atkinson, thence travelling eastward they come to speak of the shore. Mr. *Bowser* relies strongly on the fact that these two different expressions are used.

IRVING, J.

"Shore," is defined as being that space of land on the border of the sea which is covered and left dry by reason of falling of the tide, or in other words, that space of land between high and low water mark. The presumption is, that this space belongs to the Crown. The high water mark being the boundary of private ownership of lands, and the low water mark being the limit of the common law jurisdiction of the County officials, of whom the "Chief Taxers" appointed by the King saw to the collection of revenue from the County.

The expression "coast line," on the other hand, is not defined. "Coast," in Bouvier's Dictionary, p. 337, is said to be "the mar-

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gin of a County bounded by the sea. This term includes the natural appendages of the territory which rise out of the water, although they are not of sufficient firmness to be inhabited or fortified. Shoals perpetually covered with water are not, however, comprehended under the name of coast. The small islands situate at the mouth of the Mississippi, composed of earth and trees drifted down by the river, which are not of consistency enough to support the purposes of life, and are uninhabited, though resorted to for shooting birds, were held to form a part of the coast."

Bouvier does not state any authority, but I think there can be little doubt but that he refers to the judgment of Sir William Scott, reported in 5 C. Rob. 373.

Gould on Waters, section 28 says that, "The term 'coast' or 'sea-coast,' appears to have no fixed meaning apart from the context, and to be equally applicable to the space between high and low-water mark, or to the territory bordering on the sea, or to that part of the sea which adjoins the land."

There is no presumption that a parish which was originally a purely Ecclesiastical District or a Municipality extends beyond high water mark, on the contrary, there are English cases the other way. But in this Province, Municipalities are dependent for their existence upon the Provincial Legislature or Executive which may change their boundaries at pleasure. In this case, the Executive has used the expression "coast line." In construing the Letters Patent we must construe alike all written documents taking the words and seeing what is the meaning of those words when applied to the subject matter.

IRVING, J.

I am inclined to think that the expression "coast line" would include this Island. If any person were asked to draw a map of the coast line of the Pacific Ocean, I think that most people would include Vancouver Island, or again, if they were asked to draw a map of the coast line in question, they would probably include this little island; I have referred to it as an island, because it is so called on the charts, but it is well to point out that at certain stages of the tide, there is no water separating it from the mainland; at other periods, however, there is some 600 feet of water measured on the surface, with a gap of some 14 feet of water in

width where ten feet of water in depth can be found. In my opinion, it is within the Municipal boundaries of North Vancouver.

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FRY *ET AL* v. BOTSFORD *ET AL.*

MARTIN, J.
(In Chambers)
1902
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Costs—Abandoned appeal—Briefs—Counsel fee—Rules 583 and 790.

On 20th May, the plaintiffs gave notice of appeal, to come on at the November sittings of the Full Court, from an order requiring them to give security for the costs of the action. On 3rd June, the appeal was abandoned:—

Held, per MARTIN, J., on a review of taxation, that respondents were entitled to tax briefs and a counsel fee.

Counsel fee under the circumstances fixed at $10.00.

A taxation may be reviewed under r. 583 as well as under r. 790.

APPEAL from taxation of costs by District Registrar at Vancouver.

On 17th April, 1902, an order was made by IRVING, J., that the plaintiffs as being resident outside the jurisdiction should furnish each of the defendants with security in the sum of $400.00 for his costs of the action. Subsequently the defendants applied to have the action dismissed on the ground that the security had not been furnished, and on 12th May, IRVING, J., made an order that plaintiffs should furnish security in the sum of $400.00, as originally ordered, on or before 31st May, and in default that the action should stand dismissed without further order. Notice of appeal from this order was given by the plaintiffs on 20th May, 1902, to the Full Court to be held in Vancouver the following November. On 3rd June, the solicitors for the plaintiffs gave notice abandoning the appeal. On the taxation of the respondents' costs the taxing officer allowed a counsel fee of $35.00 under item 224 of the tariff of costs. The remaining facts appear in the judgment. See also *ante* p. 165.

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Joseph Martin, K.C., for the appeal.
Sir C. H. Tupper, K.C., and *Duncan, contra.*

29th July, 1902.

MARTIN, J.: A taxation may be reviewed in this Court under r. 583 as well as under r. 790. It was pointed out that the English practice is different, but the fact has been overlooked that our rule 583 contains provisions regarding costs which are not in the corresponding English rule, 754.

The taxing master has allowed briefs and a counsel fee though the appeal was abandoned fourteen days after it was brought in May, and though the next Full Court would not sit till November. No case has been cited really bearing on this exact point, and I do not think quite the same considerations apply to appeals as to trials, because where a party has got judgment in his favour, it is due to him that he should not be kept in a state of uncertainty regarding an appeal any longer than is really necessary. The appellant has a specified time within which to decide to appeal or not, and once he embarks upon it he must expect to incur, if unsuccessful, the reasonable expenses of the opposite party in promptly preparing to resist it.

In answer to my question in Chambers, I was informed by the taxing master that he had acted upon this view as he understood it to be expressed by my brother IRVING in *Oppenheimer* v. *Sperling*, and I adopt it.

MARTIN, J.

The fee in question has been allowed under item 224 of the tariff, but in my opinion that item does not apply to the present case, nor is there one which is exactly applicable and to which I may resort as decided in *In re Cowan* (1900), 7 B.C. 353. But under such circumstances I am entitled, as Mr. Justice Burton held in *Barber* v. *Morton* (1882), 2 C.L.T. 340, to proceed by analogy to other provisions of the tariff, and consequently refer to item 227 as an useful guide. This item as amended by rule of the 23rd of November, 1899, covers a counsel fee from $5.00 up, and the justice of this case will be met by allowing a fee of $10.00. This is adopting a practice similar to that existing in Ontario where a counsel fee of $10.00 is allowed where a party does not proceed to trial according to notice—*Outwater* v. *Mullett* (1890), 13 P.R. 509.

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Though I fix this fee in the present case, as the one which the taxing master would have been justified in allowing, it must be understood that every case depends on its own particular circumstances, and a larger fee may be allowed if necessary.

It will be noticed that I do not aim at interfering with the quantum of the fee which was taxed, but proceed on the ground that there was an error in principle in applying item number 224 to the present circumstances. If the taxing officer had felt at liberty to consider the matter apart from said item 224, he would not, I understand, have taxed a fee of $35.00, but in consideration of the small amount involved, I think it better to dispose of the fee ot once, rather than incur further costs by referring it back to the taxing master for further consideration.

MARTIN, J.

Appeal allowed.

IN RE THE ASSESSMENT ACT.

FULL COURT

1902

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IN RE THE ASSESSMENT ACT

Assessment—Income of locomotive engineers—Taxation—R. S. B. C. 1897, Cap. 179.

The earnings of railway locomotive engineers who receive pay according to the number of miles they run their locomotives, are not "income" within the meaning of that term as used in the Assessment Act prior to the amendment of 1901, and are therefore not liable to taxation.

Decision of IRVING, J., reported *ante* p. 60, reversed.

APPEAL to the Full Court from the decision of IRVING, J., reported *ante* p. 60. The appeal was argued at Victoria, on 24th and 25th June, 1902, before HUNTER, C.J., WALKEM and DRAKE, JJ.

Argument

Wilson, K.C., for the appeal, repeated his former argument and cited in addition the following authorities: *Attorney-General* v. *Lancashire and Yorkshire Railway Co.* (1864), 33

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L.J., Ex. 163; *Warren* v. *Whittingham* (1902), 18 T.L.R. 508; *Re Marquis of Biddle Cope and The Assessment Act* (1896), 5 B.C. 37; *In re Taylor* (1895), 16 C.L.T. 168 and see a report by the Judges to the Massachusetts House of Representatives in (1844), 46 Mass. 596.

Maclean, D.A.-G., for the Crown, repeated his former argument and in addition cited *Gilbertson* v. *Ferguson* (1881), 7 Q.B.D. 562 at p. 572; *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158; Bouvier's Dictionary, p. 1,006 and Maxwell, 3rd Ed., 475, as to *ejusdem generis*.

HUNTER, C.J.: We are all agreed that these earnings are not taxable. The word income as used in the statute would seem, after comparison of the various passages where it occurs, to point to receipts of a settled or permanent character such as by way of salary or investment, and not to ungained earnings of this type. At any rate the word is ambiguous, as the Legislature evidently thought when it passed section 2 of the Amending Act of 1901, and any ambiguity in a Taxing Act is always resolved in favour of the subject: see *per* Lord Blackburn in *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842 at p. 856.

HUNTER, C.J.

WALKEM, J.: I have read the judgment about to be delivered by my brother DRAKE, and wholly agree with it. An important feature of the case is that the taxes are assessed in the fiscal year prior to that in which they are to be collected. Hence, the amount of the earnings, for such they are, of the present appellants for which they happen to be assessed, is purely speculative. Provision is, of course, made, as stated in my brother DRAKE'S judgment, for this contingency, by giving the assessor power to base his assessment on the previous assessment. The word "income," as used in the Act, seems to me to be a word of equivocal meaning, whereas "it is a well settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because, in some degree, they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation," and I do not think it does so in this case. "In a case of doubt, the construction most beneficial to the subject is to be adopted": Maxwell on Statutes,

WALKEM, J.

2nd Ed., 347. I am in favour of the appeal being allowed with costs.

DRAKE, J.: This case comes before us by way of appeal from the decision of Mr. Justice IRVING. His reasons are not before us, neither is there any copy of the evidence, if any was taken. It was stated, and not denied, that locomotive engineers were paid by a mileage rate, that is, so much for every mile they took their engine over, and if their engine was not running they earned no wages. There is no definition of income in the Act. By section 3 of R.S.B.C. 1897, Cap. 179, all land and personal property and income in the Province shall be liable to taxation, subject to the exceptions in the section mentioned. Included in these exceptions are (14.) the income of every person up to $1,000.00; (15.) the income derived by any person from interest paid by the Province or any municipality; (16.) the income of a farmer derived from his farm, and the income of merchants, mechanics and others derived from capital liable to assessment. By section 32 certain returns are to be made to the assessor, and amongst these, a return of income, whether derivable from salary or otherwise, and returns of income shall be based upon the amount of the income which was received by the person liable to tax during the preceding year ending 31st December. There have been various definitions of the term income. Balance of gain over loss, in *Lawless* v. *Sullivan* (1881), 6 App. Cas. 373. It may mean the gross amount received by a person: *Reg.* v. *Commissioners of the Port of Southampton* (1870), L.R. 4 H.L. 449. What comes in: *Jones* v. *Ogle* (1872), 42 L.J., Ch. 334, or a person's receipts: *In re Huggins* (1882), 51 L.J., Ch. 938. In the case of *Ex parte Benwell* (1884), 14 Q.B.D, 301, which was decided under section 90 of the Bankruptcy Act, which enacted that when a bankrupt is in receipt of a salary or income other than as assessed, the Court could make an order for payment of such part thereof to the trustees in bankruptcy as the Court might direct. It was held that this did not refer to the personal earnings of a bankrupt, however large they might be, arising from the exercise of personal knowledge or skill. The words we have to construe here are, "All land and personal property and income

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in the Province." This means income arising from investments or salary within the Province, and does not apply to income which may come in from investments outside the Province. Personal earnings in future cannot be considered as income until received. The ability to earn wages is dependent on so many contingencies —health and employment are two of the chief factors, without which no wages can be earned. In section 32, sub-section (*c.*) the language used is, "income whether derivable from salary or otherwise." Salary is clearly distinct from wages, true it is due to personal exertion, but it is a payment for a year, or part of a year, irrespective of the amount of work done. In *In re Jones* (1891), 2 Q.B. 231, wages are not *ejusdem generis* with salary. In the present case they depend on the amount of work done, and stop if there is no work to be done, or if the employee is unable to do his work. It is quite possible that an income tax could be imposed on personal earnings which have been received, but, in my opinion, it cannot be imposed on unascertained earnings in the nature of wages, because it is not income until it is earned. Income, as I have before pointed out, means balance of gain over loss or what comes in; therefore income in section 3 is not liable to taxation until it is ascertained by actual receipt. If the Legislature wished to tax the income of wage earners, it would not be impossible to use apt words therefor. In my opinion, the term income in the Act does not and was not intended to include money to be received in wages for the personal labour of locomotive engineers, who are not paid by salaries, and who have no income until it is earned. The taxing clause is section 3, and we must attribute the ordinary meaning to the term income, something which has been received, gained or earned, and until it is so received, gained or earned, it is not income. The fact that the assessor makes returns based on previous years of salary or otherwise, will not, in my opinion, do away with the necessity of imposing the tax by apt words, making income to include unearned wages. I think the appeal should be allowed with costs.

DRAKE, J.

Appeal allowed.

BOYLE v. VICTORIA YUKON TRADING COMPANY.

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BOYLE v. V. Y. T. Co.

Foreign judgment, action on—Proof of—Exemplification—Judgment founded on void contract—Right to question—Final and unalterable—Company—Extra-territorial contracts of carriage—Ultra vires—B. N. A. Act, Secs. 91 and 92.

A default judgment obtained in a foreign jurisdiction, though liable to be set aside, so long as it stands, is "final and conclusive" within the meaning of that expression as applied to foreign judgments, and consequently it may be sued on in this Province.

In an action on a foreign judgment the defendant is entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous such as being founded on an *ex facie* void contract.

The Province may create a company with power to undertake extra-territorial contracts of carriage and so it is not *ultra vires* of a company incorporated in British Columbia to contract to carry goods from British Columbia to a point in the Yukon Territory.

Per MARTIN, J.: An exemplification of judgment under the seal of the Court in which the judgment was pronounced is equivalent to the original judgment exemplified, and notice under the Evidence Act of intention to produce it in evidence is unnecessary.

APPEAL from the judgment of DRAKE, J.

The defendant Company was incorporated under the Companies' Act of British Columbia, and during the season of 1899, operated as a transportation Company between Bennett, in British Columbia, and Dawson, in the Yukon Territory, and undertook to carry for the plaintiff, who was a Dawson merchant, certain goods from Bennett to Dawson. The Company failed to deliver, and the plaintiff commenced an action for damages in the Yukon Territorial Court, and the general agent for the Company was served with the writ and statement of claim, which, although intended to be issued against the defendant Company, did not contain the defendant's proper title; the writ and statement of claim were amended, and, under an order for substituted service, rendered necessary on account of the manager's absence out of the jurisdiction, were served on Messrs. Wade & Aikman, general solicitors for the defendant Company at Dawson. Under

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the order, a copy of the writ and statement of claim was mailed to the Company at Victoria, and a copy posted in the office of the Clerk of the Court at Dawson. A statement of defence was filed by Wade & Aikman, who also attended on behalf of the defendant Company on an examination for discovery of an agent of the Company. At the trial no one appeared for the Company, and judgment went by default.

The plaintiff then commenced an action in the Supreme Court of British Columbia on the Yukon judgment, claiming $761.50, being the amount of the judgment, and $169.00 the taxed costs or in all $930.50.

The action was set down for trial at the Civil Sittings commencing at Victoria on 4th March, 1902, and on 13th February the plaintiff gave defendant notice as follows:

"Take notice that the plaintiff intends at the trial of this action to give in evidence as proof of a certain record, proceedings and judgment in the Territorial Court of the Yukon Territory in an action wherein the present plaintiff was plaintiff and the present defendants were defendants an exemplification or certified copy thereof purporting to be under the seal of the said Territorial Court of the Yukon Territory."

Statement

At the trial, which came on before DRAKE, J., on 17th March, 1902, counsel for defendant objected that the notice was not sufficient under the Evidence Act to permit the exemplification of judgment on the grounds that (1.) It did not specify the documents proposed to be used. (2.) The documents proposed to be given in evidence did not comply with the notice. (3.) Having regard to the fact that the documents proposed to be used are from the files of the Court of the Yukon Territory, the notice was not given within a reasonable time as required by the statute. (4.) All the other documents attached to the exemplification of judgment are not admissible in evidence in any event.

He also tendered evidence that in the ordinary course of post it would require at least eighteen days to communicate between Dawson and Victoria.

His Lordship held that the notice was insufficient in point of time, but overruled the other objections, and he granted an

adjournment till 4th April. Later in the day the trial was proceeded with, both counsel agreeing that the hearing should be treated as if it had taken place on 4th April.

Counsel for defendant tendered in evidence the articles and memorandum of association of the Company for the purpose of shewing its constitution and the method of the appointment of its officers, but His Lordship refused to receive them in evidence.

At the conclusion of the trial His Lordship stated: "There will be judgment for the plaintiff. The validity of a foreign judgment can only be disputed under certain circumstances, but in the face of Mr. Carmody's evidence, it is perfectly clear that the solicitors in this case in the Yukon were sufficiently appointed. Their solicitor was in a position to bind them, and has done so with reference to this claim. There was no objection taken then to the position he occupied. Judgment will go for the plaintiff for the amount of the claim and costs."

The Company appealed, and the appeal was argued at Vancouver on 16th April, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Duff, K.C., for appellant: At the trial evidence of the foreign judgment was improperly admitted.

The Company was incorporated under the B.C. Companies Act, and engaged in shipping goods into the Yukon without any power to do so, and it was the Company's duty to defend the action in the Yukon on this point—the judgment was practically by consent, and so not binding. Any undertakings extending beyond the limits of the Province are *ultra vires*. He cited B.N.A. Act, Sec. 92, Sub-Sec. 10 (*a.*); *Great North-West Central Railway Co.* v. *Charlebois* (1899), A.C. 114; Lefroy's Legislative Power in Canada, 617; *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 117; *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 165; *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670; *Canadian Pacific Railway Co.* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367, at p. 372.

Argument

As to the foreign judgment. A foreign judgment, such as to

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support an action here, must be not only final and conclusive, but it must also have passed beyond the control of the Court pronouncing it. The judgment sued on here is not conclusive, as, according to the Yukon law, a judgment may be set aside by a Judge in Chambers on just cause being shewn on an application within fifteen days from the judgment, and the time may be extended. The judgment must be final and unalterable. He referred to *Berkeley* v. *Elderkin* (1853), 1 El. & Bl. 805, 806; *Austin* v. *Mills* (1853), 9 Ex. 288; *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1 at pp. 13 and 14; *Lynde* v. *Lynde* (1900), 181 U.S. 187.

[IRVING, J., referred to *Hadden* v. *Hadden* (1899), 6 B.C. 340, at pp. 351-2.]

Peters, K.C., for respondent: As to the judgment not being conclusive, he distinguished the cases already cited, and cited himself, Piggott on Foreign Judgments, 212; *Ellis* v. *M'Henry* (1871), L.R. 6 C.P. 238; *Vanquelin* v. *Bouard* (1863), 15 C.B.N. S. 341.

Argument

As to *ultra vires*, he contended that the Company had the power to undertake to act as forwarders. There is no suggestion of collusion in obtaining the Yukon judgment.

As to the notice of intention to read exemplification, see Evidence Act, Sec. 11. A certified copy of a legal record is an exemplification. He cited *Tilton* v. *McKay* (1874), 24 U.C.C.P. 98. It was a case for the Judge's discretion.

Griffin, on the same side: A distinction is drawn between consent and other judgments: see Brice, 625; *Williams* v. *St. George's Harbour Co.* (1858), 2 De G. & J. 547; *Edwards* v. *Kilkenny and Great South-West Railway Co.* (1857), 26 L.J., C.P. 224; *Re Phœnix Life Assurance Co.*: *Burges and Stock's Case* (1862), 2 J. & H. 441.

Duff, replied.

29th July, 1902.

HUNTER, C.J.

HUNTER, C.J.: This is an action on a foreign judgment which was recovered between the same parties in the Yukon Territory Court on a contract to carry the plaintiff's goods from Bennett to Dawson, the defendants having failed to deliver a portion of the said goods. The general agent for the Company in the

Territory was served with a writ of summons, which, although intended to be issued against the defendant Company, was in error issued against a non-existent company with a similar name, and another writ was then served, owing to his absence, under an order for substituted service upon Messrs. Wade & Aikman, general solicitors for the defendants at Dawson. They filed a statement of defence, and attended on the agent's examination for discovery, but no one appearing for the Company at the trial, judgment went by default.

It has been assumed during the present proceedings, and I think properly so, that the Company was within the clutch of the Yukon Court for the purpose of litigation in the Territory, and accordingly the plaintiff is suing on a *prima facie* valid foreign judgment.

Mr. *Duff*, however, on behalf of the Company, contends that the judgment should not be enforced for several reasons. One reason is that the judgment has been recovered on an *ultra vires* contract; this being so, the judgment can be of no greater validity than the contract on which it is based, and for this he cites *Great North-West Central Railway Co.* v. *Charlebois* (1899), A.C. 114.

The first question then to be determined is, can the defendants allege that the judgment is void as being based on a manifestly *ultra vires* contract, or, in other words, can it be impeached for manifest error? No doubt we must be careful not to infringe the doctrine that we are not to act as a Court of Appeal to review a foreign judgment, but I think that neither the comity of the Provinces, nor the canons of international law, require us to blindly enforce a default judgment obtained in a sister jurisdiction. I think, on the contrary, that we are entitled to scrutinize all the proceedings (compare what was done in *Houstoun* v. *Marquis of Sligo* (1885), 29 Ch. D. 448), and if manifest error going to the root of the judgment appears, that we may, and should, decline to perpetuate and enforce the error. The case of *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 414, is not, I think, an authority against this proposition. That was a case where the French Courts, including the final Court of Appeal, after a stoutly contested litigation, gave a decision *in rem*, under

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which the property, an English ship, passed to a purchaser by a judicial sale. The defeated party sought to impeach the buyer's title in England on the ground that the French Courts had erred in their application of English law. He failed, and the case is really only an instance of the inflexible adherence of the English Courts to the rule of international law, that a foreign adjudication *in rem* will be enforced even if it proceeds on a mistaken view of English law, which *quoad* the foreign tribunal is merely a mistake of fact. The case in hand is not that of a decision *in rem* emanating from the Courts of another nation after real litigation, but is a judgment taken by default in another Canadian jurisdiction in disregard, as it is alleged, of the paramount law of the land, which both the Yukon and British Columbia Courts are bound to obey and properly administer. Moreover, it does not require argument to shew that there is a radical distinction between a judgment thus obtained and one which is the result of real litigation. In the case of a default judgment, the judicial mind is not necessarily applied to the matters in issue, but the machinery of the Court is employed at the will of the plaintiff to record a judgment in his favour which may or may not be null and void; nor will it do to say that the default invariably creates an estoppel, for there may be void judgments as well as void contracts. If the contract was *ultra vires* in any sense, it was so in the strict legal sense, that

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is to say, it was, and is, beyond the power of the Company either to make it or to ratify it at any time or by any mode; and obviously a contract which cannot under any circumstances, be *intra vires*, is void and incapable of ratification. Then, if void, and incapable of ratification, no question of estoppel can arise so as to prevent the Company from saying that the contract is void, as otherwise it would come to pass that the Company might be able to do by estoppel what it could not do by law. Nor can a valid judgment, taken either by compromise or consent, or default, or in *invitum*, spring from a void contract: *ex nihilo nihil fit.* No doubt a judgment may be got on a contract as to which there may be a doubt as to whether it is void or not, yet so long as such judgment stood it would ordinarily be presumed that the judgment was valid; but I think this

presumption cannot apply to a default judgment which purports to enforce a contract *ex facie* void by the paramount law of the land.

I think, then, that the defendants are entitled to challenge the validity of the judgment on the ground that it is manifestly erroneous, as being recovered on an *ex facie* void contract, and if they were right in this contention then the judgment, in my opinion, should not be enforced. But I think that Mr. *Duff's* contention that this judgment is based on an *ultra vires* contract, and that therefore it is void, must be rejected. If I caught his argument rightly, it was that the Province could not create a corporation with power to undertake contracts of carriage beyond the limits of the Province, or, at any rate, that if it was able to do so that it had not done so, and, therefore, that the Company was not liable; but I think our decision must be against both propositions.

By the B.N.A. Act the Province may exclusively make laws relating to "the incorporation of companies with provincial objects." Bearing in mind the rule that we must assign such full, large and reasonable meaning to the phrase as the language of the Act will allow, I think the true antithesis or phrase of exclusion is not "dominion objects," or "extra-provincial objects," but "non-provincial objects," and that the phrase "provincial objects" includes both "intra-provincial" and "extra-provincial objects."

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It is well known that provincial companies have for many years undertaken outside of their Province of origin such contracts as that of loan and insurance, the investing of trust funds, the buying and selling of bonds and other obligations, the buying and selling of natural and manufactured products, etc., etc., and no authoritative judicial doubt, so far as I know, has ever been thrown on the validity of such contracts, which are enforced by and against the companies by the comity of the Provinces, or by the comity of nations as the case may be. What reason can be assigned why a provincial company should not have the power to buy and sell land, or to own and operate mines beyond the provincial boundaries if so authorized, and why can it not undertake extra-territorial contracts of carriage if not limited to intra-provincial contracts by its charter?

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So to hold would not be necessarily to deny the Dominion similar power to create companies having similar objects: the only difference would be that a company if legally created by Dominion authority would operate in any Province *ex proprio vigore*, while a company created by provincial authority would operate in any other Province by the comity of the Provinces, and both would operate outside of Canada by the comity of nations.

The power of the Province to create a company is not, in my opinion, necessarily to be measured by the territorial test, but is at least co-extensive with, and apparently in some cases transcends the general powers of the Province to deal with the given subject matter, assuming, of course, that it is capable of being dealt with by a corporation. The expression "provincial purposes," in sub-section 2 of section 92, was considered by the Judicial Committee in *Dow* v. *Black* (1875), L.R. 6 P.C. 272, where it was held that the New Brunswick Legislature could authorize a municipality to bonus a railway which was to be built in the State of Maine to connect with a railway in New Brunswick. Can there be any doubt that it could also have created a company having as its object the procuring of the building of this railway by bonus, or otherwise? If not, then the question of territoriality is not necessarily the measure of the power to create a company.

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But even if I am wrong in concluding that the Province may create a company with power to undertake extra-territorial contracts of carriage, there is nothing to prevent such a company from securing the performance of the extra-territorial portion of the contract by others. It is well settled by a long line of authorities, both in England and Canada, that a common carrier may undertake contracts of carriage to points beyond the line of his own vehicles, and that the consignor need not concern himself as to the ways or means. For instance, Watson, B., says in *Wilby* v. *West Cornwall Railway Co.* (1858), 2 H. & N. 703, at p. 711: "It would be strange if a Company who undertook to carry goods from London to Paris were not liable for a loss at Boulogne because their line did not extend beyond Dover or Folkestone. The same may be said of the

carriage of goods from London to Dublin, or from London to Barton, and from thence across the river Humber to Hull." And Channell, B., says, p. 712: "As to the objection that the carriage by sea was *ultra vires*, I do not at present see any distinction between carrying by sea and carrying on the line of another person." In fact, according to the leading judgment in *Doolan* v. *Midland Railway Co.* (1877), 2 App. Cas. 792, delivered by Lord Blackburn, it is useless for the Company to set up a plea of *ultra vires*. He says, p. 806-7:

"I may here dispose of a point on which great reliance seems to have been placed by the pleaders and by some of the Judges below, though I think it was abandoned on the argument at your Lordships' Bar. The Midland Railway Company is not authorized by any Act of Parliament to own or work steamboats, and therefore, it is said, that this company, if owning and working steamboats, would be doing so illegally, and therefore would be free from the restrictions imposed, it is said, only on those railway companies legally owning and working steamers. It is impossible to suppose that the Legislature intended those companies who were wrongfully working steamers to be in a better position than those who were rightfully working them; and the Act should not be so construed if the words permit of any other construction. And even if the words compelled this construction, I think the railway company could not set up its own wrong, against a plaintiff who contracted with the company in innocence and ignorance. Doolan and the Midland Railway Company are not *in pari delicto*. Doolan might perhaps set up against the Midland Railway Company that it was acting illegally, if it would in any way help him (which I do not think it in any way could), but it does not lie in the mouth of the railway company to set up its illegality, even if it would help it, which I do not think it would."

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Moreover, Lord Blackburn's remarks lead to the conclusion that under such circumstances as exist here, the plea is worse than useless as against an innocent plaintiff, because it virtually admits a tortious dealing with his property. Other cases which may be referred to in this connection are *Muschamp* v. *Lancaster and Preston Junction Railway Co.* (1841), 8 M. & W. 421;

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Scothorn v. *South Staffordshire Railway Co.* (1853), 8 Ex. 340; *Directors, &c., of the Bristol and Exeter Railway* v. *Collins* (1859), 7 H.L. Cas. 194, in which the Lords polled the opinions of the Judges before giving their decision; *Merchants' Despatch Transportation Co.* v. *Hatley* (1886), 14 S.C.R. 572; *The Grand Trunk Railway Co.* v. *McMillan* (1889), 16 S.C.R. 543; *The Northern Pacific Railway Co.* v. *Grant* (1895), 24 S.C.R. 546; *Hamilton* v. *Hudson's Bay Company* (1884), 1 B.C. (Pt. 2) 1 and in appeal at p. 176.

Another objection raised by Mr. *Duff* is that the judgment being by default is not final and conclusive within the meaning of that expression as applied to foreign judgments, by reason of the decision in *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, and Mr. *Duff* admitted that he was driven to contend that no judgment obtained by default is enforceable as a foreign judgment. This contention is, on the face of it, unreasonable, as of course all that a defendant, having no assets in the foreign jurisdiction, would have to do would be to ignore the process. I do not think that this is the effect of *Nouvion* v. *Freeman*. In that case the action was brought on a "remate" judgment, which, by the law of Spain, concludes nothing between the parties as the same, and in fact all questions may be agitated in another action, called a plenary action, in which it may happen that the remate judgment is for all purposes annulled, and had for nothing. Lord Herschell says, at p. 9:

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"My Lords, I think that in order to establish that such a judgment has been pronounced it must be shewn that in the Court by which it was pronounced it conclusively, finally, and for ever established the existence of the debt of which it is sought to be made conclusive evidence in this country, so as to make it *res judicata* between the parties. If it is not conclusive in the same Court which pronounced it, so that notwithstanding such a judgment the existence of the debt may between the same parties be afterwards contested in that Court, and upon proper proceedings being taken and such contest being adjudicated upon, it may be declared that there existed no obligation to pay the debt at all, then I do not think that a judgment which is of that character can be regarded as

finally and conclusively evidencing the debt, and so entitling the person who has obtained the judgment to claim a decree from our Courts for the payment of that debt."

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It is true that under the system which prevails in the Yukon, as well as in our Courts, as also in England, a default judgment may be set aside either absolutely or on terms, but so long as it stands it is a final and conclusive adjudication that a debt is due by the defendant if the claim is for debt. It is also true that other expressions occur in the judgments which at first sight would seem to imply that a default judgment has not the finality necessary to make it an enforceable foreign judgment, but I think such expressions must be taken *secundum subjectam materiam*, as remarked by Lord Bramwell in *Sewell* v. *Burdick* (1884), 10 App. Cas. 74, at p. 104. For example, Lord Watson, p. 13, says: "It must be final and unalterable in the Court which pronounced it." Now, of course, this judgment is not unalterable in the wide sense, because it can be set aside by a Judge of the Yukon Court, but it is unalterable in the sense that it is conclusive while it stands, being for a fixed ascertained amount, and as Lord Bramwell says, at p. 14, "The judgment is of such a nature as would found an action of debt." Again, Lord Herschell says, p. 10, that "The judgment must be such as cannot thereafter be disputed, and can only be questioned in an appeal to a higher tribunal." This also must be taken to mean so long as the judgment stands, as both the Lord Chancellor, at p. 14, and Lindley, L.J., in the case below, 37 Ch. D. 25-6, evidently considered that default judgments may possess the necessary degree of finality and conclusiveness, and if a default judgment taken as here by reason of the defendant not appearing at the trial (being equivalent to a judgment on the merits, according to *Armour* v. *Bate* (1891), 2 Q.B. 233) has not this quality, then it is difficult to see what kind of default judgment would have the quality required. In fact, if we were to say merely because a default judgment may be set aside by the Court in which it is taken that therefore it is of not final legal validity for the purpose of international suit, we would, in effect, be saying that the clearer the plaintiff's case the more useless his judgment would be. Take, for instance, the case of

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a defendant having no defence to a promissory note. Is it to be said that a plaintiff on getting a default judgment takes nothing by his judgment in the foreign jurisdiction? It seems to me that the law is, as stated by Erle, C.J., in *Vanquelin* v. *Bouard* (1863), 15 C.B.N.S. 341, cited by Mr. *Peters*, subject to the limitations as above explained laid down in *Nouvion* v. *Freeman* about the quality of the judgment, and subject to the qualification that it is not void for manifest error or for want of jurisdiction or fraud, or as being contrary to natural justice, or the like. He says, at p. 367-8, "I apprehend that every judgment of a foreign Court of competent jurisdiction is valid, and may be the foundation of an action in our Courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But, until that course has been pursued, the judgment remains in full force and capable of being sued upon."

Another objection raised was that the defendants had not been given long enough notice of the plaintiff's intention to put in an exemplification of the Yukon proceedings. The notice was given on the 13th of February, 1902, for the trial which commenced on the 17th of March. The learned trial Judge, considering the time insufficient, granted an adjournment at the instance of the plaintiff until the 4th of April; but if the

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original time was insufficient, then perhaps in strictness it should have been neglected in fixing the time of the adjournment. At the same time, assuming that there was error in this, the defendants knew as early as December, 1901, that they were being sued on the Yukon judgment, and on February 5th, 1902, that the plaintiff was going to trial, and they must also have known that the proper way for the plaintiff to prove his case was by producing an exemplification of the proceedings, so that they are not in a position to say that they have been taken by surprise. At any rate, I think the error, if there was any, is immaterial, as I am unable to see how it caused any substantial miscarriage of justice.

I think the appeal must be dismissed with costs.

IRVING, J., concurred with HUNTER, C.J.

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MARTIN, J.: First, the counsel for the appellant urges that the notice of intention to produce copies of certain documents under sections 11 and 20 is not sufficient either in point of certainty or in time; to which it is answered that no notice is necessary because what was tendered is an exemplification of the record as distinguished from a copy. It is stated in Stephen's Digest of Evidence, 5th Ed., p. 85, that "An exemplification is equivalent to the original document exemplified," and an exemplification is defined to be "a copy of a record set out either under the Great Seal or under the Seal of a Court." And in Taylor on Evidence, 9th Ed., 1,534, *et seq.*, the matter is fully considered, and it is stated that "exemplifications are proved by mere production, as the Judges are bound to take judicial notice of the seals attached to them; and are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination." See also to the same effect, *Tilton* v. *McKay* (1874), 24 U.C.C.P. 94; Tomlin's Law Dictionary, Vol. 1, Article, Evidence, 1; Sweet's Law Dictionary, 341. Applying the foregoing to the document now before us, which is sealed with the seal of the Territorial Court of the Yukon Territory, I am of opinion that it is an exemplification of the record and proceedings therein mentioned, and, consequently, the notice contended for was not necessary.

It appears from paragraph 1 of the statement of claim of the action commenced in this Court that "the defendants are a duly incorporated company, incorporated under the Companies' Acts of the Province of British Columbia," and it further appears from the affidavit of Henry E. Ridley, filed in the Territorial Court of the Yukon Territory on the 26th day of October, 1900, that at the time of the order to amend the writ and for substitutional service thereof, obtained the same day, there was no local manager of the defendant Company residing in the Yukon Territory. From the said affidavit of Ridley, and from the statement of claim filed in the said Territorial Court, it further appears that the defendant Company at the time of the contract sued on "operated as a transportation Company between Bennett, in the Province of British Columbia, and Dawson, in

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the Yukon Territory," and that the cause of action arose out of the failure of the said Company to carry certain goods between the said points of Bennett and Dawson according to a contract made in September, 1899. Though not so alleged in the statement of claim, it appears from the examination for discovery of Daniel Carmody that this contract was made at Bennett, in this Province, where the defendant Company had a local manager, with another local manager at Dawson, Y.T., the head office being at Victoria. It further appears from the evidence that before the said order for substitutional service was made the Company had no representative in the Yukon, and had ceased to carry on any business in that Territory, not having done so since Daniel Carmody, who acted for it, had left in the last of August or first of September, 1900. Under such circumstances, the order for substitutional service has no effect, and may be disregarded: *Sirdar Gurdyal Singh* v. *Rajah of Faridkote* (1894), A.C. 670. Though no appearance was entered to the writ on behalf of the defendant Company, yet a statement of defence, so-called, was filed on the 1st of March, 1900, by a firm of advocates purporting to act for it, and who did so act in some interlocutory proceedings, but not at the trial held on the 11th of July, 1901, whereat it was not represented by counsel. The statement of defence in effect admits the first paragraph of the statement of claim, and the question as to whether or not the contract sued on was *ultra vires* was not raised, though it

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was and is one of importance to the shareholders of the Company. It does not appear how the said advocates came to act for the Company. Carmody says he has no recollection of giving any instructions with regard to this suit at all, though it is likely he was served with the original writ before it was amended, and before he left the Yukon, and gave that original writ to the advocates who were also solicitors for his Company in all other suits against the Company then pending. But there is nothing in his evidence, or in that of the president of the Company, to shew that any instructions were given in regard to the amended writ, which alone affects this action, the original writ having been defective because of the misnomer of the defendant Company. Nevertheless, counsel for the appellant stated that he does not raise the point that the said advocates did not *de facto*

act for the Company at Dawson, but he does contend that under such circumstances there is here what is tantamount to the obtaining of judgment by consent on an *ultra vires* contract, and it is urged that this defence should have been raised, and that the consent not to raise it was illegal, and that the Company should not now be debarred from setting it up in this Court.

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On the facts, I can come to no other conclusion than that what was done in the Territorial Court was tantamount to obtaining a judgment by consent. What then is the effect of one so obtained against a corporation? It is argued that it was the duty of the Company to defend that point, and if it does not, the judgment is not binding, and the case of *Great North-West Central Railway Co.* v. *Charlebois* (1899), A.C. 114, 124, is relied upon. It is there laid down by the Judicial Committee of the Privy Council that "such a judgment cannot be of more validity than the invalid contract on which it was founded." The views on this point of the Chancellor of Ontario, who tried the case, are given at pp. 115-116, as follows:

"A Company created by Act of Parliament has no right to spend a penny of its money except in the manner provided by the Act. The expenditure of money for a purpose unauthorized by the Act is *ultra vires* absolutely. Such an expenditure cannot be validated by promoters, directors, or shareholders for the time being, nor can it be sanctioned by the Company itself. It follows that, if the act is beyond the power of the company to do or ratify, no judgment obtained by the consent of the company, treating it as authorized, can remove its invalidity, for the virtue of such judgment rests merely on the agreement of the parties, and the incapacity to do the act involves the incapacity to consent that it be treated as valid. I think, therefore, that the judgment by consent obtained by the defendant Charlebois against the company (upon which depends the subsequent judgment *in invitum*) forms no obstacle to the plaintiffs if the transaction impeached is inherently *ultra vires*."

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I note that in Brice on Ultra Vires (1893), 625, it is stated that, "In New Zealand, however, it has been explicitly decided that a judgment, obtained on a compromise of an action against a corporation to enforce an *ultra vires* agreement, was void.

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The subject was thoroughly discussed, and the opinion of the Court is valuable."

The question then arises, is this contract *ultra vires?* In support of the affirmative, the appellant's counsel contends that under section 92, sub-section 10 (*a.*) of the B.N.A Act, a provincial company such as this has no power to undertake the business of common carriers between this Province and the Yukon Territory. Certain general propositions arising out of sections 91 and 92 of the B.N.A. Act are given at p. 617 of Lefroy on Legislative Power in Canada, and the subject is discussed generally in the succeeding pages down to 644. At p. 637, it is stated "Although the provincial power to incorporate is confined to 'companies with provincial objects,' a corporation, though existing only within the limits of the sovereignty which created it, may, as a general rule, act elsewhere through agents, if the laws of other countries permit." In our Canadian Courts the point has of later years been more or less considered in the cases of *Howe Machine Co.* v. *Walker* (1874), 35 U.C.Q.B. 37; *Ulrich* v. *National Insurance Co.* (1877), 42 U.C.Q.B. 141, 158; *Clarke* v. *Union Fire Insurance Co.* (1883), 10 P.R. 313, 3 Cartw. 335; *Loranger* v. *Colonial Building and Investment Association* (1883), 3 Cartw. 133, 136; *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157, 3 Cartw. 118; and *Canadian Pacific Railway Co.* v. *Western Union Telegraph Co.* (1889), 17 S.C.R. 151. In the last mentioned case many earlier decisions are reviewed, and it is laid down at pp. 155-6, that "the comity of nations distinctly recognizes the right of foreign incorporated companies to carry on business and make contracts outside of the country in which they are incorporated, if consistent with the purposes of the corporation, and not prohibited by its charter, and not inconsistent with the local laws of the country in which the business was carried on, subject always to the restrictions and burthens imposed by the laws enforced therein; for there can be no doubt that a state may prohibit foreign corporations from transacting any business whatever, or it may permit them to do so upon such proper terms and conditions as it may prescribe . . . In the absence, as in this case, of any prohibition or restriction, no inten-

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tion to exclude can be presumed." This general principle, as above stated, had already been recognized, as I understand the decision of the Judicial Committee of the Privy Council, in *Bateman* v. *Service* (1881), 6 App. Cas. 386 (though that case was not brought to the attention of the Supreme Court of Canada) wherein it was decided that a foreign company could carry on business and make contracts by its agent in Western Australia, though it had not complied with the provisions of the Joint Stock Companies' Ordinance Act, 1858, which only applied to companies incorporated within that colony. In Brice on Ultra Vires (1893), it is stated at p. 6, that

"A Corporation being entirely fictitious and the creation of law, it might fairly be argued that it can exist only where the power which called it into being exists to give continued vitality to the artificial creation. Doubts have from time to time been expressed as to whether the English Courts at all, and if at all, how far, can recognize foreign corporations and their incidents. Some of these doubts may remain, but in so far as relates to legal proceedings, it is since the Judicature Acts quite settled that foreign corporations, even though not incorporated according to English law, may sue and be sued in English Courts to judgment, whether resident in England or not."

And after a consideration of certain apparent distinctions between the law of England and that of the United States, the learned author arrives at the following conclusion, p. 8: "The views of the United States Courts so expressed and qualified, are probably substantially, if not exactly, the same as those held in this country."

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In regard to the "undertaking" of the Company within the meaning of said sub-section 10 (*a.*), the memorandum and articles of association are not before us, so our information on that point is confined to the material already noticed; but we are entitled to assume that the transportation business as carried on was not inconsistent with the purposes for which the Company was formed, even though, as a matter of fact, the jurisdiction and authority of the Provincial Legislature cannot extend beyond the boundaries of this Province no matter what wider powers were on paper taken or claimed by the Company on

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incorporation. "The true question is, not whether one state can legally grant powers of contracting, etc., in another state, but to what extent does one state recognize the acts of another?"—Lindley on Companies, 6th Ed., 1,222, wherein it may be observed there is a strange omission to refer to the later Canadian authorities above cited, though the earlier ones are mentioned in note (1).

I should perhaps note that it was contended at the bar that if the defendants were so operating as a transportation company, it should be regarded as an "undertaking . . . . extending beyond the limits of this Province" within the meaning of subsection 10 (*a.*), and this contention was not, as I understand it, disputed. It was, however, suggested that the contract, though a "through one," should be looked at as one to act for a certain part of the route as forwarders only, and to deliver the shipment to others for transportation beyond this Province. It may be that if this were the fact that would afford an additional reason for not holding the contract to be *ultra vires*, but in my opinion the fair construction of the allegations already noticed is that the Company itself undertook the carriage for the whole distance, and so I think the question should be considered on that basis, and I have come to the conclusion that to hold it to be an *ultra vires* contract would be contrary to the authorities above quoted, and others cited at bar, which I have also consulted.

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Lastly, it is urged that because under r. 256 of the Judicature Ordinance in force in the Yukon Territory, the judgment sued on may now be, it is contended, set aside despite the lapse of the prescribed time of fifteen days, according to the views expressed by the Court of Appeal in *Bradshaw* v. *Warlow* (1886), 32 Ch. D. 403, therefore it is not final and unalterable as required by *Nouvion* v. *Freeman* (1889), 15 App. Cas. 1, 13-4, but is still inconclusive and open.

A large number of cases were cited on both sides, but in my opinion the point is exactly determined by the case of *Vanquelin* v. *Bouard* (1863), 15 C.B.N.S. 341, 367-8, wherein Chief Justice Erle says, "I apprehend that every judgment of a foreign Court of competent jurisdiction is valid, and may be the

foundation of an action in our Courts, though subject to the contingency, that, by adopting a certain course, the party against whom the judgment is obtained might cause it to be vacated or set aside. But until that course has been pursued, the judgment remains in full force and capable of being sued upon."

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Apply these expressions to the case at bar the contention must fail. The appeal should be dismissed with costs.

Appeal dismissed.

WARD v. DOMINION STEAMBOAT LINE CO.

MARTIN, J.
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Practice—Order XIV.—Cross-examination of plaintiff—Discretion to refuse —Rule 401.

On a summons for judgment under Order XIV., it is only in exceptional cases that defendant will be permitted to cross-examine plaintiff on his affidavit, and then only after defendant has filed an affidavit of merits.

APPLICATION by defendant on the return of a summons for judgment under Order XIV., for leave to cross-examine plaintiff on his affidavit filed in support of the summons. No affidavit of merits had been filed on behalf of defendant.

J. H. Lawson, Jr., for plaintiff.
Higgins, for defendant.

10th October, 1902.

MARTIN, J.: It is contended by Mr. *Higgins* that in an application under Order XIV., the plaintiff, or the deponent making the affidavit in support of the application, should be produced for cross-examination if so required by the defendant, and that the defendant is entitled to take such proceedings *ex debito justitiæ*. Reliance is placed on the cases of *Russell* v. *Saunders* (1900), 7 B.C. 173; *Kingsley* v. *Dunn* (1889), 13 P.R. 300; *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T.N.S. 262; and r. 401.

Judgment

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For the plaintiff, Mr. *Lawson* chiefly relies upon the judgment of Mr. Justice Field in *Millard* v. *Baddeley* (1884), W.N. 99 (an appeal from an order of the District Registrar), wherein it is laid down by the learned Judge that "There is no power upon a summons under Order XIV., to test the story of either party. It ought only to be in an exceptional case that the power given by this rule to examine the parties is exercised. It is the first time I have ever heard of its being done. If it became the practice it would lead to great expense, and to actions being tried upon the summons under Order XIV., which was never intended to be done."

Our rule 401 (assuming that it applied to proceedings under Order XIV.) confers a discretionary power upon the Court or a Judge to order cross-examination in general, differing in that respect from the unfettered Ontario rule 490, which is as follows:

"A person who has made an affidavit to be used in any action or proceeding, other than on production of documents, may be cross-examined thereon."

My decision in *Russell* v. *Saunders* was not in an application under Order XIV., which is a system of procedure within itself: *McGuire* v. *Miller* (1902), 9 B.C. 1; and I am satisfied that the practice does not allow a defendant to cross-examine a plaintiff without leave first obtained, a discretion which, in *McGuire* v. *Miller*, my brother IRVING thought should have been exercised in view of the defence set up, but this, it will be noticed, was only after the defendant in that case had filed an affidavit in answer to the plaintiff's.

Judgment

If I may be allowed to say so, I wholly concur with the statement of Mr. Justice Field that such cross-examination is a course to be permitted only in exceptional cases, nor do I think it should be allowed until after a defendant has filed an affidavit setting up his defence, and in the present case I shall not exercise my discretion until the defendant has filed such an affidavit and shewn good ground therefor. The recent decision of the House of Lords, in *Jacobs* v. *Booth's Distillery Co.* (1901), 85 L.T.N.S. 262, fortifies me in this opinion.

The application will be adjourned till the 14th instant at the cost of the defendant Company to give it an opportunity to file the required affidavit.

IN RE THE JUDGMENTS ACTS: HOOD, ALDRIDGE & CO. v. TYSON.

HUNTER, C.J. (In Chambers)

1902

March 25.

Costs—Creditors' action to preserve fund—Payable out of fund.

Costs incurred in a creditors' action in preserving for creditors property which had been fraudulently transferred, are a first lien upon the fund recovered, and are allowed as between solicitor and client.

IN RE THE JUDGMENTS ACTS: HOOD, ALDRIDGE & CO. v. TYSON

SUMMONS on behalf of Hood, Aldridge & Co., for payment out of certain moneys in Court and that out of said moneys in Court the plaintiffs should be allowed in preference to the other judgment creditors: (1.) The costs of the application; (2.) the costs of the sale under the Judgments Act and (3.) the costs of an action which they had brought to set aside a certain fraudulent conveyance to one Littlehales, all such costs to be taxed as between solicitor and client.

McConnell, the Bank of Toronto, R. W. Clark & Co., the Bank of British North America and Hood, Aldridge & Co., were all registered judgment creditors of the defendant Tyson, the judgments of McConnell and the Bank of Toronto were registered prior to the two judgments of the plaintiffs, and the judgments of the Bank of British North America and R. W. Clark & Co., were registered subsequent to plaintiffs' judgments.

Hood, Aldridge & Co., as judgment creditors of Tyson, then brought an action and had a transfer of land made by Tyson to one Littlehales set aside as fraudulent as against Tyson's creditors. A sale of land under the Judgments Acts was then made by the consent of all the creditors and the money was paid into Court for distribution. The summons was heard before HUNTER, C.J., on the 25th of March, 1902.

Statement

Reid, for the summons: Where costs have been incurred in preserving property for creditors, which property has been fraudulently transferred, the costs of such action are a first lien upon the fund recovered. If the fund is sufficient to satisfy all the creditors, and leave a surplus, then party and party costs

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are to be deducted, solicitor and client costs to be taxed, and the difference between party and party costs and solicitor and client costs is to be charged against the several creditors, in proportion to the amount recovered by each. If the fund is not sufficient to satisfy all the creditors, then the costs as between solicitor and client are to be deducted from the fund, and paid to the party by whose efforts the fund has been preserved for the creditors, and the balance is to be divided amongst the creditors, as according to law. He cited *Stanton* v. *Hatfield* (1836), 1 Keen, 358, see form of order at p. 362, followed in suit by judgment creditor; *Goldsmith* v. *Russell* (1855), 5 De G. M. & G. 547 at p. 556; *In re McRea* (1886), 32 Ch. D. 613; *Macdonald* v. *McCall* (1887), 12 P.R. 9; *Sutton* v. *Doggett* (1840), 3 Beav. 9, and *Barker* v. *Wardle* (1835), 2 Myl. & K. 818.

Argument

Bowser, K.C., Harris and *F. R. McD. Russell,* for different creditors.

His Lordship made the order as asked.

IRVING, J.
1902
March 7.
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July 29.

FRY *ET AL* v. BOTSFORD AND MACQUILLAN (TWO SUITS). MACQUILLAN v. FRY.

Adverse action—Certificate of improvements—Co-owner—Estoppel—Notice—Res judicata—Judgment in rem—Mineral Act, Secs. 36-7 and amendments.

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A judgment in an adverse action under section 37 of the Mineral Act is not a judgment *in rem*.

One co-owner of a mineral claim is not estopped by the result of such action instituted by an adverse claimant against another co-owner who has applied for a certificate of improvements.

Per MARTIN, J.: Section 37 does not apply to co-owners of the same claim, but to owners of conflicting claims.

Decision of IRVING, J., affirmed.

Bentley et al v. *Botsford and MacQuillan* (1901), 8 B.C. 128, followed.

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APPEAL from a judgment of IRVING, J., on a point of law directed to be heard and disposed of by an order of that Judge in Chambers, dated 28th March, 1901. Later, the sole question agreed to be argued (as recited in order of Court of 7th March, 1902) was—" Does the decision of the adverse action of *Callahan* v. *Coplen* (1899), 6 B.C. 523, prevent this action being maintained ?"

The argument was heard on the 2nd of August, 1901, and 21st of February, 1902. The facts appear from the judgment.

Joseph Martin, K.C. (*E. J. Deacon*, with him), for plaintiffs, A. C. and F. L. Fry.

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

Duncan, for defendant MacQuillan.

7th March, 1902.

IRVING, J.: These three actions are connected with the claims which formed the subject-matter of the adverse action of *Callahan* v. *Coplen*. In that action Callahan as owner of the Cody and Joker Fractional mineral claims, hereinafter called the Fractions, successfully opposed an application by Coplen for a certificate of improvements in respect of the Cube Lode mineral claim.

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The trial of the case, *Callahan* v. *Coplen*, took place before Mr. Justice MARTIN, who dismissed the adverse action (6 B.C. 523). His judgment was reversed by the Full Court (7 B.C. 422) and the judgment of the Full Court was afterwards affirmed by the Supreme Court of Canada (30 S.C.R. 555).

The formal judgment of the Full Court orders and declares " that the survey of the Cube Lode mineral claim referred to in the pleadings is invalid and illegal in so far as the same embraces or includes the Joker and Cody Fractional mineral claims; that the defendant has no right, title or interest in or to any portion of the ground comprised within the boundaries of the Cody Fractional mineral claim and the Joker Fractional mineral claim, or either of them, or to the minerals contained therein;

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also, that the defendant is not entitled to a certificate of improvements to the said alleged Cube Lode mineral claim in so far as the same overlaps or conflicts with the said Joker and Cody Fractional mineral claims."

In the first of these three actions (*MacQuillan* v. *Fry*) MacQuillan as one of the owners of the Fractions sues for damages for trespasses which he alleges the Frys have committed. The Frys, in addition to denying the trespass, allege in their statement of defence, paragraph 8, that the ground upon which the plaintiffs say they are trespassing is really a portion of the Cube Lode mineral claim.

The plaintiff in his reply says that the defendant ought not to be allowed to claim the ground in dispute as being a portion of the Cube Lode mineral claim, because, on the 14th day of October, 1897, Coplen advertised his intention to apply for a certificate of improvements in respect of the Cube Lode mineral claim, and at the time of the application the defendants, the Frys, were also interested in the said alleged mineral claim, and were part owners and were witnesses on behalf of the defendant in the adverse action which Callahan commenced.

The reply then sets out the steps taken and the judgment obtained in the adverse action, as I have already mentioned, and the plaintiff, MacQuillan, submits that the said judgment binds the Frys and that they are estopped from alleging that the Cube Lode is a subsisting mineral claim.

IRVING, J.

I stop the recital of facts for a moment to say that I do not think the judgment does declare that the Cube Lode is not a good mineral claim—the decree is silent on that point.

In the other two cases, the Frys as owners of the Cube Lode, are adversing two applications of different date by Botsford and MacQuillan as owners of the Fractions for certificates of improvements in respect of the two said Fractions.

By paragraph 6 of the statement of claim, the Frys allege that the ground in respect of which Botsford and MacQuillan are seeking to obtain a certificate of improvements is not the ground originally located or recorded by them.

By paragraphs 40 and 41, the defendants, Botsford and MacQuillan set out the application of Coplen for a certificate and the

proceedings in the adverse action, and they say that the judgment in *Callahan* v. *Coplen* was a judgment *in rem* and was binding on the plaintiffs in these actions by estoppel.

By paragraph 41 they say that as a matter of law this present action of the Frys is practically an action between the same parties for the same cause and cannot be now maintained.

On the 28th of March, an order was made directing that the points of law so raised by the reply in the first cause and paragraphs 40 and 41 of the second and third causes should be set down for argument before the trial of the issue of fact, and the three were argued before me at one time.

Some correspondence took place between the solicitors, by which it was agreed that the question to be determined was—Does the decision of the adverse action in *Callahan* v. *Coplen* prevent these actions being maintained?

The case for the owners of the Fractions was put in two ways —either because the *Callahan* v. *Coplen* judgment when read with section 37 was a judgment *in rem*, or because it was a judgment *inter partes*, and the parties were the same.

In section 36 of the Mineral Act are laid down the steps to be taken by "the lawful holder" of a mineral claim to obtain a certificate of improvements. By section 37 it is provided that a certificate of improvements, when issued, shall not be impeached, except for fraud. By sub-section 2 of section 37 a code of procedure for adversing applications is laid down.

It provides (*a.*) that any person claiming adversely to the applicant shall bring his action within 60 days; (*b.*) that failure to commence or prosecute with due diligence shall be deemed to be a waiver of the plaintiff's claim; (*c.*) that (1.) after filing the final judgment and (2.) upon complying with the requirements of section 36, the person or *any one* of the persons entitled (according to the judgment) to the possession of the claims shall be entitled to a certificate of improvements in respect of the claim which he or they shall appear from the decision of the Court.

Now, if the defendant, that is the applicant, succeeds he takes out a judgment which in terms entitled him to a certificate. This judgment in favour of the applicant might be said to be

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one affecting the status of the property and bind all the world, as by sections 36 and 37 all persons were required to come in and contest his claim, and it might be said to be a judgment *in rem*. But is the result the same if he fail? The adversing plaintiff in the adverse action does not necessarily succeed if the applicant fails—this judgment would not affect the status of the property.

Again, if we take the case where both parties fail, the judgment under section 11 of Cap. 33 of 1898 would not be a judgment affecting the status of the property.

Those are three judgments which might be given in an adverse action in one of which there would be a judgment which decided that one of the parties was not entitled to the possession of a certain piece of ground, or to a certificate of improvements in respect thereof. That seems to me to establish that judgments under section 37 are not in the nature of judgments *in rem*.

In many cases (of which the adverse action of *Callahan* v. *Coplen* is an instance) the adversing plaintiff is not at the time of bringing his adverse action, entitled to a certificate, although he, the plaintiff, may give affirmative evidence of his own title up to a certain point, *i.e.*, to the trial, yet he may not be entitled to a certificate of improvements—in such a case the judgment would not be in the nature of a judgment *in rem*—as it would affect the status of the property. At the utmost he would not be entitled to a certificate of improvements until he had complied with the provisions of section 36. The language of section 37 does not put a successful plaintiff in the secure position that a defendant is in if he succeeds, for it seems to me that there is a marked difference between the judgment in favour of the applicant's right to a certificate of improvements after advertisement duly made, and a judgment in favour of the plaintiff declaring that the defendant's claim is not good—the former may be a judgment *in rem*, or of that character, but the latter certainly is not.

IRVING, J.

Again, the action instituted by an adversing plaintiff lacks one of the peculiar features of an action *in rem*—there has been no preliminary notice to the world—it was contended that the filing of a writ (as required by section 37, was a notice of this

character), I always thought it was more in the nature of a certificate of *lis pendens*, part of the system of the registration of the mineral claims.

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If one compares the notice required by section 36, which notice Parliament has said will operate as to bar everybody unless action is commenced with the so called notice required by section 37, it will at once be apparent that it is straining the words of the statute to call the filing of a *lis pendens* a notice of the character required on the institution of an action *in rem*.

An action *in rem* has been defined as a proceeding to determine the status or condition of the thing itself, and a judgment is a decision as to the disposition of the thing.

Neither the order of the Full Court alone, nor that order when read in conjunction with section 37 of the Mineral Act, deals with the status of the Cody and Joker Fractions, nor does either of them make a disposition of the Cube Lode or the Fractions.

This determination of the right of possession is an interlocutory determination, the final disposition of the thing is ultimately worked out by the department; it seems to me that a judgment *in rem* must be in its nature final, it must determine the status of the thing. Under the Mineral Act that determination is arrived at in the department after the judgment has been given, and is not a judicial proceeding.

Then it is said that if the decision in *Callahan* v. *Coplen* was not a judgment *in rem* then it was a case *inter partes*, and that the same parties are now again seeking to litigate the matter.

IRVING, J.

In the first place, I would point out that nowhere in the Act is it said that all co-owners must join in the application for a certificate of improvements. My brother, MARTIN, has decided (*Bentley* v. *Botsford* (1901), 8 B.C. 128), that it is not necessary that all co-owners should join in the application.

Having regard to the peculiar nature of the relationship existing between co-owners, I think he is right. I do not see how one co-owner can prevent another co-owner from proceeding with an application for a certificate. That being so, I do not see how the decision in an adverse action against one co-owner can affect the other.

One of several co-owners of a patent may sue for an infringe-

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ment of his right, *Sheehan* v. *Great Eastern Railway Co.* (1880), 16 Ch. D. 59, and so may one of several co-owners of a trade-mark, *Dent* v. *Turpin* (1861), 30 L.J., Ch. 495, but apart from that, judgments *in personam* bind parties and privies only, and co-owners are not privies nor are they parties.

Sir Charles Tupper relies on *Young* v. *Holloway* (1895), P. 87, and *In re Lart: Wilkinson* v. *Blades* (1896), 2 Ch. 788; the former case is a decision peculiar to the practice of the Court of Probate, and the latter rests on the doctrine of acquiescence (see p. 796) and estoppel by conduct.

I do not see how I can deal with that class of estoppel on an application of this sort as the facts are in dispute. The question submitted must be answered in favour of the Frys. The costs of this application will be their costs in any event.

The defendants Botsford and MacQuillan appealed, and the appeal was argued at Victoria on 13th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Peters, K.C., and *Duncan*, for the appellants: The judgment was one *in rem*, but we mainly rely on this being a case of the Frys standing by and being willing to take the benefit of a successful issue of step taken by co-owner; no dissent or disclaimer here operates as estoppel; *Wilkinson* v. *Blades* (1896), 2 Ch. 788; the plaintiffs had constructive notice of adverse proceedings, and not having come in are bound; under the section it is not merely notice to those who have an adverse interest but notice to all the world, to anyone who has any interest; according to *Bentley et al* v. *Botsford and MacQuillan* (1901), 8 B.C. 128, it is an adverse suit if the party claims too much; as to *res judicata* see cases collected in Freeman on Judgments, 4th Ed., 105, and Chand on Res Judicata, 195; as to judgments *in rem*, see *Houstoun* v. *Marquis of Sligo* (1885), 29 Ch. D. 448, at p. 454; *Castrique* v. *Imrie* (1870), L.R. 4 H.L. 427-9; *Duchess of Kingston's Case* (1776), 2 Sm. L.C. 734, 753; *Wytcherley* v. *Andrews* (1871), L.R. 2 P. & M. 327; *Birch* v. *Birch* (1902), P. 72, and *Bonnemort* v. *Gill* (1897), 45 N.E. 768.

Argument

Joseph Martin, K.C., for the respondents: The case set up is really not that of a judgment *in rem*, but a statutory estoppel;

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the section gives an adverse claimant the right to come in and attack an opposing claimant, but if an opposing claimant does not come in there is still no judgment *in rem*, or otherwise against him, but a statutory estoppel; but we were not in the position of an adverse claimant or an opposing interest, quite the reverse; in any event plaintiffs cannot rely on our title as defective, because by section 11 both parties are on the same footing, and must prove their title.

[*Per curiam:* The Court is of the opinion that there is nothing here of the nature of a judgment *in rem.*]

I proceed then to the remaining point, an estoppel *in pais*, as to which see Odgers on Pleading, 3rd Ed., 206; Bullen & Leake's Precedents, 5th Ed., 694. Here there is no estoppel, because the plaintiffs were not in a position to be estopped; the question of notice to them of the adverse proceedings is immaterial, because such proceedings have by a proper construction of sections 36 and 37 no application to the case of co-owners of the same claim, if necessary *Bentley* v. *Botsford* should be, it is submitted, overruled, but it is not necessary to go into that question if section 37 bears the construction contended for; the whole procedure of the sections is directed towards procuring a certificate of improvements, and they apply to owners of conflicting claims; the defendants were in no sense adverse claimants. Recorded owners are already fully protected by said sections, and if they were not called upon to join in the adverse proceedings, the question of notice to them, and consequently of estoppel, wholly disappears; for the purposes of the argument of the point of law, the facts are all admitted as they appear in the record, so we ask for judgment on the sole question of law before the Court.

Argument

Peters, in reply.

Cur. adv. vult.

29th July, 1902.

HUNTER, C.J.

HUNTER, C.J.: In my opinion, this case comes in too unsatisfactory a way before the Court to enable us to deal with it properly. We are asked to decide several important questions as to the construction of an Act which is more frequently before the Court than any other, and which affects a large section of

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the community, in almost complete ignorance of the facts.

An order was made under r. 318, on the application of Botsford and MacQuillan, on the 28th day of March, 1901, directing that certain points of law set up by them in their pleadings should be disposed of before trial. The matter came up for argument on May 2nd, 1901, and was re-argued, it being agreed that the question for decision should be, "Does the decision of the adverse action of *Callahan* v. *Coplen* prevent this action being maintained?" Now, it is obvious that although the title of the Cody and Joker Fractions was established as against the Cube Lode in that suit, it may very easily be that the title has since lapsed by reason of the neglect to observe some provisions of the Mineral Act, so that in this view the answer would have to be in favour of the Frys. On the other hand, it may be that no such neglect has occurred, and that the Frys, even if not bound by the result of *Callahan* v. *Coplen*, although not parties to the record, may be concluded by estoppel *in pais*, as to which, of course, all the facts would have to be found before this question could be determined.

Although the question is raised by Judge's order under r. 318, the position is the same as if it had been raised by special case, and a special case is useless which does not supply the Court with all the necessary facts, either found or admitted, or, at any rate, such facts from which the Court may draw all the necessary inferences of fact.

HUNTER, C.J.

Difficult questions were raised during the discussion, such, for instance, as the nature of the judgment in an adverse action, the question whether or not the proceedings under section 36 are notice to a co-owner, whether or not one co-owner may apply for a certificate of improvements, etc. I do not, however, feel called upon at present to say anything about any of these matters, as I think the Court should decline to enter into the interpretation of this Act any further than is necessary to decide the matter in hand, and always with reference to the particular facts, as otherwise we may very easily be led into giving expression to broad views, which, after further sifting, we should find to be untenable, and few things can be more mischievous than to have misleading, or ill-considered decisions, upon an Act of this importance.

I, therefore, think that although we cannot say that the judgment is wrong, owing to the way in which the matter came up for the learned Judge's decision, yet it ought not to stand in the way of the appellants raising such questions by way of estoppel or *res judicata*, as they may be advised, and that, accordingly, the best way to deal with the matter is to dismiss the appeal, and set aside the order of 28th of March, 1901, and the judgment of the 7th of March, 1902, and to allow the actions to go to trial in the regular way.

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As the appellants fail in their appeal, I think they ought to pay the costs of the appeal, but as all parties agreed to the form of the question to be argued, the costs of the other proceedings should be costs in the cause.

Reference to *Yale Hotel Co.* v. *V. V. & E. Ry. Co.* (1902), 9 B.C. 66, will shew that the Court very recently felt similar difficulty in the way of determining important questions of law which were raised before trial.

HUNTER, C.J.

DRAKE, J.: This is an action by the plaintiffs as co-owners or co-partners with one A. D. Coplen in a claim called the Cube Lode. In 1897, William Callahan brought an action against Coplen with reference to the same ground, in which action the then plaintiff recovered judgment, and that judgment was that the Cube Lode mineral claim was an invalid claim in so far as it embraces or includes any part of the Cody and Joker Fractions. It appears the Frys were part owners of the Cube Lode mineral claim with Coplen, and were witnesses on behalf of Coplen in the action above referred to. The question we have to determine is whether they are bound by the judgment above mentioned, as being *res judicata*. Parties or privies are bound by a judgment of a Court of competent jurisdiction, and privies include trustees and *cestuis que trustent*, husband and wife, co-partners, heirs and assigns. The Frys as co-owners do not fall within any of these designations. It is true their title rests on the same foundation as that of Coplen. A co-owner of a mineral claim is entitled to apply for a certificate of improvements, which if he obtains it, he becomes a trustee for the share of his co-owners. The Frys did not join in the application for a cer-

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tificate of improvements, but apparently were content to permit Coplen to make the application, and take the benefit of it. Although not privies in the ordinary sense of the word, they were privy to the proceedings which resulted in the judgment. *Res judicata* can be pleaded when the action is between the same parties for the same cause of action, and the rule is laid down in the *Duchess of Kingston's case* (1776), 2 Sm. L.C. 734, that with certain exceptions, a transaction between two parties in judicial proceedings ought not to bind a third, for it would be unjust to bind any person who could not be admitted to make a defence or examine witnesses or to appeal from a judgment he might think erroneous, and therefore the depositions of witnesses in another cause and the judgment of the Court upon the facts found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. In my opinion

DRAKE, J.

the defendants are entitled to raise the defence of estoppel to be dealt with at the trial. The fact that a mineral claim is in the nature of a yearly tenancy leaves it open to the parties to sustain or defend these actions in the state and position of the claims as they were at the commencement of the several actions, and not as they were when the action of *Callahan* v. *Coplen* was commenced. The state of affairs may be entirely altered by neglect of statutory duties, and this reason alone is sufficient to prevent the appeal from succeeding. I therefore think the appeal should be dismissed with costs, but I also think the actions should be consolidated.

MARTIN, J.

MARTIN, J.: By agreement of the parties the question to be argued before the learned trial Judge was "Does the decision of the adverse action of *Callahan* v. *Coplen* prevent this action being maintained?" and he answered that question in the negative, and in favour of the plaintiffs. During the argument before this Court, the opinion was expressed that that judgment was not in the nature of a judgment *in rem*, thus leaving for consideration the remaining point as to whether or not the plaintiffs (respondents) are estopped by reason of the adverse proceedings under section 37 taken in the case of *Callahan* v. *Coplen*. It is contended by the plaintiffs' counsel that such is not the case, and

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that the said section has no application to co-owners of the same claim but to owners of conflicting claims. The learned trial Judge, as I understand his judgment, practically adopted this view, and in my opinion it is the correct one. The general scope and object of adverse proceedings appears from a consideration of sub-sections 36 and 37, and I see nothing to lead me to believe that they are to be construed as a means by which co-owners may attack one another. The whole procedure is directed to the procuring of a certificate of improvements, which results to the benefit and not to the detriment of the co-owners, whose interests are fully protected by section 36, sub-sections (*d.*) and (*h.*). According to sub-section (*d.*) of section 36, the notice to be posted in the Mining Recorder's office must contain "the name of the lawful holder thereof;" and sub-section (*h.*) requires that "the recorder shall also set out in Form 1 the name of the recorded owner of the claim at the date of signing the same," and the Crown grant subsequently issues to such recorded owner under section 40 as amended by sub-sections 10 and 19 of the Mineral Act Amendment Act, 1899. It will thus be seen that all through these proceedings the titles of co-owners are not only not disputed, but admitted, and how can there be any adverse proceedings between themselves in regard to their respective positions which are clearly defined and protected by the statute itself? Such being the case, I am of opinion that the learned trial Judge was right in answering the question as he did, and this appeal should be dismissed with costs.

MARTIN, J.

Appeal dismissed.

During the hearing of the above appeal, it appeared that the pleadings had been amended and that both the original and amended pleadings had been included in the appeal books.

The Court stated that where the pleadings have been amended, the original pleadings should not be put in the appeal books, except in cases where it was important that the Court should know what position a party had taken in the litigation.

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June 2.

CREWE v. MOTTERSHAW.

Trespass—Adjoining owners—Escape of fire—Maintaining dangerous thing—Liability for—Negligence immaterial.

CREWE v. MOTTERSHAW

A fire started in brush and fallen timber by the defendant for the purpose of clearing his land, spread on to the plaintiff's lands adjoining:—

Held, in an action for damages, applying the principle of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, that the defendant maintained the fire at his own risk and was responsible for the damage caused by it.

Costs on County Court scale allowed, as action should have been brought there.

ACTION for damages tried before HUNTER, C.J., at Nanaimo, on 13th May, 1902.

The facts appear fully in the judgment.

J. H. Simpson, for plaintiff.

Young, for defendant.

2nd June, 1902.

HUNTER, C.J.: This is an action for damages done by fire to the plaintiff's house, fences, shrubbery and plants, caused, as it is alleged, by the defendant's negligence.

The plaintiff and defendant are adjoining proprietors near the City of Nanaimo, and the lands of each being a few acres in area adjoin a parcel belonging to the New Vancouver Coal Company. The defendant, at the end of August last, began to build a line fence between his land and that of the Coal Company, and for that purpose used fire to clear off the land on both sides of the line, his own land being practically all clear, but that of the Coal Company being covered with brush and fallen timber. He admits doing this during August 30th and 31st, and September 1st, but says that on the evening of the 1st he, with the aid of two small sons, put all the fires out, and that the fire of September 2nd, which did the damage, was not of his causing; and further insinuates, rather than charges, that although it originated close by the scene of his operations, it was started by the plaintiff himself with the intention of committing arson for the purpose

Judgment

of getting insurance money. Whatever the cause, the fire broke out fiercely on the afternoon of September 2nd, at about 2 p.m. on the Coal Company's land close to where the defendant's fires had been set, and being favoured by a high wind soon swept over a large area of the Coal Company's land, and travelling in the direction of the plaintiff's house did the damage complained of, while on the other side of the Coal Company's block a school house was saved with difficulty.

The plaintiff's wife and daughter swear positively that the defendant came to their house on the afternoon of the 2nd and stated that his fire was getting the master of him, and that he could not put it out, and requested them to telephone for help, which they did; but the defendant swears that what he said was that a fire had broken out and that he could not put it out. Another witness for the defendant stated that she saw from her house, about 250 yards off, some children playing about the place where the last fire broke out shortly before its outbreak, but could not say she saw them on the spot itself, and, generally speaking, had a hazy notion of the circumstances. Other witnesses testify that at various times they saw the fires burning during all the days and nights mentioned, and Godfrey and his wife, who were in a position to see plainly, their house being across the road from the defendant's place, state that they saw the fire burning brightly on Wednesday about midnight. All the witnesses agree that no other fires were burning during this period in the neighbourhood.

Judgment

I think the most reasonable inference to draw in the circumstances is that the defendant is mistaken in thinking that he had completely extinguished his fires on Wednesday night, and especially because, as anyone having personal experience of the matter knows, fire at that season of the year is apt to smoulder among the roots of the brush and break out with renewed energy when least expected. I therefore find the fact to be that the fire complained of originated from fires set by the defendant, and I think he is legally responsible for the damage. If anyone chooses to call it negligence for a man to clear away debris and brush by fire in a well settled district during the driest season of the year without taking all possible means to stop the fire

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from reaching his neighbour's property I am content, but I do not think that this is the real ground on which this action should be decided. I think the principle is that on which *Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733 and *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330, were decided, namely, that if a man chooses to use on his own land in an unnecessary way that which if allowed to escape or get beyond his control may injure his neighbour, then he does so at his own risk, and is responsible if damage ensues. It may be argued that this is to say that a man could not use fire in his stove to cook his food or to warm him by, except at the risk of answering all damage thus originating, but the difference is that this use of fire is necessary, while the other is not, although no doubt customary, and generally speaking, not unreasonable. Some Ontario cases were cited by Mr. *Young* to shew that the defendant is not liable unless it is shewn that he did not use reasonable care to prevent the damage, but in my opinion such a rule is practically unworkable. It would mean that when a man saw his neighbour using fire in this way he would have to sit up all night not only to watch the fires which might be causing alarm to his household, but to keep his eye on his neighbour's movements in order to get evidence as to his negligence. At any rate, if these cases are in conflict with the English cases as to the principle involved, I must of course discard them.

Judgment

As to the damages, I think they have been over-estimated. Although I have had the advantage of a view, I am under the disadvantage of being called upon to estimate the amount some seven months after the event, and any figure I might name would necessarily be more or less conjecture, especially in view of the conflict among the witnesses. After considering all the evidence as to these, I am of opinion, without going into detail, that $175.00 is a reasonable sum to allow.

Then as to costs I see no good reason why this action, which laid the damage at $300.00, was not brought in the County Court. It is not, for example, a case in which the validity of one of a number of similar obligations is involved, or in which a constitutional question is raised, or, speaking generally, of such a type as would justify its being brought in the Supreme Court.

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If I were to allow Supreme Court costs I should be encouraging the bringing of County Court actions in that Court, thereby overloading it with work which ought to be disposed of in the County Courts, and I think the tendency to resort to the Supreme Court ought to be checked, especially as that Court is now in arrears on the appellate side. The plaintiff will therefore have judgment for $175.00 and County Court costs on the higher scale.

Judgment for plaintiff.

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July 10.

HAYES v. THOMPSON

Municipal law—Saloons—Bar-rooms—Sunday Closing By-law—Validity of —R.S.B.C. 1897, Cap. 144, Sec. 50, Sub-Secs. 109 and 110, and Cap. 124, Sec. 7.

A municipality has no power under section 50, sub-sections 109 and 110 of the Municipal Clauses Act to pass a by-law closing any kind of licensed premises, except saloons.

A municipality is not empowered, by section 7 of the Liquor Traffic Regulation Act, to pass any closing by-law, the intention of the section being to prohibit the sale during *inter alia* such hours as may be prescribed by the municipality under the authority of some other statute.

Where a statute creates offences and provides the necessary machinery for the carrying out of its provisions, a by-law to put it in force is unnecessary and bad.

APPEAL by way of case stated from a summary conviction. The facts appear in the judgment and in the following sections of the by-law in question:

"(2.) No person having a license to sell intoxicating liquors nor any keeper of licensed premises shall sell or allow, permit or suffer any intoxicating liquors to be sold on his premises between the hours of eleven o'clock on Saturday night and one o'clock on

Statement

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the Monday morning following, nor shall he allow any intoxicating liquors purchased before the hour of closing to be consumed on the premises, except in such cases where a requisition signed by a registered medical practitioner is produced by the vendee or his agent, and after three convictions under this by-law of selling or suffering to be sold or used, the license of said premises shall be forfeited and cancelled forthwith.

"(3.) The keeper of any licensed premises shall keep the bar-room, or room in which intoxicating liquor is trafficked in, closed as against all persons, other than members of his family or household, between the hours of eleven o'clock on Saturday and one o'clock on the Monday morning following, neither shall he allow, permit, or suffer any light to be used in the said room, and the glass in every window in such bar-room or room where intoxicating liquor is vended shall be transparent, nor shall there be permitted any curtain or shutter or other device at any window of such room during the time aforesaid. And any keeper of such licensed premises or any person having a license to sell intoxicating liquors who allows or suffers any person or persons to frequent or be present in such bar-room, or room in which intoxicating liquor is trafficked in, or makes use of any device or allows any partition to exist which may preclude the public from obtaining a full view of the bar through the window of the said room during the time aforesaid, shall be guilty of an offence under this by-law. The keeper shall include the person actually contravening the provisions of this by-law, as well as the lessee or person licensed to sell liquors in any licensed premises.

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"(4.) Every person, not being the occupant or a member of the family of the licensee or lodger in the house, who buys or obtains any intoxicating liquor during the time prohibited by this by-law for the sale thereof, in any place where the same is or may be sold by wholesale or retail, shall be deemed guilty of an offence under this by-law.

"(5.) Any person, not being a member of the family or household of the licensee or keeper of any licensed premises, found in the bar-room or rooms where intoxicating liquors are usually trafficked in during the prohibited hours aforesaid, shall be deemed guilty of an offence under this by-law."

The appeal was argued before HUNTER, C.J.

Duff, K.C., and *Young*, for appellants.
Barker, for respondent.

10th July, 1902.

HUNTER, C.J.: Appeal by way of case stated from the conviction of the appellant by the Police Magistrate of Nanaimo under section 5 of the Sunday Observance By-law, 1895, Nanaimo, the offence charged being that of being found in the bar-room of the Crescent Hotel between ten and twelve p.m. contrary to the provisions of the said by-law.

The by-law was passed for the purpose of regulating the hours during which houses licensed to sell intoxicating liquors should be closed. Section 2 prohibits the sale or consumption between eleven p.m. Saturday and one a.m. Monday; section 3 provides that the bar-room shall be kept closed between eleven o'clock Saturday (*sic: i.e.*, not specifying whether it is eleven o'clock a.m. or p.m.) and one a.m. Monday; section 4 makes it an offence to purchase or obtain intoxicating liquor during the hours prohibited for sale, and section 5 an offence for any one not a member of the family, etc., to be found in the bar-room during the "prohibited hours aforesaid."

Very probably the same hours were intended to be specified in section 3 as in section 2, that is to say, the prohibited period was intended to commence from eleven o'clock p.m., but I must take the by-law as I find it, although in the view that I take it is unnecessary to consider the effect of the omission.

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It was objected that there was no power in the municipality to pass a by-law closing any kind of licensed premises, except saloons, under sub-section 93 of section 104 of the Municipal Clauses Act, 1892, being sub-section 110 of section 50, Cap. 144, R.S.B.C. 1897, and I think the objection is fatal.

By section 4 of Cap. 21 of 1891, being section 7 of Cap. 124, R.S.B.C. 1897, the sale of liquor is prohibited in all places where intoxicating liquor is allowed to be sold between the hours therein named, as also on any other days or hours during which the place is to be kept closed by order of any municipal by-law. This, I think, clearly means by any by-law which the munici-

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pality may competently enact by virtue of some statute, either general or special, but not by virtue of the section itself, which gives no such power; and this is the more apparent when we find that the Legislature had already, by the Municipal Act, 1889, section 96, sub-section 85, conferred the power on municipalities generally to order and enforce the closing of saloons, and special powers by special Acts on particular municipalities, *e.g.*, on New Westminster, by sub-section 68 of section 142 of the New Westminster Act, 1888; and on Vancouver, by sub-section 68 of section 142 of the Vancouver Incorporation Act, 1886 (both enactments giving power to regulate), the latter being replaced by sub-section 19 of section 125 of Cap. 54, 1900, by which power is given to close saloons, hotels, stores and places of business during such hours, and on Sunday, as may be thought expedient.

In this connection it is unnecessary for me to dissent from the decision of Draper, C.J., in *In re Bright* v. *Toronto* (1862), 12 U.C.C.P. 433, where in upholding a similar by-law, he says in respect of the same legislation then in force in Ontario, that the by-law merely added to the provisions of the statute, and might be administered in compliance therewith. Inasmuch as he makes no reference to any other legislation authorizing municipalities to close any class of licensed premises, and I have been unable to discover any in such of the statutes of the old Province of Canada as are available, I may assume that none such existed at the time of the passage of the by-law he was considering, and therefore if he was to give full effect to the sections he could not perhaps have decided otherwise, although in this view it might be difficult to work out the clause exempting travellers. At any rate the case is instructive as it is an illustration of the fallacy of holding that because the Courts in Ontario have ascribed a particular intention to an enactment of the Ontario Legislature, we must therefore ascribe the same intention to our own Legislature, whereas the same enactment may have been passed *alio intuitu* in British Columbia. I therefore think that the intention of section 4 of the Act of 1891 is to prohibit the sale during *inter alia* such hours as the municipality may prescribe under the authority of some statute, general or special, as the case may

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be, in force for the time being, and that the municipality is not empowered to pass any closing by-law by the section itself.

This being so, the only closing powers in terms conferred on the Municipality of Nanaimo are those found in sub-section 93 of section 104 of the Municipal Clauses Act of 1892, still in force, *i.e.*, the closing of saloons during such hours of the night and on Sundays as may be thought expedient. This clearly does not give the power to close hotels, or other places of the like nature, which do not fall within the category of saloons; and I think the Legislature advisedly abstained from conferring on municipalities generally the power in relation to hotels, and in confining it to saloons. There are obviously good reasons for keeping saloons closed during Sundays, and the late hours of the night, which do not necessarily apply to hotels, as the hotel is the home or the house of the guest while he stops there, and he may be in the bar-room during such hours for perfectly legitimate social purposes, or with a view to his own comfort and convenience.

It was argued by Mr. *Barker* that the by-law could be upheld under sub-section 92, which confers power on the municipalities to make by-laws in relation to saloons, taverns, billiard-rooms and restaurants, but I think the short answer to this is that sub-section 92 confers general powers while sub-section 93 confers express powers to close a particular class of place singled out from those mentioned in sub-section 92. *A fortiori* the by-law cannot be supported under sub-section 78, which is of a more general character still *quoad* hotels and saloons.

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I think, therefore, that clause 3 of the by-law is *ultra vires*, and of course clause 5 must fall with it.

I was asked also to consider the validity of the other clauses. In my opinion, it was also incompetent for the municipality to pass clause 2, and therefore clause 4, as the subject-matter thereof is specially dealt with by the Liquor License Regulation Act, 1891, which is an automatic statute, providing penalties for its breach and the necessary machinery to enforce it, and needs no by-law to put it in force.

I may add that the cases cited to the effect that I should be slow to hold the by-law unreasonable are not in point, as the

HUNTER, C.J. question here is not whether it is unreasonable or not, but whether the municipality had power to pass it.

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Appeal allowed.

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March 25.

REX v. SING.

Justices—Practice—Different offences charged—Hearing of second information before decision on first—Conviction on second—Legality of conviction.

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Where a Magistrate is trying two distinct but similar informations against an accused, a conviction by him in the second case, without regard to the evidence adduced in the first case, is not invalid merely because he reserved his decision in the first case, which he afterwards dismissed, until the conclusion of the second case.

The Queen v. *McBerny* (1897), 3 C.C.C. 339, distinguished.

APPLICATION for *certiorari* to quash a conviction by which the applicant, who was charged with selling liquor to an Indian, was convicted and fined $50.00 by a Justice of the Peace. The facts appear in the judgment.

Harold Robertson, for the applicant.
Maclean, D. A.-G., contra.

24th March, 1902.

DRAKE, J.: A rule *nisi* in this case was granted on the ground that the Magistrate before whom the accused was charged with selling liquor to Indians, heard two informations for similar offences, one committed on the 1st of January, 1902, and the other on the 20th of January, in the same year, and reserved his judgment until the second case was concluded. He then dismissed the first information and convicted on the second.

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Mr. *Robertson* for the defendant, contended that such a course of procedure was contrary to the principles and spirit of the criminal law, which is that each case should stand on its own merits, and should be decided on the evidence given in relation to that particular charge; and the first case he cited is that of *Hamilton* v. *Walker* (1892), 2 Q.B. 25, 56 J.P. 583, in which the defendant was charged with delivering to one Farrell, a number of indecent advertisements, to the intent that they should be delivered to certain inhabitants, etc. Secondly, that the defendant aided, counselled, and procured Farrell to exhibit to certain inhabitants certain indecent advertisements. The Magistrates heard the first summons, and said they would hear the other before rendering judgment, and convicted on both charges. Pollock and Williams held both convictions bad. Pollock, because each case should be considered on its own merits, and Williams, because it prevented the defendant from pleading *autrefois convict* to the second charge in case he was convicted on the first. This case was considered in *Reg.* v. *Fry et al* (1898), 19 Cox C.C. 135, which is very like the present one. Three informations were laid against a beer house keeper for breaches of the Licensing Act, which happened on different days. Mr. Justice Fry was the chairman of the Bench of Magistrates who heard the cases. They proceeded to hear all three cases before giving their decision, and eventually convicted on the first case, and dismissed the other two. A rule for a *certiorari* was granted to quash the conviction. The arguments in favour of making the rule absolute were much the same as those put forward here, that the hearing of subsequent summonses was likely to influence their judgment, and it was in fact mixing up two matters of complaint. The Court held that the Justices had answered the objections in their affidavit, and that they had treated the evidence as applicable only to the summons to which it related, and if the postponement was merely to decide the amount of the penalty, there was nothing wrong in their proceedings; and they distinguish the case of *Hamilton* v. *Walker*, *supra*, pointing out that the conviction was quashed because there was nothing to shew that the evidence there had been confined to the particular case, and Pollock, on whose judgment the plaintiff lays great weight, says, "I do not go so far as to say

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that the Justices might not reserve their judgment after hearing the evidence (upon the first case.)" There is an affidavit in the case before me that satisfies me that the Magistrate was governed only by the evidence applicable to the case on which he convicted. In the case of *The Queen* v. *McBerny* (1897), 3 C.C.C. 339, decided by a full Bench of the Province of Nova Scotia, it was held that where the defendant was tried before the County Court Judge's Criminal Court on four distinct charges of theft, no judgment being pronounced until all the cases had been heard, the convictions were invalid on the grounds that the prisoner must be tried only on the evidence given in relation to the particular charge on which he has been indicted, and that when a prisoner is indicted, and on his trial, that trial must be proceeded with and finished before he can be tried on any other indictment. There was no evidence that the County Court Judge confined the evidence to the particular charge, in fact the contrary appears to have been the case. Townsend, J., refers to the argument which was addressed to the Court, that inasmuch as the Judge rightly admitted evidence of the other charges to shew the animus of the accused, there would be no objection to his reserving his decision until all the evidence was heard; but he did not agree with it. I think that a distinction can be drawn between trial of an indictment and a hearing before a Justice. Under the Code a trial before the County Court Judge is in all respects governed by the same principles as a trial at the assizes, and evidence is not admissible to shew what operated on the Judge's mind with reference to the conduct of the trial. In cases before a Magistrate evidence is admissible before the Superior Court which is applied to for a writ of *certiorari* as to what actually occurred and what governed the Magistrate's conduct. I think that a Magistrate should not mix up two criminal charges as there must be separate informations for each offence. He should therefore dispose of them as they arise. If the defendant had been convicted on the first case, his position would have been stronger, as he might suppose that the Magistrate had been influenced by what he heard in the second case; but here the first case was dismissed, and the second case therefore could not be influenced by circumstances arising at a previous date, and not proved.

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The Magistrate has made an affidavit stating that each case was solely governed by the evidence adduced in support of it, the same as was done in *The Queen* v. *McBerny, supra*, and the fact that the first case was dismissed strengthens the affidavit of the Magistrate. I, therefore, refuse the rule, but without costs.

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Debtor and creditor—Accord and satisfaction—Agreement to accept land in payment of debt—Solicitor's authority—Agent's authority.

One C., a commercial traveller in plaintiffs' employ, called on defendant and pressed for payment of an overdue promissory note. Defendant offered to give a parcel of land in payment, and C. in Company with defendant inspected the land. C. wrote plaintiffs submitting the proposition and giving a specific description of certain land. Plaintiffs wrote a solicitor instructing him to prepare a conveyance thereof. The solicitor finding that there had been a misdescription in the letter to plaintiffs accepted a conveyance of the land actually shewn by defendant to C.:—

Held, in an action on the note, that plaintiffs were bound as by an accord and satisfaction and could not recover.

Judgment of IRVING, J., reversed.

APPEAL from the judgment of IRVING, J.

Plaintiffs, who are wholesale liquor dealers, sued defendant for principal and interest due upon a promissory note made by him in favour of the plaintiffs. The defendant admitted the making of the note, but pleaded that one Conlin representing and on behalf of the plaintiffs, and having the authority of the plaintiffs so to do, agreed with the defendant to accept in full satisfaction of the said note a certain lot number 2, block 12, in the City of Grand Forks, and alleged that in pursuance of such agreement the defendant executed a deed of the said lot to the plaintiffs and delivered it to their solicitor and it was accepted by plaintiffs

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in discharge of their claim. The plaintiffs joined issue in their reply and pleaded that the said Conlin was a commercial traveller employed by them to solicit orders and sell goods for them in the ordinary course of business, but having no further or other authority and never having had any authority to enter into the agreement alleged in the statement of defence, and they denied that they had entered into the said agreement either themselves or by Conlin, or anyone else; they denied that the solicitor to whom the deed was delivered was their solicitor in the matter, and they also denied that they had taken the said lot in satisfaction of their claim.

Defendant was interviewed by Conlin several times regarding the non-payment of the note sued on, and ultimately he offered to transfer certain property to plaintiffs in satisfaction of their claim against him. Defendant in his evidence says that while standing with Conlin on the platform of the Yale Hotel in Grand Forks he pointed out to Conlin lot 2, block 12, about 100 yards away, as the lot he was willing to convey, and that he stated at the time that it was the next lot adjoining Dr. Averill's house. He also says Conlin told him he would communicate with his firm. Manly and Conlin together saw Heisterman, a solicitor, outside the Yale Hotel, and Conlin told Heisterman that plaintiffs would write to him in reference to the conveyance of a lot from Manly to them in settlement of an account. Heisterman says Conlin pointed out to him lot 2, block 12, as the lot, saying, "It is over there adjoining Dr. Averill's property."

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Lot 2, block 1, adjoined Dr. Averill's property on the other side from lot 2, block 12. Looking from the Yale Hotel, lot 2, block 12, was to the right of Dr. Averill's house, and lot 2, block 1, was to the left.

Conlin in his evidence says that Manly told him the lot was lot 2, block 1.

At any rate as a result of their interview and before submitting the offer to plaintiffs, he saw Holland, a real estate dealer of Grand Forks, in reference to valuation. He then wrote from Nelson on 28th September, 1900, to plaintiffs, as follows:

"John A. Manly will give you a lot in settlement of your claim against him, which I looked over when in Grand Forks. It is

located about a hundred yards from the Yale Hotel in the centre of the town, and if the town fulfils the hopes of its citizens, it will be valuable before very long. My friend, Tracy Holland, a real estate dealer there, says it would probably bring $400.00 now, although Manly says it is worth $1,000.00. I enclose you the names of solicitors who will do the conveyancing, should you decide to take the lot. The following is a description of the property: lot 2, block 1, East Addition, City of Grand Forks."

On 5th October following, plaintiffs wrote Macdonald & Heisterman, solicitors of Grand Forks, as follows:

"We are in receipt of a communication from our Mr. J. C. Conlin, who was at your place a short time since, with reference to a town lot which Mr. John A. Manly desires to convey to us. The description of the property is 'lot 2, block No. 1, East Addition, City of Grand Forks.' We desire you to see Mr. Manly in this connection and have the transfer of the property made to us, and send the title deed to us at your earliest convenience. Hoping to hear from you at an early date regarding this, we remain."

Macdonald & Heisterman answered thus:

"We have to acknowledge the receipt of yours and contents noted. We have arranged for the release . . . property and expect to have title in . . . to secure the release of another mortgage. Shall . . . have the conveyance registered before forwarding the . . . to you, the Registry Office being at Kamloops."

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Then plaintiffs in reply instructed them on 20th October, as follows:

"We are in receipt of your esteemed favor of the 23rd inst., with reference to the lot which you are arranging to transfer to us from Mr. John A. Manly. As soon as this matter is arranged please have the conveyance registered, and mail to us a certified copy of same, and oblige."

Heisterman in his evidence said that he did not know the situation of lot 2, block 1, or the number of the lot to be given in settlement of the account, but he knew the situation of the property on the ground—it had been pointed out to him by Conlin—so when he was preparing to draw the conveyance he concluded that

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lot 2, block 12, was the lot really intended, and he wrote plaintiffs the following letter :

"*Re* conveyance Manly to you. In this matter we have to advise you that owing to your sending us a misdescription of the property to be conveyed,we were unable to close this matter until yesterday. The property you mentioned to us has a mortgage over it in favor of the Dominion Permanent Loan Company, and arrangements were being made to replace this mortgage, which covered considerable other property besides. We have obtained a conveyance from Mr. Manly of the property to be conveyed and have to-day forwarded same to the Registrar of Titles for registration. Would you kindly send us receipt in full of your account against Manly, when we will be able to forward the deed to you so soon as the same is returned duly registered."

On 14th February, plaintiffs replied as follows :

"We are in receipt of your favor of the 7th inst., and as our Mr. Conlin was out of town, we were not able to answer you sooner. You advise us that there is a mortgage already on the property on which you propose that we accept security as second mortgages. We do not feel disposed, under the circumstances, to give a receipt till we realize our claim against Mr. Manly. We simply want to be secured some way in the meantime, and if this cannot be done in a proper manner, we shall have to take action against Mr. Manly, which we do not care to do, as we have always tried to deal as leniently and considerately with him as possible. Hoping to hear from you again on this matter, we remain."

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The action was tried before IRVING, J., on 8th April, 1902, who gave judgment for plaintiffs for $985.60, but without costs, as he held that plaintiffs had not pleaded their reply properly, and who delivered the following (oral) judgment :

"The facts, I think, are plain. The proposal from Manly to the plaintiffs was made through Conlin. At that time Conlin had no authority to accept or reject any proposal from the defendant. He was selected by the defendant to convey the proposal to the plaintiffs. The plaintiffs had nothing to do with the selection of him for this purpose. I will assume that Manly did

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mention a specific lot to him. I will assume that Manly's story is correct, and that he intended generally to specify the lot next to Averill's. They had not a map before them at the time. Later on Conlin consulted a map, and arrived at the conclusion that in the proposal the offer was lot 2, block 1. Conlin so informed Pither & Leiser. He advised them that the property was worth $400.00, as advised by Holland. In making this report he acted for Manly; at least it must be taken that he did so. Having that before them Pither & Leiser agreed to accept it. Their attention was directed to the value of the property, and they were in no way concerned with the mistake made by the proposal that they received, because they had not asked Conlin to do it, nor had they held him out as their agent for that purpose. The mistake in submitting the proposal was, therefore, the mistake of Manly, and not that of the plaintiffs. There was a fundamental error there.

"To resume the facts. Conlin and Manly informed Mr. Heisterman that he would receive instructions from Pither & Leiser. He received instructions to accept a particular lot; none other. He acted for both parties. He took it for granted that Manly's statement that his instructions related to lot 2, block 12, was correct. He advised Pither & Leiser that they had made a mistake, but in ambiguous language, with the result that they never were aware what the mistake was. He carried out an arrangement never authorized by Pither & Leiser, and Pither & Leiser then shifted (I think unfairly, but that has nothing to do with the question as I regard it) their ground. Mr. Pither being sick, Mr. Leiser wanted to make a better bargain. But I don't think that that now prevents Pither & Leiser from setting up what was their original ground, *viz.*, to accept only the lot upon which they had a report from Conlin."

The defendant appealed, and there was also a cross-appeal by plaintiffs as to costs.

The argument took place at Victoria on 28th and 30th June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Duff, K.C., for appellant: The evidence shews that the lot really agreed about was lot 2, block 12; it was pointed out

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on the ground by Manly to Conlin, and the minds of the parties came together and fixed on this lot; on the facts it is not open to plaintiffs to say that Heisterman did not carry out the arrangement. Conlin's admission that the lot intended was "to the right" of Dr. Averill's house, looking from the Yale Hotel, settles it that the lot was 2, block 12.

Higgins, for respondents: Heisterman had no authority to make the arrangement which was made; for extent of a solicitor's authority and effect of notice to or knowledge by Heisterman see *Saffron Walden Second Benefit Building Society* v. *Rayner* (1880), 14 Ch. D. 409; *Tate* v. *Hyslop* (1885), 15 Q.B.D. 368. Heisterman's instructions were to prepare conveyance of a specific lot and send the title deeds to plaintiffs, and not to settle an account—his action was outside the scope of his authority, and invalid. Even if there were any doubt as to the identity of the property, see *Murray* v. *Jenkins* (1898), 28 S.C.R. 565, at p. 572. Conlin only communicated one proposition to plaintiffs, and a specific lot was authorized by them to be taken—even if he did make a mistake, the assent of the plaintiffs was given on a state of facts as represented to them, and their minds were directed to that one property. He cited also *Richards* v. *Bank of Nova Scotia* (1896), 26 S.C.R. 381, at p. 386; *Day* v. *McLea* (1889), 22 Q.B.D. 610, and *Mason* v. *Johnston* (1893), 20 A.R. 412.

Argument

Duff, replied.

HUNTER, C.J.: I do not think that any repudiation of the arrangement would have been attempted if it had not been for the possibilities furnished by the misdescription of the property in the plaintiffs' letter of instructions to the solicitor.

The arrangement was plain and business-like; the defendant, having no cash, offers the plaintiffs' agent a town lot in liquidation of his debt to the plaintiffs, which the agent accepts after inspecting the lot. This arrangement is confirmed by the plaintiffs, who instructed a solicitor to procure and register the conveyance, and the only trouble arises from a wrong description of the lot being given by the plaintiffs to the solicitor, the lot being described as lot 2, block 1, when what was meant was lot 2, block 12. The solicitor after finding out from both the agent and

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the defendant the identity of the lot which had been inspected and agreed upon, prepared and registered a conveyance of it to the plaintiffs from the defendant by the proper description. There can be no doubt that there was thus an accord and satisfaction, and the fact of the misdescription is immaterial. The lot had been agreed upon by agent and defendant on the ground; it was this lot which the plaintiffs had their minds upon; it was the lot which they got; and the position is the same as if they had not given any description of it at all in their letter, but told the solicitor to find out the description from the agent and the defendant.

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The appeal should be allowed with costs, and the action dismissed with costs.

DRAKE, J.: This action was brought to recover $985.00, amount of a promissory note given by defendant to plaintiffs. The defendant admits making the note, but says that the plaintiffs agreed to accept a lot in the City of Grand Forks in satisfaction of the plaintiffs' claim, and that he accordingly executed a conveyance of the lot, which was duly registered in the plaintiffs' name. There are two points in this case; the first is, was the lot conveyed in satisfaction of the debt, and the second is, was the lot intended to be conveyed lot 2, block 1, or lot 2, block 12?

The defendant was in embarrassed circumstances, and the plaintiffs' agent, Conlin, was pressing him for payment of the note. After several applications the defendant informed Conlin he could give the plaintiffs a lot in the townsite if they would take it in satisfaction. Conlin communicated with the plaintiffs and they instructed Messrs. Macdonald & Heisterman, as their solicitors to prepare a conveyance of lot 2, block 1. Conlin now says that this was to be given as a security only, but Mr. Heisterman says that Conlin pointed out the lot which was to be given in satisfaction of the defendant's debt, and that lot was lot 2, block 12.

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The plaintiffs' instructions to Messrs. Macdonald & Heisterman were to have a transfer of lot 2, block 1, East Addition of Grand Forks, and to have the conveyance sent to them. This was followed by a letter of the 20th of October, asking to have the

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conveyance of the lot "you are arranging to transfer to us from Manly registered and forwarded." Conlin admits that he told his firm that Manly would give them the lot in settlement of their claim against him.

The solicitors notified the plaintiffs that there had been a misdescription of the property, and that they had obtained a conveyance of the right lot, and asking for a receipt in full of Manly's note. On the 14th of February, 1901, for the first time the plaintiffs used the word security. This was after the conveyance was made and completed. In my opinion, the question of security was an afterthought, and the original arrangement which was accepted was to take the lot in satisfaction.

On the second point of misdescription between the lot mentioned by Conlin to the plaintiffs and by them to their solicitors, the evidence shews that the land was pointed out to Mr. Heisterman by the defendant and Conlin, and was identified by the position it occupied with reference to Dr. Averill's house. Mr. Heisterman having been pointed out the particular plot went and examined the plan of the townsite, and ascertained the description as lot 2, block 12. The lot mentioned by the plaintiffs did not correspond with the land he was shewn. Mr. Conlin was not so well acquainted with the locality, and he got the description from a land agent in the town, and not from the defendant. The error was of small importance as there were no improvements in the neighbourhood, and nothing to guide the eye to the particular lot. Both lots front on the same avenue, only the one conveyed is considerably larger than the other. I think on this point also the evidence is greatly in favour of this being the piece of land intended, the other lot not being defendant's property, and the land having been pointed out on the ground to the plaintiffs' solicitor.

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I am of the opinion that the appeal should be allowed with costs.

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MARTIN, J.: Though I am not quite so sure as I would like to be that the decision in *Murray* v. *Jenkins* (1898), 28 S.C.R. 572, has no application to the present case, yet I find myself unable to actually dissent from the strong view taken by my learned

brothers that what the parties were really dealing with was a certain lot of land as it appeared on the ground, and not a lot according to a number on a plan.

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Appeal allowed and action dismissed.

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BOOKER v. WELLINGTON COLLIERY CO.

Master and servant—Employer's liability—Operating colliery without statutory man-holes—Allowing trip to run outside customary hours—Negligence—Railway—Excessive damages.

In defendant's coal mine the haulage slope, which was necessarily used as a travelling road by the workmen, was not provided with man-holes at intervals of not more than twenty yards as required by the Coal Mines Regulation Act, and on account of this lack of sufficient man-holes, it was the custom of the Company not to run the trip during the time the workmen were going to and coming from work. The plaintiff while coming from work was run into and injured by the trip which had been started off during a prohibited time. The trip was a train of cars, operated by a stationary engine on the outside, and used for hauling coal out of the mine. The jury found that the accident was caused by defendant's negligence in letting the trip down, and on the verdict judgment was entered for plaintiff for $1,424.00 and costs.

An appeal to the Full Court was dismissed, the Court refusing to reverse the findings of fact or to interfere with the damages as excessive.

Held, also, that the place in question was a "railway" within the meaning of the Employers' Liability Act.

ACTION under the Employers' Liability Act, for damages for injuries sustained by plaintiff, a miner, while in the employ of the defendant Company in its coal mine at South Wellington. The underground workings of the mine could only be reached by an inclined plane or slope about 900 yards long, from the bottom of which levels ran to the various workings. This slope was about ten feet wide, and six feet high. A track, three feet

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wide, ran along the middle of this slope from the top to the bottom, with ties, and steel rails connected by fishplates. On this track ran the cars used in hauling the coal out of the mine. These cars ran on flanged wheels, and were coupled together in trains of about nine cars each, called trips, the trips being raised and lowered by means of a stationary steam engine situated at the top of the slope, and running at about the rate of eight miles an hour. The width of the cars with box was three feet eight inches. Rule 11 of section 82 of the Coal Mines Regulation Act provides that

"Every underground plane on which persons travel, which is self-acting or worked by an engine, windlass, or gin, shall be provided, if exceeding thirty yards in length, with some proper means of signalling between the stopping places and the ends of the plane, and shall be provided in every case, at intervals of not more than twenty yards, with sufficient man-holes for places of refuge."

The signals to the engineer in charge of the engine were given by a bell in the engine room, worked by a wire running on pulleys attached to the timbers on the top or roof of the slope to the bottom where there was stationed the bottomer, whose duty it was to give signals to the engineer. On the south side of the slope there was a signal wire which could be used to stop the trip if danger were apprehended; the engineer in charge said that after getting the signal he could stop the trip in about ten feet. The man-holes were on the north side of the slope, and on the same side running from the top to a point some distance below where the accident happened, there was a water pipe on the surface of the ground, and between it and the side there was a ditch; while on the same side, running along the slope and across the mouths of the man-holes, there was a steam pipe between four and five feet from the ground. On account of these obstructions the south side, or the track itself, was the foot-path usually taken by both officials and workmen. The slope was not provided with sufficient man-holes, so it was the custom of the management to keep the trip from running along the slope for half an hour between shifts so that the men could go to and come from work at a time when

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the trip was not running. On the day the plaintiff was hurt the ordinary time of the trip being held off its run was between 3 and 3.30 in the afternoon, and the jury found that the plaintiff was hurt by the trip being let down the slope at a time prohibited by the rules and customs of the Company.

The plaintiff while coming from work along with four other men was run into and injured by the trip which before reaching him had jumped the track. The head man was the only one that had his light (naked) burning, as there was a strong current of air, and only the head man could conveniently or practically carry a light; the plaintiff was next to the last man. The car jumped the track about 200 feet from the mouth of the slope and plaintiff was hit while standing about nine feet farther down and at a point twenty feet from the first man-hole and seventy-one feet from the second. Plaintiff in his evidence said, "When the trip was coming, I tried to get behind a post prop. When I saw the trip it was off the track, and it was no use signalling. As soon as I heard it I saw it pretty close to me, not many feet from me, not so far as ten feet, may have been six feet; I think I did hear it before I saw it—not many seconds, say ten, I suppose; when I crossed from north to south side I was below the second man-hole. I might hear a full trip at 100 yards, and an empty one not quite so far. I got behind the prop on the south side; I can give no idea how far from the nearest man-hole—I didn't take notice; I was going up the slope not taking any notice of man-holes in particular, as I thought I was above them all, and I wasn't expecting the trip to come along; I made no effort to get into any man-hole when I saw the trip coming; I tried to get out of the way by sheltering myself behind the prop."

Statement

The accident happened on 9th November, the injuries sustained by plaintiff being a triple fracture of the leg—at the knee, below the knee, and at the ankle—and some contusions. He was attended by the colliery doctor and left the hospital the day before Christmas. At the time of the accident he was earning $70.00 a month; he did some work the following May, but it was July before he considered himself fit to do his former work.

The trial took place at Nanaimo, before MARTIN, J., and a special jury, who returned a verdict as follows:

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"Have the defendants or their servants done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? If so, what was it? Yes; the trip was let down the slope at a time prohibited by the rules and customs of the defendant Company.

"Have the defendants or their servants, by such act of commission or omission, caused injury to the plaintiff? Yes.

"Did the plaintiff do anything which a person of ordinary care and skill should not have done under the circumstances, or omit to do anything which a person of ordinary care and skill would have done under the circumstances, and thereby contribute to the accident? If so, what was it? No.

"Damages, if any? $1,424.00."

His Lordship held that the place was a railway within the meaning of the Act, and he gave judgment for plaintiff for $1,424.00 and costs.

The defendant Company appealed, and the appeal was argued at Victoria on 27th June, 1902, before HUNTER, C.J., WALKEM and DRAKE, JJ.

Argument

Luxton, for appellant: The accident was caused by plaintiff's own negligence; he did not try to ring the signal bell, nor did he try to reach a man-hole, but simply stepped aside and stood against a prop, thus taking chances in being hit by a trip off the track. He cited Beven on Negligence, 169, 176; *Butterfield* v. *Forrester* (1809), 11 East, 60; *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,206; *Brown* v. *Great Western Railway Co.* (1885), 52 L.T.N.S. 622; *Martin* v. *Great Northern Railway Co.* (1855), 24 L.J., C.P. 209.

The place in question is not a railway within section 3, subsection 5 of the Employers' Liability Act; it is a "slope-track" and the cars are run by means of a stationary engine: see *Swansea Improvements and Tramway Co.* v. *Swansea Urban Sanitary Authority* (1892), 1 Q.B. 357 at p. 360. The damages are excessive.

Barker, for respondent: The defendant did not comply with statute and provide man-holes twenty yards apart, so it was the

custom to keep the slope free of trips while men were coming from work—plaintiff knew this and had no reason to anticipate the coming of the trip—there was no reason that he should, as he had a right to rely on the practice of the Company. When suddenly confronted with the danger he did what he thought was best on the spur of the moment. There was ample evidence to support the finding.

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Luxton, replied.

HUNTER, C.J.: This is a plain case and the evidence shews that the mine was operated without the proper safeguards required by the Act. After making an arrangement with the Government Inspector not to run cars during certain hours the Company acted with gross negligence in running cars (which according to the evidence jump the track about once a week) in defiance of the arrangement, and without due notice to the men.

As to the Company's contention that plaintiff should have been walking on the other side of the slope, it seems to me idle to expect a man to walk along that side as it was made impassable to a certain extent by the ditch and the pipe. Moreover, the man-holes seem to have been partly obstructed by the pipe running between four and five feet above the floor of the slope. I see no good reason for interfering on the ground of the amount of the verdict. The appeal must be dismissed with costs.

HUNTER, C.J.

WALKEM, J.: I agree that the appeal should be dismissed. The questions and answers of the jury are the ordinary ones in such cases. As to the contention that the verdict is perverse, I can only say as the late Lord Watson said in one of the appeal cases before the House of Lords, that there is no such thing now as a "perverse" verdict. The real question is, could reasonable men, sitting as a jury, have come to the same conclusion? I can't say that this jury was wrong.

WALKEM, J.

DRAKE, J.: I agree with the Chief Justice. There was evidence of negligence for the jury who had to decide the case and such being the case this Court will not interfere.

DRAKE, J.

Appeal dismissed.

FULL COURT
1902
April 15.

YORKSHIRE GUARANTEE CORPORATION v. FULBROOK & INNES AND G. H. COOPER.

Trial—Abortive—Appeal—Full Court giving judgment which should have been given at trial.

YORKSHIRE GUARANTEE CORPORATION *v.* FULBROOK & INNES

On the second trial of an action on a promissory note where the defence alleged fraud on the part of the plaintiffs in obtaining the indorsement, the jury disagreed. Plaintiffs then moved for judgment on the ground that there was no evidence of fraud, and the motion was refused:—

Held, by the Full Court, allowing an appeal and entering judgment for plaintiffs, that no jury could properly find fraud, and it was desirable, especially in view of the first abortive trial, that the judgment should now be entered which should have been entered at the trial.

APPEAL from judgment of BOLE, Co. J.: This was an action in the County Court of Westminster in which the plaintiffs claimed the amount due on a promissory note made by the firm of Fulbrook & Innes, in favour of the defendant Cooper, and by him indorsed to the plaintiffs before maturity.

The defendant Cooper defended, and alleged fraud on the part of the plaintiffs in obtaining his indorsement of the note. At the first trial, before BOLE, Co. J., and a jury, a verdict was given in favour of defendant, the jury finding that he was induced to indorse the note by the fraud of the plaintiffs. On appeal, the Full Court ordered a new trial. The second trial took place before BOLE, Co. J., and a jury, and on the conclusion of the evidence, counsel for the plaintiffs asked that the case be taken from the jury on the ground that there was no evidence of the plaintiffs' fraud. His Honour gave leave to renew the motion at the conclusion of the case, and allowed the case to go to the jury, who disagreed. Counsel for the plaintiffs then moved for judgment, notwithstanding the disagreement of the jury, on the ground that there had been no evidence adduced to sustain the allegation of fraud, and hence no reason why the plaintiffs should not have judgment. His Honour dismissed the motion with costs, and plaintiffs appealed.

Statement

The appeal was argued at Vancouver on 15th April, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

L. G. McPhillips, K.C., for appellants: There was no evidence whatever of fraud, and as that was the sole issue the plaintiffs are entitled to judgment. If Cooper complains of having been drawn into the indorsement he should proceed against the other defendants, as it is admitted he never saw the plaintiffs till after the note was due.

The Court called on

W. J. Whiteside, for respondent: A new trial was ordered by the Full Court, and as yet there has been no hearing—that order has not been exhausted: see *Canadian Pacific Railway Co.* v. *Cobban Manufacturing Co.* (1893), 22 S.C.R. 132. As to conditional indorsements, he cited *Ontario Bank* v. *Gibson* (1887), 4 Man. 440, and *Commercial Bank of Windsor* v. *Smith* (1901), 37 C.L.J. 472. Argument

McPhillips, in reply: The whole course of the trial was directed to fraud and fraud alone.

Per curiam: No jury could properly find any fraud leading up to the indorsement, and that was the only substantial defence. There being no evidence of fraud, a finding by the jury in the defendant's favour would have been perverse and would have been set aside, and it is desirable, especially in view of the former abortive trial, that the judgment should now be entered which should have been entered at the trial. Judgment

Appeal allowed and judgment ordered to be entered for plaintiffs.

MARTIN, J.

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Oct. 10.

REX v. NEUBERGER.

Criminal law—Summary conviction (Dominion)—Payment of fine — No appeal after—Security—Money deposit in lieu of recognizance—Return of to appellate Court—Cr. Code, Secs. 880 (c.) and 888.

REX
v.
NEUBERGER

A person by paying his fine on a summary conviction loses any right of appeal he might otherwise have had under section 880 of the Criminal Code.

Where on an appeal from a summary conviction an appellant makes a money deposit in lieu of recognizance, the deposit, which includes both the fine and the security for costs of appeal, should be returned by the Justice into the appellate Court, and in default the appeal cannot be heard.

Statement

APPEAL to the County Court from a summary conviction by the Police Magistrate of the City of Victoria under the Indian Act, whereby the appellant was convicted and fined on 2nd July, 1902, $250.00 for selling liquor to an Indian. The appellant forthwith paid the amount of the fine to the Clerk of the Court, and on 31st July (within the thirty days mentioned in section 108 of the Indian Act) gave notice of appeal for the first sitting of the Court, and applied to the Magistrate to state the amount deemed by him sufficient to cover the costs of appeal. On 10th September the Magistrate fixed the sum at $50.00, which, on 8th October, was paid by the appellant to the Magistrate and by him paid into the County Court the same day. The amount of the fine was paid into the City Treasury, and was not paid into the County Court as part of the deposit as required by section 888 of the Code.

The appeal came on for hearing on 10th October, before MARTIN, J., sitting as a County Court Judge, when

Argument

Harold Robertson, for respondent, took the preliminary objection that the appeal had not been properly lodged. The amount of the fine was not paid to the convicting Justice, but to the Clerk of the Court, and the amount of the fine, $250.00, together with the amount deposited for security for costs was not paid

into the County Court as required by section 888 of the Code, and so the amount of the fine is not before this Court now as contemplated by said section, but only the $50.00 security. He cited *The Queen* v. *Gray* (1900), 5 C.C.C. 24. The appellant should either have stayed in jail and entered into recognizances, or paid with the amount of the fine the sum required for the costs of the appeal, but having elected to pay his fine he is concluded from appealing.

G. E. Powell, for appellant: Section 880 only refers to a man in custody, and where the convicted person has paid his fine instanter, the amount required for security for costs may be paid at any time before the return day.

Section 888 imposes a duty on the Magistrate to make the return, and the appellant should not be prejudiced by reason of his failure to do so. The Magistrate never fixed the amount of security until 10th September, although requested to do so within the time limited for appealing. If necessary, I now ask for adjournment to enable the Magistrate to pay the amount of the fine into Court.

Argument

As to the contention that it must be paid simultaneously with the fine, the Act doesn't say so, and the Act should be construed broadly and so as to facilitate appeal. He cited *Regina* v. *McGauley* (1887), 12 P.R. 259 and *Stanhope* v. *Thorsby* (1866), L. R. 1 C.P. 423.

Per curiam: Even if the objection to the failure to make the deposit as directed by section 888 can be got over, and I am inclined to think it can not, the only right of appeal exists under section 880. If, therefore, the defendant's counsel is right in contending that section 880 does not apply, no right of appeal exists at all. It is not contended that there is here any provision in any special Act which can take this case out of the opening words of section 880. Further, in my opinion, the objection should prevail, that the defendant having paid his fine with the intention of so doing, this appeal does not come within the purview of section 880.

Judgment

Appeal dismissed with costs.

HUNTER, C.J.
(In Chambers)

WADE v. UREN *ET AL.*

1902
June 4.

Practice—Statement of claim—Amendment by changing place of trial—Not allowed on ordinary summons to amend claim.

WADE
v.
UREN

A plaintiff who wishes to name some place other than that named in the original statement of claim as the place of trial, must obtain leave to do so on a summons which clearly shews that it is desired to change the venue and not on a summons simply to amend statement of claim.

Statement

SUMMONS to amend statement of claim. After the time limited by r. 257 for amending statement of claim, without leave, the plaintiff applied for leave to amend, and amongst other amendments it was proposed to change the place of trial already named. No affidavit was filed in support of the summons, which was simply "for leave to amend the statement of claim."

The summons came on before HUNTER, C.J., on 4th June, 1902, when

Argument

Fulton, K.C., for defendant, took the preliminary objection that the venue could not be changed in the way proposed.

Langley, for plaintiff, referred to Chitty Arch. 14th Ed., 592.

Judgment

HUNTER, C.J.: When the plaintiff asks to change the venue he must apply specifically therefor, and not merely by a summons to amend the statement of claim. The reason is that the defendant ought to have due notice of any such application as while he may not think it necessary to oppose the application to alter the pleading, he might consider himself seriously inconvenienced by a change of venue: see *Locke* v. *White* (1886), 33 Ch. D. 308. Of course one summons may embrace both applications.

DUNSMUIR v. THE COLONIST PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY.

DRAKE, J.
1902
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FULL COURT
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DUNSMUIR v. COLONIST PRINTING AND PUBLISHING CO.

Company—Memorandum incorporating agreement by reference—Preference shares—Meaning of—Special voting powers—Companies Act, 1890.

The provisions of the Companies Act of 1890, that the members and stockholders of a company incorporated under it shall be subject to the conditions and liabilities in the Act imposed and to none others, and that in the election of trustees each stockholder shall be entitled to as many votes as he owns shares of stock, do not render it *ultra vires* of a company to validly stipulate in its memorandum of association that a certain limited class of stockholders shall have the privilege of electing a majority of the trustees, and such stipulation may be contained in a document incorporated merely by reference in the memorandum of association.

Per DRAKE and MARTIN, JJ.: Preference stock means stock that has any advantage over other stock and is not confined to stock having a preference in regard to the payment of dividends, but

Per HUNTER, C.J., and MARTIN, J.: The preference stock mentioned in section 1 of the Companies Act Amendment Act, 1891, means stock having a preference in regard to the payment of dividends and not merely superior voting powers.

Judgment of DRAKE, J., affirmed, HUNTER, C.J., dissenting.

APPEAL from the judgment of DRAKE, J.

This was an action brought by Joan Olive Dunsmuir and Forbes George Vernon, who sued on behalf of themselves and all other holders, save the individual defendants, of a certain allotment of preferential shares in the defendant Company, against The Colonist Printing and Publishing Company, Limited Liability, James Dunsmuir, C. E. Pooley, Albert G. Sargison, J. A. Lindsay and H. M. Hills, to restrain the defendants other than the Company from acting or assuming to act as directors or trustees of the Company, by virtue of their election at a shareholders' meeting of the 17th of February, 1902, and from calling any meeting of shareholders to declare such defendants to be such trustees or directors.

Statement

On 5th September, 1892, an agreement was entered into between W. H. Ellis and A. G. Sargison (therein called Ellis & Co.),

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who were the owners of a printing and publishing business, of the one part, and James Dunsmuir (therein called the promoter) of the other part, and which was in part as follows:

"(2.) The promoter covenants with Ellis & Co., subject to clause nine hereof, that within fourteen days from the date hereof he will (the said Ellis & Co., subscribing for $75,000.00 of the stock thereof) cause a company to be incorporated and registered by the name of 'The Colonist Printing and Publishing Company, Limited Liability,' under the provisions of the Companies Act, 1890, having a nominal capital of $150,000.00, of which sum $50,000.00 shall be payable by the stockholders other than Ellis & Co., $20,000.00 upon subscription, and $30,000.00 by equal payments of thirty, sixty and ninety days from the formation of the company, in manner hereinafter mentioned; the life of the company being fifty years, and its capital divided into 150 shares of $1,000.00 each.

"(3.) The said Ellis & Co. agree to subscribe for seventy-five of the said shares, and to assign and set over the business to the company; and it is agreed that the said seventy-five shares so to be subscribed for by Ellis & Co. shall not be assessable until the full sum of $50,000.00, to be contributed by the stockholders other than Ellis & Co., shall have been paid up, and thereafter the seventy-five shares to be subscribed by Ellis & Co. shall rank equally with that subscribed for by the other shareholders—that is to say, shall be deemed to be paid up to the extent of sixty-six and two-thirds per cent., and shall, together with the other stock, be assessable to the extent of thirty-three and one-third per cent., and no more.

Statement

"(6.) It is agreed that the Colonist Printing and Publishing Company, Limited Liability, shall be managed by a board of five directors, of whom, notwithstanding anything to the contrary in the Companies Act, 1890, the stockholders, other than Ellis & Co., or other the owners or persons entitled to the said seventy-five shares to be held by them, or some part thereof, shall when, and as from time to time trustees or directors are to be chosen, elect or choose three; and that the other two directors shall be elected or chosen by Ellis & Co., and such five directors,

or a majority of them, shall have all the powers of trustees under the Companies Act, 1890."

A memorandum of association was duly registered of a company to take over the benefits and perform the covenants and obligations contained in the said agreement of 5th September, 1892, and generally to carry on the business of printers and publishers. The memorandum was executed on the 17th of September, 1892, and filed on the 18th of October following.

The amount of the capital stock of the Company was declared to be $150,000.00, divided into 300 shares of $500.00 each, and by clause four it was provided: "The number of trustees who shall manage the concerns of the Company for the first three months shall be five, and their names are: William Harrington Ellis, Albert G. Sargison, James Dunsmuir, Cuyler A. Holland and Sydney Aspland, and in the election and appointment of directors, the Company shall be governed by the provisions of the said agreement, dated the 5th day of September, A.D. 1892."

Statement

All the shares were issued in the same form, and there was nothing in the certificates of the shares originally issued to distinguish one class of shares from another.

The motion was argued before DRAKE, J., in whose judgment the facts not already stated will be found.

28th February, 1902.

DRAKE, J.: This is an application for an injunction and receiver. The facts not in dispute are that on 5th September, 1892, an agreement was entered into between William H. Ellis and A. G. Sargison of the one part, and James Dunsmuir of the other part. The parties of the first part, therein called Ellis & Co., agreed that the printing and publishing business, of which they were the owners, should be turned into a joint stock company, which company should assume certain liabilities of the business. James Dunsmuir covenanted with Ellis & Co. that on Ellis & Co. subscribing for $75,000.00 of stock he would cause a company to be incorporated under the Companies Act with a capital of $150,000.00, $50,000.00 to be taken by the public in shares of $1,000.00 each.

DRAKE, J.

Ellis & Co. agreed to subscribe for seventy-five shares and to assign the business to the Company, the seventy-five shares not

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to be assessable until the full sum of $50,000.00 should have been paid up, and thereupon the said seventy-five shares should be deemed paid up to the extent of 66⅔ per cent. and should be assessable only for the balance.

Then by clause 6 it was agreed that the Company when formed should be managed by five directors, of whom the stockholders, other than Ellis & Co., or the persons entitled to the seventy-five shares, should elect three, and the other two directors should be chosen by Ellis & Co.

And by clause 9 it was agreed that certain clauses therein mentioned should be binding on the Company.

A memorandum of association was duly registered of a company to take over the benefits and perform the covenants and obligations contained in the agreement of the 5th of September, 1892, and generally to carry on the business of printers and publishers.

The capital of the Company was declared to be $150,000.00, divided into 300 shares of $500.00 each. Then comes the clause which has given rise to the question now before the Court:

"The number of trustees who shall manage the affairs of the Company for the first three months shall be five," giving their names, "and in the election and appointment of directors the Company shall be governed by the provisions of the said agreement of 5th September, 1892."

DRAKE, J.

No satisfactory evidence was produced to satisfy me that any contract was entered into by the Company in accordance with the terms of the agreement, in fact the minute book of the Company was not produced in evidence. Mr. *Luxton*, for the defendants, relied on *In re Empress Engineering Co.* (1880), 16 Ch. D. 125, in support of his argument that the Company were not bound by the agreement. That case decided that a company could not ratify an agreement which existed before the company came into existence; but it did not follow that a company after its formation might not enter into a new contract to the same effect as the old one. And it was there held that a third person could not sue the company in respect of a debt due before the company was formed. *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16, is to the same effect, that an agreement

entered into before the company was in existence was incapable of confirmation by the company. Ratification pre-supposes a principal and agent, and some act done by the agent on behalf of the principal without authority. If there is no principal there can be no agent. Lindley on Companies, p. 146, lays down that a company is not liable for the acts and engagements of its promoters unless it is made so by its charter, Act of Parliament, deed of settlement, or unless it has become so by what it has done since its formation.

The Company was carried on without any disagreement until the annual meeting held in February, 1902, when the agreement that Ellis & Co., or their assigns, were to elect two directors and the other shareholders three, was ignored, and the whole body of directors was chosen without any reference to clause 4 of the memorandum of association, and without complying with clause 3 of the by-laws, no distinction being made between the different classes of shareholders.

It is admitted that only $61,000.00 of shares were issued to the vendors, and $39,000.00 to the public, being at the rate of four-fifths of the amount originally agreed for; and this was mutually agreed to by the different classes of shareholders.

The plaintiffs represented $25,000.00 of the $39,000.00 issued to the public at the annual meeting held on the 17th of February last; the defendants holding the majority of shares issued to Ellis & Co., as well as a portion of the shares issued to the public, claimed the right to elect the directors as holding a majority of shares generally, and did so elect them quite independent of the agreement and by-law before referred to, and against the protest of the plaintiffs.

The plaintiffs claim that the memorandum of association, with so much of the agreement as is specifically referred to in clause 4 thereof, and the by-laws of the Company, are binding on the Company, and that the action of the defendants is prejudicial to their rights and interest; and further, that the election by them of a board of directors without reference to the rights of the holders of what I have called the public shares is void.

The defendants say that clause 4 in the memorandum of asso-

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ciation is void as contrary to the Companies Act under which the Company was registered.

The Companies Act of 1890, Cap. 6, Sec. 2, says that companies formed under that Act, and the members and stockholders thereof, shall be subject to the conditions and liabilities by the Act imposed, and to none others, anything contained in any law notwithstanding. This Act was amended by Cap. 3, 1891, and Cap. 7, 1892. By section 5 of the first mentioned Act, it is enacted that in case the memorandum of association authorizes the creation of preference stock the holders shall have the right to select a stated proportion of the board of directors, and any by-law of a company originally incorporated without power of issuing preference stock may make the same provisions. This special stipulation as to the election of directors is a condition or liability imposed on the shareholders by section 4 of the memorandum of association and by section 3 of the Company's by-laws, and is a term of the contract binding on all shareholders who shall take shares in the Company.

Section 5 of the Companies Act states what powers the companies have when registered. Section 11 enacts that the corporate powers of the corporation shall be exercised by a board of not less than three, who shall be annually elected by the stockholders at a meeting, and in the mode directed by the by-laws of the Company; but all elections shall be by ballot, and each stockholder shall be entitled to a vote for each share held by him, and the persons receiving the greatest number of votes shall be the trustees. I think that the stipulations contained in clause 4 of the memorandum, and in section 3 of the by-laws are within the express words of the Act.

DRAKE, J.

The memorandum of association is the charter of the Company. It is a contract made between the Company and its shareholders. It imposes no new liabilities on the shareholders, it is a stipulation for the internal management of the Company's affairs, and in no way affects the rights and interest of the public; neither does it impose any new obligation on the Company or the shareholders, or limit their powers.

A great number of cases were cited with regard to what is meant by preference stock. In my view, the term preference

imports any advantage which a particular class or portion of the stock has over the other. It is not necessarily stock which has a preference in dividends. By the agreement, the stock of Ellis & Co. was to be considered to be fully paid up to 66⅔ per cent. when the $50,000.00 was subscribed for and paid.

It is argued by the defendants that the agreement is not binding on the Company, following *In re Empress Engineering Co., supra*, but in the case of *Browne* v. *La Trinidad* (1887), 37 Ch. D. 1, the memorandum of association stated that the object of the company was to adopt and carry into effect, with or without modification, an agreement made between (the parties) prior to the formation of the company. The agreement was embodied in the articles. In that case it was not contended that the agreement was invalid, but only that the agreement was a contract between the members *inter se*, and not between the company and the plaintiff. In my opinion the by-laws are in fact a covenant between the shareholders, and, as Lord Herschell says in *Welton* v. *Saffery* (1897), A.C. 299 at p. 315, the articles constitute a contract between each member and the company *inter se*, and clause 3 of the articles regulates the election of directors in the manner therein prescribed, and is in accordance with section 11 of the statute. The Company have ignored this provision of their by-laws. There must be an injunction restraining the newly elected directors from acting in the words of the motion. I am also asked to appoint a receiver. As by enjoining the directors from acting, the business of the Company cannot be carried on pending the trial of the action, I think some one should be appointed to carry on the business in the meantime. The limitations of his powers and the person to be appointed can be settled in Chambers.

The defendants, other than the Company, appealed to the Full Court on the grounds, that the action was not maintainable by the plaintiffs; that it was not a case in which a receiver could be appointed, or in which it was proper, just or convenient to appoint one; that no sufficient grounds had been shewn for an injunction; that the election of the trustees at the meeting of the shareholders on the 17th day of February, 1902, was a valid

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and proper election; that the proposed meeting of the shareholders to confirm the said election was properly called, and might be lawfully held; that the alleged agreement of the 5th of September, 1892, mentioned in the affidavits filed by the plaintiffs was not binding on the Company or on the shareholders, and, together with so much of the memorandum of association and by-laws as relates thereto, is *ultra vires*; that the Company was not formed in accordance with the terms of the said alleged agreement; that the Company never entered into, adopted, ratified or confirmed any agreement binding upon the Company or its shareholders with reference to the election of the Company's directors or trustees, and that no preference stock was ever validly created or issued by the Company.

The appeal was argued at Victoria on 11th April, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument

Gregory, for appellants: The agreement of 5th September was abandoned by the promoters of the Company, and the Company never confirmed or ratified it—its provisions as to the election of directors, etc., are *ultra vires* of the Company. The agreement is inconsistent with section 11 of the Act of 1890, which provides that each shareholder shall have one vote for each share held by him. To create preference stock, section 1 of the Act of 1891 requires that it must be stated in the memorandum of association that a portion (not exceeding one-half) of the stock shall be preference stock, but the memorandum here contains no such statement; the statute gives no authority to fix the preference by reference to another document. Preference stock under the section means preference as to dividend. The agreement was not filed, and there is no way by which a stranger could find out the constitution of the Company by a public document on file. Under our Act the memorandum of association cannot contain anything other than what the Act says it is to contain. By altering the by-laws the number of directors could be changed, and three elected in one way and say seven others besides by the majority stockholders—if that has been done irregularly which might have been done regularly the Court will not interfere. He referred to *Browne* v. *La Trinidad* (1887), 37

Ch. D. 1; *The Bagot Pneumatic Tyre Co.* v. *The Clipper Pneumatic Tyre Co.* (1900), 17 T.L.R. 117; *In re New Buxton Lime Company: Duke's Case* (1876), 1 Ch. D. 620; *Ashbury* v. *Watson* (1885), 30 Ch. D. 376 at p. 381; *Andrews* v. *Gas Meter Co.* (1897), 1 Ch. 361; *Trevor* v. *Whitworth* (1887), 12 App. Cas. 409; *MacDougall* v. *Gardiner* (1875), 1 Ch. D. 13 at p. 23 and *Welton* v. *Saffery* (1897), A.C. 299 at p. 315.

Luxton, on the same side: At all the shareholders' meetings at which directors were elected, from the time of the incorporation of the Company to the meeting in February, 1902, the method of election provided for in the agreement of 5th September, 1892, was not followed, but all the directors were elected by all the shareholders indiscriminately, and without reference to any class of shareholders. He cited *Smith* v. *Cork and Bandon Railway Co.* (1870), 5 Ir. R. Eq. 65 at p. 69; *In re Peveril Gold Mines, Limited* (1898), 1 Ch. 122; *Payne* v. *The Cork Company, Limited* (1900), 1 Ch. 308; *In re Empress Engineering Co.* (1880), 16 Ch. D. 125 and *In re Northumberland Avenue Hotel Co.* (1886), 33 Ch. D. 16.

Peters, K.C., and *Griffin*, for respondents, referred to the facts, and contended that section 11 of the Act of 1890 is merely directory; it does not say that a different mode of election than that mentioned in it can't be adopted without statutory agreement. Preference stock means stock that has any advantage over other stock, and is not confined to stock having a preference in regard to the payment of dividends. No by-law can do away with our preferential right. They cited *Andrews* v. *Gas Meter Co.* (1897), 1 Ch. 361; *Ashbury* v. *Watson* (1885), 30 Ch. D. 376; Lindley on Companies, 396; *Bannatyne* v. *Direct Spanish Telegraph Co.* (1886), 34 Ch. D. 287 at p. 300; *In re Barrow Hæmatite Steel Co.* (1888), 39 Ch. D. 582 at p. 603; Rawlins & Macnaghten on Companies, 120; Palmer's Company Precedents, 361; Palmer's Company Law, 57.

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Luxton, in reply, cited *Walker* v. *London Tramways Co.* (1879), 12 Ch. D. 705; *Pilling* v. *Pilling* (1865), 3 De G. J. & S. 162; *In re Frank Mills Mining Co.* (1883), 23 Ch. D. 52; *In re Florence Land and Public Works Co.: Nicol's Case* (1883), 29

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Ch. D. 421 and *Phosphate of Lime Co.* v. *Green* (1871), L.R. 7 C.P. 43. *Cur. adv. vult.*

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HUNTER, C.J.: This is a dispute as to whether or not one set of shareholders in a joint stock company, formed under the Companies Act, 1890, being as it happens in the minority as to the amount of stock held by it, has the right under the constitution of the Company to elect three out of the five directors, leaving the other two to be elected by the other set of shareholders who are the majority in interest.

The question arises in this way. The memorandum of association contains the following clause: [Setting out clause 4 of memorandum as in statement.]

The agreement referred to contains a clause which reads thus: [Setting out clause 6.]

The validity of the clause in the memorandum is sought to be supported in one of two ways: first, because its provisions being not inconsistent with the provisions of the Principal Act it is open to the incorporators to make such a stipulation in the memorandum, and secondly, as being authorized by the provisions of the amending Act of 1891.

The first argument is demolished by the provisions of section 11 of the Principal Act as it is there stated in terms with regard to the election of trustees that "each stockholder shall be entitled to as many votes as he owns shares of stock, and the persons receiving the greatest number of votes shall be trustees." This is obviously inconsistent with a right such as that claimed to segregate the stockholders into various groups with different voting powers, as the persons elected in this way would not necessarily receive the greatest number of votes, in other words, the section prescribes equality in voting power among the shares, and by section 2 of the Act the "corporation members and stockholders shall be subject to the conditions imposed by the Act and to none others, anything contained in any law to the contrary notwithstanding." Under the Imperial Acts the question as to the relative voting power of the shares is probably a matter of internal regulation (see *Andrews* v. *Gas Meter Co.* (1897), 1 Ch. 361), but under this Act equality in voting power is made part of the

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constitution of the Company, that is to say, it is one of those legal relations which are fixed for the shareholders by statute and which can not be altered, even by their unanimous consent.

The second contention that the clause in question can be maintained under the Amendment Act of 1891 is, I think, equally untenable.

By the first section it is provided that the promoters may state in the memorandum in addition to the other matters required, that a portion not exceeding one-half of the stock shall be preference stock.

The preference stock here contemplated, means I think, after perusal of the other provisions of the Act, profit or dividend bearing stock having special monetary privileges and not stock which carries with it merely superior voting powers or other such non-monetary privileges, but it is not necessary to decide this question for the reason that no portion of the stock has been stated in the memorandum to be preference stock.

If any intending investor in this Company were to be told after looking at the memorandum that any portion of the stock was stated in it to be preference stock, he would I think, open his eyes with surprise and all the more when he found out that the document (which he might or might not get hold of, not being registered) alleged to be incorporated into it, does not in terms state that a given portion shall be preference stock, and his bewilderment would not be lessened when he found that the number of shares called for in the agreement was different from that created by the memorandum itself.

By section 3 of the Principal Act certain information as to the name and objects of the Company, the amount of stock and the number of shares and trustees, their names, etc., shall be stated in the memorandum.

In my opinion the verb "state" as used here, means to set forth categorically, and not by a reference to or by incorporation of other document or documents, containing the statement, which the statute does not require to be registered and the meaning of which may be more or less obscure.

By this, however, I do not mean to definitely decide that it is necessary where the object is to carry out the provisions of a

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certain agreement that the agreement itself should be inserted at length, although no doubt this would be preferable, but obviously it is one thing to say that the object of the Company will be found in another document, and another to say that the object is to carry out the provisions of a certain document.

I put it to Mr. *Peters* as to whether all the matters required to be stated by section 3 could be left out of the memorandum itself and relegated to a non-registered document and made part of the memorandum only by reference. He admitted that he was bound to so contend, and that he could not draw the line anywhere, but submitted that this would be a sufficient compliance with the statute. I think not, and am prepared to hold that the Legislature did not intend to clothe such a memorandum with the power to give life to a joint stock company.

If I am right then in holding that the details required to be stated by section 3 of the Principal Act must appear in the memorandum itself, the same must be held as to the statement of the amount of preferred stock permitted to be created by section 1 of the Amendment Act, as the two sections are on a par.

Then by section 5 it is provided that the holders of preferential stock authorized to be created by the memorandum may, if the memorandum so provides, have the unusual power which is claimed here on behalf of the plaintiffs and which is a very radical departure from the great principle of equality. It is plain,

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however, that the right to create this privilege is conditional upon the memorandum authorizing the creation of preference stock in the manner pointed out by section 1, which in my opinion, has not been done.

A number of other points were raised by the appellants, such as the impossibility of identifying the shares to which the superior voting power is attached, all the shares being admittedly issued in the same form, also the question of abandonment by all interested in claiming the privilege, also the fact that the agreement does not in terms bind the assigns of Ellis & Co., etc., but in the view that I have taken of the other questions it is unnecessary for me to discuss these points.

Numerous cases on the English Companies Acts were cited during the argument, but in my opinion, while useful as illum-

inating the general principles underlying joint stock company law, they can afford little, if any, assistance in the construction of the Acts in question here.

The appeal should be allowed with costs and the order of Mr. Justice DRAKE, which by consent was to be treated as a final judgment, set aside and the action dismissed with costs.

IRVING, J.: I think the decision of the learned Judge appealed from is correct, except as to costs, but as there was no cross-appeal as to that, the order as to costs must stand.

In my opinion, the document which was signed by Messrs. Ellis and Sargison, and filed as the memorandum of association, governs the case. By reference, it incorporates the agreement of the 5th of September, 1892. As soon as it was filed it became the charter of the Company. The only question that offers any difficulty is the question whether this sixth section is *ultra vires* of the Company, having regard to the language of the Companies Act, 1890. The maxim, *Quilibet potest renunciare juri pro se introducto* is applicable to matters of the internal management of the Company, and in my opinion, permitted the parties forming this Company to arrange the conditions relating to the election of directors.

The appointment of the directors is not one in which the public are concerned. The right of voting is a right of property merely, and concerns the members of the Company and no one else. I can see no good reason why the members should not waive the provision for equality of voting which was designed for their benefit.

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I would affirm the judgment appealed from with costs to the plaintiffs against the defendants other than the Company.

MARTIN, J.: In my opinion, section 2 of the Companies Act, 1890, does not declare the powers of the Company or its members, but merely limits the conditions and liabilities to which they are subject.

By section 5 the memorandum of association is "the constitution of and binding upon the Company."

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Because the amending Act of 1891 gives power to state in the memorandum that preference stock of the nature contemplated

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by that Act may be issued, it does not necessarily follow that such power did not theretofore exist—Interpretation Act, Sec. 10, Sub-Sec. 54. Sections 4 and 5 of said amending Act contemplate only one kind of preference stock being issued thereunder: *i.e.*, stock with a "preferential dividend or interest assigned thereto out of the profits of each year in priority to the ordinary stock of the Company." But I agree with the learned Judge appealed from that the term preference stock "imports any advantage which a particular class or portion of the stock has over" another class or portion.

The question herein must be considered, not from the point of view of the Company *versus* the shareholders, but as between the shareholders themselves, the point being how far the shareholders can go in agreeing that in the domestic management of the concern, one class of shareholders shall exercise a greater control than the other.

It is argued that section 11 is imperative, but if that be so, no election for trustee would be valid unless it were by ballot, the result being that even if all the shareholders were unanimous that the office of trustee should be held by one of their number, nevertheless, the formality of a ballot must still be observed. It seems to me that simply to state such a result causes one to doubt if it were the intention of the Legislature to meddle with such domestic matters and not merely to provide a means by which in default of any other procedure being adopted or rights defined the interests of the shareholders would be conserved. By the same section each stockholder is declared to be "entitled to as many votes as he owns shares of stock;" that is his right, primarily, but if he choose to enter into an arrangement by which he limits his own rights and confers greater rights and privileges upon a fellow shareholder, why should he not do so even if it means that he accepts less than that which the statute declares him entitled to? There is no prohibition against such a bargain, and the right to contract freely is certainly not against public policy. It must be conceded that the shareholders have the right to contract themselves out of any statutory provision which is not imperative; and that the use of the word "shall" does not prevent the section being construed as directory appears

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by the recent case of *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314 (affirmed by the Supreme Court of Canada), and authorities therein cited.

The general proposition that "there is a condition in the memorandum of association that all shareholders are to be on an equality unless the memorandum itself shews the contrary," was declared to be unsound in *Andrews* v. *Gas Meter Co.* (1897), 1 Ch. 361, and the Court stated that "it is desirable, from all points of view, to remove from companies a fetter which ought never to have been imposed upon them, and which in practice has been got rid of by skilled draftsmen by the insertion of power to issue preference shares in the original articles of association or the memorandum of association itself. These devices will no longer be necessary."

There is nothing in *Welton* v. *Saffery* (1897), A.C. 299, in conflict with the views above expressed, but there is much in harmony with them. Take for example the judgment of Lord Watson, p. 308, wherein, after stating that it is impossible for arrangements to be made which will relieve shareholders of their statutory liabilities to the creditors of the company, he proceeds to say: "The rights and liabilities *inter se* of the members of different classes of shareholders, in relation to matters which do not concern or affect the interests of creditors, do not appear to me to stand upon the same footing. . . . . The truth is, that all these are domestic matters, in which neither creditors nor the outside public have any interest, and with which, in my opinion, it is the policy of the Legislature not to interfere."

It follows then, that if section 11 is not imperative, preference shares could be authorized under our said Act of 1890 at the time of incorporation by means of the memorandum of association just as well as could be done after incorporation by articles of incorporation under the English Companies Act of 1862: *Andrews* v. *Gas Meter Co., supra.*

So far as concerns that part of section 3 which requires various matters to be "stated" in the memorandum of association. I observe, first, that the amending Act of 1891 does not in this particular relate to that class of preference stock now under consideration; and second, that in such case and in the absence of

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any direction in section 3 as to what shall be "stated," when the creation of preference stock is sought to be authorized, what has been done herein is sufficient to confer the power contended for, though in the public interest it would have been better if the Act had required fuller particulars to be stated in the memorandum.

I am unable, on the facts, to accede to the contention that there has been such acquiescence by the plaintiffs as would justify us in concluding that there had been a waiver or abandonment of their rights. The judgment below should be affirmed.

Appeal dismissed, with costs to be paid by the defendants (appellants) other than the Company, Hunter, C.J., dissenting.

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DUNSMUIR v. THE COLONIST PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY (No. 2).

Company—Trustees and shareholders—Right to exercise corporate acts and make by-laws—In whom vested—Companies Act, 1890.

The shareholders in a company incorporated under the Companies Act, 1890, have no power to interfere in the ordinary management of the company by the trustees who have the exclusive right of exercising its corporate powers and of making by-laws.

SUMMONS to set aside a notice of appeal.

Statement

After the conclusion of the above appeal to the Full Court, the old directors decided that no appeal should be taken on behalf of the Company and they changed the Company's solicitors from Pooley, Luxton & Pooley to F. Temple Cornwall, who on 19th July, filed a notice of change of solicitors in the Registry. The majority shareholders thereupon caused a special meeting of the shareholders to be held, and at their meeting on 21st July, it was resolved that the Company appeal, "and that the Company's

solicitors, Pooley, Luxton & Pooley, take the necessary steps to prosecute the appeal."

On 23rd July, Pooley, Luxton & Pooley, purporting to act as solicitors on behalf of the Company, gave notice of appeal to the Supreme Court of Canada from the judgment of the Full Court. A summons was then taken out by F. Temple Cornwall as solicitor for the Company, for an order setting aside the notice of appeal on the ground that Pooley, Luxton & Pooley had no authority from the Company to act in giving it and that the directors had passed a resolution declining to take part in said appeal.

The summons was argued before DRAKE, J., on 29th July, 1902.

Peters, K.C., for summons.

Griffin, for plaintiffs.

Luxton, for defendants, other than the Company and for Pooley, Luxton & Pooley.

1st August, 1902.

DRAKE, J.: The plaintiffs apply to have The Colonist Printing and Publishing Company, Limited Liability, struck out from being appellants to the Supreme Court of Canada on the ground that the trustees of the Company do not desire any appeal, and that the appointment of Messrs. Pooley, Luxton & Pooley as solicitors for the Company has not been properly made. They claim that as trustees they have the management and control of the internal affairs of the Company, and the shareholders have no power to prevent them. Their only course is to reject them as trustees at the meeting when trustees are elected.

Judgment

The Act under which this Company is incorporated is Cap. 6, 1890. Under section 5 when the memorandum of association has been filed with the Registrar of Joint Stock Companies, the trustees mentioned in the memorandum of association, and their successors, shall by their corporate name have certain powers, among others, to sue and be sued and to make by-laws for the organization of the Company, the management of its property and the regulation of its affairs. By section 11 the corporate powers shall be exercised by a board of not less than three trustees. By section 13 a majority of the trustees shall form a

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board for the transaction of business, and every decision of the majority of persons duly assembled as a board shall be valid as a corporate act.

The Company passed some by-laws, but when or how does not appear. By by-law No. 5 the trustees are to elect a secretary and treasurer at the first meeting held after their election as trustees. By section 8 the secretary amongst other duties, subject to the order and direction of the trustees, shall have custody of the corporate seal and shall affix the same to deeds and documents on the order of the trustees. By section 14 a special meeting of the shareholders may be called upon a requisition in writing of one-fifth in value of the shareholders.

There appears to be some friction between the majority of the shareholders and the body of trustees; and the shareholders contemplate, as I am informed, calling a special meeting for the purpose, amongst other things, of taking away from the trustees the power to direct the secretary to affix the corporate seal to documents, and to further control the trustees in the management of the Company.

Mr. *Peters* contends that the shareholders have not power to interfere with the trustees in the ordinary management of the Company, and cites *Spurgin* v. *White* (1860), 2 Giff. 473. There it was held that if by the constitution of the company the shareholders were deprived of all control over the managing body, then the managers might disregard the wishes of the shareholders. The difficulty which exists here is that by section 11 the corporate powers of the company are to be exercised by the trustees, and those corporate powers are set forth in section 5, and to accentuate the fact that the shareholders have no power to interfere with the ordinary management of the corporation, section 8 gives certain other powers to the corporation, but these cannot be exercised except with the consent of shareholders representing two-thirds in value of the stock of the Company. When the Act referring to stock and stockholders, section 15 *et seq.*, is looked at, these sections do not give any powers to shareholders relating to the management of the company's business. They deal with the right of transfer of shares—their liability as shareholders, the right to increase or diminish the capital of the

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company, and the right to vote at meetings. There is no direct authority to interfere with the ordinary management of the company, or to make by-laws. This is the business of the trustees; and in support of this view, by section 28, the trustees are jointly and severally liable to labourers, servants and apprentices for all debts, not exceeding three months' wages after the company have failed to pay. The authorities that have been cited are grounded on the English Joint Stock Companies Acts, where the shareholders of a company can control the management of a company by resolution of a special meeting. I see no such power here. A company formed under this Act by section 2, and the stockholders thereof, are subject to no other conditions than those by that Act imposed, anything contained in any law to the contrary notwithstanding. This Act appears to give an independent power to the trustees to do all corporate acts necessary to carry on the business of the company. The powers of stockholders under this Act appear very limited. No doubt if the trustees were acting *ultra vires* the Courts would interfere; but that does not arise here. The power to make by-laws by a corporation is part of the common law, but here it is given expressly to the trustees, and that, I apprehend, excludes the stockholders. This Act is apparently based on some statute of the United States, where the trustees for all purposes have almost the sole power of the corporation in their hands. The result is that the cases of *Foss* v. *Harbottle* (1843), 2 Hare 461; *Orr* v. *Glasgow, &c., Railway Co.* (1860), 3 Macq. H.L. Cas. 799; *Macdougall* v. *Gardiner* (1875), 10 Chy. App. 606; and a long line of similar cases, which decided that a company incorporated under the English Acts was practically governed by the majority of shareholders has no application. The powers of shareholders under the English Joint Stock Companies Act are such as enable them to control the acts of their directors, and in fact leave the management very much in their hands. The only powers that I see here vested in the stockholders are to vote at elections of trustees; to decide on the question of borrowing money under section 8, and to consent to levying assessments on the capital stock of the company under section 31. The Act is very imperfect and is carelessly drawn. The words shareholders and stock-

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holders are used interchangeably, although they have a widely different meaning. Then in section 35 they refer to letters patent as the foundation of the Company's powers, whereas there is no reference made anywhere else in the Act to letters patent. Neither does the Act contain any of the safe-guards for the protection of members which are contained in the English Joint Stock Companies Act. I therefore make the order asked for on the summons.

Application allowed.

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REX v. HOLMES.

Criminal law—Grand jury—Indorsing names of witnesses on indictment—Abortion—Form of indictment—Cr. Code, Secs. 273 and 645.

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The provisions of section 645 of the Criminal Code requiring the names of all witnesses examined by the grand jury to be indorsed on the bill of indictment are directory only and an omission so to indorse does not invalidate the indictment.

An indictment under section 273 of the Code charging accused "with unlawfully using on her own person . . . . with intent thereby to procure a miscarriage" (without stating whose miscarriage) is sufficient.

Statement

THE prisoner was indicted at the Nelson Assizes on the 8th of May, 1902, before MARTIN, J., for that she "unlawfully did use on her own person an instrument, to wit, a catheter, with intent then and there thereby to procure a miscarriage." Among the witnesses who gave evidence before the grand jury were two who had been summoned by the grand jury of its own motion, and whose names were not indorsed on the bill of indictment. The grand jury returned a true bill.

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W. A. Macdonald, K.C., and *A. M. Johnson*, for the prisoner, moved to quash the indictment. Only such persons whose names appear on the back of the indictment should be called before the grand jury: sections 644 and 645 of the Criminal Code; Arch. Crim. Ev., 22nd Ed., 89. The latter part of section 645 has been held to be merely directory: *Reg.* v. *Buchanan* (1898), 12 Man. 190 at pp. 196 and 197, but the requirement that the names of the witnesses examined before the grand jury shall be on the indictment is mandatory and not merely directory: *O'Connell* v. *The Queen* (1844), 11 Cl. & F. 155; *The Queen* v. *Townsend* (1896), 3 C.C.C. 29.

Further, no offence is charged by the indictment. The forms in Crankshaw and Taschereau shew that it is necessary to allege that the use of this instrument was intended to commit an abortion on herself. The indictment alleges the use of this instrument with intent to procure a miscarriage, without saying upon whom the miscarriage was attempted.

Argument

Hamilton, for the Crown: As to the first objection, the cases cited lay it down that the whole of section 645 is merely directory and it is not divisible. "Shall" in that section is not imperative. The reasons applicable to the latter part of the section, as to the foreman initialling the names of the witnesses, are equally applicable to the part under discussion. In any event, if the Court thinks the names of these witnesses should be on the indictment, it is within its power to have the indictment amended, and the names placed thereon: section 629 of the Criminal Code; *O'Connell* v. *The Queen* (1844), 11 Cl. & F. 155 at pp. 193 and 197. As to the second objection, if this is upheld, the section itself is invalid. The section does not state that the miscarriage shall be upon the prisoner's self. If the indictment shews clearly the crime as laid down in the section, it is sufficient.

Judgment

MARTIN, J.: I overrule the second objection: it is answered by the latter part of section 273, which says, "with intent to procure miscarriage;" whose is immaterial.

Then as to the first objection. The reasons for requiring the foreman of the grand jury to initial the names of the witnesses are at least as important as those requiring the witnesses' names

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to go on the indictment. The language of Tindal, C.J., in *O'Connell's Case* and the principle recognized in *Reg.* v. *Buchanan* and *The Queen* v. *Townsend*, are fully as applicable to the former part of this section as to the latter. See also *Ross* v. *B. C. Electric Railway Co.* (1900), 7 B.C. 394. The irregularity objected to does not seem to be an essential requirement, and I therefore rule that it is directory. But so that the accused may have the full benefit of notice of all the witnesses who have appeared against her, I shall send for the grand jury, and direct the names of the two witnesses to be added to the list on the back of the indictment, and initialled, and the indictment will be re-presented to the Court.

Judgment

The grand jury were thereupon summoned into Court and the names of the two witnesses were added to the list of witnesses on the back of the indictment and initialled by the foreman.

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COUNTY COURT.

County Court—Practice—Discovery—Oral examination.

A County Court Judge has no jurisdiction to grant an order for an oral examination for discovery except in the case of a failure to answer interrogatories.

SUMMONS on behalf of defendant for an order for the oral examination of the plaintiff for discovery.

Higgins, for the summons.

G. E. Powell, for plaintiff, contended that an oral examination for discovery could only be ordered by a Judge as provided in section 126 of the County Courts Act, *viz.*, in the event of failure to answer interrogatories.

MARTIN, J.: The objection is sustained, and the summons dismissed with costs in any event.

CANE v. MACDONALD.

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CANE v. MACDONALD

Dominion official—Salary—Receiver—Appointment—Partnership in—Right to share in salary ceases on dissolution.

While C. and M. were in partnership as architects, M. received an appointment from the Dominion Government as supervising architect and clerk of the works in connection with a Government building being erected in Nelson, and for a time M. paid the salary of the office into the partnership funds. M. afterwards notified C. that the partnership was at an end and thereafter refused to account for the salary.

C. sued for a declaration that he was entitled to half the salary since the dissolution and asked that a receiver be appointed of it and also of the book debts of the firm, which he alleged M. had been collecting and not accounting for:—

Held, by the Full Court, that no receiver of the salary could be appointed; that although the amount of the book debts was small there should be a receiver in respect to them.

Per HUNTER, C.J., at the trial: Even if it were agreed that the appointment should be for the benefit of the firm, all the partners would not have any right to share in the salary after the dissolution of the firm, unless there was a special agreement to that effect.

APPEAL from judgment of MARTIN, J., refusing to appoint a receiver.

The plaintiff and defendant carried on business as architects in Nelson, under the firm name of Cane & Macdonald. During the continuation of the partnership the defendant obtained in August, 1900, from the Dominion Government an appointment (during the pleasure of the Government) as supervising architect and clerk of the works in connection with a Government building then being erected in Nelson. This appointment carried with it a salary of $7.50 per day and for some time was treated as a partnership appointment and the money coming from it was paid into the partnership funds, but in December, 1901, the defendant notified plaintiff that the partnership would cease at the end of that month, and defendant thereafter continued to perform the duties under the appointment for his own use and refused to account for any share of the salary subsequent to 31st December.

Statement

Plaintiff claimed that the appointment was a partnership

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asset and as such he was entitled to share in the proceeds of it, and in getting in the partnership accounts it appeared, as he alleged, that defendant had been collecting moneys due the firm and not accounting for them, so he commenced an action claiming an account; a declaration that the said appointment was an asset of the firm and that he was entitled to half the proceeds thereof since the dissolution; an injunction restraining the defendant from continuing to receive the profits thereof and from receiving or dealing with the book debts of the firm, and a receiver.

The amount of the book debts did not appear clearly from the affidavits, but plaintiff in his affidavit stated that it was very small.

Plaintiff then moved for an injunction and a receiver.

On the hearing before MARTIN, J., the motion was dismissed.

The plaintiff appealed and the appeal was argued at Victoria on 10th and 11th July, 1902, before HUNTER, C.J., WALKEM and DRAKE, JJ.

Davis, K.C., for appellant: The appointment was a partnership asset and plaintiff is entitled to a part of the salary; as to the ordinary firm accounts plaintiff is entitled to an injunction to prevent defendant receiving them as we shew a *prima facie* case of misconduct against him.

Argument

[HUNTER, C.J.: It seems to me the action would never have been begun had it not been for the government appointment.]

It may be that it was the most important, but whether the amount of the ordinary accounts is large or small, the rights of the parties are not changed, as in the eyes of the law the right to a small amount is as important as the right to a large amount. He cited section 39 of the Partnership Act; *Hartz* v. *Schrader* (1803), 8 Ves. Jun. 317; *Steele* v. *Grossmith* (1872), 19 Gr. 141; *Blakeney* v. *Dufaur* (1851), 15 Beav. 40; *Collins* v. *Jackson* (1862), 31 Beav. 645; *Ambler* v. *Bolton* (1872), 41 L.J., Ch. 783; *Smith* v. *Mules* (1852), 9 Hare 556 and *Clegg* v. *Edmondson* (1857), 26 L.J., Ch. 673.

Duff, K.C., for respondent: Plaintiff must shew more than *prima facie* case. Where a public servant is receiving remuneration from time to time out of the public funds as distinguished

from local funds he cannot make an agreement under which his salary could be taken from him. To appoint a receiver of this salary would be to impound the salary of a resident Dominion public servant, which cannot be done. Any attachment or assignment of such a salary is against public policy. He referred to *Ex parte Harnden* (1859), 28 L.J., Bk. 18; *Hill* v. *Paul* (1840), 8 Cl. & F. 295 at p. 305; *Lidderdale* v. *The Duke of Montrose* (1791), 4 Term 205; *In re Mirams* (1891), 1 Q.B. 596; *Palmer* v. *Bate* (1821), 6 Moore 28 at p. 42; *Cooper* v. *Reilly* (1829), 2 Sim. 560; *Leprohon* v. *City of Ottawa* (1877), 40 U.C. Q.B. 478, (1878), 2 A.R. 522 at pp. 526-8; *Regina* v. *Bowell* (1896), 4 B.C. 498 and *Ackman* v. *Town of Moncton* (1884), 24 N.B. 103.

Before appointing a receiver the Court must be satisfied that there is a substantial likelihood of plaintiff getting some benefit, but such likelihood does not exist here where there is a dispute as to what are partnership assets: see *Preston* v. *Luck* (1884), 27 Ch. D. 497 at p. 505 and *Pini* v. *Roncoroni* (1892), 1 Ch. 633.

Argument

Davis, in reply: Although the salary is not assignable, still if a receiver were appointed the Government might pay the salary to the receiver. If the plaintiff can't get a receiver of the salary that is all the more reason that the Court should assist him in getting the ordinary accounts.

HUNTER, C.J.: We are all agreed that there should be no receiver as to the salary payable by the Dominion Government. Personally, I am of the opinion that the appeal substantially fails, as I am satisfied that an application for a receiver would never have been made had it not been for the Government appointment held by the defendant, as the plaintiff in his affidavit says the amount of the general accounts is very small, and therefore I think the appeal should be dismissed with costs, but I yield to my brother DRAKE'S view as to the disposition of the costs.

HUNTER, C.J.

WALKEM, J.: It would be futile to make an order giving a receiver any power over the defendant's income, for the latter has no power to dispose of it by any order on the Government.

As to the ordinary partnership accounts a receiver should be appointed. There should be no order as to costs.

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DRAKE, J.: The appeal should be allowed as to the ordinary partnership accounts. There should be no receiver of the defendant's salary from the Dominion Government. As to the costs of the appeal I am in favour of leaving that question to the trial Judge who will ascertain the facts which are so much in dispute here, and if the defendant has, as alleged, made away with partnership funds he can be made to suffer for it by paying costs. This is a case which should have been brought in the County Court as it is clear that a very small pecuniary amount is involved.

Judgment varied by appointing receiver of partnership assets other than the salary—Costs of motion below and of appeal reserved for trial Judge.

The action was afterwards tried at Nelson on 7th October, 1902, before HUNTER, C.J.

R. W. Hannington, for the plaintiff, cited *Collins* v. *Jackson, supra; Ambler* v. *Bolton, supra; Smith* v. *Mules, supra* and Lindley on Partnership, 5th Ed., 404.

Galliher, for defendant: The appointment was a personal one in its nature, and if it ever was an asset of the firm it ceased to be so upon the dissolution of the firm: see *Alston* v. *Sims* (1855), 24 L.J., Ch. 553.

HUNTER, C.J.: The plaintiff says that it was agreed that the appointment should be for the benefit of the firm. There could not of course be a partnership interest in the office itself as only the defendant was dealt with by the Government. Assuming the plaintiff's version to be correct, the natural meaning of such an agreement is that the receipts are to be shared by the partners as long as the firm lasts, and not as long as the job lasts. If this latter had been intended there should have been a special stipulation to that effect. No one would seriously contend that on the dissolution of a firm of solicitors the profits made after dissolution by one out of the business taken away with him would have to be shared with the others in the absence of the most explicit stipulation.

So far as this claim is concerned I must dismiss the action, but I direct a reference as to the other matters in dispute. Costs reserved.

TURNER *ET AL* v. COWAN *ET AL.*

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TURNER v. COWAN

Company—Paid up shares—Payment in cash—Price of property sold to company—Companies Act, Secs. 50 and 51.

A company incorporated to take over a business carried on by defendants in partnership, entered into possession, and in payment for his relative interest in the business each defendant received a corresponding number of shares at par value:—

Held, that the payment for the shares was a "payment in cash" within the meaning of section 50 of the Companies Act, and as the purchase price was fair, the shares were fully paid up.

ACTION tried before HUNTER, C.J., at Revelstoke, on 19th May, 1902. The facts appear in the judgment.

S. S. Taylor, K.C., and *McCarter*, for plaintiffs.

Davis, K.C., and *Scott*, for defendants.

16th July, 1902.

HUNTER, C.J.: This is an action by the creditors of a company against three of the shareholders under section 51 of the Companies Act. The plaintiffs recovered judgments for $652.90 and $537.80 against the company, and to the executions issued there were returns of *nulla bona*, on September 11th, 1900. The defendants are sought to be made personally liable on the ground that the shares held by them in the company have not been paid up.

Judgment

The company was incorporated by the defendants to take over the business theretofore carried on by them in partnership; the three defendants, with two others, being the subscribers to the memorandum, which was filed on the 27th of April, 1899. A transfer, dated 27th of July, 1899, was made under seal by the partners of all the assets to the company, the consideration being stated to be $8,187.21, a resolution authorizing the company to purchase at this price having been passed on the same date, but the agreement was not formally executed by the company.

It appears by the evidence of Mr. Murphy, the solicitor who advised the parties, that the object of the formation of the com-

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pany was to prevent the withdrawal of capital out of the business, which one of the partners had been doing, and that he advised them that they could not make anything out of the transfer; that the valuation would have to be fair; and that, accordingly, after taking stock and writing off bad debts, they arrived at the sum of $8,187.21 as a fair valuation. The company, although it entered into possession, did not pay for the assets by cash or cheque, but the relative interest of the partners was calculated, and on this basis they received a corresponding number of shares at par value, the issuing of these shares and the taking possession being practically simultaneous, and the differences in the amount of shares subscribed for and those received being due to the fact that changes occurred in the relative interests of the partners after signing the memorandum.

The transfer was not registered under section 50 of the Act, so that unless what took place here was a payment in cash within the meaning of the section, the shares have not been paid up.

It is well settled that by payment in cash the statute does not require that actual cash should pass between the parties, that is to say, that where there are cross-debts both immediately payable, the company's debt being for assets purchased from the shareholders, and the shareholders' debts being for shares issued, the one may be set off against the other, and no cash need actually pass: *In re Harmony and Montague Tin and Copper Mining Co : Spargo's Case* (1873), 8 Chy. App. 407, approved in *Larocque* v. *Beauchemin* (1897), A.C. 358.

Judgment

It was argued by Mr. *Taylor* that these cases have no application because of the admissions of the defendants in discovery that they had paid no cash for the shares, and that the transaction was not intended to be a cash transaction. As to this, men are to be judged by what they do rather than by what they say, and what was really meant was, not that there was to be an exchange of the assets for the shares without more, but that there was a sale for an ascertained sum, which sum was to be paid out of the share capital, which is exactly what happened in *Spargo's Case*. The agreement there called for the payment of the sum agreed upon out of the share capital (see the statement in 8 Chy. App. p. 408) and I think there is no doubt that, as

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Lord Justice James said in that case, the company in any action for calls could have been met by a plea of payment. There is a radical distinction between an agreement to exchange property for shares, which in itself negatives the idea of payment in cash, and an agreement to set off a debt due by the company for goods purchased against a debt due the company for shares issued, under which, if carried out, there is, in reality, a payment in cash, although nothing passes between the parties. The company here, by the agreement and entry into possession, had become indebted to the defendants for $8,187.21, and the defendants had become indebted to the company in the same amount for the shares issued.

Moreover, the evidence as to the valuation being fair was not seriously attacked, and the fairness of the valuation is an important element to be considered, as appears by the remarks of the Judicial Committee.

Judgment

In my opinion, this transaction is within the spirit of *Spargo's Case* as approved by *Larocque* v. *Beauchemin*, and the action must be dismissed with costs.

Action dismissed.

HARRIS v. DUNSMUIR.

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Verdict—General and special—Setting aside—Illusory agreement.
Jury, special—Challenge—Same juror sitting on former trial—New trial.

The fact that a member of a special jury was one of the jurors at a former trial is a good ground of challenge at a new trial, but the fact that such a juror served without challenge is not *per se* a ground for granting a new trial.

At first trial with a special jury plaintiff got a verdict in his favour, and on appeal a new trial was ordered. At the second trial a non-suit was entered and on appeal a new trial was ordered. At the third trial, also with a special jury, the plaintiff got a verdict in his favour. Be-

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tween the second and third trials the defendant changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. James Muirhead was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of the fact until after the conclusion of the trial:—

Held, refusing a new trial on this ground, that in selecting a special jury it was the duty of the solicitor to ascertain any grounds of challenge, an opportunity to do which is provided by sub-section 5 of section 59 of the Jurors Act.

D. gave instructions in writing to H. respecting the sale of a coal mine on terms mentioned and agreeing to pay a commission of five per cent. on the selling price, such commission to include all expenses. H. failed to effect a sale.

In an action by H. to recover expenses incurred in an endeavour to make a sale, and reasonable remuneration, the jury returned a verdict as follows:

"Mr. Foreman: In reply to the questions, we have found a general verdict. We find that the plaintiff is entitled to compensation of $9,667.62.

"The Court: So that disposes of the questions?

"Mr. Foreman: Yes.

"Mr. Foreman handed in a written verdict as follows:

"(1.) Did the defendant, Mrs. Dunsmuir, verbally authorize the plaintiff, say, in the middle of 1890, 'to do his best' to sell her mine, and if so, was any compensation mentioned at the time? (*a.*) In view of concessions made subsequently we believe there was. (*b.*) A promise of fair treatment in case of no sale.

"(2.) Were the documents, which were dated later, *viz.*, on the 18th of September, 1890, and 18th January, 1892, which provided that the plaintiff was to be paid a commission of five per cent., which was 'to include all expenses' in the event of his effecting a sale, intended to represent all the terms agreed upon between the parties with respect to a sale and to compensation to the plaintiff? Yes. Had sale been effected.

"(3.) If you should be of opinion that the above documents were not intended to represent the whole agreement between the parties, what agreement was come to? Answer to question number one expresses our view on this point.

"(4.) Is the plaintiff entitled to any damages, and, if so, how much? Stating amount of disbursements, including sums for which he was liable and also amount of compensation separately? The plaintiff is entitled to compensation. We have no means of proving the accuracy of his statement of disbursements, but accept it as correct, with exception of one item of £525, which we have deducted.

"We find the plaintiff is entitled to compensation for expenses to the amount of $9,667.62."

Held, by the Full Court, affirming the judgment entered at the trial in the plaintiff's favour (1.) The agreement as found by the jury was not illusory.

(2.) The verdict supported the judgment.

(3.) The verdict was not one which the jury could not reasonably find.

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ACTION by Lowenberg, Harris & Co. (referred to throughout the proceedings and also in this report sometimes as Harris and sometimes as plaintiff), real estate agents, against Joan Olive Dunsmuir, the owner of the Wellington Collieries, for $50,000 damages caused plaintiff by reason of the defendant's conduct in preventing his earning a commission on a sale of her collieries, or in the alternative, for $30,000 for services and disbursements incurred in the attempt to procure a purchaser for the said collieries.*

The plaintiff had done considerable work for the defendant's husband before his death and was one of the business confidants of the family and was in partnership with her son-in-law in the real estate business at the time the negotiations were entered into.

The defendant desired to sell one of her properties, the Wellington Collieries, and the plaintiff states that in an interview with her he said he would do the best he could to sell the property if she would give him a fair remuneration for his services and allow his expenses, to which she said, "Go ahead and do the best you can." Consequent on this interview, the plaintiff went to Wellington to examine the plans and appurtenances of the mine, and on his return had a discussion with the defendant about the price which was to be asked for the property, and then the two went to the office of her solicitor, Mr. Pooley, for the purpose of giving the plaintiff written instructions to shew his authority in London. Two letters were prepared by Mr. Pooley and handed to plaintiff. They were as follows:

Statement

Victoria, B. C., 18th Sept., 1890.

Dennis R. Harris, Esq., Victoria.

Dear Sir,—I appoint you my agent and authorize you to sell the property known as the Wellington Mines, with the plant and appliances for working the same, for the sum of $2,600,000.

Yours truly, J. O. Dunsmuir.

* After the decision in this case reported in 6 B.C. 505 and 30 S.C.R. 334 (*sub nom. Lowenberg, Harris & Co.* v. *Dunsmuir*) the pleadings were amended.

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Victoria, B. C., 18th Sept., 1890.

Dennis R. Harris, Esq., Victoria.

Dear Sir,—I allow you twelve months in which to sell the Wellington Mines, and I agree to allow you a commission of five per cent. upon the sale should you accomplish it, such commission to include all expenses. You to pay me the net sum of $2,470,000. Terms of sale as follows: $1,000,000 to be paid down at time of sale; $1,000,000 to be paid at the end of one year from sale, and the balance at two years from date of sale—such deferred payments to bear interest at six per cent. per annum. If purchasers desirous of paying at once or at shorter dates they will be allowed to do so.

Yours truly,

J. O. Dunsmuir.

While Mr. Pooley was out of the room giving instructions in regard to the typewriting of the letters, the plaintiff says that he told the defendant that the terms were too onerous, but that so long as she would allow him his expenses he would do the best he could as he had promised her, to which she replied, "Well, you try to do the best you can;" and testified further that this understanding was repeated on another occasion at the defendant's house.

No sale was made within the time limited, so the following further authority to sell was given to the plaintiff:

Statement

18th January, 1892.

D. R. Harris, Esq., Victoria.

Dear Sir,—I appoint you my agent and authorize you to sell the property known as the "Wellington Mines," with the plant and appliances for working the same, for the sum of 430,000 pounds sterling. This authority to continue six months from date.

Yours truly,

J. O. Dunsmuir.

Langley Street, Victoria, B. C., 18th Jan., 1892.

D. R. Harris, Esq., Victoria.

Dear Sir,—I allow you six months in which to sell the Wellington Mines, and I agree to allow you a commission of five per cent. upon the sale should you accomplish it, such commission to

include all expenses. Terms of sale as follows: 200,000 pounds to be paid down, 100,000 pounds to be paid at the end of one year from sale, and the balance at the end of two years from the date of sale; but you are to be allowed to take for me in any company that may be formed for the purchase of the mines, shares to the value of 100,000 pounds. This taking of shares in a company shall not in any way affect the first two payments, which are to be made in cash. All deferred payments to bear interest at six per cent. per annum. If purchasers are desirous of paying at once, or at shorter dates, they will be allowed to do so.

Yours truly,
J. O. Dunsmuir.

The action was tried in December, 1901, before WALKEM, J., and a special jury, whose verdict appeared in the appeal book thus: (as in headnote).

The defendant appealed.

The action was first tried in 1896, before a Judge with a special jury, and plaintiff got a verdict for $19,377. On appeal a new trial was ordered, and at that trial in 1897, also with a special jury, a non-suit was entered. On appeal a new trial was ordered by the Full Court (affirmed by the Supreme Court of Canada (1900), 30 S.C.R. 334). The third trial took place before a Judge with a special jury in December, 1901, and on the verdict the plaintiff obtained judgment for $9,667.62. The defendant before the last trial changed her solicitors. At the first trial the defendant was in Court, but on account of illness was not present at either the second or the third trial. James Muirhead was a juror on the first trial and also on the third trial, but neither the defendant nor her solicitors were aware of that fact until after the conclusion of the trial.

Statement

One of the grounds of appeal was that the trial herein was irregular and abortive, in that unknown to the defendant James Muirhead, one of the jury, was a member of the jury to whom the case was submitted at the first trial thereof, and who returned a verdict in favour of the plaintiff.

The appeal was argued at Victoria in June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

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The point as to the disqualification of the juror Muirhead was argued first.

Peters, K.C. (*Sir C. H. Tupper, K.C.*, with him), for appellant: The fact that the juror sat on the former trial is a good ground for challenge, and this can be taken advantage of after verdict where the ground of challenge was not known to the party entitled to challenge at the time of the trial. We cannot be held to have waived our right to challenge as we were ignorant of the fact. He cited Archbold's Q.B. Prac. 14th Ed., 619; Co. Lit. 157b; 3 Blackstone's Comm. 363; Hawkins' Pleas of the Crown, 577; Thompson on Trials, Vol. 1, Secs. 68, 114, Bacon's Abr. Vol. 7, p. 771; *Herbert* v. *Shaw* (1708), 11 Mod. 118.

Argument

Bodwell, K.C., and *Duff, K.C.*, for respondent: The old decisions are greatly restricted in their modern application by the change in the system and procedure. Now there is no challenge unless it is taken in accordance with the Jurors Act: see section 59. Defendant was present at the first trial and must have seen Muirhead in the jury box; her former solicitor had knowledge of the first jury and defendant can't get away from it by changing her solicitor—she must be assumed to have remembered the jurors' names and it must be assumed that the jury list was presented to her before the jury was struck. They cited *Central Railroad & Banking Co.* v. *Ogletree* (1895), 22 S.E. 953 and *Brown* v. *Sheppard* (1856), 13 U.C.Q.B. 180.

Peters, replied.

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HUNTER, C.J.: The objection as to the juror must be overruled. It is the duty of the solicitor in such a case to ascertain who the former jurymen were and section 59, sub-section 5 of the Jurors Act provides for an opportunity being given to the parties to ascertain objections that may exist to the forty-four jurors whose names are then on the list.

DRAKE, J.

DRAKE, J.: I concur.

MARTIN, J.

MARTIN, J.: I concur, and only add that in my opinion the new solicitor cannot rid himself of the notice the former solicitor had.

The argument on the main question then proceeded.

Peters, for appellant: The findings are incomplete, inconclusive and contradictory. The jury state that the verdict is founded upon evidence which did not and could not bear upon the issue found. The fact that concessions were made is not evidence of a contract that plaintiff should be paid even though no sale made. There is a general verdict, but there are also specific questions and answers and the special findings must be looked at—they explain how the jury arrived at the general verdict, and a special finding wrong in a material point vitiates a general verdict. It is a sympathetic verdict. He cited *Yorkshire Banking Co.* v. *Beatson* (1879), 4 C.P.D. 204, (1880), 5 C.P.D. 109; *Rosenberger* v. *The Grand Trunk Railway Co.* (1882), 32 U.C.C.P. 349 at p. 364, (1883), 8 A.R. 482; *Cobban* v. *Canadian Pacific Railway Co.* (1895), 26 Ont. 732, (1896), 23 A.R. 115; *Reg.* v. *Gray* (1891), 17 Cox C.C. 300; *Shepherd* v. *White* (1876), 11 N.S. 31; *McKinnon* v. *McNeill* (1882), 16 N.S. 25; *Newton* v. *Gore District Mutual Fire Insurance Co.* (1872), 33 U.C.Q.B. 92; *Parrot* v. *Thacher* (1830), 26 Mass. 425 and *Pierce* v. *Woodward* (1828), 23 Mass. 206 A promise of fair treatment is not such a promise as to impose any legal responsibility on defendant —it is illusory: see *Taylor* v. *Brewer* (1813), 1 M. & S. 290; *In re Vince: Ex parte Baxter* (1892), 61 L.J., Q.B. 836 and *Croasdaile* v. *Hall* (1895), 3 B.C. 384 at p. 392.

Argument

Sir C. H. Tupper, on the same side, referred to the evidence and contended that the verdict was unsupported by the evidence and should be set aside. He referred to *Jones* v. *Spencer* (1897), 77 L.T.N.S. 536; Roscoe's N.P. Ev., 17th Ed., 75; *Wood* v. *Braddick* (1808), 1 Taunt. 104; *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Webster* v. *Friedeberg* (1886), 17 Q.B.D. 736; *Pritchard* v. *Draper* (1830), 1 Russ. & M. 191; *Ferrand* v. *Bingley Local Board* (1891), 8 T.L.R. 70; *Allcock* v. *Hall* (1891), 1 Q.B. 444; *Hiddle* v. *National Fire and Marine Insurance Company of New Zealand* (1896), A.C. 372; *Campbell* v. *Cole* (1884), 7 Ont. 127 and *Hotson* v. *Browne* (1860), 9 C.B.N.S. 442.

Bodwell, for respondent: The plaintiff's case is that certain portions of the agreement are contained in a verbal understanding that he should be paid his expenses and a fair remuneration

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for services if the sale was not carried out. The point is, did Harris tell the truth? His story is probable and two juries have now given a verdict in his favour. It is a question of credibility of witnesses and the Court will not interfere with the jury's finding. He cited *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,201; *Commissioners for Railways* v. *Brown* (1887), 13 App. Cas. 134; *Australian Newspaper Co.* v. *Bennett* (1894), A.C. 284 at p. 289; *Steves* v. *South Vancouver* (1897), 6 B.C. 17 at p. 34.

As to the general verdict and special findings, even if there were a wrong reason for a right answer, the finding would stand: *Sheridan* v. *Pidgeon* (1886), 10 Ont. 632 at p. 636.

It is against the policy of the law to grant new trials after several verdicts to the same effect: *Wight* v. *Moody* (1857), 6 U.C.C.P. 502 at p. 506; *McCulloch* v. *Gore District Mutual Fire Insurance Co.* (1874), 34 U.C.Q.B. 384; *Ireson* v. *Mason* (1863), 13 U.C.C.P. 323; *CinqMars* v. *Moodie* (1858), 15 U.C. Q.B. 601.

Argument

The Court will not lightly set aside the verdict unless it works a clear, substantial injury to defendant: *Bray* v. *Ford* (1896), A.C. 44.

Duff, on the same side.

Peters, in reply: Where a jury has several times found on the same facts the Court is loath to interfere, but in this case the plaintiff has shifted his ground. He cited *Gibson* v. *Muskett* (1841), 3 Sco. N.R. 419 at p. 434 and *Goodwin* v. *Gibbons* (1767), 4 Burr. 2,108.

Cur. adv. vult.

29th July, 1902.

HUNTER, C.J.: In this case a large number of points are taken by the appellants in their reasons for appeal, but I will deal only with those which seem to call for notice.

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The first one was about the juror, Muirhead, who was also a juror at the first trial, and although the Court gave judgment against the appellant on this point immediately after argument, we are now asked for our reasons. The appellant changed her solicitor in the Fall of 1900, and neither the new solicitor nor

counsel was aware of the fact that Muirhead had sat on both trials until after the judgment complained of was rendered, but it is admitted that no inquiries were made until after the judgment. The fact that a juror was one of the jurors at a former trial is a good ground of challenge at common law: Co. Lit. 157b; Archbold's Q.B. Prac. 14 Ed., 619; but as Bramwell, B., says *arguendo* in *Williams* v. *Great Western Railway Co.* (1858), 28 L.J., Ex. 2, where the ground was that a shareholder had sat in the jury box in an action against the company, in answer to the statement that the ground of challenge was not known at the trial, "Those who have the right of challenge must make inquiries with a view to its exercise;" and in answer to the plea that it would be impossible for the suitor to search the register of shareholders before the trial after the jury had been struck or summoned, "The circumstance that practically a suitor is not, at the trial, in a position to know whether he has a right to challenge a juror, does not give him a right to a new trial because he afterwards discovers that if he had known the facts he might have challenged;" and the Court in delivering judgment by Pollock, C.B., says, "Generally speaking, where there is a ground of challenge, but no objection is taken to the juror who might be challenged, that is not a ground for a new trial." And again, "Generally speaking, it may be laid down that the fact of a juryman who is open to challenge having served on the jury, is not *per se* a ground for disturbing the verdict." And as the Court could not say that any injustice had occurred by reason of this fact, they refused a rule for a new trial. Here it was not even alleged that any injustice had occurred by reason of Muirhead sitting a second time, and, as we have just seen, the mere fact is not enough to warrant a new trial. Moreover, the Juror's Act gives ample facilities to the parties to prevent any one who has already acted as juror in the cause from being put again on the panel: R.S.B.C. 1897, Cap. 107, Sec. 59, Sub-Sec. 5; and nothing can be easier than for them to find out who were the former jurymen. Without saying more as to this, it is obvious that in view of the double opportunity thus afforded to challenge a juror on this ground, we cannot now allow such an objection which would permit a party to take the chance of a verdict in

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his favour, and then if it was adverse, demand a new trial.

The next point was that the jury found an illusory bargain because of their answer to the first question that there was a promise of fair treatment in case of no sale. They however, find, in answer to question 4, that the plaintiff is entitled to compensation, which answers taken together can only mean that there was an agreement that the plaintiff should get compensation in case of no sale, and that it was compensation for the amount of his expenses is shewn by their general verdict, which they had an undoubted right to find: *Mayor and Burgesses of Devizes* v. *Clark* (1835), 3 A. & E. 506, and the question as to whether there was such an agreement was properly submitted to the jury: *Dunsmuir* v. *Lowenberg, Harris & Co.* (1900), 30 S.C.R. 334.

Another ground taken was that the verdict was against the weight of evidence. It is too well settled to require citation of authorities, that a verdict cannot be set aside unless it is one which the jury could not reasonably find, but I may refer to one which seems closely in point, *viz.*, *Pearse* v. *Schweder & Co.* (1897), A.C. 520. In that case it was left to the jury to say whether as the result of certain writings and personal interviews a binding agreement had been reached, and the jury having so found, the Supreme Court of Natal set aside the verdict, and in advising reversal of this judgment, Sir Richard Couch, at p. 526 says, "In fact, the learned Judges appear to have considered the application to set aside the verdict as if they were a Court of Appeal upon the facts, and were at liberty to decide upon the evidence which party was entitled to judgment. No authority in the law of Natal was produced to shew that they have this power."

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Now there was undoubtedly evidence which if believed by the jury will support the verdict. The defendant desired to sell one of her properties, the Wellington Collieries, and the plaintiff states that he said he would do the best he could to sell the property if she would give him a fair remuneration for his services, and allow his expenses, to which she said, "Go ahead and do the best you can." It may be observed that this is a very common and reasonable kind of bargain between the vendor and his agent for sale, especially where the property is worth a large

sum of money, and where, in the nature of things, there would be considerable work, time and expense necessary to properly place it before financiers or capitalists. Consequent on this interview, the plaintiff went to Wellington to examine the plans and appurtenances of the mine, and on his return had a discussion with the defendant about the price which was to be asked for the property, and then the two went to the office of her solicitor, Mr. Pooley, for the purpose of giving the plaintiff written instructions to shew his authority in London. The written instructions contained in two letters state the terms on which the property was to be sold, and fix his commission at five per cent., to include all expenses. While the solicitor was absent having the draft letters typewritten, the plaintiff says that he told the defendant that the terms were too onerous, but that so long as she would allow him his expenses, he would do the best he could as he had promised her, to which she replied, "Well, you try to do the best you can;" and testified further, that this understanding was repeated on another occasion at the defendant's house. It was strenuously argued that it was very unlikely that the question as to whether there was to be any remuneration in case of no sale would not have been provided for in the second letter; as a written agreement was being drawn up for what the plaintiff was to get in the event of the sale going through, and that therefore all that the plaintiff was to get in any event appeared in the letter; and that this contention was fortified by the existence of the letter of the 20th of June, 1893, in which Harris expresses the hope that the defendant may possibly see her way to reimburse his firm for their trouble in the matter. But as pointed out in the judgment of the Chief Justice of the Supreme Court, these were really arguments to be addressed to the jury, and suffice it to say that they did not prevail. Moreover, while they would be of much force in the ordinary case of vendor and agent, the existence of the alleged oral understanding about this matter does not appear wholly unreasonable when the position of the parties is considered. The plaintiff had done considerable work for the defendant's husband, and, apparently, to his satisfaction, in fact was one of the business confidants of the family, and was at this time in partnership with her son-in-law.

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The position then before the jury was that the plaintiff affirmed and the defendant denied the existence of an agreement to compensate in case of no sale, and there having been no witnesses to the interviews, the jury had to decide between them, and they are the judges of the credibility of the witnesses: *Lowenberg, Harris & Co.* v. *Dunsmuir* (1900), 30 S.C.R. at p. 336; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,115, *per* Lord Blackburn at p. 1,201. No doubt a case may occur in which one party is plainly telling a concocted story, and in such event the Court would have power to set aside a verdict in his favour on the ground that the jury either wholly misapprehended the position, or that the verdict was obviously perverse; but while the evidence of Harris was not wholly satisfactory, particularly as regards the Hargreaves transaction, it is impossible to say that the existence of the alleged contract was antecedently improbable, and therefore, as already said, his credibility was a question for the jury.

Moreover, it does not at all follow from the verdict that the jury did not give credit to the testimony of the defendant, as they may have considered either that she had forgotten what had passed in relation to a matter which was of much less moment to her than to the plaintiff, or that she had so expressed herself, as, while without any intention to allow any compensation, to lead Harris to believe that she had agreed to it.

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Then it was said that the verdict was against the weight of evidence by reason of the corroborative evidence given by Messrs. James Dunsmuir, Bryden and Pooley. As to these witnesses, apart from the fact that they were not present at any of the interviews in question, the jury no doubt considered that their relationship to the defendant weakened the weight of their testimony, the two first being her son and son-in-law respectively, and the third the family solicitor; and there was also the fact that James Dunsmuir was all along hostile to the idea of selling the property. Mr. Pooley states that the defendant said at the interview in his office that she was not to have any expense at all in the matter, but assuming that his recollection is accurate as to this, this is quite consistent with the fact that this term was afterwards varied; and he also states that "the terms of

the bargain (*i.e.*, the conditions at which the defendant would sell the property) were all the time being altered," which no doubt weighed with the jury in coming to the conclusion that Harris' statement was not unreasonable or improbable. Then Mr. Bryden testified to an admission made after the first trial to him by Snowden, the plaintiff's former partner, and a son-in-law of the defendant, to the effect that the plaintiff's claim was an after-thought; but this evidence was inadmissible, as the statement was made after the dissolution, and no proper foundation for its admission was laid: *Parker* v. *Morrell* (1847), 2 Ph. 453.

Another objection was that the accounts, so-called, of Harris' expenditures were not properly proved, but the answer to this is that the claim is not on an account open or stated, or for debt, but for *quantum meruit*, and the jury merely took the bill of expenses (some of which Harris admitted he was unable to prove) as a guide to assist them in arriving at the amount which they should award as compensation, and the sum given is not unreasonable in view of the fact that the plaintiff was engaged in promoting the sale for upwards of two years.

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Another objection was that the learned trial Judge had ruled out the plaintiff's examination taken on the first trial. It is not very clear from the notes what actually occurred, but the objection vanishes in view of Mr. *Peters'* admission that he tendered only those portions of Harris' evidence on which he cross-examined.

It was also urged that the plaintiff had changed front at this trial by taking up a different position from that which he took at the first trial. It is clear, however, that the claim for compensation was made at the first trial: see the judgment of Mr. Justice WALKEM (1899), 6 B.C. at pp. 509 to 511.

On the whole, I do not see any solid ground on which we can interfere, and the appeal must be dismissed.

DRAKE, J.: The plaintiff claimed damages for being prevented from claiming a commission for the sale of a coal mine, the property of the defendant, and in the alternative $30,000 for services and disbursements incurred in an attempt to procure a

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purchaser for the said mine. The learned Judge submitted certain questions to the jury, who brought in a general verdict for $9,667.62, and also answered the questions submitted by the Court; and in reply to the question 4, whether the plaintiff was entitled to any damages, the answer was, "He is entitled to compensation, we have no means of proving the accuracy of his statement of disbursements, but accept it as correct, with the exception of the item of £525, which we have deducted." This clearly shews that the jury were dealing with his alleged disbursements, and they have taken his figures, deducting £525.

The defendant appealed on the ground that the verdict was perverse, and for wrongful admission of evidence. The jury having found a general verdict, the answers which were given to the questions submitted to them must be treated as reasons merely, and whether good or bad they will not affect the result. If, in the opinion of the Court there was evidence on which to base a verdict, this Court will not interfere with the result. The greater part of the evidence and statement of claim is taken up with the claim for damages for preventing the plaintiff from earning his commission. As to this I think there was no evidence to go to the jury. On the other branch of the case there was some evidence, the weight and value of which was entirely a question for the jury, and we cannot ignore their finding, even if the learned Judge who tried the case was dissatisfied with the verdict, unless it is clearly demonstrated that the verdict was one which reasonable men acting reasonably could not have found.

DRAKE, J.

Most of the numerous objections taken to the appeal refer to the conduct of the learned trial Judge in admitting evidence of the plaintiff as to his accounts, and the mode in which they were made up, and of other alleged wrongful admissions of evidence. Unless the evidence admitted is clearly inadmissible, and the jury must have been so misled, the verdict would have been given the other way. I do not think that the evidence objected to was inadmissible, and it certainly would not have altered the jury's verdict in favour of the plaintiff.

I agree with the Chief Justice on the subject of the jury, that

the fact of a juryman, who sat on the previous trial and also on this, is not ground for a new trial.

The only point on which I think the judgment should be varied is on the question of costs. I think that the plaintiff having failed on the main issue of the case he put forward for damages for preventing him from earning his commission, which has been his chief contention throughout the various trials, he should not be allowed the costs of so much of his action as related to this portion of his case; and the defendant is entitled to the costs of this issue to be taxed: see *Sparrow* v. *Hill* (1881), 8 Q.B.D. 479. This question of apportionment of costs has had consideration in the Court of Appeal in the case of *Jenkins* v. *Jackson* (1891), 1 Ch. 89. The order should be that the plaintiff is entitled to the costs of the action, except in so far as they have been increased by the issue on which he was unsuccessful.

It is not intended to interfere with any costs that have been dealt with by the Full Court, but only to order the apportionment of the costs of the action not dealt with by the Full Court. The plaintiff is entitled to the costs of this appeal.

MARTIN, J.: I agree that the appeal should be dismissed.

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Note—The appellant's contention that in view of the substantial reduction of the verdict ($19,377 at first trial and $9,667.62 at the last trial) the trial Judge erred in granting to the plaintiff the costs of the first trial and of the appeal therefrom to the Full Court, was reserved for argument after judgment, but eventually a settlement was effected and the question was not argued.

HARRIS v. DUNSMUIR (No. 2).

DRAKE, J. (In Chambers)
1902
May 2.
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Costs—Taxation—Change in tariff.

Plaintiff taxed, in 1896, his costs of recovering judgment and on appeal it was ordered that there should be a new trial and that the costs of the first trial should follow the event. Plaintiff finally, in 1901, recovered judgment with costs:—

DRAKE, J. (In Chambers)

1902

May 2.

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Held, that the costs of the first trial were not now taxable under the new tariff, which came in force in 1897, but that the old taxation must stand.

Semble, costs incurred before the new tariff came into force are still taxable under the old tariff.

APPEAL to Judge in Chambers from a ruling by the Registrar at Victoria, refusing to re-tax on the new tariff of costs, the costs of the first trial of the action already taxed under the old tariff before the new tariff of costs came into force.

The appeal was argued before DRAKE, J., on 2nd May, 1902.

J. H. Lawson, Jr., for appellant.
Griffin, for respondent.

DRAKE, J.: This action was first tried in October, 1896, and judgment entered on the 7th of December, 1896, in favour of the plaintiff with costs. Thereupon the plaintiff taxed his costs in the ordinary way.

The defendant appealed against the verdict and judgment, and on 3rd March, 1897, it was ordered that a new trial should be had, the costs of the first trial to follow the event of such new trial.

Other litigation followed, and in the result the plaintiff obtained a verdict with costs. He now contends that the costs of the first trial in December, 1896, should be re-taxed on the existing scale.

Judgment

By section 83 of the Legal Professions Act, the then existing scale of costs was only to remain in force until a new scale was approved by the Judges. This approval was given on 5th April, 1897, and from that time all subsequent costs were to be taxed on that scale only. Costs incurred prior to the scale coming into force were, in my opinion, governed by the then existing scale.

The plaintiff contends that as the judgment of the 7th of December, 1896, was set aside by the order of the 3rd of March, 1897, therefore the taxation already had falls with it. If the costs of the first trial had not been ascertained by taxation, then section 83 before referred to would govern, but the plaintiff having taxed his costs, the amount due has been ascertained, and cannot now be re-taxed. The order of March, 1897, does not set aside the taxation, but only directs that the costs of the first

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action shall abide the result of the new trial. The term "costs" in this order means costs incurred by the plaintiff, and which the plaintiff would be entitled to at the time the taxation was had. In my opinion, the costs cannot now be re-taxed for the purpose of taking advantage of the increased advantages allowed by the new tariff. The case of *Delap* v. *Charlebois* (1899), 18 P.R. 417 is very much in point.

Appeal dismissed.

Note—Compare *Youdall* v. *Douglas* (1893), 2 B.C. 342.

REX v. MAH YIN.

BOLE, CO. J.

1902

Oct. 13.

REX v. MAH YIN

COUNTY COURT.

Criminal law—Summary conviction—Appeal—Notice—Description of offence—Sufficiency of.

A notice of appeal from a conviction for playing in a common gaming house, which describes the offence for which the appellant was convicted as "looking on while another was playing in a common gaming house," is insufficient.

APPEAL from a summary conviction whereby appellant was convicted under section 199 of the Code of playing in a common gaming house. The notice described the conviction as being for looking on at an unlawful game. Statement

The appeal was argued before BOLE, Co. J., on 11th October, 1902.

Wilson, K.C. and *Spinks*, for appellant.

C. B. Macneill and *Cane, contra.*

13th October, 1902.

BOLE, Co. J.: This is an appeal from a conviction made by the Police Magistrate of Vancouver, whereby appellant, Mah Yin, was convicted under section 199 of the Code, of playing in a common gaming house, but the notice of appeal set out that he was convicted of looking on while another was playing in a common gaming house, and the learned counsel for respondent objects that Judgment

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the notice is not such as will give jurisdiction to try the appeal. It is true that so long as the appeal is similar to the form provided in the statute it is a compliance therewith, but its office "is to inform the respondents that some particular conviction is to be appealed against, and care should be taken that they cannot be misled on this subject; therefore the names of the appellants, the intention to appeal, the sessions to which the appeal is to be made, as well as the nature of the conviction itself, should be contained in the notice. Notices, however, will not be critically construed, and if they substantially give the respondents the requisite information they will (apart from statutory provision) be held sufficient; all the statutory conditions must be accurately fulfilled": Paley, 7th Ed., 291-2. Code Form NNN. after the words "convicted of having," says "here state the offence as in the conviction, as correctly as possible." And *Spice* v. *Bacon* (1877), 2 Ex. D. 463 seems to indicate how far the Court can go to relieve against a formal error. In *Davies* v. *Kennedy* (1868), 3 Ir. R. Eq. 31 at p. 69, the Master of the Rolls observed, "when a statute like this (relating to the registration of judgments) directs certain matters to be stated in a document, although the Court may be satisfied that the object for which any particular statement is required might be equally well attained some other way, it cannot speculate on that, or inquire into the object intended, with any view to allowing an equivalent. But it may and ought to inquire into the object intended with another view, *viz.*, to ascertain whether what is stated is or is not what the Act requires." Can I say this notice fulfils the statutory conditions? See also *The Queen* v. *Justices of Middlesex* (1843), 12 L.J., M.C. 59. Again, *The King* v. *Boultbee* (1836), 4 A. & E. 498 at p. 507 decides that the Court can adjudicate only on the matter stated in the notice of appeal. See also *Cragg* v. *Lamarsh* (1898), 4 C.C.C. 246 and *Reg.* v. *Durham* (1891), 55 J.P. 277.

Judgment

I think that the appeal has not been lodged in due form and in compliance with the requirements of the Code, and therefore must dismiss the appeal. I reserve the question of costs for further consideration.

Appeal dismissed.

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SAUNDERS v. RUSSELL

Mortgage by infant—Voidable contract—Repudiation of—What amounts to—Infants' Contracts Act.

A mortgage executed by an infant before the passing of the Infants' Contracts Act, is not void, but voidable, and if the infant wishes to avoid it he must expressly repudiate it within a reasonable time after coming of age.

R. in 1896, being then an infant, executed a mortgage in favour of S. R. came of age on 27th January, 1900, and at that time on account of default having been made in the payment of the loan, S. was proceeding to sell under power of sale in the mortgage. R's solicitors on 13th February, 1900, wrote S. saying that no valid mortgage had ever been executed by R., and threatening proceedings to protect their client's interests, and on 2nd March they issued a writ on behalf of R. against S. claiming a declaration that the mortgage was null and void, and an injunction restraining sale. On cross-examination on an affidavit made by R. in support of a motion for an interim injunction, he said in substance that the reason he did not pay was because he couldn't, and that he had never repudiated his contract, and in October, 1900, he discontinued his action. On 2nd November, 1900, S. commenced his foreclosure action, and in defence R. pleaded infancy:—

Held, that the solicitors' letter and the writ in *Russell* v. *Saunders* did not constitute repudiation, as they were qualified by R's statement that he did not intend to repudiate.

Judgment of IRVING, J., dismissing the action, reversed.

APPEAL from judgment of IRVING, J., dismissing a mortgage foreclosure action.

The defendant, who was born 27th January, 1879, executed on 10th October, 1896, a mortgage of certain real estate of which he was the registered owner, in favour of the plaintiff, to secure $1,100. The money was used by defendant to pay off a mortgage on the same property executed by him in 1893, in favour of one George Webb, to secure repayment of money loaned by Webb to defendant and used in the construction of a dwelling house on the property. Statement

The defendant having made default in the payment of the principal and interest due under the mortgage, the plaintiff's agents in January, 1900, proceeded to sell under the power of

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sale contained in the mortgage, and advertised for tenders, whereupon the defendant's solicitors, on 13th February, wrote the agents the following letter:

"Dear Sirs:—We have been consulted by Mr. J. P. Russell with regard to his property, which you have advertised for sale in the Times of January last, and which is known as (describing the property).

"We beg to say that no valid mortgage of the above property has ever been executed and you have no right whatsoever to deal with the same, and herewith give you notice that if you do attempt to deal any further with the same, we shall hold you responsible for all damages and shall take such legal proceedings as we may be advised to protect our client's interest."

On 2nd March, 1900, a writ was issued on behalf of Russell against Saunders, claiming a declaration that the mortgage was null and void, and for an injunction restraining the defendant from proceeding with the sale and selling. A motion for an interim injunction was made on Russell's behalf, and for use on the motion Russell made an affidavit on which he was cross-examined.

The following are extracts from his cross-examination:

"Now, Mr. Russell, why do you object to paying this money that you borrowed? I don't object to paying it if we had it.

"If you had the money you would not object to paying it? No, I would not.

Statement

"You say you would not object to paying the money if you had it? No.

"That is your only reason for objecting? That is my only reason.

"Well then, you never repudiated this mortgage, yourself, that is correct isn't it? I don't understand you.

"You never said that you would not be bound by this mortgage, you, yourself? I would not be bound?

"Yes, that you would not be bound by it? No, I don't think so.

"You never said that you would not be bound either by the Webb mortgage or by the Saunders mortgage? No, I never said that."

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On re-examination he said:

"What were your instructions to your solicitor? Give me that again please. To get an injunction to stop the selling of the property.

"Your instructions were to stop the sale of the property and get an injunction? Yes."

The action of *Russell* v. *Saunders* was discontinued on 2nd October, 1900, without a statement of claim having been delivered and on 2nd November, 1900, the present foreclosure action was commenced.

Defendant pleaded that at the time of the execution of the mortgage he was an infant.

The action was tried on 15th July, 1901, before IRVING, J., who dismissed the action without costs, holding that defendant did intend to repudiate and had in effect disaffirmed the contract, and within a reasonable time.

The plaintiff's appeal was argued at Victoria on the 17th and 18th of June, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Duff, K.C., for appellant: The mortgage made by the defendant before coming of age does not depend on ratification after coming of age, but it is valid unless expressly repudiated. Section 3 of the Infants' Contracts Act has no bearing on our action which goes to the origina promise and which is not based on ratification. He cited *Foley* v. *Canada Permanent Loan and Savings Co.* (1883), 4 Ont. 38; *Edwards* v. *Carter* (1893), A.C. 360 at p. 364, (1892) 2 Ch. 278 at p. 288; Encyclopædia of the Laws of England, Vol. 6, p. 414; and *Whittingham* v. *Murdy* (1889), 60 L.T.N.S. 956. Argument

Here there was no repudiation as the solicitors' letter and the writ are qualified by the defendant's statement that he never intended to repudiate and that the reason he did not pay was because he was not able—the writ in *Russell* v. *Saunders* did not amount to repudiation because Russell says he didn't intend to repudiate, and the solicitors' letter does not raise the question of infancy.

Repudiation is a privilege given "as a shield and not as a sword," and when Russell discontinued his action without deli-

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vering statement of claim he lost his right to avail himself of the privilege of repudiating: see *Whalls* v. *Learn* (1888), 15 Ont. 481; *Zouch* v. *Parsons* (1765), 3 Burr. 1,794 at pp. 1,801-5. At any rate an infant will not be allowed to disaffirm except on making restoration on the principle laid down in *MacGreal* v. *Taylor* (1897), 167 U.S. 688. He cited also *Thurstan* v. *Nottingham Permanent Benefit Building Society* (1902), 1 Ch. 1.

Harold Robertson, for respondent: The mortgage was repudiated by the solicitor's letter and the writ in *Russell* v. *Saunders*, and it then became invalid: see *Jackson* v. *Woodruff* (1850), 7 U.C.Q.B. 332; *Gilchrist* v. *Ramsay* (1868), 27 U.C.Q.B. 500 and *Foley* v. *Canada Permanent Loan and Savings Co.* (1883), 4 Ont. 38.

[HUNTER, C.J.: You must read the letter and the writ in the light of the facts disclosed on the examination.]

I submit not: as soon as the writ was issued the contract was repudiated. To make defendant liable there must be a new promise and new consideration: *Jackson* v. *Woodruff*, *supra* and *Gilchrist* v. *Ramsay*, *supra*.

Argument

There is no exact rule as to time within which repudiation must take place, but here it was within a reasonable time. Once repudiated the contract was at an end. The Courts will protect an infant so long as he is acting on the defensive: see *Confederation Life Association* v. *Kinnear* (1896), 23 A.R. 497; and will not require restitution as a condition precedent to relief where the infant is the defendant.

Section 3 of the Infants' Contracts Act is a bar to this action, although the contract was made before the Act was passed, still the section applies as it is retroactive: *Duncan* v. *Dixon* (1890), 44 Ch. D. 211; *Ex parte Kibble* (1875), 10 Chy. App. 373 followed in *Smith* v. *King* (1892), 2 Q.B. 543. See also *Thurstan* v. *Nottingham Permanent Benefit Building Society* (1902), 1 Ch. 1.

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HUNTER, C.J.: The mortgage in question was executed before the passing of the Infants' Contracts Act, R.S.B.C. 1897, Cap. 95, and therefore it was voidable and not void: *Foley* v. *Canada Permanent* (1883), 4 Ont. 38.

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Now, there has not only not been repudiation within a reasonable time after majority, but the plaintiff in cross-examination on his affidavit filed, while his mind was *tabula rasa*, distinctly affirms the transaction. At page 39 of the appeal book, we find this: "And the only reason you have for not paying it is because you have not the means? Yes, sir. You are not repudiating your obligation under the mortgage at all, that is correct, that is what you have just told me? Yes." Again, at p. 40, in re-examination: "Have you never repudiated this mortgage? Have you ever said anything to anyone that you would not pay this mortgage?" Mr. *Duff*, "I object to that." "No, I have not, I never said I would not pay the mortgage." In the face of these admissions it is idle to contend that the solicitors' letter was a repudiation. It contains no reference to repudiation, but on the contrary, says that no valid mortgage has ever been executed, and since the mortgage was not void but valid till repudiated, it may very well have been taken to have indicated an intention to set up fraud or duress, or mistake, or undue influence, or the like, or it may have been intended only to put off the evil day as long as possible.

HUNTER, C.J.

The appeal must be allowed with costs.

DRAKE and MARTIN, JJ., concurred.

CENTRE STAR v. THE ROSSLAND MINERS UNION *ET AL.*

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CENTRE STAR v. ROSSLAND MINERS UNION

Practice—Amending pleadings—Exceeding terms of order allowing—Waiver of right to object.

Two weeks after the receipt of an amended statement of claim defendants' solicitors wrote plaintiff's solicitor that they would "prepare and file a new statement of defence according to the amendment you have made," and two weeks later took out a summons to strike out amended

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statement of claim on the ground that it exceeded the terms of the order authorizing amendment:—

Held, reversing FORIN, LO. J., that the defendants had waived their right to object.

CENTRE STAR *v.* ROSSLAND MINERS UNION

APPEAL from an order made on 22nd August, 1902, by FORIN, LO. J., striking out an amended statement of claim on the ground that it contained allegations in excess of the amendments authorized by an order made by HUNTER, C.J., on 28th May, 1902. The amended statement of claim was delivered by A. C. Galt, solicitor for the plaintiff to Taylor & O'Shea, solicitors for the defendants, on 18th June, and subsequently the following correspondence passed between the solicitors:

"Rossland, B.C., 1st July, 1902.

"Messrs. Taylor & O'Shea,

"Barristers,

"Nelson.

"*Centre Star* v. *Miners Union.*

"Dear Sirs:—

"I return the affidavits received this morning, with admission of service endorsed.

"It seems to me that one or more of the dates given you may be inaccurate. Is 1895 correct, in the 1st paragraph, and 1896 in the second?

"Kindly certify these, and also the other dates, and let me know the result.

Statement

"Do you intend filing any defence for the newly added defendants?

"Yours truly,

"A. C. Galt."

"Nelson, B. C., July 4th, 1902.

"Mr. A. C. Galt,

"Rossland, B. C.

"*Re Centre Star.*

"Dear Sir:—

"I will prepare and file new statement of defence according to the amendment that you have made. I will try to have this prepared in a few days.

"Yours truly,

"Taylor & O'Shea."

And on 17th July, in reply to an inquiry "What about your new defence (if any)?" defendants' solicitors wrote the following letter:

"A. C. Galt, Esq.,

"Rossland, B. C.

"*Re Centre Star.*

"Dear Sir:—

"We have your enquiry *re* defence contained in yours of the 16th. We regret that it is impossible for us to enter defence to amended statement of claim because we think, upon the perusal of same, it goes far beyond the amendment allowed by the Court. We have already instructed you to be served with summons in this action as well as in the War Eagle, which of course explains itself.

"Yours truly,

"Taylor & O'Shea."

Defendants then applied on summons to strike out the amended statement of claim and the following judgment was delivered by

FORIN, LO. J.: This is an application to strike out the amended statement of claim. The order authorizing the amendment must be looked to and after a careful consideration, I do not see why I should depart from the well established rule of practice that the order authorizing an amendment must be strictly complied with.

FORIN, LO. J.

The question of waiver by the defendants' solicitor was argued at length; after reading the affidavits and copies of letters filed which deal with this point I do not consider there was a waiver as the defendants' solicitor had not perused the pleadings when he wrote his letter of July 4th; he thought the usual practice had been followed and that the amended pleading was within the terms of the order.

The amended statement of claim will be struck out with leave to the plaintiff to file an amended statement of claim in accordance with the terms of the order allowing the amendment. Costs to the defendants in any event.

The plaintiff appealed and the appeal was argued at Vancouver

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CENTRE STAR v. ROSSLAND MINERS UNION

on 17th November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Galt, for appellant: The amendment was made in a way different from that authorized by the order, but defendants' right to object was waived by their solicitors' letter of 4th July, written two weeks after they had received the statement of claim.

The Court on the question of waiver called on

S. S. Taylor, K.C., for respondents: When I got the amended statement of claim I was entitled to assume that the amendments were made in accordance with the order allowing the amendment; I have been misled and under such circumstances there can be no waiver. There can be no waiver without an intention to waive.

Argument

Per curiam: The letter of 4th July was a waiver. The appeal is allowed with costs.

Appeal allowed.

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RENDELL v. McLELLAN

RENDELL v. McLELLAN.

Appeal—Amending Judge's notes of evidence—Practice.

Where a party desires to introduce on an appeal, evidence alleged to have been omitted from the Judge's notes of evidence, he should first apply to the Judge appealed from to amend his notes.

APPEAL by defendant from a judgment of SPINKS, Co. J.

The appeal came on for argument at Vancouver on 17th November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ., when

Clement, for appellant, applied to admit further evidence

alleged to have been omitted from the Judge's notes: r. 681 (*b.*), and tendered an affidavit.

Davis, K.C., for respondent, *contra.*

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RENDELL
v.
MCLELLAN

Per curiam: Where it is desired to take exception to a Judge's notes of evidence, if there was no stenographer at the trial, a formal motion after due notice to the other side should first be made to the Judge himself while the matter is fresh in his memory; it is a serious matter to amend the notes. It is not now necessary to hold what would be done in case the Judge refuses to amend, or what would be deemed to be "other materials;" in the present case the application must be refused.

Judgment

IN RE SMITH: IN THE MATTER OF THE RIVERS AND STREAMS ACT.

FULL COURT
1902
Nov. 25.

RE SMITH

Appeal—Right to—Party interested—Who is—Rivers and Streams Act, Sec. 12.

Section 12 of the Rivers and Streams Act provides that if a "party interested" is dissatisfied with the judgment of the County Judge he may appeal to the Supreme Court:—

Held, that "party interested" means one who was a party to the proceedings before the Judge appealed from.

THIS was an appeal from an order of SPINKS, Co. J., made on an application under the Rivers and Streams Act, ordering that Samuel Cameron Smith be at liberty to charge tolls for boomage, rafting, driving of logs, timber, lumber, crafts and for taking care of the same until delivered, between Mabel Lake and Enderby upon the Spallumcheen River or between any intermediate points upon the said river between Mabel Lake and Enderby after the rate of fifty cents per thousand feet of such logs, timber or lumber driven or floated upon the said river as aforesaid.

Statement

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RE SMITH

The appeal was by Peter Ryan, described in the notice of appeal as being the lessee by grant from the Crown in right of the Dominion of Canada of timber berths adjoining the said Spallumcheen River. The appellant alleged in his notice of appeal that he had had no notice of the application to the County Court Judge, and that unless the said order was reversed he would suffer serious loss.

The appeal came on for argument at Vancouver on 25th November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ., when

Davis, K.C., for respondent, took the preliminary objection that the Court had no jurisdiction to hear the appeal as the appellant was not a "party interested" within the meaning of section 12 of the Act; he was simply an applicant for a timber licence from the Dominion Government. The County Court Judge has fixed the amount of the toll pursuant to section 10 of the Act and he has power to vary his order. The Act does not contemplate that all that *may* have an interest must be considered on the first application; the power to vary is for the protection of future interests.

Fulton, K.C., for appellant, applied to read several affidavits of various parties as to facts not before the Judge appealed from.

Argument

The order was made without notice to appellant. "Party interested" is not confined to a party to the litigation: *In re Winder* (1877), 46 L.J., Ch. 572. Appellant has a lease.

[HUNTER, C.J.: Why did you apply to this Appellate Court as though it were one of first instance? Should you not have applied to the County Judge to vary his order?]

It seemed to me that by doing so we would waive our right of appeal in case we were dissatisfied with his judgment.

Davis: Appeal means a review of the order of the Judge below on the material he had before him. This is not an appeal at all in the proper sense, even though by the practice of the Court further evidence may be allowed—it is an attempt to confer original jurisdiction upon a Court of Appeal.

HUNTER, C.J.

HUNTER, C.J.: I am clearly of the opinion that this is not an "appeal" within the meaning of the section: an appeal pre-

supposes that the appellant has taken some part in the proceedings below, otherwise under the wide language of the Supreme Court Act anyone could appeal to the Supreme Court although a total stranger to the proceedings: *Cf.* Supreme Court Act, "An appeal shall lie or be brought." What is attempted to be done here is to force this Court to exercise for the first time those powers which the statute clearly contemplates should be exercised by the County Judge. Having regard to the whole enactment "party interested" must mean one who has been before the Judge appealed from: it does not mean anyone who thinks he is aggrieved. It may be that the appellant should apply to the County Judge to rescind or vary his order or he may have a remedy in the Supreme Court by an action for a declaratory judgment or for an injunction, but however this may be, I have no doubt that this Court can not be used as the Court of first instance.

HUNTER, C.J.

IRVING, J.: By the statute an appeal is given to any party interested who is dissatisfied with the order or judgment of the County Court Judge. Without express words allowing an appeal this official's decision would be final. The Legislature, in my opinion, has not confined the right of appeal to those who were actually before the County Court Judge. I think, therefore, the appellant is rightly before us. If he had not come here, I think the County Court Judge would have regarded any application to him as an application to vary the tolls. The appellant wishes to contest the right to make any order as to tolls at all. I think we are not justified in dismissing this application as brought without jurisdiction, however inconvenient it may be.

IRVING, J.

MARTIN, J.: I agree with the learned Chief Justice; the expression "party interested" must be construed here in the light of the surrounding circumstances and of the procedure laid down by the accompanying sections; it is plain to me that the statute contemplates that the County Judge should primarily dispose of the matter on all the facts before him; there cannot properly be an appeal from him on facts which were never passed upon by him.

MARTIN, J.

Appeal dismissed, Irving, J., dissenting.

FULL COURT

1902

Dec. 17.

BODI v. CROW'S NEST PASS COAL COMPANY, LIMITED.

Practice—Different plaintiffs against same defendants—Stay of proceedings, where similar orders are being appealed from, pending decision in one—Consolidation of actions.

BODI
v.
CROW'S NEST

Twenty-nine actions having been brought by different persons against the defendant Company for damages caused by the death of relatives in an explosion in the Company's coal mine, and on twenty-nine summonses for better particulars of the plaintiffs' claims having been dismissed the defendants appealed:—

Held, that the Court by virtue of its inherent jurisdiction to prevent the abuse of its process, could and would on the application of the defendants, stay proceedings in twenty-eight of the actions (upon defendants consenting to be bound in all the appeals by the result in one) until after the decision of the appeal in the remaining action—proper provision being made in case that appeal did not properly dispose of the questions in all.

The proper practice would have been to have applied to have the actions consolidated.

Statement

ACTIONS to the number of twenty-nine had been brought against the defendant Company by different plaintiffs for damages caused by the death of relatives in an explosion in one of the Company's coal mines at Fernie, and the causes of action were all practically identical. The Company applied on summons in all the actions for further and better particulars of the plaintiffs' claims and the summonses were all dismissed.

The Company desired to appeal, and on 6th December, 1902, moved the Full Court at Vancouver, composed of HUNTER, C.J., DRAKE and MARTIN, JJ., for leave to enter twenty-eight of the appeals without appeal books being filed in each case, the intention being to have the appeal books filed in the first case do duty for all the others.

Argument

Davis, K.C., for the motion.

Sir C. H. Tupper, K.C., contra: The Court has no jurisdiction to make such an order. The respondent has a right under the statute and the rules to require appeal books in every case.

17th December, 1902. FULL COURT

1902

Dec. 17.

BODI
v.
CROW'S NEST

HUNTER, C.J.: Some twenty-nine actions have been brought against the defendants by different plaintiffs for damages caused by the death of relatives in an explosion in one of the defendants' mines at Fernie.

The causes of action are practically identical but twenty-nine different statements of claim have been delivered by one solicitor acting for all the plaintiffs, twenty-nine demands for further and better particulars of the claim have been served and twenty-nine summonses for orders for further and better particulars taken out, heard and dismissed.

The Company desires to appeal and in order to avoid the piling up of useless costs, asked to have one set of appeal books do duty for the twenty-nine appeals. The plaintiff's solicitor refuses to consent to this as he thinks that it will aid his client's cause to compel the Company to file 145 appeal books containing practically the same matter with different captions, although five appeal books would answer every legitimate purpose and his contention has been argued with great pertinacity by the learned cousel.

It is needless to say that no matter how the appeals were decided no one could benefit by the filing of these 145 appeal books except the solicitors, and it would be a scandal to the administration of justice if the Court was powerless to prevent the proposed waste of time and money.

HUNTER, C.J.

The only difficulty arises from the Company's form of application for relief. They ask in one action that the appeal books to be filed in another action be received and used as the appeal books in the first mentioned action. This cannot be granted as it is clearly not in the power of the Court, against the respondent's objection, to decide the appeal on material filed in another action. At the same time I have no doubt that the Court may and should by virtue of its inherent jurisdiction to prevent the abuse of its process, stay the twenty-eight actions until the appeal in the first is decided.

The order therefore ought to be that, upon the defendants consenting to be bound in all the appeals by the result of the Wilson appeal, all the actions except the Wilson action be stayed

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BODI
v.
CROW'S NEST

pending the determination of the appeal in that action or until further order, with liberty to all parties by consent to bring forward any special matter relating to any of the twenty-eight appeals at the hearing.

As the Company's application was wrong in form, and as they might have avoided much trouble and expense by applying to have the actions consolidated, I think they should pay the costs of the motion.

Only one stay order need be drawn up and it may be entitled in all the actions and should reserve liberty to all parties to apply in Chambers to have the order varied or discharged if circumstances so require.

DRAKE, J.: These are twenty-nine actions brought by the same solicitor against the defendant Company for injuries arising from an explosion in the defendants' mine.

The defendants desire to appeal in all the actions from a decision in Chambers relative to a refusal of an order for particulars.

The same question arises in each case.

The defendants apply on motion to dispense with the setting down and filing the appeal books in all the actions but one. We are told that we have no jurisdiction to make such an order, but I think we have. In *Amos* v. *Chadwick* (1877), 4 Ch. D. 869, Malins, V.C., made an order restraining all but one of seventy-nine plaintiffs and binding the plaintiffs by the result of this test action; and the learned Judge said that the Court had a general discretion over the conduct of its proceedings. The hearing of twenty-eight appeals by the Full Court on a point which can be decided on one application is most vexatious and oppressive, and I think that ample justice will be done by arguing one appeal only, and the judgment in that appeal shall bind the plaintiffs in the other actions; and in the meantime the defendants need not file the appeal books in the other actions, or set down the same for argument. The case of *Amos* v. *Chadwick* was followed in *Bennett* v. *Lord Bury* (1880), 5 C.P.D. 339. The same principle applies more strongly in the case of an appeal against an order in Chambers, and it would, in my opinion, be nothing short of a scandal that twenty-eight appeals should be set down and argued on a point common to all. The Court has

DRAKE, J.

FULL COURT
1902
Dec. 17.
BODI
v.
CROW'S NEST

the power to make the trial of one of a series of actions a test action, and to stay proceedings in the others until the action is disposed of; or it can on the application of the defendants consolidate the actions. Under the English rules consolidation can be made on the application of either plaintiff or defendant.

The costs of the present motion will have to be paid by the defendant as his application was wrong in form.

MARTIN, J.: I agree with the views expressed by the learned Chief Justice.

Order accordingly.

MARINO v. SPROAT *ET AL.*

FULL COURT
1902
April 29.
MARINO
v.
SPROAT

Appeal—Introducing fresh evidence on appeal—Practice.

Practice settled as to applications for leave to introduce on appeal further evidence which might have been adduced at trial.

MOTIONS by appellants to admit in the Full Court further evidence on the hearing of appeal from a judgment at the trial. The motions were argued at Vancouver in April, 1902, before HUNTER, C.J., WALKEM and MARTIN, JJ.

Davis, K.C., and *S. S. Taylor, K.C.*, for the motions.
Duff, K.C., and *John Elliot, contra.*

29th April, 1902.

HUNTER, C.J.

HUNTER, C.J.: We think it ought to be understood that an application to admit further evidence which might have been adduced at the trial, should be supported by the affidavit of the applicant indicating the evidence desired to be used and setting forth when and how the applicant came to be aware of its existence, what efforts, if any, he made to have it adduced at the trial, and that he is advised and believes, that if it had been so adduced, the result would probably have been different. The motions should be dismissed.

WALKEM and MARTIN, JJ., concurred.

MARTIN, J.

1902

Aug. 6.

TANAKA v. RUSSELL.

TANAKA
v.
RUSSELL

Jury—For Victoria or Vancouver Civil Sittings—Special direction to Sheriff to summon jury necessary—Jurors Act, Secs. 28 and 69 and Supreme Court Act Amendment Act, 1901, Sec. 5.

Where an action is to be tried at the Victoria or Vancouver Civil Sittings held pursuant to section 5 of the Supreme Court Act Amendment Act, 1901, a special direction (under section 69 of the Jurors Act) to the Sheriff to summon a jury is necessary.

SUMMONS by defendant for an order directing the Sheriff of Vancouver to "summon twenty jurors to attend on the trial of this action at the Court House, Vancouver, B.C., at the Assizes commencing on Tuesday, the 28th day of October, 1902, the said jurors to be drawn by ballot by said Sheriff in the presence of the parties or their solicitors, from the petit jury list for the current year."

An order for trial by jury had been made on 12th May, 1902, and the case, after an adjournment before DRAKE, J., came on to be tried at the July Sittings at Vancouver before MARTIN, J.,

Statement

and a common jury on the 23rd of that month, but the jurors not having been properly selected by ballot as required by section 69 of the Jurors Act, the learned Judge on the 24th quashed the panel, and directed the case to be placed first on the list for the next regular Sittings (October) of the Court at Vancouver, the original order for trial by jury being held to be still in force.

The present application came on for hearing before MARTIN, J., on 1st August, 1902.

J. A. Russell, for defendant: I ask that the Sheriff be directed to summon the jury for the date already fixed: see section 69 of the Jurors Act and section 5 of the Supreme Court Act Amend-

Argument

ment Act, 1901.

Sir C. H. Tupper, K.C., for plaintiff: There is no necessity for the application; the defendant having got his order for a jury can proceed under section 28 of the Jurors Act and try the case at the next Assizes; it is understood that is the view taken

by Mr. Justice DRAKE when the matter came before him when the case was first brought on for trial.

Russell, in reply: The amendment of 1901, above cited, prevents our adopting that course; it is submitted that Mr. Justice DRAKE did not take the view attributed to him.

MARTIN, J.: It is desirable that I should confer with my brother DRAKE before delivering judgment on this matter. In any event the present summons is wrong in asking that the case be set down for the "Assizes." As applied to civil actions that is a confusing misnomer so far as Victoria and Vancouver are concerned; what is meant is the October Civil Sittings as directed by said section 5.

Cur. adv. vult.

6th August, 1902.

MARTIN, J.: In this matter I have conferred with my brother DRAKE and am of the opinion that in view of the provisions of section 5 of the Supreme Court Act Amendment Act, 1901, there must be a special direction (under section 69 of the Jurors Act) to the Sheriff to summon a jury in all cases which are to be so tried in Victoria and Vancouver, though this is not necessary once an order for a jury has been obtained where cases are to be tried at the Sittings of Assize and *nisi prius* under section 28.

The intention of said section 5 is that civil cases are not to be tried at the the Assizes in Victoria and Vancouver, but at the regular Sittings of the Court as fixed by the statute, six times a year.

An order will, consequently, issue directing the Sheriff to summon a jury for the date already fixed, *i.e.*, the first day of the Vancouver October Sittings.

MARTIN, J.
1902
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TANAKA
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RUSSELL
Judgment

IRVING, J.

1902

April 30.

ATTORNEY-GENERAL v. V. V. & E. RY. & N. CO.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA *EX REL.* THE KETTLE RIVER VALLEY RAILWAY COMPANY v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

Public company—Act of incorporation of—Crown Franchises Regulation Act —Not applicable to Dominion Companies.

The defendant Railway Company was originally incorporated in 1897 by a Provincial Act, and in 1898 by a Dominion Act its objects were declared to be works for the general advantage of Canada and thereafter to be subject to the legislative authority of the Parliament of Canada and the provisions of the Railway Act:—

Held, by IRVING, J., setting aside an order allowing the Provincial Attorney-General to bring an action at the instance of a relator under the Crown Franchises Regulation Act, that the said Act did not apply to the Company.

Statement

MOTION to set aside an order made by WALKEM, J., on the application of the Kettle River Valley Railway Company allowing the Attorney-General of the Province to bring an action under the Crown Franchises Regulation Act, in His Majesty's name, upon the relation of the said Company against the defendant Company claiming in such action such relief as the Attorney-General might consider himself entitled to. The facts appear in the judgment. See also *ante* p. 66.

The motion was argued on 26th April, 1902, before IRVING, J.

Argument

Bodwell, K.C., for the motion: By 61 Vict., Cap. 89, the works which this Company by its Provincial Act of Incorporation was empowered to operate and undertake were declared to be works for the general advantage of Canada; they are not subject to Provincial legislation; any right that there might be to bring this action would be in the Dominion Attorney-General and not the Provincial Attorney-General. Even if the action could be brought it should not be brought as the Chief Commissioner of Lands & Works has given the defendant Company assurances and encouraged it, with the result that it has gone on with con-

struction and spent large sums of money. He cited *Attorney-General* v. *Corporation of City of Victoria* (1884), 1 B.C. (Pt. 2) 107; *Grant* v. *Cornock* (1888), 16 Ont. 407; *Clegg* v. *Grand Trunk Railway Co.* (1886), 10 Ont. 708; *Darling* v. *Midland Railway Co.* (1885), 11 P.R. 32; *Madden* v. *Nelson and Fort Sheppard Railway Co.* (1897), 5 B.C. 396, (1899) A.C. 626; *Attorney-General* v. *International Bridge Co.* (1881), 6 A.R. 537; *Attorney-General* v. *Niagara Falls Bridge Co.* (1873), 20 Gr. 34; *Attorney-General* v. *Midland Railway Co.* (1882), 3 Ont. 511 at p. 518; *Holland* v. *Ross* (1891), 19 S.C.R. 566; *Davenport* v. *The Queen* (1877), 3 App. Cas. 117; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227.

MacNeill, K.C., on the same side.

Clement (Cowan and *T. M. Miller,* with him), *contra:* The defendant Company is not a Dominion corporation as its powers otherwise than *qua* railway are governed by B. C. Stat. 1897, Cap. 75: see Sec. 21; it is contravening its Act of incorporation. (Counsel here repeated his argument reported *ante.* pp. 75, 76 and 77). All those things mentioned are infringements of the Company's powers and come within the scope of the Attorney-General's right to bring an action to question under the Act. *Qua* railway the Dominion has jurisdiction, otherwise the Province. The public of the Province are the people injured. The remarks of Burton, J.A., in *Attorney-General* v. *International Bridge Co.* (1881), 6 A.R. 537, against our contention are *obiter,* the case being decided on another ground. He cited *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367; Lefroy, 102, 596; *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157; *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada* (1892), 21 S.C.R. 72; *Attorney-General* v. *Ironmongers' Co.* (1840), 2 Beav. 313 at p. 329; *Attorney-General* v. *Cockermouth Local Board* (1874), L. R. 18 Eq. 172; Abbott on Railways, 1; *London County Council* v. *Attorney-General* (1902), 71 L.J., Ch. 268.

Argument

Bodwell, in reply, cited *Attorney-General* v. *Great Northern Railway Co.* (1860), 1 Dr. & Sm. 154 at p. 161; *Dominion Salvage and Wrecking Co.* v. *Attorney-General of Canada,*

IRVING, J.

1902

April 30.

ATTORNEY-GENERAL v. V. V. & E. RY. & N. CO.

supra; *Attorney-General* v. *Corporation of Cashel* (1842), 3 Dr. & War. 294 at pp. 310-11; *Attorney-General* v. *Great Eastern Railway Co.* (1879), 11 Ch. D. 449 at pp. 485 and 500; *Attorney-General* v. *London County Council* (1901), 1 Ch. 781 at p. 803; *Rex* v. *Daws* (1767), 4 Burr. 2,120; *Rex* v. *Clarke* (1800), 1 East, 38 at p. 47.

30th April, 1902.

IRVING, J.: On the 20th of March, 1902, Mr. Justice WALKEM, on the application of the Kettle River Valley Railway Company, made an order allowing the Attorney-General of this Province to bring an action under the Crown Franchises Regulation Act, in His Majesty's name, upon the relation of the Kettle River Valley Company against the Vancouver, Victoria & Eastern Railway and Navigation Company, claiming in such action such relief, as he the Attorney-General, might consider himself entitled to upon the facts disclosed upon the motion.

The Attorney-General for the Province was represented on the hearing of that application, but the Vancouver, Victoria & Eastern Railway and Navigation Company, which I shall hereafter refer to as the defendant Company, was not. The defendant Company now applies, under r. 539 of the Supreme Court Rules, to have the matter re-considered, and the re-consideration has been referred by Mr. Justice WALKEM to me.

Judgment

The point upon which my judgment turns is this: "Does the Crown Franchises Regulation Act apply to the defendant Company?

It was originally incorporated by an Act of the Legislative Assembly of the Province of British Columbia" (Cap. 75, Stats. 1897), but on the 13th of June, 1898, by an Act of the Parliament of Canada, 61 Vict., Cap. 89, the works which the Company by the Provincial Act of incorporation was empowered to undertake and operate were declared to be works for the general advantage of Canada, and the said works were declared to be subject to the legislative authority of the Parliament of Canada, and the provisions of the Railway Act, except section 89 thereof. By section 4, the time for commencing and completing the railway was prescribed.

By section 4 of the Crown Franchises Regulation Act, the

Provincial Attorney-General is authorized to bring an action against any corporation, (1.) "Contravening or offending against its act of incorporation . . . " or (4.) "Misusing a franchise or privilege conferred upon it by law."

In my opinion, the Attorney-General of this Province under this Act would only have power to institute an action in respect of companies incorporated by provincial authority for misusing a franchise or privilege conferred upon it by a statute of this Province. He acts for the Crown in the right of British Columbia. In this particular case, the legislation of the Parliament of Canada in 1898, has removed the defendant Company from the operation of the Act. That Act, applying as it can, and does, only to the powers of the Provincial Attorney-General with reference to companies incorporated for Provincial objects within the authority of the Provincial Legislature, cannot effect or authorize the Attorney-General of this Province to commence an action for the cancellation of its charter against a company which by Dominion legislation has been removed from the status of a Provincial company and has become in effect, a Dominion company.

The points raised against the Company on the application for leave were: (1.) That it had not confined itself to the line of railway prescribed by the Provincial charter; (2.) That it had not been commenced within two years; (3.) That no map of the whole line, as contemplated by the Provincial charter, had been filed, but merely sections, or parts of the line; (4.) That it was part of the Great Northern Railway, and that in permitting the Great Northern Railway to acquire shares in the Company there had been a contravention of the requirement of section 21 of the Provincial Act of incorporation. It is on the fourth ground only that I find any difficulty in disposing of the case, because the first, second and third grounds are purely matters relating to the physical construction of the road, and are dealt with by the Dominion Railway Act. I am inclined to the opinion that when the Dominion authority declared that the undertaking was one for the general benefit of Canada, it wholly removed the Company from the Provincial authority, just as if it had been originally incorporated by the Dominion of Canada.

Judgment

IRVING, J.

1902

April 30.

ATTORNEY-GENERAL v. V. V. & E. RY. & N. CO.

Some twenty years ago, Mr. Justice Burton, delivering a judgment in which Patterson and Morrison, JJ.A., and Osler, J., concurred (*Attorney-General* v. *International Bridge Co.* (1881), 6 A.R. 537), in a case where there was an abuse of a Dominion Act relating to the construction of a bridge across the Niagara River, said that the Attorney-General for Ontario was not the proper person to file the information.

In 1892, the Supreme Court of Cannda (*Dominion Salvage and Wrecking Co.* v. *The Attorney-General of Canada*, 21 S.C.R. 72) decided that proceedings to set aside a Dominion statutory charter were properly taken by the Attorney-General for Canada. In that case the Court expressed no opinion as to whether, or in what cases within the legislative authority of the Dominion, the Attorney-General for the Province could also exercise the right of interfering.

The point upon which I decide this application is that the Provincial Legislature, in passing the Crown Franchises Regulation Act, was dealing only with matters within their own legislative powers.

I do not say that the Crown Franchises Regulation Act is *ultra vires*. It is applicable to Provincial Crown franchises, but in my opinion it is inapplicable to the defendant Company by reason of the Dominion legislation in 1898. I think if the learned Judge had had this called to his attention he would have taken the same view as I do, and in that event he would have refused to act under the statute.

Judgment

For these reasons I think the order of the 20th of March should be set aside.

It was suggested by affidavit that the defendant Company was in contempt, in that it was disobeying the injunction granted in this case; and that, therefore, I should not entertain its application. The affidavit does not allege with precision that a breach of the injunction has been committed. Having regard to the surrounding circumstances of this case, I think I would be acting improperly if I delayed hearing the present application until the parties had discussed the question whether or not there had been, in fact, a breach of the injunction.

Order set aside.

OPPENHEIMER v. THE BRACKMAN & KER MILLING COMPANY, LIMITED.

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Contract by letters—Acceptance—New terms.

On 2nd October, O. handed the Company's purchasing agent the following letter: "Gentlemen,—I can offer you 30 cars of timothy hay at $10.50 per ton on cars at Chewelah, subject to acceptance in five days, delivery within six months. P. S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted," and on 5th October, the Company mailed to O., an answer as follows: "Dear Sir,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant. Please ship as soon as possible the orders you already have in hand and also get off the seven cars at $10 as early as possible, as our stock is very low. Try and ship us three or four cars so as to catch the next freight here from Northport. We will advise you further as to the shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in. Do the best you can to get some empty cars at once, as we must have three or four cars by next freight." This letter was received by O. on 8th October:—

Held per McColl, C.J., and Martin, J., that the Company's reply was not a complete acceptance.

Per Walkem and Irving, JJ., that it was a complete acceptance.

ACTION by a merchant residing at Chewelah, in the State of Washington, for the price of hay sold and delivered to the defendant Company, who were wholesale dealers carrying on business in British Columbia, with their head office in Victoria and a branch in Nelson. In the action, which was commenced on the 21st of November, 1899, the defendants counter-claimed, in their pleading delivered the 19th of December, 1899, for damages for breach of an alleged contract for the sale of hay, and the counter-claim is the subject of this report. The circumstances concerning the alleged contract were as follows: Frank B. Gibbs, the defendants' local manager at Nelson, while on a purchasing trip for his firm, on 2nd October, 1899, called on the plaintiff at Chewelah, and, as the result of a conversation between them, the plaintiff on that day handed to Gibbs the following letter:

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"Chewelah, Wash., Oct. 2nd, 1899.

"Messrs. Brackman & Ker Milling Co.,

"Nelson, B. C.

"Gentlemen,—I can offer you 30 cars of timothy hay at $10.50 per ton on cars at Chewelah, subject to acceptance in five days, delivery within six months.

"Yours respectfully,

"J. Oppenheimer.

"P. S.—I also agree to furnish seven cars of timothy hay at $10 per ton if above offer for 30 cars is accepted.

"J. O."

Gibbs took this offer away with him, and on 5th October, 1899, wrote on behalf of his firm from Nelson, B.C., to the plaintiff, as follows:

"Dear Sir,—We would now inform you that we will accept your offer on timothy hay as per your letter to us of the 2nd instant.

"Please ship us as soon as possible the orders you already have in hand and also get off the seven cars at $10 as early as possible, as our stock is very low.

"Try and ship us three or four cars so as to catch the next freight here from Northport.

"We will advise you further as to shipment of the 30 cars. Should we not be able to take it all in before your roads break up, we presume you will have no objection to allowing balance to remain over until the farmers can haul it in.

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"Do the best you can to get some empty cars at once, as we must have three or four cars by next freight."

This letter was sent by mail, registered, to the plaintiff who received it on 8th October, 1899. On 12th October, 1899, the plaintiff's brother, on the plaintiff's behalf, wrote to the defendants as follows:

"Gentlemen,—Received your letter, but regret to inform you that your acceptance of my offer on hay arrived too late, and therefore not able to furnish you the hay."

On the 17th of October, the plaintiff himself wrote to the defendants as follows:

"Gentlemen,—I have just returned from the Fruit Fair, and

in looking over things find your correspondence concerning hay. My brother had already replied to your letter, and which reply I again have to confirm. I would also say this, that aside from your acceptance for hay reaching me after five days had expired, your house has not treated me fair in this hay proposition, for your Mr. Gibson, as soon as he left my store, has employed some farmers in town to buy up the hay, which he seemingly had intended to buy from me, and he also went to Addy and done the same thing when I requested him not to do so. While I otherwise would not take advantage of it when your acceptance reached here too late, I am compelled to likewise take advantage of now rejecting the low offer I had made you on hay.

"Should you be inclined to buy any hay from me it will have to be an entirely new deal, and in which now I would not be able to give you the same deal as before. Kindly acknowledge receipt of three last cars."

On the 6th of November, 1899, the defendants' general manager wrote to the plaintiff from Victoria:

"Dear Sir,—We have been handed by our Nelson branch correspondence which has taken place with you over the question of thirty loads of hay.

"On this hay an option was given by you for a certain length of time at a stipulated price.

"Two days before the option expired a registered letter of acceptance was forwarded to you and which reached your post office in ample time for you to have taken delivery of the same.

"On the day on which the option expired you, however, through no fault of ours, failed to sign for the same till the following day, and in consequence now wish to get out of your bargain on this paltry excuse.

"We, however, feel satisfied that no course of law would sustain your contention for one moment. . . . We therefore beg to advise you that if the delivery of the hay as contracted for by us does not commence by the 15th of the month, that we shall commence replacing the order, charging you up with whatever extra expense we may be put to in the premises."

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As a result of this, the plaintiff's solicitors, Elliot & Lennie, wrote to the defendants on the 20th of November, 1900:

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"Dear Sirs,—We beg to advise you on behalf of J. Oppenheimer, of Chewelah, that car G. N. No. 11,816 is now loaded and awaiting your acceptance at Chewelah, and has been loaded for you since the 14th inst. Mr. Oppenheimer is ready to deliver same on payment of the price as agreed upon.

"We shall expect payment of the present account against you at once, *viz.*, $997, otherwise shall enter suit for the full amount due, several small items for freight having been deducted by you which should be borne by yourselves instead of Mr. Oppenheimer. Unless acceptance of the above mentioned car be made at once and the price paid, Mr. Oppenheimer will consider the contract off."

On the day following the date of the last letter, the plaintiff commenced this action. The defendants did not accept delivery of the hay mentioned in the last letter, but, counter-claimed for damages, charging the plaintiff with breach of contract.

The action came on for trial at Nelson, before MARTIN, J., on the 16th of February, 1900.

Wilson, K.C., and *Fred. Elliot*, for the plaintiff.
S. S. Taylor, K.C., for the defendants.

The plaintiff's claim on the original action was admitted (subject to certain deductions) and judgment was given thereon accordingly.

On the 18th of April, 1900, MARTIN, J., delivered the following judgment on the counter-claim:

MARTIN, J.

Of the questions arising on the counter-claim and reserved for my consideration the first is, was there a contract between the parties? If there be a contract it is contained in the offer and answer as follows: (Setting out letters of 2nd and 5th October, 1899, as in statement).

On behalf of the plaintiff by counter-claim it is argued that the words after the positive language in the first paragraph do not annex any new qualification or condition to the acceptance, but are merely immaterial additions. For the defendants it is strongly urged that the alleged acceptance viewed as a whole is not an unqualified acceptance of the offer in the very terms in which it was made, and therefore there is no contract.

Objection is chiefly taken to the acceptance, so-called, on two grounds. (1.) As to the statement "We will advise you further as to shipment of the 30 cars," because this implies that the plaintiff would direct or control the manner of shipment, whereas by the offer the only qualification as to delivery was that it was to be within six months, and might be either daily by car till completed, or in one train load on the last day. (2.) As to the statement "Should we not be able to take, etc. . . . . haul it in," that it was not a mere suggestion but the introduction of a new request in an equivocal manner, which left the defendant in an uncertain position. The question is one of some difficulty because, though there are cases without number on the principle involved, yet the language is, as might be expected, different in each case; as was said in *Bruce* v. *Tolton* (1879), 4 A.R. 144 at p. 149, "a decision upon one set of correspondence may be of little assistance where the effect of another set comes in question." After a perusal of many cases I am of the opinion that the rule of law is laid down most lucidly by Mr. Justice Morrison in *Carter and Todd* v. *Bingham* (1872), 32 U.C.Q.B. 615, as follows:

"An acceptance of a proposition must be a simple and direct affirmative in order to constitute a contract, and if the party to whom the offer or proposition is made accepts it on any condition, or with any change of its terms or provisions which is not altogether immaterial, it is no contract until the party making the offer consents to the modifications; there can be no contract which the law will enforce until the parties to it have agreed upon the same thing in the same sense."

MARTIN, J.

Further expressions in the same judgment are of assistance here, thus:

" . . . . The introduction of the period of delivery was most important, and it certainly qualified the plaintiff's offer very materially . . . and to this qualified acceptance or proposition of the defendant, the plaintiffs sent no reply. . . . So here . . . the plaintiffs never replying to or acquiescing in that modification of their offer, the defendant might say equally well with the plaintiffs, 'There was no contract concluded be-

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tween us, as you did not accept my terms qualifying your offer.'"

In *Fulton Bros.* v. *Upper Canada Furniture Co.* (1883), 9 A. R. 211, the necessity of communication of assent to any new qualification is laid down. In *Appleby* v. *Johnson* (1874), L.R. 9 C.P. 158 at p. 163, Mr. Justice Grove says that "if the answer is equivocal, or anything is left to be done, the two do not constitute a binding contract; and there is no acceptance if it involves something which may be an alteration—a more clearly defining of something which may be the essence of the contract."

Both counsel cited *Marshall* v. *Jamieson* (1877), 42 U.C.Q.B. 115, and it is a case somewhat similar, as a whole, to the present. *Carter and Todd* v. *Bingham* was cited (p. 121) among the authorities relied upon by Chief Justice Harrison in his judgment in *Marshall* v. *Jamieson*, wherein it was decided (Morrison and Wilson, JJ., concurring) that an inquiry for directions as to shipping constituted no material part of the contract; but that is not the point raised here.

The case nearest the plaintiff's that I can find is *Webb* v. *Sharman* (1873), 34 U.C.Q.B. 410, and the question there was as to the meaning of the apparently simple words "When will you box?" following a precise acceptance by telegram, yet two of three Judges divided on the answer that should be given. The defendants' case at bar is much stronger than this.

MARTIN, J.

It seems to me that the contention of the plaintiff that the defendants should have regarded the reference to the plaintiff not being able to take in the hay before the roads broke up as merely an inquiry collateral to the contract is answered by *Fulton Bros.* v. *Upper Canada Furniture Co.*, *supra*, at p. 215, where it is said, "The defendants may have intended this, or they may have intended to leave it an open question. Were the plaintiffs safe in drawing the inference which the defendants now say that they might have drawn? I should say not, etc." Applying that test to this case I must say that the defendant here would not have been "safe" in drawing that inference. The answer, as Mr. Justice Grove said *supra*, was in my opinion "equivocal," and "it involved something which might be an alteration, etc.;" an

ordinary business man would be placed in a position of uncertainty by such an answer; he would not know exactly how to take it; if he acted on it as an unqualified assent the other party might set up that he had acceded to the "presumption" of allowing the balance to wait. In my opinion there should be no room in an acceptance for embarrassing "presumptions" which may be set up should the party "presuming" see fit to do so. Among the ordinary definitions of "presume" given in the Standard Dictionary are: "To accept as a natural deduction from circumstances; a qualified form of assent as to something that has not been made the subject of consideration." Applying these definitions to the whole of the answer can it be said that the minds of the parties were exactly at one? I think not, because there is an assumption as to shipment and a presumption as to delivery. Lord Westbury speaks emphatically of its being desirable "to adhere strictly to the rule of the Court, that whoever brings forward a contract, as constituted of a proposal on one side and an acceptance on the other, should shew that the acceptance was prompt, immediately given, unqualified, simple and unconditional"—*Oriental Inland Steam Co.* v. *Briggs* (1861), 4 De G. F. & J. 191 at p. 197.

It was suggested that the answer to the offer must be regarded as an acceptance because Oppenheimer so styled it in his letters of October 12th and 17th, wherein he objects to the "acceptance" on the ground that it arrived too late. But if it arrived too late (though in fact it did not) the defendant would be incorrect in calling it an acceptance, and if he did so it would not make it an acceptance. So if in a letter of repudiation of the offer as an acceptance Oppenheimer took one ground of objection, that would not debar him from taking at a later stage any other objection his legal advisers might see the "acceptance" was open to. As was said in *Adie and Sons* v. *Insurances Corporation, Limited* (1898), 14 T.L.R. 544, these subsequent letters could not affect the legal position of the parties.

MARTIN, J.

I find myself unable to regard the words in the answer above considered as being simply immaterial additions, and a perusal of the cases cited in the note on that point in Addison on Contracts (1892), 16, shews that they differ considerably from the

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present, and do not sufficiently sustain the argument of counsel for plaintiff (by counter-claim).

The result is that judgment should be entered in favour of the plaintiff (by original action) for $1,009.24, less $12.48 the set-off, which reduces the amount to $986.76, with costs. The counter-claim is dismissed, with costs.

The defendants appealed to the Full Court and the appeal came on for hearing at Vancouver on the 30th of May, 1900, before McCOLL, C.J., WALKEM and IRVING, JJ.

S. S. Taylor, K.C., for appellants.
Wilson, K.C., and *Lennie*, for respondent.

At the conclusion of the argument the Court directed a new trial, which was had on 7th February, 1902, before IRVING, J., and a special jury, with the result that judgment was directed to be entered for the defendants for $1,270 and costs, on their counter-claim.

The plaintiff appealed and the appeal came on to be heard at Vancouver on the 27th of June, 1901, before McCOLL, C.J., WALKEM and MARTIN, JJ.

Wilson, K.C., and *Lennie*, for appellant: The proposal and answer do not constitute a contract: *Carter and Todd* v. *Bingham* (1872), 32 U.C.Q.B. 615; *Cole* v. *Sumner* (1900), 30 S.C.R. 379; *Fulton Bros.* v. *Upper Canada Furniture Co.* (1883), 9 A. R. 211; *Felthouse* v. *Bindley* (1862), 11 C.B.N.S. 869; *Appleby* v. *Johnson* (1874), L.R. 9 C.P. 158 at p. 163; *Oriental Inland Steam Co.* v. *Briggs* (1861), 4 De G. F. & J. 191; Benjamin on Sales, 7th Ed., 48 and *Falck* v. *Williams* (1900), A.C. 176.

Argument

The answer of the appellant's offer was not communicated within the time limited, as the circumstances shewed an intention on both sides that the acceptance should be in the appellant's hands within five days: *Carlill* v. *Carbolic Smoke Ball Co.* (1893), 1 Q.B. 256 at p. 269; *Household Fire Insurance Co.* v. *Grant* (1879), 4 Ex. D. 216; *Henthorn* v. *Fraser* (1892), 2 Ch. 27 at p. 33.

The contract, if it existed, was not rescinded. The respondents by their letter of 6th November, elected to treat the con-

tract as subsisting, and the action was therefore premature: *Michael* v. *Hart & Co.* (1902), 71 L.J., K.B. 268 and cases there cited; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460; *Scarf* v. *Jardine* (1882), 7 App. Cas. 345 at p. 360 and *Dalrymple v. Scott* (1892), 19 A.R. 477 at p. 484.

Conditions precedent on respondents' part as to supplying cars, inspecting hay and tendering price had not been performed: *Marshall* v. *Jamieson* (1877), 42 U.C.Q.B. 115 and *Morton* v. *Lamb* (1797), 7 Term Rep. 125.

S. S. Taylor, K.C., for respondents: The proposal and answer constitute a contract: *Simpson* v. *Hughes* (1897), 66 L.J., Ch. 334; *Port Canning Land, Investment, Reclamation and Dock Co.* v. *Smith* (1874), L.R. 5 P.C. 114; *Marshall* v. *Jamieson, supra; Webb* v. *Sharman* (1873), 34 U.C.Q.B. 410; *Thorne* v. *Barwick* (1866), 16 U.C.C.P. 369 at p. 375; *Bruce* v. *Tolton* (1879), 4 A.R. 144 and *Ottawa Gas Co.* v. *City of Ottawa* (1901), 21 C.L.T. 528.

Argument

The acceptance operated from the time of posting: *Brogden* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 666 at p. 692; *Magann* v. *Auger* (1901), 31 S.C.R. 186; *Marshall* v. *Jamieson, supra* and *Henthorn* v. *Fraser, supra.*

Cur. adv. vult.

2nd May, 1902.

McColl, C.J.: I adhere to the opinion expressed on the former trial, that the plaintiff has failed to prove any contract, but I understand that the new trial was granted because the majority of the Court held there was such a contract. If necessary the time from the former judgment of the Full Court should be extended to allow an appeal to the Supreme Court of Canada.

McColl, C.J.

Martin, J.: Though this appeal comes before us in the shape of one from the judgment of my brother Irving, directed to be entered in favour of the respondent, nevertheless it also affects, as I regard it, the judgment in the first trial which I delivered on April 18th, 1900, and consequently I should have been pleased if the quorum of the Court could have been formed without me, but owing to the unavoidable absence of my brother Drake from

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that Session of the Full Court this could not be done, and I must consequently deal with the matter as best I may.

To explain my understanding of the situation it is necessary to state that after the appellant's counsel had entered upon his argument and had begun the discussion of the first ground of his appeal, to wit, the question of contract or no contract, I stopped him and, in order to leave no room for misunderstanding, asked if this point were now open for discussion in view of the judgment of the Full Court (composed of the Chief Justice and WALKEM and IRVING, JJ.), delivered on May 30th, 1900, ordering a new trial. In answer to me Mr. *Wilson* replied as follows (I quote from my notes):

"The Full Court did not say on what ground a new trial was ordered, but I understood it was on the ground that the trial Judge erroneously rejected evidence; the point as to no contract was not passed upon by the Court."

This explanation of the situation was thereupon accepted as correct and consequently the appellant's counsel proceeded without demur to argue the question at length (and other questions), several pages of my note-book being taken up with his argument and the reply thereto of the respondents' counsel. It will be noted that my learned brothers sitting on this appeal formed a majority of the Court which sat on the prior appeal.

MARTIN, J.

Despite the foregoing, it has been suggested by one of my learned brothers, since the appeal has been reserved for judgment, that the question of contract or no contract is not now open to us by reason of the result of the former appeal, but in view of what has happened, I regret I cannot take that view of the matter, and I think it due to the appellant to make these remarks in order that his right to appeal from the former judgment of the Court may be preserved, in case by reason of any misunderstanding, he cannot now raise it by way of appeal from the present judgment of this Court, if he is so disposed.

I venture to add that in future, to avoid further misunderstanding, in cases where the Judge appealed from gives written reasons for his judgment and is reversed, we should follow the practice of giving reasons for our reversal, not only for the guidance of suitors but as something due to the Judge himself.

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In my opinion the question of the alleged contract should, in view of the foregoing circumstances, be now specifically determined by this Court, and the additional argument has furnished me with no reason for departing from my former judgment. So far as the case of *Simpson* v. *Hughes* (1897), 66 L.J., Ch. 334, 76 L.T.N.S. 237 (not cited at the trial) is concerned, all I have to say, with all humility is, that I do not see how the learned Judges could have come to any other conclusion, but no one, I venture to think, who carefully compares the language used in the correspondence in that case with what is used in this can fail to be struck by the difference in the effect of the wording employed.

In my opinion there never was a contract between these litigants, and the present appeal should be allowed with costs.

Appeal dismissed, Martin, J., dissenting.

Oppenheimer appealed (on special leave as to the Full Court judgment of the 30th of May, 1900) from both of the Full Court judgments to the Supreme Court of Canada, and on 17th November, 1902, judgment was given allowing the appeals with costs.

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JAMES TURNER & CO. v. COWAN *ET AL.*

Company—Paid up shares—Payment in cash—Price of property sold to company—Companies Act, Secs. 50 and 51.

Judgment of HUNTER, C.J., reported *ante* at p. 301, affirmed.

APPEAL from the judgment of HUNTER, C.J., reported *ante* at p. 301.

The appeal was argued at Victoria on the 7th and 8th of January, 1903, before DRAKE, IRVING and MARTIN, JJ.

S. S. Taylor, K.C., for appellants: What was done was simply throwing the partnership into a joint stock company; there was never any intention that the partners should be paid anything for their assets; it was not a cash transaction, and in order that it may stand it must be shewn that it was intended to be a cash transaction, namely, an independent contract on the part of the defendants to take shares and an intention to pay for the same in cash, and an independent contract with the Company to sell property with an intention to receive cash for the same, and instead of exchanging cheques mutual credits are given; here from the beginning there was no intention on the part of the defendants to pay cash for their shares and no intention on the part of the Company to pay cash for the partnership assets. Under section 51 (*a.*) of the Act a shareholder is limited in his defence to a set-off which he could set up against the Company, but here none of the defendants would have a set-off against the Company as the assets were not sold by the partners individually, but by the partnership. The defendants were never in a position to give cash, and in any event it would have been a case of their paying cash to themselves. He cited *Spargo's Case* (1873), 8 Chy. App. 407 and *Larocque* v. *Beauchemin* (1897), A.C. 358. A transaction in which the purchase price is to be paid in shares out of share capital cannot stand: see *White's Case* (1879), 12 Ch. D. 511 at p. 514 and *In re New Eberhardt Company* (1889), 43 Ch. D. 118 at p. 129.

Argument

[IRVING, J., referred to *Ooregum Gold Mining Company of India* v. *Roper* (1892), A.C. 125].

The identical shares subscribed for have never been paid for; the shares issued and taken in exchange for the assets settled that transaction and it leaves all the shares subscribed for unpaid for. He cited *Spargo's Case, supra*; *Evans's Case* (1867), 2 Chy. App. 427 and *Baron de Beville's Case* (1868), L.R. 7 Eq. 11.

Davis, K.C., for respondents: If a cheque had been issued by the Company to the partnership and a receipt given and then the shares issued to the three individuals and the money paid back, that transaction could not be attacked; in effect that was what was done here only not in that roundabout way. The shares issued were those subscribed for.

Taylor, in reply.

January 27th, 1903.

DRAKE, J.: The defendants formed themselves into a joint stock company on 27th April, 1899, and signed the memorandum of association for some 1,564 shares in different proportions. They paid nothing on these shares until 27th July.

The Company was launched for the purpose of carrying on, amongst other things, the business of wholesale wine, spirit, liquor and cigar merchants, and to acquire the business of any other firm carrying on any of the businesses therein mentioned, and to pay for any property or rights acquired by the Company in cash or shares or partly in one way and partly in another.

On 27th July the Company, by resolution, agreed to purchase from the defendants for $8,187.21 the business of wine and spirit merchants which they had formerly carried on in partnership, and an agreement was entered into on 27th July, 1899, between the defendants and the Company, whereby in consideration of $8,187.21 cash paid by the Company to the defendants all the goods, chattels, stock-in-trade and trade fixtures of the defendants as wholesale liquor merchants, and book debts were assigned to the Company, and the Company agreed to pay all the debts of the concern and to indemnify the defendants from all liability in respect of the same.

The plaintiffs on 17th August, 1900, recovered a judgment

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against the Company for $537.80, and on 11th September in the same year another judgment for $652.90, and issued executions which were returned *nulla bona*. They thereupon commenced this action against the defendants in respect of the amount alleged to be due for shares in the Company, and which they claim were not paid in cash.

The price paid by the Company as found by the Chief Justice was a reasonable price, but no money passed, and the contract does not state that shares were to be issued to the vendors in lieu of cash. The Company failed. The judgment creditors now sue the defendants as shareholders who have not paid for their shares. Mr. *Taylor*, for the appellants, relies on section 51 of our Companies Act, which is identical with section 25 of the English Act of 1862, and contends that the payment for shares must be in cash, and that although the deed of conveyance states the consideration money to be in cash, yet in fact it was a payment made in shares and therefore invalid. The facts shew that there were no shares issued to the subscribers to the memorandum of association in respect of the shares subscribed for until 27th July. When the purchase of the assets of Cowan, Downes & Holten was made, it is apparent that the defendants were liable to the Company for the amount due on their shares whenever a call was made, a liability the Company could have enforced at any time. Now, when this transaction was entered into these defendants were owing the Company for their shares to be paid when called up. They were also owners of the assets of Cowan & Co., and these were valued to the Company at $8,187.21. The owners instead of handing cheques over for the amount due on their shares and receiving it back in payment of the assets, sold to the Company, appropriated the amount due by them respectively for shares against the amount due to them for the assets sold. This transaction falls within *Spargo's Case* (1873), 8 Chy. App. 407. This case was disapproved in *Re Johannesburg Hotel Co.* (1891), 1 Ch. 119 and *Ooregum Gold Mining Company of India* v. *Roper* (1892), A.C. 134, by the present Lord Chancellor, but it was approved and followed in the Privy Council in *Larocque* v. *Beauchemin* (1897), A.C. 358; and in *North Sydney Investment and Tramway Co.* v. *Higgins*

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(1899), A.C. 273, and must now be considered the law governing section 50.

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Mr. *Taylor* urged that as the defendants had signed the memorandum of association individually, they could not when it came to sell a partnership business claim the right to set off the amounts due by them as individual signatories against the amount to be paid to them as a partnership in respect of partnership assets, which might be owing to them in different amounts. In my opinion the assets of a partnership are due to the partners according to their individual interests in the concern, and it is a matter which can be arranged when the sale takes place just as easily as if the amount paid in cash was afterwards divided. There is no question here as to the non-registration of a deed enabling assets to be paid for in fully paid up shares, because the articles of association nowhere treat the business of the defendants as a specific object for which the Company was formed. The transaction here was slightly varied as to the shares, as the amount received was $8,187.21 in lieu of $8,127.21, but this sum of $60 is of little importance as it only varies the distribution of the shares and does not alter the number which were handed to the defendants.

The cases cited by Mr. *Taylor*, *In re New Eberhardt Company* (1889), 43 Ch. D. 118 at p. 129; *In re S. Frost & Co., Limited* (1899), 2 Ch. 207 and *Fothergill's Case* (1873), 8 Chy. App. 270, are all cases on the construction of section 50, where the agreement as to taking paid up shares was by some contract filed with the Registrar of Joint Stock Companies. These cases do not apply. The only question here is whether or not the signatories to the memorandum of association are at liberty to set off the calls on these shares against property transferred by them to the Company. There were no other shares issued, and in my opinion the judgment is right, and this appeal should be dismissed with costs.

DRAKE, J.

IRVING, J.: The authority of *Spargo's Case*, L.R. 8 Chy. 407, decided in 1873, for a long time rested under suspicion, but it was finally established in *Larocque* v. *Beauchemin* (1897), A. C. 358, and acted upon without question in *North Sydney In-*

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vestment and Tramway Co. v. *Higgins* (1899), A.C. 273.

The effect of the decision in *Spargo's Case* was to strike out of section 25 of the Companies Act, 1867, section 50 of our B.C. Statute, the words "in cash" and to recognize as sufficient the principle of payment in "meal or malt." In each case the question is, does the transaction amount to that which would have been pleadable in an action at law for calls on the shares as payment?

In the present case there was a sum payable immediately by the three defendants for shares subscribed by them, and there was a larger sum immediately payable by the Company to the defendants for the purchase money for the stock-in-trade which the Company had by resolution agreed to buy, and of which they took possession. The learned Chief Justice found that the transaction was an honest one entered into after a fair valuation of the property. I confess that that finding goes a long way with me, and that under those circumstances a settlement of the account between the parties, made by them, is not to be overturned because the formality of issuing shares to the defendants jointly was not observed.

This view, *viz.*: that a convenient mode of carrying out the arrangement, was adopted in the case of *In re Barrow-in-Furness and Northern Counties Land and Investment Co.* (1880), 14 Ch. D. 400, and I think we may now, in considering what has been done, adopt that view.

IRVING, J.

As to the alternative proposition that the shares paid for were not the shares subscribed for, I should think that the presumption would rather be that a man intended to appropriate the money coming to him from the Company in satisfaction of the debt he then owed the Company than that he intended to incur further liabilities by taking additional shares The whole evidence bears out the idea that this was in fact the case. In *Coates' Case* (1873), L.R. 17 Eq. 169, a somewhat similar question was decided on the facts surrounding the transaction, although in the memorandum of association it was not so expressed.

I agree with the Chief Justice that we must not attach too much importance to the expressions used by laymen in giving

evidence on technical matters as to what they did, or thought they were doing, and think this appeal should be dismissed.

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MARTIN, J.: This case is not without difficulty, and the line of distinction is a fine one, but with some hesitation I have, after a further consideration of the cases mentioned in the judgment of the learned trial Judge, reached the conclusion that I am unable to say he has wrongly applied the law to the facts of this case, and consequently his decision should be affirmed for the reasons in his judgment mentioned.

Appeal dismissed.

D'AVIGNON v. JONES *ET AL.*

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Evidence—Relevancy—Evidence to contradict.

In an action to set aside a bill of sale of a mineral claim on the ground that it was a forgery by one of the defendants, evidence was given by plaintiff and his witnesses as to matters which, whether material or not, were intended to make the Judge give a readier credit to the plaintiff's case. For the defence, witnesses were allowed to give evidence shewing that the plaintiff and his witnesses in respect to the same mineral claim, had been parties or privy to a fraudulent transaction involving perjury and conspiracy and tending to shew that a like fraudulent scheme was being attempted in this case, and the result was that the Judge was so influenced by this evidence that he gave judgment for the defendants:—

Held, by the Full Court, that the said evidence on behalf of defendants was properly admitted.

APPEAL from the judgment of CRAIG, J., in the Territorial Court of the Yukon dismissing the plaintiff's action with costs.

Statement

The action was brought to set aside a bill of sale of a mineral claim. The claim was recorded in the name of the plaintiff, who gave one Barlow a power of attorney to deal with it, and the defendants claim title under a bill of sale which purported to be

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executed by plaintiff in favour of the defendants Rutledge and Davis. The plaintiff's case was that his signature to the bill of sale was a forgery by Rutledge.

The statement of claim alleged that the plaintiff at the date of the alleged bill of sale was the duly recorded owner of the placer mining claim No. 13 on Gold Run Creek. By a joint statement of defence the defendants originally denied each and every allegation in the statement of claim, pleaded that they purchased the said claim from the plaintiff, and subsequently an amended statement of claim was delivered on behalf of Davis denying the allegations in plaintiff's claim and alleging that he purchased his interest through Rutledge, who at the time was a real estate and mining broker in the City of Dawson, and who came to him and offered the said interest for sale, whereupon he having searched the title and finding the same clear, paid over to Rutledge the moneys asked by him for the said interest as the agent of the plaintiff, and instructed Rutledge to procure the said interest and record the same in his (Davis') name, and Rutledge did procure a bill of sale from the plaintiff, which is the bill of sale recorded in the Gold Commissioner's office.

At the trial, D'Avignon swore that he himself staked the claim and in his evidence on this point, and also in regard to his dealings with the claim, he was corroborated by Hildebrand, a witness on his behalf. Barlow, was also a witness for the plaintiff, and swore that the claim was staked by plaintiff.

Statement

For the defence witnesses were called and allowed to give evidence shewing that Barlow, Hildebrand and D'Avignon had in the location and record of the same claim been parties or privy to a fraudulent transaction involving perjury and conspiracy and tending to shew that a like fraudulent scheme was being attempted in this case. It was shewn that the claim was really staked by Barlow, but as his right of staking in that district had been exhausted, as he had already staked a claim and could not under the law stake another, he used the plaintiff's name with the intent to defraud the Crown.

At the trial, CRAIG, J., gave judgment in favour of the defendants, but in his judgment he said that if it had not been for the evidence given to discredit the testimony of Barlow, D'Avignon

and Hildebrand, his judgment would have been in favour of the plaintiff.

The appeal was argued at Victoria in January, 1902, before WALKEM, IRVING and MARTIN, JJ.

Peters, K.C., and *A. G. Smith* (of the Yukon bar), for appellant.
Davis, K.C., and *Wade, K.C.* (of the Yukon bar), for respondents.

The following authorities in reference to the admissibility of the evidence were referred to in the argument:

By counsel for the appellant: Phipson's Evidence (1898), 167; Taylor on Evidence, p. 229; *Wilkin* v. *Reed* (1854), 23 L.J., C.P. 193; *New Zealand and Australian Land Co.* v. *Watson* (1881), 7 Q.B.D. 374 at p. 382; *Jacobs* v. *Layborn* (1843), 11 M. & W. 685; Robinson & Joseph's Digest at 2,579; *Yardley* v. *Arnold* (1842), 10 M. & W. 141. Argument

By counsel for respondents: *King* v. *Haney* (1873), 46 Cal. 561; Thompson on Trials, p. 575; *Harrison* v. *Courtauld* (1830), 1 Russ. & M. 428; *Corporation de Sutton Coldfield* v. *Wilson* (1684), 1 Vern. 254 and *Moorhouse* v. *De Passou* (1815), 19 Ves. 433.

On the 16th of April, 1902, the judgment of the Court was given dismissing the appeal with costs, and the following judgment was delivered by

IRVING, J.: The plaintiff's case rests on the charge of forgery being established against the defendant Rutledge. To affix the stigma of fraud to a man is so serious a matter that the Judges have again and again laid it down that fraud charged, must be sheeted home with nearly the same degree of certainty as is required to convict a man of a crime. Judgment

Now, in the present case, the evidence of the plaintiff as to the forgery, rests on the evidence of Barlow—his evidence, if believed, is fatal to the defendant. The learned Judge who tried the case says that his story was given in a straightforward way and not shaken in cross-examination.

The defendants were allowed to call witnesses who gave evidence shewing that Barlow, Hildebrand and D'Avignon had, in the past, been parties or privy to a fraudulent transaction in-

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volving perjury and conspiracy, and that a like fraudulent scheme was being made use of in this case.

The result of this evidence was that the learned Judge lost confidence in Barlow, and returned a verdict of "not proven."

The question for our decision is, was this evidence admissible?

In cases of fraud a great deal more latitude is allowed as to the reception of evidence than in ordinary cases. This principle applies as well to evidence produced by the defendant resisting a charge of fraud as to evidence submitted by the plaintiff in support of the accusation. In *McDonald* v. *Johnston* (1889), 16 A.R. 430, a new trial was ordered because of the failure to recognize this principle.

In conformity with that rule, and to render Barlow's story as to the forgery more probable, Hildebrand and D'Avignon gave evidence as to matters not raised by pleadings—this evidence was either rightly or wrongly admitted. If rightly admitted, it would be on the ground that it was material to the case, as it was calculated to make, and did make, the Judge give a readier credit to the substantial part of Barlow's story. The plaintiff having elected to make this evidence relevant to the issue, I think the defendants were at liberty to contradict it.

Taking the question the other way, that the evidence of Hildebrand and D'Avignon as to the staking and recording was immaterial and that it ought to have been objected to, and that failure on the part of the defendant to object, cannot make it material or relevant. There can be no doubt in any person's mind why it was that the plaintiff put in that evidence. In my opinion, whether it was strictly admissible or not is immaterial—the offering of fabricated evidence with the intent that it should operate on the mind of the Judge was sufficient—it then became open to the defendant to prove its fabrication and consequently its falseness, to dissipate the charge of fraud brought against him.

Judgment

The plaintiffs having given that evidence, I think it was open to the defendant to shew that the plaintiff's witnesses were in conspiracy against him to give false evidence, and that their relationship to each other and to the plaintiff was such that their evidence would be biased in favour of the plaintiff—*Thomas* v. *David* (1836), 7 C. & P. 350. In making his defence the

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defendant was at liberty to resort to circumstantial evidence, and what circumstantial evidence could be more relevant than that the plaintiff was suborning false witnesses to give colour to the story of his chief witnesses? This conduct of the plaintiff is relevant also as shewing the weakness of his case.

It is suggested that there should be a new trial—with deference I think not—*Le Lievre* v. *Gould* (1893), 1 Q.B. 499.

The trial Judge offered an adjournment—but as the plaintiff elected to proceed with the trial, I think he should be bound by the result.

Mr. Justice WALKEM agrees that the appeal should be dismissed, and is of opinion that a new trial would be useless.

Appeal dismissed.

Note:—An appeal to the Supreme Court of Canada was dismissed in November, 1902.

NICHOL v. POOLEY *ET AL.*

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1902

June 24.

NICHOL v. POOLEY

Costs—Criminal libel—Taxation or action for—Stay—Cr. Code, Secs. 833-35.

Appeal from the decision of IRVING, J., reported *ante* p. 21, dismissed.

Quaere, where costs are taxable under section 835 of the Criminal Code, on what scale should they be taxed?

APPEAL by defendants from judgment of IRVING, J., on a summons by defendants to stay all proceedings on the ground that the plaintiff had no right to maintain the action and that the same was vexatious and an abuse of the process of the Court. The judgment appealed from is reported *ante* at p. 21.

Statement

The action, as appeared by the statement of claim, was to recover the amount of costs incurred by the plaintiff by reason of an indictment brought by the defendants against him for criminal libel, upon which a verdict of not guilty and judgment accordingly had been rendered at a third trial; the two former trials having been abortive owing to the jury disagreeing in each instance.

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Upon the application of the accused in *Rex* v. *Nichol*, MCCOLL, J., had made an order for a commission to examine witnesses for the defence in England, and by the order had reserved the costs of the commission to be dealt with by the Judge who should try the indictment. The commission evidence was used by the accused at the first two trials, but not at the third trial.

The plaintiff, after judgment had passed for him on the indictment, delivered to the defendant a bill of costs incurred by reason of the indictment under section 833 of the Criminal Code, and obtained an appointment from B. H. T. Drake, the Registrar of the Supreme Court, who had also acted as Clerk of the Court at the criminal trial, for the taxation of the plaintiff's costs.

The plaintiff and defendants by their solicitors attended upon the appointment, the taxation was proceeded with, and all the items were passed upon by the taxing officer, but the taxation was not closed because the officer had refused to allow to the plaintiff the costs of the commission evidence without an order of the Judge who tried the indictment. The officer had allowed to the plaintiff his costs of the two abortive trials, though objected to by the defendants. The plaintiff Nichol thereupon made an application in *Rex* v. *Nichol*, upon notice of motion, to DRAKE J., who had tried the indictment, for an order that the costs of the commission reserved to be dealt with by the trial Judge by the order of MCCOLL, J., be taxed and paid to him.

Statement

On the return of that motion, DRAKE, J., ordered the plaintiff's application to be dismissed, holding that the plaintiff was not entitled to any of the costs of the abortive trials, and was therefore not entitled to the costs of the commission as the evidence had not been used at the last trial (*Rex* v. *Nichol* (1901), 8 B.C. 276).

The taxation was not closed, but the plaintiff then brought this action and delivered as particulars under his statement of claim the same bill of costs that he had submitted to taxation.

IRVING, J., held that the plaintiff should not be allowed to pursue both remedies at once, but as in the criminal proceedings there was no appeal, he should be allowed to proceed with this action on terms.

The appeal was argued at Victoria on the 23rd and 24th of June, 1902, before HUNTER, C.J., WALKEM and DRAKE, JJ.

Cassidy, K.C., and *Luxton*, for the appeal: Taxation of the bill and an allocatur are conditions precedent to the right of action: see section 835, which provides for the recovery of the amount either by warrant of distress or action, and a warrant of distress can only be applicable to an ascertained sum: Odger on Libel, 643; *Mackay* v. *Hughes* (1901), 19 Que. S.C. 367 indicates that the action may be brought, but that proceedings will be stayed till a taxation is had, so that a taxation is the proper mode of ascertaining the amount, and action or distress the mode of recovering the amount when ascertained. The plaintiff having proceeded with taxation is bound by the result.

This is not a case of a plaintiff pursuing two remedies at the same time, but of a party who, having a judicial mode of procedure and determination open to him, adopts that mode, and, obtaining a result contrary to his desires, proposes to treat what has taken place as a nullity and to re-agitate the matter *de novo* in another form in the same Court. If plaintiff was dissatisfied with the decision of DRAKE, J., he should have appealed. As to the condition nominated in the judgment of IRVING, J., that the plaintiff should submit to the decision of the trial Judge herein as to the costs of the taxation in *Regina* v. *Nichol*, there is no power to relegate that matter to the decision of the Judge. The base of this application is that the exercise by the Court of the jurisdiction to stay the action is the only mode of redress open to the defendants on the facts. Before the Judicature Act they could have pleaded the pendency of the taxation proceedings in abatement, but pleas in abatement being abolished (Order 21, r. 20) the motion to stay is the only available substitute and matters of abatement are now tried on affidavit on such motions: see An. Pr. (1902), 404; *McHenry* v. *Lewis* (1882), 22 Ch. D. 397 and *The Christiansborg* (1885), 10 P.D. 141 at p. 153. If the question is not dealt with on this motion it cannot be raised in any other way: see also *Earl Poulett* v. *Viscount Hill* (1893), 1 Ch. 277 at p. 281.

Argument

The subject matter of the statement of claim is not *res judi-*

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cata nor is there an estoppel in the strict sense by reason of the taxation, or order, as there is no record, in the technical sense, the proceedings being in their nature interlocutory. The defendants cannot therefore take advantage of the point by pleading. As a defence these facts may in law constitute no answer to the action, but in substance there is an equitable estoppel and the Court in the exercise of its general jurisdiction will not permit the action to proceed: see *Stephenson* v. *Garnett* (1898), 1 Q.B. 677 and *In re May* (1885), 28 Ch. D. 516 at p. 518. The authorities which indicate that the Court should not, except in a very plain case, dismiss an action on the ground that the statement of claim discloses no reasonable cause of action, or is frivolous, have no application to the present motion which goes behind the statement of claim and appeals to the general jurisdiction of the Court to stay vexatious proceedings and it must be dealt with on the base that it is the only recourse of the defendants.

Davis, K.C., for respondent: A successful defendant by taking proceedings by warrant of distress to recover his costs would get into a sea of doubt in working out his proceedings. Who is "the proper officer to determine" the amount of costs? But a debt is created by section 833 and the action lies without more; the language is clear and must be given its ordinary meaning. The English statute (6 & 7 Vict., Cap. 96, Sec. 8) is materially different from ours. He cited *Richardson* v. *Willis* (1873), 42 L.J., Ex. 68 and *Reg.* v. *Steel* (1876), 1 Q.B.D. 482.

Argument

See facts as shewn in *Rex* v. *Nichol* (1901), 8 B.C. 276 and from which leave to appeal was procured and a case was stated by the Judge, but I came to the conclusion that there was no right of appeal as the order was made in a criminal matter in which there was no conviction: see section 742; *Rex* v. *Trepanier* (1901), 4 C.C.C. 259 and *Reg.* v. *Mosher* (1899), 3 C.C.C. 312.

As to the question of the costs of the abortive trials decided against defendant in *Rex* v. *Nichol, supra*. The defendants' motion was to be allowed the costs of the commission evidence which had been reserved by the order under which the commission was issued for the trial Judge and on that motion the authorities as to the costs of the abortive trials were not cited, but the Judge came to the erroneous conclusion that the costs of

the abortive trials could not be allowed to the defendant, and of course the costs of the commission fell with the rest. The taxing officer at first taxed all our costs except those of the commission and then on the motion for commission costs only defendant was deprived of all the costs of the first two trials, the judgment being founded on *Brown* v. *Clarke* (1843), 12 M. & W. 24, but now the costs of the abortive trials follow the event: see *Creen* v. *Wright* (1877), 2 C.P.D. 354 and *Field* v. *Great Northern Railway Co.* (1878), 3 Ex. D. 261.

Bartlett v. *Higgins* (1901), 2 K.B. 230, shews that we are entitled to the costs of the commission.

Section 835 is new and is not connected with section 833; 835 only refers to costs ordered to be paid by a Court, but the plaintiff in this case can bring his action without an order: see *Richardson* v. *Willis* (1872), L.R. 8 Ex. 69.

As to *lis alibi pendens*, that there is another action or that the matter is being agitated elsewhere is not a ground of estoppel—it is only a ground for putting a party to an election: *Behrens* v. *Pauli* (1837), 1 Keen, 457 and *McHenry* v. *Lewis* (1882), 22 Ch. D. 397. The taxing officer is not "a Court of competent jurisdiction" and besides he gave no decision so the doctrine of *res judicata* cannot be used against us.

The other side are appealing to the Court's discretion, but at the same time seeking to take advantage of the highest kind of a technicality; they are trying to shut us out of our appeal on the ground of *quasi* consent or acquiescence, but that is a criminal proceeding and the ordinary civil rules don't apply: *Reg.* v. *Judge of the County Court of Shropshire* (1887), 20 Q.B.D. 248 and *Stephenson* v. *Garnett* (1898), 67 L.J., Q.B. 447 at p. 449, Smith, L.J. If there is any doubt at all the action should be allowed to go to trial.

Argument

Cassidy, in reply: These costs are "ordered to be paid" and section 835 applies to them. The judgment for defendant carries an order for the costs *sub silentio*. The practice in England is to take the order out in the form of a side bar rule: *Reg.* v. *Latimer* (1850), 15 Q.B. 1,077.

The "proper officer" is *persona designata* as the tribunal to adjudicate. The only jurisdiction of this Court is to furnish

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machinery to collect the amount ascertained if unpaid as an alternative to proceedings in distress. It is a nominated remedy. It may be that there is no appeal from the decision of the "proper officer" to a Judge of this Court: see *Reg.* v. *Newhouse* (1853), 22 L.J., Q.B. 127, but that accentuates the position that the proper officer is the only tribunal having jurisdiction to ascertain the amount, and not this Court.

Argument

The Appellate Court has always power to set aside any order of a Judge made without jurisdiction: see Strong, J., in *In re Sproule* (1886), 12 S.C.R. 140, and the defendant should have appealed. The taxation was not closed and Mr. Justice DRAKE'S judgment may be taken as an advisory determination by an arbitrator before whom the parties went. We prefer that the plaintiff should now have leave to appeal from Judge DRAKE'S order. At all events either this action does not lie, or it is improperly brought after what has taken place and it is vexatious.

Judgment

HUNTER, C.J., said the Court was unanimously of the opinion that the appeal should be dismissed. The jurisdiction to stay ought to be exercised only in a plain case. The defendants should be allowed to plead any estoppel which they may think exists by reason of the taxation proceedings or the rulings of Mr. Justice DRAKE. We would suggest that the parties should settle as there may be a radical difference of judicial opinion both here and at Ottawa as to what is meant by the "lowest scale of fees allowed in such Court" in paragraph 835, *i.e.*, whether it is the Supreme Court tariff or the lowest County Court tariff which is sometimes allowed in a Supreme Court action.

Appeal dismissed with costs—
liberty to defendants to amend defence

DAVIDSON v. FRAYNE *ET AL.*

HUNTER, C.J. In Chambers)

1902

Nov. 14.

DAVIDSON v. FRAYNE

Lien, woodman's—Lumber—Saw-mill men.

There is no lien given to saw-mill men by the Woodman's Lien for Wages Act, but only to those engaged in getting the timber out of the forest.

SUMMONS on behalf of defendants and John Black & Co., who claimed to be the owners of the lumber in question for an order to set aside an attachment issued under section 13 of the Woodman's Lien for Wages Act.

Defendants sold and shipped a scow load of lumber sawn in their saw mill at Port Renfrew to John Black & Co., in Victoria, where it was seized under an attachment issued under the said Act by the Registrar of the County Court at the instance of the plaintiff who was an employee in defendants' mill and had been employed in sawing or manufacturing the logs into lumber.

Statement

The summons was argued on 14th November, 1902, before HUNTER, C.J.

Higgins, for the summons.
Jay, for plaintiff.
Harold Robertson, for the Sheriff.

HUNTER, C.J.: The Act gives no lien for work done in a saw-mill, but gives it only to those engaged in getting the timber out of the forest, which indeed the title shews.

Judgment

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McLEOD v. WATERMAN *ET AL.*

Practice—Entering action for trial—Order to enter for trial and proceed at next Sittings—Adjournment of Sittings.

McLEOD v. WATERMAN

An order, made on defendants' application to dismiss for want of prosecution, that plaintiff set down his action for the next Sittings at Nelson and proceed with the trial, otherwise the action do stand dismissed without further order, dispenses with a notice of trial; and if before the date fixed for the Sittings at the time the order was made the Sittings are adjourned it is a compliance with the order by the plaintiff if he enters the action for the later date and is ready for trial when the case is called.

APPEAL from judgment of MARTIN, J.

At Nelson, on the 10th of October, 1902, on the return of defendants' summons to dismiss for want of prosecution, HUNTER, C.J., ordered "that the plaintiff do set down this action for trial at the next Sittings of this Honourable Court and proceed with the trial thereof, and that in default of so doing this action do stand dismissed without further order." At that time the next Sittings to take place at Nelson had been fixed for the 2nd of December, but on the 27th of November, the Deputy District Registrar at Nelson, acting at the direction of the Judges who were then engaged in the Full Court, gave notice that the Sittings fixed for the 2nd of December, had been adjourned until the 15th of December; the notice was given to the solicitors in the District and was posted in the Court House in Nelson. The plaintiff gave no notice of trial, and did not set the action down for trial until the 10th of December. When the case was called on at the adjourned Sittings, before MARTIN, J., he held that the order of the Chief Justice eliminated the necessity for a notice of trial, but that the action should have been entered for the first day of the Sittings of the 2nd of December, and that it was therefore wrongfully on the list. His Lordship then directed the Registrar to make the following entry in his minute book:

Statement

"Court refuses to try the case. Registrar ordered to strike the case off the list. No order for costs or any other

order, case being already disposed of by order of the Chief Justice—nothing before this Court to try—Entry of record was a nullity."

The plaintiff appealed and the appeal was argued at Victoria on the 29th of January, 1903, before HUNTER, C.J., WALKEM and IRVING, JJ.

Wilson, K.C., for appellant: The case was set down in compliance with the order. When notice of trial of an action outside Victoria is given, there is no rule requiring the action to be entered or set down for trial at any certain time; the order dispenses with notice of trial; setting down for trial is a mere matter of form. "Next Sittings" means "Sittings actually next held." He cited Rules 342-6; *Reg.* v. *Justices of Surrey* (1880), 6 Q.B.D. 100 and *Toronto Type Foundry Co.* v. *Tuckett* (1897), 17 P.R. 538.

S. S. Taylor, K.C., for respondent: The order of the Chief Justice leaves it at the plaintiff's option as to setting the action down and going to trial, or letting it go by default; it is not an order that it be set down at all events, and therefore it does not dispense with notice of trial. Notice of trial is a condition precedent to entering an action for trial, and entering is a condition precedent to trial; it should have been entered for Sittings beginning on the 2nd of December, which was the next Sittings contemplated at the time the order was made: see B.C. Stat. 1901, Cap. 14, Sec. 5. There was no power to adjourn the Sittings, and on the 2nd of December we got a judgment in our favour by the operation of the Chief Justice's order and we are entitled to hold it; it is not a question of hardship. He cited *Baxter* v. *Holdsworth* (1899), 1 Q.B. 266 at p. 271.

Argument

HUNTER, C.J.: I am of opinion that the spirit of the order was complied with. The order that the plaintiff should set the action down for trial at the next Sittings and proceed with the trial operated so as to render a notice of trial unnecessary and immaterial, as it gave notice to the defendants equally with the plaintiff to be ready for trial. By "next Sittings" is meant the next Sittings actually held and not a Sittings appointed to be held, but which is postponed, before the time for entry for trial

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has expired, to some other date. It cannot be contended that the plaintiff was bound to go through the formality of being present and of having his witnesses at the Court House on the day originally fixed for the Sitting, although it had been postponed, and yet this is as much a term of the order as the setting down for trial. The appeal should be allowed without costs and the costs below should be costs in the cause.

WALKEM, J.

WALKEM, J., agreed with HUNTER, C.J.

IRVING, J.: Under the order the defendant was entitled to rely on the established practice. He had a right to expect that the notice of trial would be served.

The scheme of the Rules is to make the service of the notice a condition precedent to the entry for trial; and the entry for trial a condition precedent to the trial. This notice and the entry are required so that the defendants may know whether or not they must prepare for trial.

IRVING, J.

It is said we must read the order of the Chief Justice as eliminating these intermediate steps before trial. I can see nothing in the order to justify this contention; such a construction would place the defendants in a most unfair position.

Appeal allowed without costs (Irving, J., dissenting)—Costs below costs in the cause.

IN RE VANCOUVER INCORPORATION ACT, 1900, AND B. T. ROGERS.

IRVING, J.

1902

March 30.

FULL COURT

Dec. 3.

IN RE VANCOUVER INCORPORATION ACT

Assessment—Vancouver Incorporation Act, 1900, Cap. 54, Secs. 38 and 56—Valuation of improvements—Mode of—Decision of Judge on appeal from Court of Revision—No appeal from.

No appeal lies from the decision of a Judge on an appeal from the Court of Revision, had under section 56 of the Vancouver Incorporation Act.

An objection to an appeal on the ground that the Court has no jurisdiction to hear it is not a preliminary objection within section 83 of the Supreme Court Act.

Although the Full Court has no jurisdiction to hear an appeal it has jurisdiction to award costs in dismissing it.

Under section 38 of the Vancouver Incorporation Act, 1900, all ratable property for assessment purposes, shall be estimated at its actual cash value as it would be appraised in payment of a just debt from a solvent debtor:—

Held, per IRVING, J., that in estimating the value of an expensive residence built by its owner, it is fair to assume that the owner will not permit his property to be sacrificed, and therefore a valuation approaching to nearly the actual cost is not excessive.

APPEAL from judgment of IRVING, J., refusing on an appeal from the Court of Revision to reduce the assessment of a certain lot and the improvements thereon in the City of Vancouver, and being the property of the appellant, B. T. Rogers. Statement

The judgment appealed from was as follows:

30th March, 1902.

IRVING, J.: The Court of Revision having fixed the value of the improvements at $46,000, Mr. Rogers appeals.

The building is just completed. Its cost to the owner was something considerably in excess of the sum of $50,000. The assessor says he valued it by endeavouring to arrive at its cost, he took into consideration the value of material and cost of construction. His estimate is some $6,000 less than the actual cost. IRVING, J.

Mr. McFarland, a real estate agent, says that its value is $20,000. He fixes the value by reference to its revenue producing qualities.

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By the statute the buildings are to be valued at their actual cash value as they would be appraised in payment of a just debt from a solvent debtor.

If we assume there is no one going to purchase the property, the value might be *nil*, but we cannot assume that. It is perfectly fair to assume that the "solvent debtor" will not permit his property to be sacrificed. I do not mean to say that anything should be added for sentimental reasons, *e.g.*, because the house is a man's home. I think that as the owner was willing to pay a handsome figure for a handsome building, he must be taken into account as one of the possible purchasers in the appraisement of the property.

I cannot say that the amount fixed is excessive. I feel that the assessor has placed the valuation at its highest figure, but I do not see that I can reduce it.

The appeal came on for argument at Vancouver on the 3rd of December, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ., when

Davis, K.C., for respondents, took the preliminary objection that the Court had no jurisdiction to entertain the appeal.

L. G. McPhillips, K.C., for appellant: No notice of this preliminary objection has been given as required.

Per curiam: It has been frequently held by this Court that an objection to the jurisdiction is not a preliminary objection.

Argument

Davis: This matter has never been in Court: see section 56 of the Vancouver Incorporation Act, 1900, providing for an appeal from the Court of Revision. The Judge is a *persona designata* and so there is no appeal from him; he has to give summary judgment and the proceedings must be concluded in one month. He referred to R.S.B.C. 1897, Cap, 56, Sec. 76; *Doyle* v. *Dufferin* (1892), 8 Man. 294; Dominion Railway Act, 1888, Cap. 29, Sec. 165; *Re Toronto, Hamilton and Buffalo Railway Co. and Hendrie* (1896), 17 P.R. 199; *Canadian Pacific Railway Co.* v. *Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606; *Re Sheffield Waterworks Act, 1864* (1865), L.R. 1 Ex. 54 and *Re Young* (1891), 14 P.R. 124.

McPhillips: The Court of Revision is a Statutory Court,

The statute expressly constitutes it and calls it so, and gives it all the necessary powers of a Court: Harrison's Municipal Manual, 5th Ed., 755, note (q.) and *Appeal from Court of Revision* (1870), 6 C.L.J. 295.

This is an appeal to a Court, and not to a Judge. The section referred to clearly shews this.

Appeal to the "Supreme Court" is expressly referred to in section 55 of the Vancouver Incorporation Act, 1900, and by section 56, sub-section 1, the notice of appeal from the decision of the Court of Revision must be served on the District Registrar at Vancouver.

[HUNTER, C.J.: I think there is no doubt that it is a Court].

Then if this is an order of a Court there is an appeal: see section 76, Cap. 56, R.S.B.C. 1897: "An appeal shall lie . . . from . . . every . . . order . . . made by . . . a Judge . . . whether in respect of a matter specified in the rules of Court or not."

The Municipal Clauses Act, Cap. 144, Sec. 135, Sub-Sec. 6, gives an appeal to the Court of Appeal from the decision of the Judge, and the power is there conferred on the Judge in words similar to those used in our case, and it is a fair assumption that the Legislature intended to give in Vancouver, where much larger sums are involved, the same right of appeal as in rural municipalities. And if the sections of the Vancouver Incorporation Act are read in this light, it is clear that there is a right of appeal. Argument

None of the cases cited were cases where the Judge was given the right to hear witnesses or to take evidence, or to do anything in the nature of the power given to a Court, while in this case the matter which comes before the Judge is a judgment of the Court, and there is a clear distinction between such cases, as counsel for respondent cited and cases merely under the Railway or other similar Acts, and this case is a review by a Judge of the Supreme Court of the judgment of an inferior tribunal. He referred to *City of Halifax* v. *Reeves* (1894), 23 S.C.R. 340; *In re Durham County Permanent Benefit Building Society* (1871), 7 Chy. App. 45; *Corporation of Peterborough* v. *Overseers of*

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Judgment

Wiltshorpe (1883), 12 Q.B.D. 1 and *Walsall Overseers* v. *London and North Western Railway Co.* (1878), 4 App. Cas. 30.

Per curiam: There is no jurisdiction to hear this matter. An appeal is not given in terms here; it must be expressly given; nor looking at this group of sections does the intention appear to be to have any other appeal than the one given to the Judge therein referred to; it is not as though the appeal were given to this Court or a Judge thereof, in which case the question of *persona designata* would not arise. It may be as the counsel for the appellant contends that the result may be a hardship, but this Court cannot usurp jurisdiction even in such a case. The fact that an appeal to this Court is expressly given in the general Municipal Act is a strong circumstance to shew that no appeal other than that to the Judge is given in the case of this municipality which is incorporated by special Act, as is also the circumstance that the matter is to be decided within one month from the final revision. The proceedings are before the Judge, but not in the Court. The appeal must be dismissed.

McPhillips: I ask that no costs be allowed.

Per curiam: This Court frequently dismisses an appeal with costs which it has no jurisdiction to entertain.

Appeal dismissed with costs.

BELCHER *ET AL* v. McDONALD.

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BELCHER v. McDONALD

Yukon appeal—Extension of time for appeal by Full Court—Jurisdiction. Practice—Pleadings—Amendment at trial to conform to evidence. Judgment, final in part and interlocutory in part—Appeal from—Duty of party taking out order or judgment to make it clear.

By the Yukon Territory Act (62 & 63 Vict., Cap. 11) the Supreme Court of British Columbia sitting together as a Full Court is constituted a Court of Appeal from final judgments of the Territorial Court, and notice of appeal shall be given within twenty days after judgment. From interlocutory orders or judgments there is no appeal:—

Held, by the Supreme Court of British Columbia, sitting as a Full Court, that it has no jurisdiction to extend the time for appealing.

In an action on an alleged promissory note in the Territorial Court of the Yukon, the plaintiffs' counsel at the close of his case, asked leave to amend the claim by inserting counts on an account stated, and leave was refused. The trial proceeded and the claim on the note was dismissed and a reference was ordered for the purpose of taking accounts and an order to that effect was taken out on the 30th of May, without specifying the date from which the accounts were to be taken. On taking the accounts the referee, at the direction of the Judge and as to which it did not appear that plaintiffs had notice, took the accounts as beginning at a date unsatisfactory to plaintiffs, and the referee's report was confirmed by the Judge:—

Held, on appeal, that as the plaintiffs should have been allowed to amend their pleadings, and although the order of the 23rd of May, being final so far as the claim on the note was concerned, and an appeal from it had not been brought in time, yet as an amendment had been improperly refused, and the Judge in giving his judgment of the 23rd of May, had not made it clear to the plaintiffs what his judgment really decided, the case should be examined on the merits.

Held, on the merits, that the judgment of DUGAS, J., must be affirmed.

Per HUNTER, C.J., and DRAKE, J.: In an action embracing several causes of action there may be a judgment or order which is final as to one cause of action and interlocutory as to others, and a party dissatisfied with the part which is final must appeal within the time limited for appealing from final orders and cannot question its correctness in an appeal from the judgment at the conclusion of the whole action.

Per HUNTER, C.J.: (1.) It is incumbent on a successful party to take care that any order or judgment in his favour is drawn up in clear and unmistakable language, otherwise the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous

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record or other competent document, should be given to the party aggrieved.

(2.) A man is not bound to say yes or no at once when confronted with a demand for the payment of money about which there may be doubt as to his liability to pay, but he is entitled to a reasonable time according to the circumstances of the case, to consider the position and to make up his mind whether he really owes the money or not, and as to what course he will take.

APPEAL from the judgment of DUGAS, J., in the Yukon Territorial Court.

This was an action brought against defendant by the executors of Alexander Calder, who was the defendant's former partner in certain mining interests in the Yukon.

The plaintiffs claimed $57,673.33 in gold dust at $16 per ounce, being the balance alleged to be due on a promissory note for $100,000 made by defendant in favour of Alexander Calder, payable on demand in gold dust at $16 an ounce; the sum of $8,797.80 being Calder's one-half (after making certain deductions) of the clean-up for 1899, of claim No. 27, Eldorado Creek, and a balance on what was called the James note.

Statement

The action came on for trial before DUGAS, J., on the 12th of February, 1901, and on the plaintiffs' case being closed, His Lordship was of the opinion that the $100,000 document was not a promissory note as calling for payment in gold dust, and on the plaintiffs applying to amend their pleadings by inserting a claim on an account stated at the date of the note, he reserved his decision and ordered the defendant to proceed with his case. Afterwards the plaintiffs asked for leave to amend by inserting counts on an account stated as of the date of an interview between plaintiffs and defendant in relation to the question of the latter's indebtedness to the estate and tendered written amendments.

The learned Judge refused the amendment, his judgment on that point, pronounced on the 13th of May, being in part as follows:

Here the plaintiffs have chosen to sue upon what they term a promissory note, payable in gold dust, and upon a claim for money, alleged to be payable also in gold dust. They now ask to amend their statement of claim so as to plead to the alterna-

DUGAS, J.

tive that there were stated accounts between the deceased, Alexander Calder, and the defendant on the 19th day of September, 1898, whereby a balance of $100,000 was stated to be due by the defendant to the deceased, and that on or about the 15th day of April, 1900, there was a stated account between the actual plaintiffs, as executors, and the defendant whereby the defendant admitted the sum of $50,000 mentioned in paragraph 2, and the sum of $26,222 mentioned in paragraph 3, as being items of indebtedness by the defendant to the plaintiffs, and, in the other alternative, they ask to allege that on the 5th of April, 1900, an account was stated between plaintiffs and defendant whereby the defendant admitted the round sum of $76,000 as an item of indebtedness due by him to the plaintiffs.

It is not needed for the purpose of this case that I should say how I would have considered this application if it had been made at the opening of the case. Here I believe it has been made too late for, if allowed, it cannot be said that the defendant could not be prejudiced thereby. In making their case the plaintiffs limited themselves to the proof of the note and the output of the claim No. 27, Eldorado Creek, in the Spring of 1899, so as to shew what quantity of gold dust the deceased was entitled to as his share therein. As far as the note is concerned, they directed their efforts in establishing that there must have been a consideration for the same by certain conversations and admissions of the defendant. The defendant conducted the cross-examination of the plaintiffs' witnesses accordingly, and, though it is only right to admit that the cross-examination was minutely conducted, yet, it cannot be stated that if the defendant had had to defend himself against all the allegations of settled accounts between the parties he would not have pushed his cross-examination further or adopted another mode of defence thereunder, so as to meet squarely such new alleged facts.

DUGAS, J.

It is a question, therefore, as to whether the defendant would not be prejudiced if such amendment was allowed; and as I believe that such a possibility exists; and, as the plaintiffs have only themselves to blame for coming so late, even if made in proper time, I feel it my duty to refuse the application. I might add that I would further be far from admitting that, even taking

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the conversations and admissions of the defendant in the circumstances which have been narrated there would be sufficient to establish an account stated between the parties so as to make thereof any basis for an action. (The learned Judge here referred to English Ruling Cases, Vol. 2, p. 786, and proceeded). The case cited shews that on appeal it was maintained that the Court could not permit an amendment which would change the nature of the action, and I hold that after the plaintiff has closed his case and witnesses have been examined and cross-examined by both parties the same principle should apply, for I cannot see here how the defendant could be compensated by costs if the amendment were permitted.

Having reserved the application for a non-suit, which strictly exists no more, I prefer to hear the argument on the merits, after which, I will adjudge on the whole.

DUGAS, J.

I should have said before that at the second argument the plaintiffs abandoned all that portion of the statement of claim which is not included in paragraphs 2 and 3, and therefore, the whole contestation is now limited to the claim for the balance of the alleged $100,000, that is, $50,000 and the alleged claim of $26,222, or whatever may be due thereon.

After argument, the plaintiffs' claim on the $100,000 note was dismissed on the 23rd of May, and a reference was ordered for the purpose of taking accounts.

The order in full was as follows:

"It is ordered and adjudged as to the alleged note or paper writing, mentioned in paragraph 2 of plaintiffs' statement of claim, that the plaintiffs' action thereupon and the same is hereby dismissed.

Statement

"It is further ordered that it be referred to Charles Macdonald, Clerk of the Territorial Court of the Yukon Territory, to inquire into the state of accounts between the deceased, Alexander Calder, and the defendant, and to ascertain what amount, if any, is due from the defendant to the estate of the said Alexander Calder, or from the estate of the said Alexander Calder to the defendant; and generally, to ascertain the state of accounts between them without reference to the said alleged note or paper

writing, referred to in paragraph 2 of plaintiffs' statement of claim.

"And for the purpose of said reference the referee shall have access and recourse to the evidence already taken upon the trial of this action, but with liberty to him to take cognizance of all books, papers and vouchers, and to require such evidence to be brought before him as he may think necessary and proper to arrive at the true state of accounts between the parties.

"And that the said referee do file his report on or before the 9th day of June, 1901, with liberty to apply for further time if necessary.

"C. A. Dugas,
"Judge."

Statement

The referee in taking the accounts treated them as beginning 1st October, 1898, and found that Calder's estate was indebted to the defendant in the sum of $8,846.31, and he so reported on 10th September, 1901.

The plaintiffs moved to set aside the report and the defendant moved to confirm it and for judgment for the amount found due. On the motions the following judgment was pronounced by

23rd September, 1901.

DUGAS, J.

DUGAS, J.: The plaintiffs, as executors of the estate of the late Alexander Calder, are claiming by their statement of claim, different sums, amounting in the aggregate, in money and in value, to $102,947.33. The four last items were, after the evidence was taken, adandoned by the plaintiffs, and the Court, having been urged by the learned counsel then acting for them, to give its judgment upon item two, alleging a promissory note for $100,000, payable in gold dust, on account of which a balance of $50,000, payable in gold dust, was claimed, and, it being the opinion of the Court that this claim was not founded and could not be recovered under the present action, firstly, because it was claimed as a promissory note, while it was not, and, secondly, because the proof established, to the satisfaction of the Court, that the said writing had been given by the defendant to the deceased, Alexander Calder, to secure him for property which he had passed in the name of the defendant, in order to effect a sale thereof in London, and that, therefore, after the defendant had

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transferred the same to the plaintiffs as such executors, the said writing remained without any consideration. The action was, therefore, dismissed as to this particular claim and the plaintiffs non-suited *pro tanto*, so that the only item upon which it remained to adjudge was that contained in paragraph three of the statement of claim.

It is right to say that in adjudging upon the so-called note alleged in paragraph 2, all consideration was given to the evidence adduced in the case, including certain declarations, which, if isolated from all the business transactions and the intercourses which took place between the defendant and the deceased, Alexander Calder, might appear damaging to the defendant.

The Court feels that it is its duty to express here regret at the action of the advocate of record for the plaintiffs, acting as their legal adviser from the beginning, he managed with them to bring the defendant several times before them, and by questions, cross-questions and even certain pressure, obtain from him some assent of which it is evident, to the mind of the Court, he never understood the exact sense. The Court has also to express its reprobation at having the same advocate of record offering himself afterwards, under such circumstances as the principal witness against the defendant. It must be said that this action has diminished, in the judgment of the Court, a great deal, the weight of the sayings of the defendant, when so cornered.

DUGAS, J.

At the trial voluminous evidence was taken with the result that it was clearly shewn that none of the parties knew, or ever understood exactly in what condition they were towards each other, as far as indebtedness is concerned. The plaintiffs, as such executors, did not know, and the party directly interested, the defendant himself, did not know. On the whole, it is evident that the one who would have been able to give the best information would have been the deceased himself. The books kept by the parties up to a certain date had been destroyed by fire. The deceased had more to do with them, and the defendant's business connected with his own, than the defendant himself. The books were kept under his superintendency during the absence of the defendant, and even after his return entries were made under his

dictation, and there are recognitions on his part on the 1st of October, 1898 (after the departure of the defendant for Europe), and again in June, 1899, that he was from that first date (the 1st of October, 1898), indebted to the defendant in the sum of $885.98. No proof could be adduced behind that at the trial, and the Court took this to be settled account between the parties from that date. It being evident by the proof adduced that even as to the item mentioned in paragraph 3 of the statement of claim, the plaintiffs themselves, no more than the defendant, knew how they stood, and that, as such administrator and manager for the defendant, the deceased, having remained in possession of notes, for which he was himself responsible, and upon which the name of the defendant appeared for accommodation and, perhaps, some of them paid with the defendant's own money, the Court thought it advisable to order an inquiry into the matter, and appointed the Clerk of the Court, Mr. Charles Macdonald, as referee to that effect. Certain special instructions were given in the order of reference and it was intimated in open Court that the inquiry should not go beyond the 1st of October 1898, the date of the recognition by the deceased, Alexander Calder, of his indebtedness to the defendant. The report was filed on the 10th of September, instant.

The Court has now two motions before it, one to confirm the report of the referee, and the other to reject it. Finding that the referee has conformed himself to the direction of the order appointing him, and to the intention of the Court, the motion to confirm the same is granted with costs, and the motion to reject the same dismissed with costs; and as the report shews, that instead of being indebted to the plaintiffs, as such executors, the defendant is a creditor thereof to the amount of $8,846.31, the action will therefore also be dismissed for the rest with costs, reserving to the defendant all recourse against the estate of the deceased to recover this amount from them.

DUGAS, J.

It might be added that this action, as taken, was very peculiar inasmuch as, after having sued for the recovery of six different items, an account was also asked. It was not thought, under the circumstances, advisable to grant such a demand, so much so that, after all the evidence was taken, it appeared that the best

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way to render justice to the parties was to have an enquiry made as ordered.*

The plaintiffs appealed to the Supreme Court of British Columbia, and the appeal was argued at Victoria before HUNTER, C.J., DRAKE and MARTIN, JJ. The argument commenced on the 30th of June and ended on the 7th of July, 1902.

Sir C. H. Tupper, K.C., for appellants, opened.

Davis, K.C., for respondents, took preliminary objections. The only judgment open to appeal is that of the 25th of September in so far as it confirms the report: see Yukon Territory Act, 62 & 63 Vict., Cap. 11, Sec. 7, for Full Court's jurisdiction: also *Retemeyer* v. *Obermuller* (1837), 2 Moo. P.C. 93 at pp. 95, 97 and 98; *Taylor* v. *Taylor* (1875), 1 Ch. D. 426 at p. 431. The Yukon Judge refused to extend the time: see *Wauchope* v. *North British Railway Co.* (1862), 4 Macq. H.L. 348, 352; *Grand Trunk Railway Co.* v. *MacMillan* (1888), 16 S.C.R. 543 at p.

Argument

*The judgment taken out at the conclusion of the whole action was dated the 25th of September, and after reciting—

"This action having come on for trial on the 12th day of February, 1901, to the 8th day of March, 1901, in the presence of counsel for both parties, upon reading the pleadings, and upon hearing the evidence that was adduced, as well for the plaintiffs as for the defendant, and what was alleged by counsel, the plaintiffs having abandoned so much of their claim as is contained in paragraphs four, five, six and seven of their statement of claim, and judgment having been reserved until the 23rd day of May, 1901, the plaintiffs' counsel then and there urging the Court to deliver judgment upon item No. 2 of the statement of claim, the said judgment was then delivered in open Court, ordering and adjudging that the same be dismissed and the plaintiffs non-suited *pro tanto*," and after reciting also the order of reference and the report thereon, concluded thus:

"It is adjudged that the motion to set aside, vary or alter the report of the said referee is dismissed with costs, and the motion to confirm the same is allowed with costs. The plaintiffs' action as to all matters contained in the statement of claim (other than those claimed in paragraph two of said statement of claim, as to which judgment has already been given, dismissing the same, and paragraphs four, five, six and seven of the said statement of claim, as to which the plaintiffs have abandoned their claim) be and the same is dismissed with costs of and incidental to the said action, to be paid by the plaintiffs to the defendant, reserving to the said defendant his recourse against the estate of the said Alexander Calder for the said sum of $8,846.31."

560; *Journal Printing Co.* v. *Maclean* (1896), 23 A.R. 324. Here they are appealing against an interlocutory order against which there is no appeal. As to right of appeal generally see *Cooksley* v. *Nakashiba* (1901), 8 B.C. 117; *Hostetter* v. *Thomas* (1899), 5 C.C.C. 10; *Morgan* v. *Edwards* (1860), 29 L.J., M.C. 108 and *Lockhart* v. *Mayor, &c., of St. Albans* (1888), 21 Q.B.D. 188.

As to the pronouncing of judgment see Supreme Court Act, Sec. 40; *The News Printing Co. of Toronto* v. *Macrae* (1896), 26 S.C.R. 695; *Martin* v. *Sampson* (1897), 26 S.C.R. 707 and Cass. Sup. Ct. Prac. 2nd Ed., 60.

[HUNTER, C.J., referred to *Koksilah* v. *The Queen* (1897), 5 B.C. 600.]

The application to amend statement of claim cannot be granted as paragraph 2 is not before this Court.

There is no jurisdiction to extend the time for appeal to this Court; by the Yukon Act such power is confined to a Judge of the Yukon Court.

Although both a final and an interlocutory order are contained in one, a party desiring to appeal from the interlocutory part must do so within the time limited for an interlocutory appeal: see *Cummins* v. *Herron* (1877), 4 Ch. D. 787 and An. Pr. (1902), 843, 851.

Sir C. H. Tupper: The order of the 30th of May is a peculiar document; it bears no date and is not made on the application of counsel; it is generally to ascertain the state of accounts without limitation, though later the Judge illegally instructed the officer to take the accounts as from a certain day; we did not know the Judge's reasons until the 23rd of September, and the fact that he gave full reasons then supports our contention that the only really final judgment was given on the 23rd of September. The order was largely satisfactory to us because the referee had to ascertain the accounts without reference to the note; it left the whole matter open and really instructed the officer to consider the amount, disregarding the mere writing as a note or whatever it was. The Judge is careful not to say that the intimation in open Court as to the limit of inquiry was given at the time of the order of reference.

Argument

As to final judgments see R.S.C. Cap. 135, interpretation Sec.

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2, Sub-Sec. (*e.*); 3 Bla. Com. 396-8; 4 Bla. Com. 16; Stephen's Com. Vol. 3, p. 606 and *Shaw* v. *Canadian Pacific Railway Co.* (1889), 16 S.C.R. 703.

A cause cannot be divided so as to bring up separately distinct parts of it; there can be no final judgment until all the issues are disposed of: see *Keystone Iron Co.* v. *Martin* (1889), 132 U.S. 91, 93 and *Tolson* v. *Kaye* (1843), 7 Sco. N.R. 222 at p. 268 (Baron Parke).

Davis, in reply. A demurrer dealing with only a certain portion of an action is appealable. An appeal lies to the Supreme Court of Canada while an action is still going on: see *Shaw* v. *St. Louis* (1883), 8 S.C.R. 385; *Shields* v. *Peak* (1882), *Ib.* 579 at p. 600; *Brenchley* v. *McLeod* (1889), 12 Man. 647. See also *Hay* v. *Johnston* (1888), 12 P.R. 596; *London and Canadian Loan and Agency Co.* v. *Rural Municipality of Morris* (1891), 19 S.C.R. 434; *Chevalier* v. *Cuvillier* (1879), 4 S.C.R. 605; *Baptist* v. *Baptist* (1892), 21 S.C.R. 425; *Trowell* v. *Shenton* (1878), 8 Ch. D. 318; Yukon Rule 79 and Cap. 21 of Revised Ordinances.

Plaintiffs here made the application for a separate disposal and are now estopped and cannot dispute the recital in the judgment: Cassell's Digest, 406, 434. If the plaintiffs are not bound by the recital in the judgment of the 25th of September, then there is no judgment at all, and the Judge proceeded at their request under a jurisdiction by consent and they are bound: see *Harris* v. *Harris* (1901), 8 B.C. 307 and Case No. 5, 1 Macq. H.L. 794.

Argument

Sir C. H. Tupper, in further argument, cited Cassell's Digest, 429 and 430; *Roblee* v. *Rankin* (1884), 11 S.C.R. 138; *Mackinnon* v. *Keroack* (1887), 15 S.C.R. 111; *Hovey* v. *Whiting* (1887), 14 S.C.R. 524; *Langevin* v. *Commissaires de St.-Marc* (1891), 18 S.C.R. 599 at p. 601; *Maritime Bank of the Dominion of Canada* v. *Stewart* (1891), 20 S.C.R. 108; *Hamel* v. *Hamel* (1896), 26 S.C.R. 17 and *Griffith* v. *Harwood* (1900), 30 S.C.R. 315.

All interlocutory orders are opened up on an appeal from a final decree: *De Burgh* v. *Clarke* (1837), 4 Cl. & F. 562; *Attwood* v. *Small* (1835), 6 Cl. & F. 232 at p. 234; *Ex parte Moore* (1895), 14 Q.B.D. 663; *Shelfa* v. *City of London Electric Lighting Co.* (1895), 1 Ch. 301; *Lowe* v. *Lowe* (1879), 10 Ch. D. 432; *Edison General Electric Co.* v. *Edmonds* (1896), 4 B.C. 354 at p. 379;

Chitty's Archbold's Practice, 318; *Laird* v. *Briggs* (1881), 16 Ch. D. 663 and Daniell's Chancery Practice, 396 and 1,286.

Peters, K.C., on the same side: We ask for an extension of time to appeal.

[MARTIN, J., referred to *Sung* v. *Lung* now reported in (1901), 8 B.C. 423.]

The Court were unanimous in holding that it had no power to extend the time for appealing.

When the Court opened the next day the Chief Justice announced that the Court had decided to hear the appeal, reserving the consideration of the question as to whether it was competently brought.

Sir C. H. Tupper and *Peters*, on the main appeal, dealt with the evidence and cited in respect to the reasons for judgment *Mayhew* v. *Stone* (1895), 26 S.C.R. 58 and *Sun Life Assurance Company of Canada* v. *Elliott* (1900), 31 S.C.R. 91 (Sedgewick, J).

Argument

Davis, in reply. [DRAKE, J., referred to Daniell, 6th Ed., 1,286-7 as to interlocutory judgments and appealing separately.]

Those are the cases that have been cited and are not against us; he referred particularly to *Krehl* v. *Burrell* (1878), 10 Ch. D. 420 at p. 424. There is no evidence supporting a cause of action on an account stated: see Camp. R.C. 425, 430-1 and *Ashby* v. *James* (1843), 11 M. & W. 542.

He cited also *In re Swire* (1885), 30 Ch. D. 239; *Ainsworth* v. *Wilding* (1896), 1 Ch. 677; *Hatton* v. *Harris* (1892), A.C. 547 at p. 560 and *Milson* v. *Carter* (1893), A.C. 638 at p. 640.

Cur. adv. vult.

1st November, 1902.

HUNTER, C.J.: This is a suit brought against the defendant by the executors of Alexander Calder, who was the defendant's former partner in certain mining interests in the Yukon.

The suit embraced several causes of action: first, on a note of hand for $100,000, payable on demand in gold dust at $16 per ounce; secondly, for the sum of $26,222, being Calder's one-half of the clean-up for 1899, on No. 27 Eldorado, less $17,424.20 received by Calder, which was the defendant's share of the clean-up for 1900 of said claim, less miners' royalty thereon, making the claim on this head $8,797.80; and thirdly, on what I will call

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the James note, for $6,000 and interest, and also other causes of action which were abandoned.

To deal with the principal cause of action first. At the trial the learned Judge upon the plaintiffs' case being closed, being of opinion that the document was not a promissory note as calling for payment in gold dust (the correctness of which opinion has not been disputed) was inclined to refuse to allow the plaintiffs to amend their pleadings by inserting a claim on an account stated at the date of the note, but reserved his opinion and ordered the defendant to proceed with the case. Afterwards amendments were tendered asking that the plaintiffs have leave to amend by inserting counts on an account stated as of the date of an interview between the plaintiffs and defendant in relation to the question of the latter's indebtedness to the estate.

The first amendment which was applied for before the defence was opened should have been made as a matter of course, and if necessary, liberty given to the defendant to re-cross-examine; the other amendments, although formally tendered at the close of the defendant's case, should also have been allowed, as they would only have adopted the allegations of the statement of claim to the case as set up by the evidence adduced for the plaintiffs: *Piche* v. *City of Quebec* (1885), Cassell's Digest, 498; *Gough* v. *Bench* (1884), 6 Ont. 699. And generally on this subject I may quote some remarks from a judgment delivered by

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Knight Bruce, L.J., which though pronounced in an appeal from a Court in India seems to me apt to describe the system introduced by what are commonly called the Judicature Acts. He says at pp. 410, 411 (1856), 6 Moo. Ind. App.; 19 English Reprint, 154, "On the first point their Lordships think it right to observe that it is of the utmost importance to the right administration of justice in these Courts, that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that the substance and not the mere literal wording of the issues is to be regarded; and that if, by inadvertence, or other cause, the recorded issues do not enable the Court to try the whole case on the merits, an opportunity should be afforded by amendment, and, if need be,

by adjournment, for the decision of the real points in dispute."

It is, however, unnecessary to dwell at further length on this, as it would appear that all the evidence available in support of the claim in whatever aspect it could have been put forward, was adduced, so that no material prejudice has been occasioned by the error.

The learned Judge gave written reasons for coming to his conclusion upon the question of the amendments on May 13th, 1901, and on May 23rd, after hearing argument, dismissed the cause of action on the said document and ordered the Clerk of the Court to inquire into the state of accounts between the parties without reference to it. Now, I think it cannot be gainsaid that the order as drawn up is more or less ambiguous, that is to say, it is not clear from the order itself whether the Clerk was to inquire if there was anything owing by the defendant at the date of the said document, or whether that question was already decided in the negative in favour of the defendant. The learned Judge's own view of the matter is clearly enough set forth in his judgment of the 23rd of September, 1901, confirming the Clerk's report, but this judgment was rendered long after the time for appeal from the order had expired, if it was a final order, either in whole or in part. Accordingly, when the plaintiffs found themselves in jeopardy of being held to have lost their right of appeal an unhappy dispute arose as to the scope of the order as to what took place at the time of pronouncement, and as to what passed when the inquiry was opened. At any rate the plaintiffs did not appeal from the order, and the defendant's counsel now insists that no appeal having been taken the learned Judge's decision rejecting this claim is not open to review. It appears from the judgment of the 23rd of September that the learned Judge was urged by the plaintiffs to adjudicate on this demand, which he did, at the same time ordering an inquiry, as already stated, so that they can hardly ask this Court to deprive the defendant of any advantage which he may have gained by the situation which they themselves have created.

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The reasons given by the solicitor for not appealing in due time are somewhat singular. He states in his affidavit of the 20th of June that he thought the order was interlocutory in

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character, and that he hoped to have the accounts taken before the time for appeal should expire, in which case no appeal might be necessary. It is, to say the least, remarkable that he was ignorant of the fact that interlocutory orders were unappealable. Then he says that failing to obtain even the commencement of the account and being constantly in Court in other actions, he was unable to draft a notice of appeal before the 12th of June, which was one day after the lapse of the time allowed for taking an appeal. It is idle for a solicitor to say that he cannot find time to give a notice of appeal within twenty days; he may, perhaps, be unable to state all the grounds in his notice, but the notice in this respect is amendable on terms; yet, as everyone knows, to draw up the notice itself is a matter of only a few minutes, and the filing and delivery of such notice are all that is necessary to constitute the appeal.

Now, I do not think that there can be very much doubt as to the nature of the order. It dismisses the action on the note *simpliciter*, and then goes on to order an inquiry and report by the Clerk of the Court into the state of accounts between the parties. It seems to me that the order is clearly final as to the dismissal, and interlocutory as to the remainder. Since the introduction of the practice by which the joinder of two or more causes of action is allowed in an action, it must logically follow that there may be more than one final judgment in an action, *i.e.*,

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there may be as many final judgments in an action as there are causes of action disposed of in the action, inasmuch as they may all be tried and decided separately, or, as happened here, one of the parties may move the judgment of the Court in respect of one cause of action before the Court is in a position to deal finally with the whole dispute. If, however, authority is needed to shew that there may be more than one final judgment in an action, I may refer to *In re Alexander* (1892), 1 Q.B. at p. 219, where Lord Esher says, "*Ex parte Moore* (1885), 14 Q.B.D. 62 shews that the existence of other disputes between the parties does not prevent the judgment which decides one of the matters in dispute from being a final judgment." Nor is there any difficulty in holding that this order is in part final and in part interlocutory, though this may at first sight seem to run counter

to the remarks of the same learned Judge in *Ex parte Moore* (1885), 14 Q.B.D. 627 at p. 653, but he is there speaking of indivisible judgments as will be seen by reference to other reports of the case in 52 L.T.N.S. 376; 33 W.R. 439 and 54 L.J., Q.B. 190; and in the latter report Lord Selborne is thus recorded: "That part of the judgment is not the less final because there is another part of it which is not final." The fact is that two orders appear together on the same piece of paper, but that circumstance is immaterial in determining their nature.

It is very plain that ordinary prudence would have dictated the taking of an appeal within the time prescribed and it is needless to add that this Court has no jurisdiction to extend the time, nor has it been extended by the Yukon Court, which is the only Court that has such jurisdiction.

But it is said that the order of dismissal is still open to review as the plaintiffs have duly appealed from the judgment confirming the report. This is very clearly untenable, as in the first place that judgment does not purport to re-dismiss the claim, nor would it make any difference if it did, as by so doing it obviously could not affect the finality of the order by which the claim had already been dismissed, and in the next place, the judgment merely contains a recital that the claim had been dismissed at the date of the order in question.

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But it is more difficult to say how far the plaintiffs should be held bound by the order, that is to say, whether the *res judicata* should be held to extend only to the claim *qua* promissory note or to the claim in whatever way it may be regarded, and the difficulty arises from the fact that it nowhere appears by any record made at the time of the pronouncement of the order that the plaintiffs were clearly given to understand exactly what the learned Judge intended to decide or what disposition he intended to make of this part of the dispute. It is true that it appears from his judgment of the 23rd of September, that he intimated in open Court that the inquiry should not go beyond the 1st of October, 1898, *i.e.*, a date subsequent to the date of the note in question, which would of course be clear notice that the claim was totally rejected, but the learned Judge does not

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state when this intimation was given, or that it was given in the presence of the parties.

In a matter of this importance it is unfortunate that no record of his directions, either judicial or stenographic, was kept, at least I assume this to be the case, as none such appears in the appeal book. On the other hand the plaintiffs were refused leave at the trial to put forward the claim as an account stated, and it is difficult to say that there has been an adjudication on an issue which was not allowed to be formally raised. At any rate I think that the only way to prevent possible injustice is to hold that it is the duty of the successful party to take care that any order or judgment in his favour is drawn up in clear and unmistakable language, and that if this is not done the benefit of any doubt as to its scope which cannot be resolved by reference to any prior or contemporaneous record or other competent document, should be given to the parties aggrieved. I think, therefore, that the plaintiffs are entitled under the circumstances to have the case examined on the merits.

Then as to the merits. First, I must remark that one cannot read through the evidence without feeling that we have not had, as the learned Judge has had, the advantage of observing the demeanour of the witnesses (excepting that of the defendant) which in a case of this kind must be of great assistance in coming to judgment, and while in saying this I am not unmindful of the

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remark of Lord Halsbury, that we are not to be overwhelmed by the thought that we have not seen the witnesses, yet it cannot be denied that, to use the phrase of Coleridge, J., we have now before us only the dead body of the evidence, without its spirit.

Calder and the defendant were partners and friends; they had numerous interests together in rich claims; they trusted each other implicitly, and by reason of this mutual trust they did their business commonly with each other by word instead of by writing; Calder kept what books were kept, and in their settlements there was no haggling, but a rough give and take. Their relations cannot be better described than by quoting the constant acknowledgment of the defendant that if Calder said so, it must be so.

The two partners had each a half-interest in 27 Eldorado, which was recorded in the name of the defendant, and each had an equal interest in other claims not now in question. Calder was given his half-interest in 1896 by McDonald in consideration of $4,000, to come out of the ground and of the former looking after and working the claim. In 1897 there was a clean-up, but no accounts seem to have been kept of it, and it also seems that the share coming to each partner was settled and received upon the ground; in fact there were no books of account or stationery to be got in the country until after the opening of navigation in 1898, and as one witness puts it, "the sour doughs kept all their accounts in their poke, and used to divide after each clean-up."

In 1898 there was a large clean-up, the whole of which came to the defendant, but the amount of which it is impossible to state, as no accounts were kept of it, or if kept, are now extant, and the defendant appears to know nothing about it. However this may be, in September, 1898, it was agreed between the partners that McDonald should go to England to try to effect a sale, *inter alia*, of all the properties and interests of which they were joint owners, and that for this purpose all interests standing in the name of Calder should be transferred to McDonald, and it was then arranged that Calder should receive a note for $100,000, which he got on the 19th of September, 1898, and which is the note in question. McDonald says that the object of this note was "to secure Calder good and plenty," or, as he also puts it, "in lieu of property and whatever I owed at the time;" that is to say that the consideration for the note was the relinquishment by Calder, in the event of the sale going through, of all claims against McDonald, both in respect of any interest which Calder had in any of the claims, and in respect of any net balance coming to him out of all clean-ups made up to that time, after expenses paid and cross-claims allowed. The executors claim, on the other hand, that the note had nothing to do with the question of Calder's interests, but that it was given as a lump settlement of McDonald's indebtedness up to that time.

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The question then for us to solve is on which side the balance of probability lies, as, owing to the nebulous character of the

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evidence, any judgment which the Court can pronounce must be more or less conjecture.

At the time of the making of the note it appears by his own admission that McDonald was indebted to Calder in some amount which is not disclosed by the evidence, and it also appears that the note for $6,000 was at that time current, which was signed by McDonald at Calder's request for the accommodation of James. In fact, according to McDonald's testimony, Calder owed him $22,000, being the price of a quarter-interest in 22 Eldorado, as well as a part, which is not stated, of the price of half the partnership interest in 26 Hunker, which had been advanced by McDonald, and also $9,000 which he had got from McDonald when he went out of the territory on account of illness. On the other hand McDonald admits that he got the most of the clean-up of 27 Eldorado for 1897, so that it is clear enough that the parties had all along been mutually indebted, but as all the books of account which could throw any light on the matter seem to have disappeared in the Dawson fire, it is impossible to definitely ascertain in whose favour and at what amount the balance stood, although the probabilities are that at this time it was in favour of Calder. Now, as already stated, the partnership interests which were recorded in the name of Calder were transferred to McDonald. This was effected by separate instruments for the nominal consideration of one dollar, so that it is

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reasonably certain that the transfers formed part of the consideration for the note, and that the amount of the note did not represent only cash indebtedness. The fact of these transfers being for a nominal consideration is strongly corroborative of the truth of McDonald's story. We then get thus far, that to use McDonald's expression, "the note was in lieu of property and whatever I owed at the time," but how much of the consideration represented cash indebtedness and how much property, it is impossible to determine, in fact, according to McDonald the parties themselves did not undertake to cast up accounts, but merely fixed the total consideration at the lump sum of $100,000.

McDonald returned from England without effecting a sale of the claims, and on 30th June, 1899, Calder indorsed a credit on the note of $50,000, and McDonald says that the balance of

$50,000 has been extinguished by the re-transfer of Calder's interests to the executors on their demand. In the interval Calder had the management of McDonald's affairs under a power of attorney, which among other powers, authorized him to collect all moneys owing to McDonald. McDonald says he does not know how the credit was made up, but it is clear that Calder still retained his beneficial interest in the claims, and in fact did so until the time of his death, and kept the same positon as managing partner as he always had. It is therefore more reasonable to suppose that the credit was in respect of McDonald's indebtedness than to suppose that the only security Calder had to make good his claim to his interest in the properties or its equivalent, was surrendered by him in view of the fact that they remained in McDonald's name; and inasmuch as it was mutually admitted at the trial that one more season would see the property worked out, it is highly probable that not only was the whole indebtedness extinguished, but that Calder also intended to make allowance for the current exhaustion of the claims and their consequent decrease in value, in other words, to lessen the amount of his security.

Then in order to aid in the determination of the probabilities we must look at the conduct of the litigants as well as the way in which they gave their testimony, which is to be weighed rather than measured.

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The defendant, so far as one can tell from the record, without having had the advantage of hearing him give his evidence, appears on the whole to have given his account in a simple and straightforward way, although at times his answers were somewhat careless and stupid. According to him he informed the executors at the outset of the existence of the note and how it came to be given, that "it was in lieu of property and for what he owed Calder," and "to secure him good and plenty," and also informed them what interests belonging to Calder were recorded in his own name. The executors, under pressure of cross-examination, admit that he made this claim, if not at the very first interview then at any rate at the second; in fact Belcher does in one portion of his evidence admit that the claim was made at the first interview. They and their solicitor all admit that he

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answered all questions very readily and tried to keep nothing back and shewed every disposition to help them to get the affairs of the estate in order. He made no objection to transferring the property to the executors, nor did he deny his liability to half the clean-up of 1899, all of which he had received except 100 ounces. He was at first disposed to yield to their demand to give security for the alleged debt of $50,000 on the note and the $26,000 in respect of the clean-up of 1899, besides making the transfer of the property, but as he knew nothing of the state of accounts between himself and the deceased, nor had any reasonable opportunity either to consider over the whole matter by himself or to take legal advice, and as some allowance should be made for a natural reluctance to contest a claim put forward by the estate of his dead friend, and as on the other hand the executors were constantly besetting him, with the aid of their solicitor, I do not think that their contention that he had practically admitted the correctness of their claim, is entitled to very much consideration. A man is not bound to say yes or no at once when confronted with a demand for the payment of money about which there may be doubt as to his liability to pay, but he is entitled to a reasonable time according to the circumstances of the case to consider the position and to make up his mind whether he really owes the money or not, and as to what course he will take.

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On the other hand, the conduct of the plaintiffs has not been such as to inspire judicial confidence in the merits of their case. At the outset we are met with the awkward, not to say ugly fact, of the mutilation of the note. This mutilation consists not of the cancellation of the signature of Calder to the $50,000 credit indorsed by him on the note, but of its complete obliteration. There can be very little doubt that if any such alteration had been contemplated by Calder himself he would have done it by striking his pen through his signature, or through the whole indorsement and that he would have notified McDonald that he had done so, especially as a duplicate was to his knowledge in McDonald's possession. The obliteration which is so complete as to leave it possible only in a strong light to see that there ever has been a signature, but not whose signature, is the sign

of a sinister purpose, which is not made any the less glaring by dissimulation of the executors about the existence of the note at the opening interview. No explanation of the erasure was vouchsafed, but it is unnecessary for me to speculate either as to the author or the purpose, or to say anything more than that a case launched under such auspices will generally founder in a storm of suspicion, or run aground on the shoals of equivocation and perjury. In giving their evidence the executors and their solicitors, notwithstanding their constant communication with each other, differed materially from each other on material points. For instance, Woodworth says that the discussion about the erasure took place at the end of May or the beginning of June. Belcher says it was early in April. Duncan McDonald says it was at the end of May. Then again, as to McDonald's claim that the note was given in lieu of property and for whatever he owed Calder, Woodworth seeks to convey the impression that it was not made until after the suit was commenced; Belcher practically admits that it was made at the first interview, and Duncan McDonald contradicts himself, but finally admits that the claim was made, although he puts it at the end of May. Without going into a minute examination of their testimony, I think it enough to say that I agree with the view of the learned trial Judge that the evidence of the defendant is more worthy of credit than that of the plaintiffs.

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On the whole I see no reason for differing from the conclusion of the learned trial Judge, that the defendant's obligation in respect of the $100,000 was extinguished by the transfer of the property to the executors.

Nor with reference to the other causes of action do I see any reason for saying that there was error in the way in which the inquiry was taken, and I think substantial justice was done.

Calder's account in McDonald's ledger was admittedly opened and carried on under his own instructions, and there can be no doubt that it is binding on the executors. Even if it were true that the debt of $885.50 with which it opens was only a balance due by him on a store or provision account and not the general balance between the partners, it was for the executors to prove what the general balance was, as Calder had admittedly

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charge of the accounts of the partnership business. Moreover, as no counter-claim has been made by McDonald in this suit, it is not necessary for us to find what amount is owing to him, but it is sufficient to say that there is nothing due to the plaintiffs. For these reasons I think that this appeal, which was very ably argued on both sides, must be dismissed with costs.

DRAKE, J.: The plaintiffs, as executors of one Calder, deceased, bring this action to recover $50,000 balance due on a note for $100,000 signed by the defendant, and $26,222 alleged to be due as Calder's interest in a clean-up of a mining claim for 1899, half-interest in which was held by the deceased and defendant in partnership. The case as presented is full of difficulties, in part owing to the very loose way the parties conducted their business, and the entire want of business habits in the defendant; and still more by the doubts thrown upon the plaintiffs' *bona fides* by the erasure of the deceased's name to a receipt for $50,000 indorsed on the back of the note for $100,000 given by the defendant to the plaintiffs and of which the plaintiffs have given no satisfactory evidence. The defendant appears to have been a successful miner, one who had implicit trust in the deceased. He left the whole of the accounts to him and he continually repeats in his evidence that if Calder says so he must be right. He apparently never made an inquiry as to the accounts, but left everything to his partner, who was quite worthy of the trust placed in him. These few remarks are necessary to give a key to the character and actions of the deceased and the defendant.

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The deceased and defendant owned a half-interest in claim 27, and quarter of claim 22 Eldorado Creek, one-eighth of 26 Hunker Creek, a quarter claim of 28 Gold Bottom, and a claim on Adams Creek. No question arises in this action as to any claims but the proceeds of claim 27 Eldorado. Calder kept all the books of the partnership. These books are apparently in a very imperfect condition, some only of the clean-ups being entered therein, and the original books are not forthcoming, having been lost in the fire at Dawson.

It is admitted that the defendant received the whole clean-up for 1899 by agreement, and Calder was to receive the whole

clean-up for the following year. Calder opened a new ledger. How this new ledger was made appears at page 262 of the appeal book. It was made up under Calder's direction and starts with a balance against Calder of $885.50.

The note for $100,000 nowhere appears in the books, and it is about this note that the contest arises.

After the trial of the action, Mr. Justice Dugas having reserved judgment, was requested by the plaintiffs' counsel to deliver judgment on the second paragraph of the statement of claim, which is the claim on the note of $100,000. He delivered judgment on the 13th of May dismissing the plaintiffs' action as to the note, and Mr. *Davis*, counsel for the defendant on this appeal, contends that this was a final judgment; and the time for appealing against it having lapsed, it was not now open to this Court. *Sir Charles Tupper* argued that there could only be one final judgment in an action and that all that took place was in the nature of an interlocutory judgment and that a final judgment is one that disposes of all the issues and the costs, and until that is done there is no finality. This is too broad a statement, because in foreclosure actions a judgment is frequently rendered on the covenant, and a subsequent judgment on the foreclosure: see *Farrer* v. *Lacy, Hartland & Co.* (1885), 31 Ch. D. 50; and in claim and counter-claim there may be two judgments; and in equity actions it not infrequently happens that the Judge disposes of the legal questions as they arise before the final disposition of the action itself, and these judgments, if not appealed from within the time limited by the rules, are held conclusive. If the judgment referred to was interlocutory, there is no appeal to this Court, and the contention put forward is that on an appeal from the judgment finally disposing of the matter all interlocutory judgments are open to review. I do not agree with this view. The plaintiffs might have given notice of appeal and obtained a stay until final judgment on the other portions of the case. Not having done so I think they are barred from doing so now. The learned Judge in his reasons for judgment of the 13th day of May, 1901, deals with an application of the plaintiffs for an amendment of their pleadings by pleading alternatively an account stated. This amendment was refused, as I think

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wrongly, as under the present rules and practice almost all amendments which are necessary for the final disposal of an action can be made on terms; but this refusal to allow the amendment does not become of importance as we have had the opportunity of considering the whole evidence. It appears that the judgment dismissing the plaintiffs' claim on the note was made at the request of the plaintiffs' counsel, who desired a decision on this point before the rest of the case was disposed of, and the plaintiffs cannot, because the judgment was against them, claim that it is open to them to appeal now that the time for appealing has long since past. But quite apart from this question, as I have before stated, we have had the opportunity of discussing the evidence at length, and hearing all that can be said on both sides relating to this note, and have come to the conclusion that the note for $100,000 was an acknowledgment of a liability at the date it was given; and that it was given as a security to Calder for his interest in the mining claims, which were then transferred to the defendant, and for any other claim which might be due at that time to Calder. It was a rough guess at the value of Calder's interest in the partnership. The defendant gave Calder this note for $100,000 as he says to secure him good and plenty, as he was going to England to try and sell this and other claims, and would have the whole of the claims in his hands. The note was given on the 19th of September, 1898,

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and a few days after Calder had transferred all his interests to the defendant, and this note would, if anything happened to the defendant, apparently be an equivalent to the value of Calder's interest in the claims and a settlement of all accounts between them.

The defendant was not successful in his attempt to sell the claims, and Calder on 1st July, 1899, sent him a duplicate of the note with an indorsement of a receipt for $50,000 duly signed. What was the actual consideration for the indorsement does not appear. It may have been that the claims were reduced in value by the workings of 1898 and 1899, and Calder considered $50,000 a fair reduction to make; or it may have been for other reasons, which we cannot guess at; neither did Calder when he communicated with the defendant and sent him a copy of the

note with a receipt for $50,000 specify why he had made the indorsement, or what property he had applied to the payment, and apparently the defendant never inquired, being quite satisfied that what Calder did was right, as he kept the accounts, and the defendant never disputed his actions. At Calder's death in March, 1900, there had been no re-transfer of the mining claims to Calder, but as soon as Calder's executors asked to have this done the defendant made the transfers, and asked about the note. In my opinion the judgment of Mr. Justice Dugas on this note is correct, and that leaves the question of what is the true statement of accounts between the parties. The defendant received the clean-up for 1899 amounting to $26,222, by arrangement with Calder; and as far as can be gathered from the evidence, which is not clear, Calder was to receive the clean-up for the subsequent year, and this was received by the executors and amounted to $28,795, one-half of which being his own property left the amount to be credited to the defendant about $14,000.

100 ounces of gold admitted	$1,600 00
Cheque, 1899	5,000 00
Half of realty sold	4,600 00
Paid canning	2,000 00
James note	8,994 00
Balance in ledger	885 50

These items shew an over-payment of $10,000, and if the reconveyance of the claims settled the note, as I believe it did, there is nothing due to the plaintiffs, but something due to the defendant which has been referred to the referee, and he finds $8,846.

The plaintiffs claim the whole of the clean-up for 1899 as a debt due by the defendant, and it is to be remarked that the royalty was not deducted, and which was paid by the defendant, amounting to $9,324.34. This amount must be deducted from the $26,222, which leaves the debt $16,880 only. The defendant gave a security over the dumps for any money which might be due, and from this the plaintiffs received some $14,397. There were also other items of account for which Calder was liable, which would more than pay the amount of this clean-up.

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In my opinion the note for $50,000 was satisfied by the re-transfer of the claims and the $26,222 was considerably over-paid.

With regard to the James note referred to in paragraph 6 of the statement of claim, this note, with all the others referred to in the statement of claim, are stated by the learned Judge to have been abandoned by the plaintiffs in his judgment of 23rd September, 1901, cannot now be re-argued before us.

Another contention put forward by the appellants was that the accounts ordered to be taken by Mr. Justice Dugas were imperfectly and improperly taken; but it appears that the restricted nature of the reference was due entirely to the plaintiffs' counsel objecting to any evidence being taken outside the evidence before the Court. The learned Judge referred, at the request of the plaintiffs' counsel, the accounts between the parties omitting the $50,000 note, to a referee, and Mr. *McCaul* insisted that no other evidence should be taken on such reference but that evidence which was before the Court, and to this the learned Judge acceded, and so ordered, but authorized the referee to take any evidence explanatory of the accounts which he might think necessary. Accordingly, the accounts were taken and the referee found that there was due from the Calder estate to the defendant $8,846.31. I cannot say that the account is wrong and I think the appeal should be dismissed with costs.

DRAKE, J.

I cannot part with this case without referring to the oft-repeated view of eminent Judges that the demeanor of witnesses and the opportunity which the trial Judge has of forming an opinion on the evidence given before him, is a most valuable factor in arriving at the true merits of disputed facts, and where, as in this case, the facts are disputed, and no explanation is offered by the plaintiffs of certain important matters which one would suppose to be within their cognizance, the opinion formed by the learned Judge should not be lightly disregarded. As far as I am able to judge of the merits of the case, I think the judgment of Mr. Justice Dugas was eminently right.

MARTIN, J.

MARTIN, J.: It is only necessary for me to say that I agree with the conclusion reached by my learned brothers that no

good ground has been shewn for disturbing the judgment of the Court below.

Appeal dismissed.

FULL COURT
1902
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Note:—In the Court below the counsel were *C. C. McCaul, K.C.*, and *C. M. Woodworth*, for plaintiffs, and *F. C. Wade, K.C.*, and *A. Noel*, for defendant.

IN RE WATER CLAUSES CONSOLIDATION ACT.

CENTRE STAR MINING COMPANY, LIMITED v. CORPORATION OF THE CITY OF ROSSLAND.

FULL COURT
1903
Jan. 26.

CENTRE STAR
v.
ROSSLAND

Water rights—Grant of under private Act—Unused water—Jurisdiction of Gold Commissioner under section 18 of the Water Clauses Consolidation Act—B. C. Stat. 1896, Cap. 61, Secs. 11 and 42.

Under section 11 of the Rossland Water and Light Company Incorporation Act, 1896, the rights of the City of Rossland, which purchased the water works system of the Company, to the waters of Stoney Creek are paramount but not exclusive, and the Gold Commissioner has jurisdiction to adjudicate on an application under section 18 of the Water Clauses Consolidation Act for an interim record of the surplus water not used by the City.

APPEAL from the decision of HUNTER, C.J., on a petition by the Company by way of appeal from a decision of the Gold Commissioner at Rossland.

The petitioning Company claimed that they were entitled, under the Water Clauses Consolidation Act, to an interim record of the surplus water of Stoney Creek which the City of Rossland did not need and with its existing plant could not use. On the application for the interim record, Mr. Kirkup, the Gold Commissioner, dismissed the application. Statement

The petition by way of appeal was argued at Rossland before HUNTER, C.J. The facts appear fully in the judgments.

Galt, for the petitioning Company.

Abbott, for the City of Rossland.

FULL COURT

22nd October, 1902.

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HUNTER, C.J.: These are petitions by way of appeal from the decisions of the Gold Commissioner at Rossland refusing the petitioners' applications under the Water Clauses Consolidation Act, 1897, for interim records of fifty inches of water for mining purposes on Stoney Creek above the elevation of 3,021 feet above the sea.

The Commissioner held that the City had the exclusive right to the waters of Stoney Creek, and therefore that he had no power to entertain the applications.

By chapter 61 of the Statutes of 1896, the Rossland Water and Light Company were incorporated for the purpose of supplying water, electric light and electric power to the then town of Rossland and the mines thereto adjacent, and were empowered by section 11 for water works purposes, to divert and appropriate so much of the waters of Stoney Creek, Little Stoney Creek and Little Sheep Creek above the said elevation as the Lieutenant-Governor in Council might deem necessary and proper, and by section 12, for electric purposes, to divert and appropriate so much of the waters of the said creeks as it should judge suitable and desirable, conditional on the approval of the Lieutenant-Governor in Council of the plans, etc., and on publication of notice of intention to apply for his authority, etc.

HUNTER, C.J.

By indenture dated August 2nd, 1899, the Company transferred its water works and appurtenances to the City and also gave the City an option on its electric light plant, but I need not say anything more as to this latter, as the case involves only the consideration of the rights of the City with regard to the waters of Stoney Creek.

By Order in Council dated September 25th, 1899, it was ordered "that the diversion and appropriation by the Rossland Water and Light Company or their assignees, of all the waters of Stoney Creek and Little Stoney Creek above the elevation set out in their Act of Incorporation (59 Vict. Cap. 61), for the purposes of the Company be and the same is hereby approved and confirmed pursuant to section 11 of the said Act."

By chapter 32 of the Statutes of 1900, the transfer to the City was confirmed and the City has since had what-

ever rights in the premises that were possessed by the Company.

The question then for decision is, whether the City has the sole and exclusive right to the waters of Stoney Creek or whether its right is paramount but not exclusive, and in my opinion the latter view is correct.

To begin with, the Incorporating Act is careful throughout to guard the interests of the Crown and the public by making the powers of the Company subject to future legislation and existing rights, as by section 42, it is enacted " The powers and privileges conferred by this Act, and the provisions hereof, are hereby declared to be granted, subject to the rights of the Crown, and also subject to any future legislation regarding the subject-matter of this Act, or of the powers and provisions hereby conferred, which the Legislature may see fit to adopt; and this Act is passed on the express conditions that the Lieutenant-Governor in Council may from time to time impose and reserve to the Crown, in right of the Province, such rents, royalties, toll and charges in respect of the waters, or of the lands of the Crown (if any), rights and privileges, which shall be set out, appropriated, or enjoyed by the Company, or are conferred by this Act, as by the Lieutenant-Governor in Council shall be deemed to be just and proper, etc." And by section 45 it is enacted " This Act shall not be deemed in any way to authorize any interference with or abrogation of the powers, rights, and privileges of any person or Corporation heretofore granted or acquired."

In the next place the language of section 11 does not in terms, confer the *exclusive* right to divert and appropriate the water, nor are there any other words to be found in it which would amount to a grant of the stream or water course in question. Even in the case of a deed from A. to B. the right given to divert and appropriate water without more, would not confer the *exclusive* right to divert and appropriate the water, but A. would have it in his power if he chose, to grant a similar right or license to others, subject of course, to the right already given to B. The question as to whether a particular right or license granted by a subject was or was not exclusive has arisen in numerous cases.

For instance in *Duke of Sutherland* v. *Heathcote* (1891), 3 Ch.

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504 at p. 517, on appeal (1902), 1 Ch. 475, Lindley, L.J., speaking of a reservation to get coal, says at page 485, "An exclusive right to all the profit of a particular kind can, no doubt, be granted; but such a right cannot be inferred from language which is not clear and explicit;" and again "*Lord Mountjoy's Case* has always been regarded as a leading authority for the proposition that a grant in fee of liberty to dig ore does not confer on the grantee an exclusive right to dig them, even if the grant is in terms without any interruption by the grantor."

In *In re Haven Gold Mining Company* (1882), 20 Ch. D. 151 at p. 160, Jessel, M.R., speaking of a license to sink shafts or tunnel for gold says, "It was not an exclusive license, and therefore if this New Zealand savage was the owner of the property there was nothing to prevent his granting licenses to other people, and, as I said before, there is no grant of the gold itself to Mr. Eicke."

In *Carr* v. *Benson* (1868), 3 Chy. App. 524 at p. 532, Wood, L.J., speaking of a power to dig fire clay says, "The plaintiff's license it is conceded, is not an exclusive license, and it has been held from the earliest period that a man taking a license where he is under no obligation to work cannot exclude his licensor from granting as many more of those licenses as he thinks fit, provided always that they are not so granted as to defeat the known objects of the licensee in applying for his license;" and again at p.

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534, "the license cannot be reasonably construed to operate as a grant to the plaintiff of as much of this particular mineral as he can possibly make use of in the course of his business. What the plaintiff could raise and get he was to have but he could not bring trover against the lessor for removing the remainder."

In *Newby* v. *Harrison* (1861), 1 J. & H. 393 at p. 396, the same learned Judge speaking of a liberty to take ice from a canal says, "The first question that arises upon the plaintiff's leases is, whether there is an exclusive license. It appears to me, that I cannot hold it to be an exclusive license, because, if it were intended so to be, it would be framed with words of an exclusive character. That may, I think, be assumed, unless I find something in the deed which compels me to come to a different conclusion. The distinction is well known between an ordinary

license and an exclusive license, and in the latter you expect to find something of that nature expressed."

In *Ross* v. *Fox* (1867), 13 Gr. 683, Spragge, V.C., decided that a power to dig for mineral was not an exclusive right, and in support of his view, referred to the fact that there was no compulsion on the licensee to work the minerals, and it is needless to add that the city is under no compulsion to maintain any water works system at all, although by section 32 of the Act, if it does maintain it, it must supply applicants on certain conditions.

In *Sinnott* v. *Scoble* (1884), 11 S.C.R. 571, it was decided that a license to cut timber was not exclusive, and that it did not give the licensee any property in the standing trees or interest in the land.

And I apprehend that so far as concerns the determination of the question as to whether the particular right claimed is exclusive or not, or such as to amount to a grant of the thing itself, it makes no difference whether the right is of the nature of a license, or privilege, or an easement, or a profit *a prendre*. In fact these cases proceed on the plain principle that an instrument giving a right to dig ore, cut timber or take ice, etc., as the case may be, means exactly what it says, *i. e.*, gives only *a* right and not the *sole* or *exclusive* right unless the context clearly shews otherwise.

These were cases as between subject and subject, so that *a fortiori* in a case of such a right conferred by the Crown or the Legislature, it would require apt and explicit language to uphold its exclusive character.

HUNTER, C.J.

Then again, even if there were no such saving clauses as section 42 in the Act, and there was any doubt as to the intention of the Legislature, two rules of construction in relation to statutes would require me to hold that the City's right is not exclusive; the first being that the Act should be construed in favour of the right of the Crown through the Gold Commissioner to dispose of the unused water, and the second, that enunciated by Strong, C.J., in the *St. Hyacinthe Case* (1895), 25 S.C.R. at pp. 173 and 174 which I have already quoted in *Calder* v. *The Law Society* (1902), 9 B.C. at p. 58.

For these reasons I am of the opinion that the City's right to

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take the water from Stoney Creek is paramount but not exclusive, and that the Gold Commissioner's ruling was wrong, and therefore that the applications must be referred back to him for further consideration.

The petitioners will have their costs of the appeals.

The City appealed to the Full Court and the appeal was argued at Victoria on the 22nd of January, 1903, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

Duff, K.C., for appellant: The Water Clauses Consolidation Act has no application to the water already dealt with by the special Act passed in 1896. The Company applied for an interim record under section 18 of the general Act, but section 18 cannot apply to rights such as have been granted the City of Rossland: this water is not subject to be taken under the general Act therefore the term "unrecorded water" cannot sensibly be applied to it and the definition in the interpretation clause does not apply. Section 18 refers only to unused recorded water, if not, the application for an interim record would have been made under section 10. A grant of water under a private Act is not dealt with by the statute as a "record." A subsequent general statute does not interfere with a special statute: see *Garnett* v. *Bradley* (1878), 3 App. Cas. 944; *Barker* v. *Edger* (1898), A.C. 748 and *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59; *Tracey* v. *Pretty & Sons* (1901), 1 K.B. 444 at p. 470 and Maxwell on Statutes, 3rd Ed., 242-3. A clear indication that the rights under the special Act were intended to be in any way derogated does not clearly appear.

Argument

Galt, for respondent, referred to Blackstone's Commentaries, p. 18, shewing that there is no such thing as a proprietory interest in water itself, but only a usufructory interest. Section 42 of the special Act shews that the Legislature in 1896 had in view the intention of passing a general Act dealing with water and which was passed the next year. Section 4 of the general Act vests unrecorded water in the Crown, and section 2 says "unrecorded water" shall include water not used for a beneficial purpose.

All we want is the water not being used. The key-note of

the Water Clauses Consolidation Act is equitable distribution and greatest beneficial use of all available water supply: see sections 7, 13, 18, 28, 144 and 146. It is against the policy of the Act to allow parties to say "we own the water, but we need not use it and may waste it if we please." Section 44 (*a.*) clearly recognizes the right of an applicant to obtain an interim record where, as in this case, a municipality holds a prior record, but is not using all the water.

Duff, replied.

Cur. adv. vult.

26th January, 1903.

WALKEM, J.: I agree with the judgment appealed from, and am of the opinion that the appeal should be dismissed with costs.

In coming to this conclusion, I wish it to be understood that I only intend to hold with the learned Chief Justice that Mr. Kirkup had jurisdiction to deal with the matters brought before him.

WALKEM, J.

DRAKE, J.: The Rossland Water and Light Company was incorporated in 1896 on a private Act, and in the preamble the objects stated are to supply the Town of Rossland with water, and the power to be taken from Stoney Creek, Little Stoney Creek, and Sheep Creek. By section 11, the Company were authorized to enter upon Crown Lands and to divert and appropriate so much of the waters of Stoney Creek and the other creeks mentioned, as the Lieutenant-Governor in Council may deem necessary and proper above the elevation of 3,021 feet. The Governor in Council on the 25th day of September, 1899, gave the Company all the water in Stoney Creek and Little Stoney Creek above the altitude indicated. In 1897 the Water Clauses Act was passed. The preamble of that Act is to confirm to the Crown all unreserved and unappropriated water, and water power. Unrecorded water in this Act means water which for the time being is not held and used in accordance with the record under any public or private Act, and includes all water for the time being unappropriated or unoccupied or not used for a beneficial purpose.

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The above named Company are not using the whole of the water granted to them by the Order in Council. The Order in

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Council is a record. Mr. *Duff* contended that as the general Act which was passed subsequent to the special, and which did not in terms mention the special Act, could not be held as interfering with the grant of all the waters in these creeks, and cited *Garnett* v. *Bradley* (1878), 3 App. Cas. 944 at p. 950; *Barker* v. *Edger* (1898), A. C. 748 at p. 754 and *Seward* v. *Vera Cruz* (1884), 10 App. Cas. 59. These cases are distinguishable from the present case inasmuch as the Act under review does not in words affect past legislation.

The definition of unrecorded water includes water granted under any public or private Act, unappropriated or unoccupied or not used for a beneficial purpose, and therefore includes the water granted to the Rossland Water Company running to waste. The incorporating Act is also by section 42 made subject to any further legislation regarding the subject matter of the Act, or of the powers or provisions thereby conferred.

DRAKE, J.

The learned Chief Justice discussed the various authorities which refer to the question whether the grant is an exclusive one or not. The law thus referred to shews clearly that a license from the Crown is not an exclusive right unless the language used is clear and definite. If the Water Company were using all the water granted to them there would be nothing left on which a further grant could operate; but all that the applicants ask for is liberty to use the unappropriated water, and this, as it does not affect the corporation user, can in my opinion be given; and such being the case I think the appeal should be dismissed with costs, and the judgment of the Chief Justice confirmed.

IRVING, J.: The application for an interim record is resisted on the principle that a later general law does not abrogate an earlier special one.

IRVING, J.

The principle is limited to those cases in which the later Act does not in itself or its history shew that the Legislature, at the time of the passing of the later Act, had its attention turned to the earlier special Act.

At p. 250 *et seq.*, in Maxwell on Statutes, 1896 Ed., a number of instances are cited.

If the general Act deals specifically with the special Act, the

principle of course would not be applicable. The same result occurs if it is plain either by anticipatory words inserted in the special Act, or by the history and language of the general Act; or where both these grounds for the non-application of the principle exist.

If we turn to the private Acts passed in the same session in which the Water Privileges Act of 1892 was passed, we will find several private water Acts in which language similar to that used in section 42 of the Rossland Electric Light Company Act, occurs. Again, in 1893, 1895 and 1896 the same language is inserted. In short, in all Acts, with one or two exceptions, passed in 1892, and afterwards, until the Water Clauses Consolidation Act, 1897, was passed, we find the same anticipatory words, which occur in section 42 of the Rossland Electric Light Company Act.

Then in 1897 came the Water Clauses Consolidation Act with its preamble, its far-reaching definition of "unrecorded" water, and its fourth section. I am of opinion that the Rossland Water and Light Company is within the sweep of the Water Clauses Consolidation Act, and that the appeal should be dismissed.

MARTIN, J.: The right of the City under its record to the water not at present being "used for a beneficial purpose" was not lost, but only dormant, and could be revived if the necessity arose for the use of the water now going to waste.

Appeal dismissed with costs.

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BRITISH COLUMBIA LAND AND INVESTMENT AGENCY, LIMITED v. WILSON.

Counsel fees—Right of action for—Failure of solicitor to pay counsel fees received by him from client.

Counsel in this Province have the right to maintain an action for their fees.

Where a solicitor contrary to his client's expectation does not pay over to a counsel, fees received from his client, the client is still liable to the counsel.

ACTION tried before MARTIN, J., in October, 1902. This case is reported only on the question of the right of counsel to sue for their fees.

A. E. McPhillips, K.C., and *Goward*, for plaintiff.
Bodwell, K.C., for defendant.

9th January, 1903.

MARTIN, J. [after dealing with other questions which were decided in favour of the plaintiff, proceeded]:

Then as to the defendant's set-off for $1,011.50 for professional services. This is pleaded as an assignment to the defendant of a bill of costs for "work, expenses, journeys, attendances and money paid by Wilson & Senkler of the City of Vancouver as the plaintiff's solicitors in the suit of *Kirk* v. *Kirkland*." The bill of costs, so-called, on examination is not what is usually known as a bill for solicitors' services, but consists, with two minor exceptions, of charges for counsel fees and travelling expenses and the plaintiff's counsel has properly treated it as substantially the assertion of a right by a counsel in this Province to recover his fees from his client. This is a question of importance to the profession and litigating public, and in the absence of any express enactment on the point, such as exists in, *e.g.*, the Provinces of Quebec and Manitoba, it is not easy to answer it. Much assistance, however, can be derived from the case of *The Queen* v. *Doutre* (1884), 9 App. Cas. 745, wherein the

Judgment

appellant (plaintiff) "mainly relied upon the proposition that in those Provinces of the Dominion where the common law of England prevails, members of the Canadian Bar can neither have action for their fees, nor make a valid agreement as to their remuneration, unless that right has been conferred upon them by statute." In giving judgment, their Lordships say that it was not necessary to decide this point. But in regard to the leading case of *Kennedy* v. *Broun* (1863), 13 C.B.N.S. 677, which decided that such a right did not exist in England, they state that they are willing to assume that case to have been rightly decided, "but they are not prepared to accept all the reasons which were assigned for that decision in the judgment of Erle, C.J. It appears to them that the decision may be supported by usage and the peculiar constitution of the English Bar, without attempting to rest it upon general considerations of public policy. Even if these considerations were admitted, their Lordships entertain serious doubts whether, in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who is not a mere advocate or pleader, and who combines in his own person the various functions which are exercised by legal practitioners of every class in England, all of whom, the Bar alone excepted, can recover their fees by an action at law."

This question came before this Court in *Barnard* v. *Walkem* (1880), 1 B.C. (Pt. I) 120; and the case of *McDougall* v. *Campbell* (1877), 41 U.C.Q.B. 332, was therein relied on, *inter alia*, in support of the right of counsel to sue for his fees. Chief Justice Begbie, however, considered it "quite unnecessary to examine into" that point, at the same time expressing his "inclination" against the right, but Mr. Justice Gray was of the opinion that the right did not exist, and placed little reliance on *McDougall* v. *Campbell*, saying "That very decision, however, has not been accepted in Ontario, for the appeal from it is yet undecided." On the other hand, the third member of the Court, Mr. Justice Crease, was in favour of the contention, and pointed out that "there is nothing to shew that the *McDougall* v. *Campbell* case has been appealed." Judgment

Since that time the decision of the Court of King's Bench, *in*

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banc, in the last mentioned case has unquestionably been recognized as the law in Ontario, and has been precisely followed and its principle expanded to proceedings before the Supreme Court of Canada by the Chancellor of Ontario in *Armour* v. *Kilmer* (1897), 28 Ont. 618. That learned Judge states that "the general result of *The Queen* v. *Doutre, supra*, is to affirm the decision of the Puisne Judge in *McDougall* v. *Campbell*, as against the dissenting opinion of Chief Justice Harrison. So that the present law of Ontario, in contrast with that of England, permits counsel to sue client for the value of professional services."

In the case at bar, the cases of *Kennedy* v. *Broun, supra*, followed by *Mostyn* v. *Mostyn* (1870), 5 Chy. App. 457, were mainly relied upon by the plaintiff's counsel. These were considered by the Chancellor in *Armour* v. *Kilmer*, and he remarks that "the effect of *Kennedy* v. *Broun* as a decision, has been greatly circumscribed by the observations of the Judicial Committee in *The Queen* v. *Doutre*." Earlier in his judgment, after pointing out some peculiarities of the English system, the same learned Judge had said:

"Hence the broad result in England that no right of action exists for fees by the advocate against either solicitor or client.

"In Ontario, however, a different system obtains in the organization of the legal profession. The same person may be and usually is both solicitor and barrister, and the fees payable to counsel are as a general thing regulated by legislation, tariffs, and rules of Court even between solicitor and client, so that altogether a radical change has been wrought in the relations of counsel, solicitor and client; *McDougall* v. *Campbell*, 41 U.C.R. at p. 349. This case marks the point of departure in Ontario from the English doctrine of the honorary nature of counsel fees, as expounded in *Kennedy* v. *Broun*."

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And again at p. 622:

"Contrary again to the English rule it appears necessary now to hold in Ontario that solicitors who employ counsel have implied authority to pledge the client's credit for the payment of counsel fees, and that legal privity exists between client and counsel though a solicitor has intervened in the usual way. This should be the rule, I think, because of the general authority

which the retainer from client to solicitor imports to do all that need to be done for the proper and effective conduct of litigation. It is a part of the solicitor's duty to instruct counsel in conducting litigation, as is very well stated in *Hobart* v. *Butler*, 9 Ir. Com. L. Rep. at pp. 165-66. The services of counsel as such in the Courts are services that cannot be rendered by the solicitor as such. There is, therefore, in retaining counsel, by the solicitor, no delegation of duty which the solicitor could himself perform, and no benefit accrues to the solicitor by the employment of counsel. That marks the line of distinction between cases where the client is held responsible through the agency of his solicitor and those where the solicitor has been made to answer in person for work he directs to be done for the client."

And again at page 623:

"The like rule should prevail where the services rendered are in the nature of advocacy; as to these the client is the principal and the solicitor is merely the agent who intervenes according to usage. It is evident that the benefits derived from the aid of the advocate accrue directly to the client, and on a *quantum meruit* the value of these services falls to be ascertained with reference to that client. The client, therefore, is for such services *prima facie* the proper and only person to be sued. This should be the legal conclusion, I think, unless a bargain is made that the solicitor shall be liable or there is evidence to shew by a course of dealing or otherwise that credit was given to the solicitor and not to the client: *Johnson* v. *Ogilvy*, 3 P. Wm. 277; and *Brigham* v. *Foster*, 11 Allen (Mass.) 419."

Judgment

All the observations made in the cases of *The Queen* v. *Doutre*, *McDougall* v. *Campbell*, and *Armour* v. *Kilmer*, regarding the inapplicability of the English rule in question to new countries where the conditions are different apply, in my opinion, with greater force to this Province than to any other Province of Canada. This view is supported by the Supreme Court of Canada in *Martley* v. *Carson* (1889), 20 S. C. R. 634, a water right case, wherein Mr. Justice Gwynne in delivering the judgment of the Court, remarks (pp. 658-9) "that the statute should be construed as an encroachment upon that venerable embodiment of all wisdom, the common law, is really no hardship, but quite the

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reverse in a country of such peculiar conformation as British Columbia. . . . . To my mind the Act is infinitely more suited to the condition of the colony and better calculated to promote the interests of all persons becoming settlers in it than the common law of England, however admirable it be, and however entitled to the designation of 'perfection of wisdom,' when applied to the conditions of a country like England." And the Full Court of this Province has, in *Atkins* v. *Coy* (1896), 5 B. C. 6, at p. 19, recognized in the matter of procuring the attendance of witnesses, the difficulties to be experienced in a mining country such as this, wherein the population is relatively sparse and scattered over a vast area, much greater than that contained within the boundaries of any other Province of Canada.

It is true that in the action of *Kirk* v. *Kirkland* then pending, the present defendant, though both barrister and solicitor, acted as counsel only, and that another solicitor was employed by the plaintiff Company to retain the defendant to defend that action, but I am unable to see how that alters the principles above quoted. Nor are they altered by the fact that the defendant Company paid its solicitor certain sums out of which it expected its counsel would be paid by said solicitor. And it seems proper to state here that the evidence of the solicitor was not of a clear and satisfactory nature regarding the exact circumstances under, and the precise object for which he received advances or payments from the defendant's manager at Vancouver on his bill or bills against it.

Judgment

It was suggested that on the facts herein the counsel should be taken to have agreed to look to the solicitor alone for his fees, but having regard to all the circumstances of the case, and the prior course of dealing between the parties, I would not be justified in reaching such a conclusion.

It follows, therefore, that in my opinion the defendant is entitled to recover his proper counsel fees against his client, the defendant Company. As to the amount of these, it was intimated, as I understood it, during the course of the trial, that the plaintiff Company considered that the fees charged in connection with the appeal before the Supreme Court of Canada were excessive, but the matter was not gone into, and nothing

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was suggested as to what should be done towards ascertaining the proper amount thereof. Such being the case, if the parties cannot agree on the amount I shall hear counsel on the point, at which time the question of costs may also be spoken to.

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1902
Dec. 16.

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v.
McARTHUR

Master and servant—Employers' Liability Act—Notice of injury—Want of—Reasonable excuse—Defendant prejudiced by want of notice—Evidence of—When to be given.

In an action for damages under the Employers' Liability Act for injuries sustained by plaintiff it was shewn that the plaintiff was without means and for some weeks after the accident was unable to transact any business; and that the defendants' business manager and representative saw the accident and arranged for plaintiff's admission into the hospital where a few days later he discussed with him the cause of the accident:—

Held, the circumstances excused the want of notice of injury.

At the close of the plaintiff's case a non-suit was moved for on the ground that plaintiff had not proved notice of injury, and plaintiff then adduced evidence which the Court held shewed a reasonable excuse for the want of notice and the trial proceeded. Before closing his case defendants' counsel tendered evidence of being prejudiced by want of notice:—

Held, excluding the evidence, that the proper time to shew prejudice was while the question of reasonable excuse was still open.

ACTION under the Employers' Liability Act, for damages for personal injuries, tried before MARTIN, J., at Nelson on the 15th and 16th of December, 1902, with a jury. The plaintiff was injured while working aloft on the derrick of a pile driver. On the conclusion of the plaintiff's case, defendants' counsel moved for a non-suit, on the ground that no notice of injury, as required by section 9 of the Employers' Liability Act, had been given. The

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notice required by section 13 to be given by the defendants of their intention to rely on this defence, had been duly given, and the point was also taken in the statement of defence.

Plaintiff's counsel then asked leave to call evidence to shew that this was a proper case for the Court to dispense with the notice under sub-section 5 of section 12, and leave having been granted, evidence was given of the circumstances attending the injury as stated in the judgment.

S. S. Taylor, K.C., for plaintiff.
W. A. Macdonald K.C., for defendants.

Per curiam: Section 12, sub-section 5 is the provision of the statute which covers this question. It is therein stated that the non-existence or want, as it is called, of the notice may be dispensed with by the Court (1.) "If the Court or Judge before whom such action is tried, or, in the case of appeal, if the Court hearing the appeal is of the opinion that there was reasonable excuse for the want or insufficiency (2.) and that the defendant has not been thereby prejudiced in his defence."

I am of the opinion that the second of these two provisions is really the more important; I should feel personally disposed to attach more importance to it. Here there is absolutely no evidence that the defendant has been prejudiced by the want of notice, and therefore I may dismiss that condition without further remark.

Judgment

I proceed then to the consideration of the next one: that is, is there here an excuse for the want of notice? The case of *Armstrong* v. *Canada Atlantic R. W. Co.* (1902), 4 O.L.R. 560, has been referred to as the case of most use in determining that point. Mr. Justice Osler in giving the decision of the Court of Appeal points out what really is the object of the Act as it now exists, at p. 567:

"The object of the notice is to protect the employer against stale or manufactured or imaginary claims, and to give him an opportunity while the facts are recent of making inquiry into the cause and circumstances of the accident. The several clauses which bear upon the subject are very loosely fitted together, but the stringency of the original provision has been much relaxed,

and the injured workman is evidently the first object of the Legislature's care."

Now, starting from that basis it may be said in answering the question of reasonable excuse, that the Court will not be adroit to defeat the plaintiff. On the question of what is reasonable excuse the Court of Appeal says: "What may constitute reasonable excuse for not giving notice is not defined, and must depend very much upon the circumstances of the particular case. The notoriety of the accident is one element, and the employer's knowledge of it and that the workman or his representative is in fact making a claim upon him in respect of it, is another. Both these circumstances concur in the present case, and there is the additional fact that the employers took the claim into consideration but never gave the plaintiff a final answer."

So it may be said that the Court of Appeal is of the opinion that the circumstance of a claim being made upon the employer is one thing that might be considered. It does not say though that the judgment of the Divisional Court was wrong on that point and the Chief Justice of Ontario in that Court does not seem to consider that the advancing of a claim is an element provided the employer is aware of the accident. In giving the judgment of the Court below, the Chief Justice of Ontario, in (1901), 2 O.L.R. 219 at p. 222, says:

"The whole object of the Act in requiring notice to be given was attained by the knowledge of the defendants, at the time, of the injury and of the cause of it, and there was no evidence that they were in any way prejudiced in their defence by the want of it."

Judgment

Then, what have we in the case at bar? This plaintiff was actually seen by the defendants' representative and business manager, McDonald, at the time of the accident; actually saw him carried to the boat in a shattered condition and undertook to telegraph the hospital authorities at Nelson and arrange for his admission therein. Now, seeing the immediate result of accident then, under his very eyes, you might say, it no doubt resulted in his making prompt inquiries, as he should have done, as to how the accident occurred, and when he saw the plaintiff at the hospital a few days later, he attributed the accident to the

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default of the engineer. So on that circumstance alone one would be fairly entitled to assume that McDonald had no reason to suppose that the natural consequence of what would follow on the happening of an accident such as this would not take place; that is, that there would be an action for damages and he should as a careful man be prepared for it. The plaintiff was confined for several months to the hospital in consequence of the serious injuries he sustained and that is a most material element in this case. There is no doubt that for the first few weeks this man was not in a position to transact the most ordinary business or attend to his affairs. It may be that his mind was clear, but we all know that when a man was sick and suffering such as this man was that he is hardly capable of attending to such matters: such a shock to the system causes frequently loss of mental force and dulls the faculties, and I am not prepared to say that this man in this case could not, from that fact alone, be reasonably excused from the giving of the notice. In addition to this he was without means. All these matters are with some very small matters, but with small people they are very important matters; at the least they all have a substantial bearing upon the question of reasonable excuse—even the nature of the witness's own disposition and frame of mind and his mental qualifications are things that the Court should take cognizance of. I have no hesitation at all in saying that in this case the want of notice should be dispensed with. There is no provision in sub-section 5 of section 12 or in section 13 for an adjournment of the Court. It would seem almost to cover any case. There is no necessity to resort to that, because I find here, there having been no evidence before the Court of the defendants having been prejudiced, this would be perfectly useless.

Judgment

I overrule the motion for a non-suit.

Motion overruled.

The defendants counsel before closing his case, tendered evidence to shew that he had been prejudiced by want of notice of injury. The Court of its own motion, and under the circumstances below mentioned, excluded this evidence, for the following reasons:

Per curiam: It is too late now for the defendants to put in this evidence shewing that they were prejudiced by the want of notice. That question has been determined by me once and for all when the objection was taken that the action should be dismissed because of want of notice. Evidence was taken on that point, which is a trial within a trial, just as in the case of an alleged confession under the criminal practice, and it was ruled on; and so far as this Court is concerned it is settled.

If you had evidence on that point, then was the time to put it in, but you were satisfied with challenging the plaintiff's evidence, and put none in yourself, though you had then in Court available for that purpose the very witness, the defendants' manager, you now seek to call on that point, but you did not choose to offer his evidence.

It may well be, that if during the course of the trial it should appear to the Court that the defendant had been prejudiced, the Court would of its own motion take such action with regard thereto as would seem just; but the onus would be on the defendant to shew that he was not in a position to have drawn the attention of the Court to the facts creating such prejudice at the time when he took the objection to the want of notice. If the defendant were not taken by surprise, or knew, or should have known of the existence of such facts creating a prejudice, and yet did not bring them to the attention of the Court in the manner above indicated, it would not be right to allow him to set them up at the end of the trial, because it is due to the Court and the plaintiff that all objections to the notice should be brought forward at an early stage in the case, so that the objections may be considered, and if thought advisable, ruled upon before evidence is gone into, otherwise much unnecessary delay and expense might be occasioned.

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STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (FOREIGN) (No. 2).

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Inspection—Underground workings—Extralateral rights—Right to inspect and copy plans—Privilege—Rule 514.

The right to inspect underground workings in a mine carries with it the right to inspect and make copies of the plans of such workings.

Per MARTIN, J.: (1.) The practice respecting inspection under r. 514 is distinct from the practice in obtaining discovery and a claim of privilege set up in an affidavit in answer to a motion to compel inspection is not conclusive.

(2.) It is a proper and convenient practice to apply to the Court to enforce an order for inspection when the resistance is not contumacious.

MOTION to compel defendant Company to produce for inspection certain working plans and drawings which it was alleged the plaintiff Company was entitled to inspect and make copies of under an order of Court dated the 11th of December, 1901, and affirmed (save in one particular not material to this report) by the Full Court on the 10th of January, 1902. See *ante* p. 9.

Statement

On the return of the motion, the defendant Company set up a claim of privilege. The facts appear in the following judgment of

31st May, 1902.

MARTIN, J.: By an order of this Court made on the 11th day of December, 1901, the plaintiff Company was, *inter alia*, given leave to "inspect and make copies of the working or mining plans, drawings, charts, or surveys of the defendants at any time made or used and any number connected with any and all of their said workings and mining operations in or upon" certain specified mineral claims owned and worked by the defendants "so far as may be necessary to ascertain whether the defendants have worked or are working into and under the surface of the plaintiffs' claims and the nature and extent thereof and the quantity of mineral or ore (if any) removed therefrom, and also so far as may be necessary to ascertain the apex and loca-

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tion or position thereof as to the lodes or veins or ore deposits which may have been or are being operated or mined by the defendants under the surface of the plaintiffs' claims."

This order was affirmed, save in one particular not at present material, by the Full Court on the 10th of January, 1902—9 B.C. 9.

The present is a motion to compel the defendant Company to produce for inspection certain working plans and drawings which it is alleged the plaintiffs are entitled to inspect and make copies of under the said order of the 11th of December, 1901, and in support of the application are filed affidavits of two surveyors and of the manager of the plaintiffs' mines. The result of my consideration of facts set out in these affidavits, and of the accompanying plans and of the affidavit of Oscar V. White, filed in reply, is that for the purposes of effectuating the true intent of the said order the plaintiffs are entitled to the production and inspection asked for unless the defendants' contention in regard to the construction to be placed upon r. 514, by virtue of which the order was made, is correct.

That contention is founded on the affidavit of the said White, the defendants' mine superintendent, which sets up a claim of privilege and objects to the production of any plan (other than one tracing which is of practically no assistance) because as White deposes, the defendants "have been advised by their solicitor, and I very believe that the said maps or plans are not documents material to this action, that they do not contain any information which the plaintiffs are entitled to obtain for the purpose of their suit, and do not disclose any fact or circumstance which is detrimental to the defendants' case or which would in any manner support the plaintiffs' claim in this action."

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It is argued that a claim of privilege can be so set up under r. 514 in the same manner as in proceedings for discovery, and that the affidavit is conclusive unless it comes within one of the excepted cases which are conveniently set out in the Yearly Practice, 1902, pp. 319-20. I find myself unable to take this view of r. 514, and have come to the conclusion that said rule authorizes a procedure distinct from discovery in the general acceptance of that term. If this be not so, then the defendant

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would have been able to prevent the surveyors from making surveys and plans of the mine, as authorized by said order, and would have justified its action by simply filing an affidavit in terms almost precisely similar to that here relied upon. But it must, I think, be apparent that such an affidavit would under such circumstances be no answer to an application to compel the defendant to allow surveyors to enter its mine for said purpose; hence it follows that r. 514 does differ from the rules relating to discovery in this essential particular, and if the principle relied on does not apply to a survey it cannot apply to an inspection directed by the same rule. The cases of *E. & N. Ry. Co.* v. *New Vancouver Coal Co.* (1898), 6 B.C. 194; *Centre Star* v. *Iron Mask* (1898), 6 B.C. 355 and *Iron Mask* v. *Centre Star* (1899), 7 B.C. 66 sustain this view.

Rule 514 provides a most useful and beneficial procedure, particularly in mining cases, but if the contention of the defendants' counsel is correct it is liable to be defeated by the simple statement of the mere belief of the immateriality of documents. I am of the opinion that such is not the practice, and that the application should be resisted by submitting such facts as will enable the Court to decide the question as one of fact in each particular case.

MARTIN, J.

Though I have dealt with the matter as one of substance as regards all the plans, yet I point out that technically the plaintiff would in one respect be entitled to succeed in any event because the original of one admittedly relevant plan has, by an oversight as explained, not been produced, but merely a copy.

I might add that as a matter of practice the course that has been adopted of moving in the present way seems a proper and convenient manner of enforcing the order, there being no question of contumacious resistance on the part of the defendant Company.

The application is granted; costs to the plaintiff in any event.

The defendant Company appealed and the appeal was argued at Victoria on the 9th and 10th of January, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

The ground on which counsel for appellant based his argument was not taken in the Court below.

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Bodwell, K.C., for appellant: Rule 514 does not give the Court power to direct the production of plans, and the order of McColl, C.J., and the judgment of the Full Court on appeal were given in error: although not able now to rescind its former order, the Court will refuse to carry out a wrong order. Rule 514 applies to property and not to title deeds: if a piece of property is the subject of an action it may be detained, or inspected, a mine may be entered and a plan must be produced, but these things are done under the ordinary rules of discovery. It will be argued that we cannot take this ground now, but the Court should not enforce an order known to be wrong—it will not perpetuate error. He cited *O'Connell* v. *McNamara* (1843), 3 Dr. & War. 411; *Hamilton* v. *Houghton* (1820), 2 Bligh, 169 at p. 193 and 4 Eng. Rep. 290 at p. 299; *Commercial Bank* v. *Graham* (1850), 4 Gr. 419 at p. 424; Mitford's Chancery Pleas, 116; *Morgan* v. ——— (1737), 1 Atk. 408; *White* v. *Parnther* (1829), 1 Kn. 179 at p. 221; *Lawrence Manufacturing Co.* v. *Janesville Mills* (1891), 138 U. S. 552 at p. 561 and *Reg.* v. *Victoria Lumber Co.* (1897), 5 B. C. 288.

[Hunter, C.J.: But there the causes of action were different although identical, but here the orders are in the same suit.]

In some of the cases cited there had been no appeal from the decrees, but the Court held it was not bound to enforce a wrong decree.

Argument

Davis, K.C. (*S. S. Taylor, K.C.*, with him), for respondent: Inspection alone is not sufficient for us as we allege some old workings have been closed up so it is necessary for us to see the plans. Liberty to see the plans of the workings is a necessary part of an order for inspection and leave to make copies of plans is ancillary to inspection: inspection includes taking extracts: *Boord* v. *African Consolidated Land and Trading Co.* (1898), 1 Ch. 596. He cited Daniell's Chy. Forms, 5th Ed., 950-1; Seton on Decrees, 6th Ed., 574; *Bevan* v. *Webb* (1901), 2 Ch. 59; *Lewis* v. *Earl of Londesborough* (1893), 2 Q.B. 191 where bills of exchange were photographed under Order 50, r. 3, which is the same as r. 514.

He was stopped.

Bodwell, in reply: The form in Seton is only the form of an

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order after judgment in an action for trespass to underground workings: the form in Daniell is only the form of a notice of motion. In the cases cited there was a clear right to see a book and the notes and so there was a right to make a copy and take photographs, but here there is no right to see the plans.

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HUNTER, C.J.: In my opinion we cannot accede to Mr. *Bodwell's* contention that we should not enforce the former order of this Court on the ground that it is erroneous, as I think it was quite within the jurisdiction and discretion of the Court to make it. With regard to the power to order inspection, Order L., r. 3 is practically only declaratory of the jurisdiction which has long been well settled in the case of mines, machines, etc. (see *Earl of Lonsdale* v. *Curwen* (1799), 3 Bligh, 168 at p. 171), and which was gradually developed in the case of property generally (see Bray on Discovery, p. 577, *et seq.*, and cases cited), and is in fact little more than the application to the matters of practice dealt with therein of the doctrine that equity expands to meet the justice of new-arising cases.

In the case of underground workings it is a common practice for the order to allow access to the plans, for the simple reason that without such assistance the inspection would often be futile by reason of the concealment, obliteration, or inaccessibility of some of the workings. This being so, it follows that it would be unreasonable to expect those who make the inspection to carry the plans in their heads, and to say that they should not have a copy to assist them both in making the inspection, and to prepare their case with the aid of the results of the inspection. The forms given in the standard works sustain Mr. *Davis'* contention that the inspecting party may be allowed access to the plans and to take copies: see Daniell's Chy. Forms, 4th Ed., p. 786; 5th Ed., pp. 950, 951; Seton on Decrees, 6th Ed., p. 574; and in Chitty's K.B. Forms, 13th Ed., at pp. 226, 227, I find a form of application "to enter and inspect the (defendants') mine and mining operations at . . . *and to inspect the working plans relating* thereto, and to *make* measurements and drawings

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of the said mine and mining operations, and *copies of the said plans*, so far as may be necessary or proper in order to ascertain whether," etc. . . . .

I am quite free to admit that the order appears to have gone further than was necessary, and that it might have contained an undertaking by counsel not to use the information gained by the inspection, or the copies, for any other purpose than that of the litigation, but these were matters which should have been brought to the attention of the Court when the order was being settled.

The present appeal is virtually an attempt to have the order re-heard, which, in the case of a perfected interlocutory order is seldom if ever allowed, even when made on the heels of the decision: see *Birmingham and District Land Company* v. *London and North Western Railway Co.* (1886), 34 Ch. D. 261 at pp. 277 and 278. The appeal should be dismissed with costs.

DRAKE, J.: In this case the plaintiffs obtained an order to ascertain by inspection whether or not the defendants had worked or were working into and under the surface of the Heber Fraction and Rabbit Paw mineral claims, and the amount of mineral if any removed therefrom. There is no dispute as to the validity of this portion of the order, but what the defendants object to is the further part of the order that allows them for any or all of the said purposes to inspect and make copies of the working or mining plans, drawings, charts or surveys of the defendants at any time made or used in any manner connected with any and all of their said workings and mining operations in or upon any or all of the said above mentioned mineral claims.

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Mr. *Bodwell* contended that r. 514 did not sanction this latter part of the order, that it was a new procedure not contemplated thereby. The Court of Equity has frequently made orders for inspection, and making plans of the workings of mines, and for the removal of obstructions to enable the inspection to be effective, but he contends that the use of the defendants' plans is something novel, and infringes the right, which every litigant has, not to produce his muniments of title, and plans come within that category. The production of working drawings is apparently contemplated by the forms given in Daniell and

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Seaton on Decrees, and it is undoubtedly an advantage to both parties. The form of order given in *Earl of Lonsdale* v. *Curwen* (1799), 3 Bligh, 168 at p. 171, and in *Walker* v. *Fletcher* (1804), in the same volume, 178, compel the defendants to remove all obstructions which would interfere with an inspection of closed up ways and workings, the cost of which might be very serious. The production of working plans would obviate this necessity. In my opinion the order as regards the production of the working plans limited to the ground under the surface of the Heber and the Rabbit Paw mineral claims is correct. It is I think clear that this was all that the original order intended to give. Perhaps the language used might be construed as giving the right to see the plans of the mines, but that is not the intention, and the defendants are right in restricting the plans to those under the land in dispute. If the working plans cover more ground than the disputed claims, the other portions can be sealed up. I also consider that the persons making copies of the plans should make a declaration not to disclose any evidence that might come to their knowledge from the inspection, except for the sole purpose of the action; and I am further of the opinion that every order made under this r. 514 should depend on the facts shewn to the Court, and that this judgment is not to be considered as laying down any general principle that plans should in all cases be produced.

DRAKE, J.

I think that the costs of this appeal should be costs in the cause.

IRVING, J.

IRVING, J., concurred with HUNTER, C.J.

Appeal dismissed with costs.

IN RE LELAIRE.

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Jan. 17.

Administration—Heirs outside jurisdiction—Official Administrator.

RE LELAIRE

The Official Administrator is not allowed to take out Letters of Administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the Province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property although he died possessed of considerable real estate within the Province subject to a mortgage.

APPLICATION on behalf of the Official Administrator for administration of the estate of Felix Lelaire who died in France, leaving real estate in Victoria valued at about $29,000 (subject to mortgages) and personal estate amounting to $85 in cash, in the hands of his agent in Victoria, and which the agent had without knowledge of Lelaire's death paid out six days after his death to the mortgagees in payment of interest due. The agent had conducted the affairs of the deceased for two years prior to his death and stated on affidavit that deceased left no debts other than the mortgages and that he had a general power of attorney authorizing him to act for the next of kin and heirs in respect of the management and sale of the deceased's estate.

Statement

Harold Robertson, for official administrator: Under the amendment to the Official Administrators' Act "estate" includes both real and personal estate, and it is the duty of the Official Administrator to apply for administration. No one unless appointed by the Court has any right to deal with the estate as where the heirs are all resident outside the jurisdiction the estate does not vest in them; no one can say the deceased left no debts owing by him. There will be succession duty payable and there is no guarantee that it will be paid unless administrator is appointed.

Argument

Gregory, for heirs, contended that the only result of granting administration would be to demand a return of the $85 paid although it was properly expended.

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MARTIN, J.: The Court in dealing with applications of this nature will have regard to the special circumstances of each case. Here the Official Administrator should not be allowed to take out Letters of Administration in opposition to the heirs of the deceased, such heirs being resident out of the jurisdiction, but having an attorney-in-fact within the Province to manage the estate, and there being no evidence that the deceased had any debts or any substantial personal property although he died possessed of considerable real estate within the Province subject to a mortgage.

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IN THE EXCHEQUER COURT. IN ADMIRALTY.

HACKETT *ET AL* v. THE SHIP BLAKELEY: *EX PARTE* JONES.

HACKETT v. THE SHIP BLAKELEY: EX PARTE JONES

Admiralty—Practice—Marshal's sale—Purchaser refusing to complete sale—Re-sale—Statute of Frauds.

Where the purchaser of a ship at a Marshal's sale refuses to complete his purchase the ship may be put up for sale again without an order for re-sale and the defaulting purchaser will be ordered by the Court to pay the deficiency, if any, on such re-sale and the costs caused by his default.

Judicial sales are not within the Statute of Frauds.

MOTION by plaintiffs to compel Henry Humphrey Jones to pay the difference in the price of a ship purchased by him at a Marshal's sale and that realized at a subsequent sale caused by his refusing to complete the purchase.

Statement

The motion was argued before MARTIN, Local Judge in Admiralty.

Bond, for plaintiffs.

Higgins, for Jones.

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MARTIN, L.J.A.: On the evidence there is no difficulty in arriving at the conclusion that the ship was purchased at the Marshal's sale on the 17th of October, 1902, by Henry Humphrey Jones for $2,000, and that he subsequently in writing, on October 28th, absolutely refused to complete his purchase, and repudiated all responsibility in regard thereto. Under such circumstances the Marshal re-sold the ship, without obtaining an order for such re-sale, for the sum of $1,900. The present application is by the plaintiffs to compel the defaulting purchaser to make good the difference in price, and pay the costs and expenses occasioned by and incidental to such default.

The application is resisted, first, on the ground that there was no memorandum in writing of the sale to satisfy the Statute of Frauds. Even if such were the case, the answer is that judicial sales are not within that statute: *Attorney-General* v. *Day* (1748-9), 1 Ves. Sen. 218.

In the second place it is contended that before the defaulting purchaser can be held liable there must be an order for a re-sale.

The analogous practice in Chancery on this point is to be found in the cases of *Hodder* v. *Ruffin* (1813), 1 V. & B. 544; *Gray* v. *Gray* (1839), 1 Beav. 199; *Harding* v. *Harding* (1839), 4 Myl. & Cr. 514; *Crooks* v. *Crooks* (1854), 4 Gr. 376; and *Re Heeley* (1859), 1 Chy. Cha. 54; and it is the fact that in those cases an order for re-sale was made, but it is apparent to me, at least, that the reason for adopting that practice was to fix a limited time within which the purchaser might still have an opportunity to complete, and failing that he should be, as it were, formally adjudged a defaulter and held liable as such. The object, in short, was to give him a certain time within which to make up his mind, and the clear distinction between those cases and this is that in none of them had the purchaser definitely repudiated his purchase, but had either taken steps in the direction of completion, or had simply done nothing towards carrying it out, while in this case he has under his own hand declared himself to be a defaulter. It would, under such circumstances, be going through an idle and expensive formality for the Court to declare a purchaser to be a defaulter when he has himself

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already deliberately notified the Marshal to that effect. It is only the possibility that the purchaser may be trying to complete that renders the application for the order necessary.

If the re-sale is otherwise regular, it is, as a matter of practice, just as convenient that the order directing a defaulting purchaser to be held liable should be made after the sale as before. Indeed, in such a case as the present wherein it is not necessary to ascertain by an order whether the purchaser may still at the eleventh hour wish to complete or not, it would appear to be the better practice to wait till after the result of the re-sale before applying for such order, because it might very well happen that on the re-sale a greatly increased price would be obtained.

There would in any event be a further reason why an application for an order for re-sale might be necessary in Chancery without that being the case in this Court, which is that sales in Chancery are subject to the approval of the Court, while such is not the practice in this Court, sales of ships being conducted pursuant to an open and general commission of sale to the Marshal. If one sale prove abortive there is no good reason why the Marshal should not hold another sale at the earliest convenient date without further order.

The defaulting purchaser herein has caused a loss to the plaintiffs, and as the Lord Chancellor said in *Harding* v. *Harding, supra*, "I do not know why a person purchasing under a decree of the Court should not be held to his contract as much as a person purchasing in the ordinary way." There has been an attempt to play fast and loose with the Court in this matter, and under the circumstances it would not be seemly that to obtain redress the plaintiffs should be sent to another tribunal when this Court possesses ample power to speedily and at less expense than elsewhere afford relief.

Judgment

There will be an order, therefore, directing the said Jones to pay into Court the deficiency in price, $100, and all costs, charges and incidental expenses attending the last sale, and incidental thereto, and occasioned by the default, which amount to $170, and also to pay to the plaintiffs or their solicitors the costs of the present motion.

IN RE THE SMALL DEBTS ACT: *IN RE* WAXSTOCK.

HUNTER, C.J.

1903

March 5.

IN RE WAXSTOCK

Small Debts Court—Judgment summons—Non-payment of instalments ordered—Notice by solicitor of application for committal—Committal order—Waiver.

A notice by a judgment creditor's solicitor of an application to a Magistrate of a Small Debts Court for an order to commit a judgment debtor because of failure to pay instalments ordered to be paid on the return of a judgment summons, is a nullity.

A judgment debtor by appearing pursuant to such notice does not waive his right to object at any stage.

APPLICATION for *habeas corpus*. On September 12th, 1902, judgment was given against one Waxstock in the Small Debts Court of Vancouver for $102.50 debt and costs. A judgment summons was issued and on the 31st of October an order was made for payment of the debt by monthly instalments of $5.

The defendant failed to pay two instalments and at the beginning of January a notice was served on him signed by the plaintiff's solicitors stating that they would apply to the Court on the 6th of January for an order for his committal for failing to pay the two instalments.

On January 6th, the defendant appeared and the Magistrate made an order for his committal but suspended the order for a week to enable the defendant to pay the amount of the two instalments and the costs. This the defendant failed to do and the warrant of commitment was issued and handed to the Sheriff of Vancouver.

Statement

On February 18th, the defendant was arrested on this warrant and immediately applied for a writ of *habeas corpus*. The usual order *nisi* was made by the Chief Justice returnable at 2.30 p.m. and on its return

A. D. Taylor, in support of the application, contended, first, that the order for commitment was bad as it should have been preceded by a shew cause summons issued out of the Court instead of a mere notice signed by the plaintiffs' solicitors and

Argument

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that the appearance of the defendant on the notice and his failure to object were not a waiver, as it was not a question of mere irregularity, but of nullity, citing *Mander* v. *Falcke* (1891), 3 Ch. 488 and *Taylor* v. *Roe* (1893), 68 L.T.N.S. 213.

[HUNTER, C.J.: There might be a question as to whether the Act provides for such a shew cause summons at all as the expression "after the return of the summons" might be satisfied by interpreting it to mean up to the time of hearing, and if that is so, the only order that could be made for committal would be on the judgment summons itself.]

That the warrant of commitment was bad, as in the statement of the amount on payment of which the defendant would be discharged, $1.50 was included for a shew cause summons and its hearing, and there had been no shew cause summons.

Argument

Wintemute, for the judgment creditors, argued that the appearance of the defendant and his failure to object were an absolute waiver, and that in giving a notice as had been done, the plaintiffs had followed the usual practice in the Small Debts Court and also in the County Court.

5th March, 1903.

HUNTER, C.J.: The notice signed by the solicitor was a nullity and cannot take the place of the proper process which should issue out of the Court itself, and the defendant did not waive his right to object now by appearing. The matter affected the liberty of the subject and there should be no departure from the strict rule. The order will be made absolute and the defendant discharged from custody.

Judgment

Order absolute.

LION BREWERY COMPANY, LIMITED v. THE BRADSTREET COMPANY.

IRVING, J.

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LION BREWERY CO. v. BRADSTREETS

Libel—Mercantile agency—Incomplete report of Court process—Privilege.

In a mortgage foreclosure action, the Lion Brewery Company as second mortgagees was joined as a party defendant, and a mercantile agency published in a notice or circular, distributed amongst its subscribers, that a writ had been issued against the Lion Brewery Company claiming foreclosure of a mortgage and indicating by means of the words "*et al*" that there were other defendants:—

Held, per IRVING, J., in an action by the Lion Brewery Company against the mercantile agency, that the publication was libellous and not privileged.

ACTION for damages for libel tried at Rossland, before IRVING, J., on the 25th of February, 1903, without a jury.

The plaintiffs were an incorporated Company, carrying on the business of brewers at Rossland, and the defendants were a mercantile agency carrying on business throughout the Province of British Columbia and elsewhere, and were the publishers of a semi-weekly sheet called "Bradstreets," the object of which publication was to furnish information to subscribers of anything tending to affect the credit of any person or corporation engaged in business.

Statement

The defamatory matter complained of was published in the issue of that sheet of the 21st of June, 1902, and consisted of the following words:

"Writs and Summonses.

"Defendant. "Plaintiff.

"Rossland—Lion Brewing Co. *et al.* "Mara, John Andrew.

"Foreclosure of mortgage."

The statement of claim, after setting up that the defendant had falsely and maliciously printed and published of the plaintiff the above words alleged the following innuendo: "Meaning thereby that one John Andrew Mara held a mortgage over the property of the plaintiff, the Lion Brewing Company as security for money owing him by the plaintiff and that the plaintiff was

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unable to satisfy the said debt when the same became due, and was therefore a company unable or unwilling to pay their debts and that they were about to be deprived of their property on that account."

Paragraphs 1, 2, 3 and 4 of the statement of defence consisted of denials of the allegations in the statement of claim and by paragraph 5 the following alternative pleas were raised:

"Par. 5. In the alternative if it should be proved that the words complained of were written and published by the defendant, the defendant says that:

"(a.) Certain persons, firms or corporations were desirous of obtaining information relating to persons in business or trade and employed the defendant to obtain and furnish to them such information.

"(b.) In the course of such employment the defendant was required by certain persons, firms or corporations by whom it was so employed, to obtain for and furnish to such employers its sheet of changes and corrections containing (*inter alia*) information relative to the commencement of suits and actions in the Courts in the Province of British Columbia; and the said employers had an interest in receiving such information, and the defendant was under a duty to furnish them the said information, and so wrote and published to such employers only the words complained of *bona fide* in the discharge of said duty, and in the honest belief that the said words were true and without malice.

Statement

"(c.) The said words are a fair and accurate report of a judicial proceeding, namely, of an action being commenced in the Supreme Court of British Columbia of one John Andrew Mara as plaintiff against several persons, of whom the plaintiff was one, as defendants for the foreclosure of a mortgage, and the defendants deny that they published the said words with any of the meanings as alleged in the said paragraph 2 of the statement of claim; the said words being incapable of said alleged meanings, or any defamatory or actionable meaning.

"(d.) The said words were published upon an occasion of privilege."

The proceeding of which the words complained of purported

to be a report, was an action in the Rossland Registry of the Supreme Court of British Columbia between John Andrew Mara as plaintiff, and Andrew H. Revsbeck, Annie Revsbeck, The Lion Brewing Company, Limited, and Joseph Tasse as defendants, and the indorsement on the writ of summons in that action was as follows: "The plaintiff's claim is to have an account taken of what is due to him for principal and interest and costs on a certain mortgage dated the 27th day of January, 1899, and made between the defendant, Andrew H. Revsbeck, as mortgagor, and the plaintiff, John Andrew Mara, as mortgagee; and on a certain other mortgage dated the 8th day of September, 1900, and made between the said Andrew H. Revsbeck, as mortgagor, and the said John Andrew Mara, as mortgagee; and to have the said mortgages enforced by foreclosure or sale. The lands embraced in the above mentioned mortgages are lots numbered 1, 2, 3 and 4, block 28, Railway Addition to Rossland."

The plaintiffs held a second mortgage over the lands mentioned in the indorsement on the writ which had been registered, and the other defendant in the mortgage action, Joseph Tasse, was a judgment creditor of Andrew H. Revsbeck, the mortgagor, and his judgment had been registered, and they had been joined as defendants in the action brought by Mara for these reasons.

Several witnesses called for the plaintiff stated that they had seen the "Bradstreets" of the 21st of June, 1902, and had read the words published therein and had understood them in the sense ascribed to them by the plaintiff's innuendo.

Statement

The writ of summons in *Mara* v. *Revsbeck* was put in evidence and the omission of the names Revsbeck and Joseph Tasse from the report in the sheet was thus shewn. Actual malice was not proved.

For the defendant it was shewn that the nature of its contract with its subscribers was to keep them informed by means of the semi-weekly sheet above mentioned, of anything which might affect the credit of each mercantile person, firm and corporation doing business in Canada, and that under this contract it was the defendant's duty to obtain for and send to each and every subscriber information which might affect the credit of such mercantile person, firm and corporation.

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J. A. Macdonald, for the defendant: The occasion was one of qualified privilege. The evidence shews that every subscriber has an interest in the standing of every mercantile person and company in the field covered by the defendant's publication and the subscriber's contract with the defendant for information affecting such persons and companies. The contract is a standing request for such information; the defendant is the subscriber's agent to procure and give, and every subscriber is interested in receiving such information, and the publication of such information to subscribers only by means of printed sheets, is a proper, usual, and practically necessary means of furnishing it. Odgers Libel and Slander, 3rd. Ed., p. 273. *Boxsius* v. *Goblet Freres* (1894), 1 Q. B. 842; *Stuart* v. *Bell* (1891), 2 Q. B. 341. The cases of *Todd* v. *Dun, Wiman & Co.* (1888), 15 A. R. 85 and *Robinson* v. *Dun* (1897), 24 A. R. 287 are distinguishable. In neither of these had the Court to decide whether or not general communications such as the one in question were privileged. Expressions of opinion in those cases on the point in question here are *obiter dicta*. The report was a fair and reasonably correct report of Court process to which any one has access: Sup. Ct. Rule 699; *Fleming* v. *Newton* (1848), 1 H. L. Cas. 363.

Argument

Hamilton, for plaintiff. The judgments in *Todd* v. *Dun, Wiman & Co.*, and *Robinson* v. *Dun* are conclusive against the defence of privilege where the agency has made a general publication to all its subscribers as distinguished from an answer to a special inquiry. The innuendo has been proved and follows from the nature of the publications: See *Williams* v. *Smith* (1888), 22 Q. B. D. 134. A corporation can sue for libel calculated to injure its reputation in the way of its business, and actual damage need not be proved: *South Hetton Coal Co.* v. *North-Eastern News Association* (1894), 1 Q. B. 133. Substantial damages may be awarded though no proof is given that any damage has been sustained: *Tripp* v. *Thomas* (1824), 3 B. & C. 427.

Judgment

IRVING, J., gave judgment for the plaintiff for $25.00 damages and costs, holding that the publication was libellous and not privileged.

BEATON v. SJOLANDER *ET AL.*

FULL COURT

1903

Jan. 27.

BEATON v. SJOLANDER

County Court—Practice—Defendant outside County—Jurisdiction—Judgment by default—Application to set aside and for leave to defend—Waiver.

After judgment had been signed in default of a dispute note in a County Court action in which it did not appear on the face of the process that the Court had jurisdiction, the defendant filed a dispute note (what it contained was not shewn) and applied to set aside the judgment and for leave to defend on the merits, and on the hearing of the application, which was dismissed, facts were disclosed shewing that the Court had jurisdiction:—

Held, on appeal, that County Court process should shew jurisdiction on its face, but that the defendants by filing the dispute note and applying for leave to defend on the merits had waived their right to object to the jurisdiction.

APPEAL from an order of SPINKS, Co. J., refusing to set aside a judgment recovered by the plaintiff in the County Court of Yale. By the plaint it appeared that the defendants resided in Vancouver and the plaintiff's claim was described as being "against the defendants as makers of a promissory note for $179.12 dated 12th March, 1902, payable two months after date." The facts appear in the judgments. Statement

The appeal was argued at Vancouver on 27th November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Sir C. H. Tupper, K.C., for appellants: On the face of the process no jurisdiction was shewn as the residence of the defendants was given as outside the County: the jurisdiction must appear: see *Waldock* v. *Cooper* (1754), 2 Wils. K.B. 16; *Read* v. *Pope* (1834), 1 C. M. & R. 302; *Cook* v. *McPherson* (1846), 15 L.J., Q.B. 283; *Baker* v. *Wait* (1869), L.R. 9 Eq. 103 and *Sherwood* v. *Cline* (1888), 17 Ont. 30. Argument

Leave to defend should have been given.

Kappele, for respondent: Appellants by applying for leave to defend waived their right to object to the jurisdiction. He cited

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Fry v. *Moore* (1889), 23 Q.B.D. 395 and *Northey Stone Company* v. *Gidney* (1894), 1 Q.B. 99.

Sir C. H. Tupper, replied.

Cur. adv. vult.

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27th January, 1903.

HUNTER, C.J.: This was an action on a promissory note brought in the Yale County Court against the defendants, who both, as appears by the plaint itself, reside at Vancouver, that is outside of the jurisdiction of the said Court. The particulars given in the plaint do not shew where the note was made or payable, so that for anything that appears in the summons or plaint the cause of action may not have been within the jurisdiction of the Court. Judgment was signed by default, and had nothing more appeared in the case it may very well be that the defendants could have had the judgment set aside on appeal to this Court from the learned Judge's order, or at any rate had the Court prohibited from proceeding further on the judgment.

However, it appears that the defendants on being served forwarded a dispute note (what it contained does not appear), which reached the Registrar by mail some fifteen minutes after the judgment was signed, and they applied to have the judgment set aside, the only ground mentioned in the summons being that they were served without the leave of the Judge, and it does not anywhere appear that they objected at the hearing of the summons that the Court had no jurisdiction over the cause of action. Not only so, but it did appear at the hearing that the Court had jurisdiction, as the note in question was produced on affidavit, and shews on its face that it was made and payable within the said County. Affidavits going into the merits were filed by all parties, and the learned Judge after considering the matter refused to set the judgment aside.

HUNTER, C.J.

It seems to me that under these circumstances the defendants cannot now be heard to say that the judgment was taken without jurisdiction. On the merits I cannot say that the learned Judge was wrong.

The only defence set up was that an agreement had been made to discharge the note by the plaintiff taking over some grain at a fixed price per ton, or selling it and applying the proceeds on

the note. But according to the plaintiff's affidavit the value of the grain was to be applied first in discharge of a chattel mortgage to which the grain was made subject in favour of a third party; and secondly to discharge the plaintiff's debt for which the note was afterwards taken, and that the defendants countermanded the instructions for sale, leaving it still subject to the mortgage.

There is nothing to prevent the defendants from bringing any action they may think fit on account of the grain, but I do not see why a judgment obtained on a promissory note, over which the Court had as a matter of fact complete jurisdiction, should be opened up on the meagre statement of the defendants, who have not contradicted the circumstantial account of the matter sworn to by the plaintiff and the mortgagee's solicitor.

HUNTER, C.J.

The appeal should be dismissed with costs.

IRVING, J.: I concur.

IRVING, J.

MARTIN, J.: It is contended by the appellants, first, that the jurisdiction of the County Court of Yale, exercised under section 64, should have appeared on the face of the proceeding issuing therefrom, *i.e.*, the plaint, that Court being, in a legal sense, an inferior Court. According to such plaint the defendants dwell at Vancouver, and nothing appears therein shewing that the cause of action wholly or in part arose within the County of Yale. On the face of the process therefore, no jurisdiction is shewn.

I find on examining the old cases that this exact point arose in the 19th year of the reign of Charles II. (1666-7), in the case of *Peacock* v. *Bell and Kendal*, 1 Saund. 73 (and notes), wherein, after error brought, it was laid down, in considering the status of the Court of the County Palatine of Durham, that "the rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of a superior court but that which specially appears to be so; and on the contrary, nothing shall be intended to be within the jurisdiction of an inferior court, but that which is so expressly alleged." These expressions are cited with approval by Mr. Baron Parke in *Gosset* v. *Howard* (1846), 10 Q. B. 411, at pp. 453-4, and that learned Judge deals with the point

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at some length and with his customary lucidity. Some other decisions on this same line are *Waldock* v. *Cooper* (1754), 2 Wils. K.B. 16; *Read* v. *Pope* (1834), 1 C. M. & R. 302; *Tinniswood* v. *Pattison* (1846), 3 C. B. 242; *Cook* v. *McPherson* (1846), 15 L. J., Q.B. 283; *Timothy* v. *Farmer* (1849), 7 C.B. 814; *Brown* v. *London and North Western Railway Co.* (1863), 32 L.J., Q.B. 318 and *Sherwood* v. *Cline* (1888), 17 Ont. 30.

In the corresponding section (74) of the English County Courts Act there is contained a provision for the obtaining of leave from the Judge or Registrar before an action can be brought in one county against a defendant dwelling in another county, and Order V., rr. 9a. and 9b., deal with the procedure—Yearly County Court Prac. (1902), pp. 63-5, 201-2—and the obtaining of leave has been held to be a condition precedent to the right of action—*Brown* v. *London and North Western Railway Co., supra.* Before the amendment contained in our County Courts Amendment Act, 1894, Sec. 3, this was substantially the practice in this Province (Order IV., r. 3), but since that amendment the obtaining of leave from the Judge has been dispensed with, though the necessity for jurisdiction appearing on the face of the document still remains.

As I understand the summons that was taken out before the Court below to set aside the service and the judgment, it was intended to raise this question of jurisdiction, because the application is stated to be "on the ground that the said summons was served upon the defendants outside the County of Yale without leave of a Judge, and on other grounds." It is true that the reason given in regard to leave is not tenable (it was doubtless suggested because r. 3 of Order IV., has never been repealed, though inoperative), but I think the general exception to the jurisdiction is sufficiently raised.

MARTIN, J.

If the case stopped here the appellants should in my opinion succeed, but it is contended that they have waived their objection to the jurisdiction by sending a dispute note to the Registrar and by applying to be allowed to defend on the merits, on which application evidence was adduced before the Judge shewing clearly that the Court had jurisdiction. It does not appear what was contained in the dispute note, but it is not suggested

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that it contained an exception to the jurisdiction. We are not exactly informed as to what occurred on the hearing of the summons, or precisely how the application to defend on the merits came before the Judge, and there is no reference to such a ground (merits) in the summons. Consequently the questions raised are not before us in as full and satisfactory a manner as I should like, but I think it would have been open to the Judge to have amended the plaint on the material before him once his jurisdiction had been made apparent, and I feel unable to arrive at a different conclusion from that reached by my learned brothers both on the question of waiver and on that of merits.

MARTIN, J.

The case of *Fry* v. *Moore* (1889), 23 Q.B.D. 395, in general supports this view as to waiver, because here there has only been an irregularity in procedure.

Appeal dismissed with costs.

TROWBRIDGE v. McMILLAN.

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Practice—Service out of jurisdiction—"Proper" parties—Order XI.

T. the British Columbia agent for the P. C. Line of Seattle, sued McM. the agent of the D. & W. H. N. Co. on a bill of exchange drawn by McM. on the Company in favour of T. This bill was for the balance of freight moneys due under a charter-party entered into between the principals; and the Company having a claim against the P. C. Line for demurrage obtained an order adding them as party defendants, and giving them and McM. leave to deliver a counter-claim and serve it upon the P. C. Line.

This order was affirmed by the Full Court (*ante* p. 171) on the ground that the real parties in interest should be brought before the Court.

An order was then made by IRVING, J., giving leave to McM. and the Company to serve notice on the P. C. Line of the defence and counter-claim:—

Held, on appeal *per* DRAKE and MARTIN, JJ. (HUNTER, C.J., dissenting), that asno cause of action or counter-claim against T. was shewn there

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was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to make the order.

APPEALS from two orders of IRVING, J.

Trowbridge sued McMillan as the drawer of a bill of exchange payable to Trowbridge's order, with an alternative claim against McMillan on a guarantee that the bill would be paid. Trowbridge was the manager of the Pacific Clipper Line of Seattle, which owned the steamer Mexico, and the defendant was the agent of the Dawson & White Horse Navigation Company, and these two principals had through Trowbridge and McMillan entered into a charter-party providing that the steamer Mexico should carry certain freight for which the Dawson and White Horse Navigation Company agreed to pay. McMillan alleged he gave the bill of exchange sued on along with the guarantee to Trowbridge as the balance of the freight moneys due under the charter-party, and the Company set up a claim for demurrage and advised McMillan not to pay.

On an application made by McMillan and the Dawson and White Horse Navigation Company, an order was made adding the Company as a defendant and granting leave to them and McMillan to deliver a counter-claim and serve it on the Pacific Clipper Line as a defendant to said counter-claim, and on appeal the order was affirmed on the ground that the real parties in interest should be before the Court: see *ante* p. 171.*

Statement

Subsequently, on the 3rd of October, 1902, McMillan and the Dawson & White Horse Navigation Company obtained an order from IRVING, J., giving them leave to serve notice of the statement of defence and counter-claim upon the Pacific Clipper Line

* The order made by the Full Court on appeal was as follows: "Upon motion . . . . by way of appeal from the order pronounced by the Honourable Mr. Justice Irving on the 13th day of March, 1902, adding the Dawson and White Horse Navigation Company as party defendants to this action, and granting liberty to the defendants, W. J. McMillan and the Dawson and White Horse Navigation Company, to deliver a counter-claim herein and serve the same upon the Pacific Clipper Line as a defendant to said counter-claim; Upon hearing . . . . This court doth order that the said appeal be and the same is hereby dismissed with costs to be paid by the appellant to the respondent forthwith after taxation thereof."

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at Seattle. The material used on the application was an affidavit by the applicant's solicitor reciting the fact that the action had been brought by Trowbridge against McMillan, and also that an order had been made adding the Company as a defendant and granting them and McMillan liberty to deliver a counter-claim and serve it upon the Pacific Clipper Line.

An application by the Pacific Clipper Line made to IRVING, J., to set aside his former order of the 3rd of October was refused, and this order of refusal is one of the orders now appealed from.

McMillan and the Company delivered a counter-claim and served it on Trowbridge and the Pacific Clipper Line. Trowbridge then applied for an order striking out the counter-claim on the ground that it disclosed no cause of action against him, and on the return of the summons the application was dismissed by IRVING, J., and this order is the second one now appealed from.

Both appeals came on for argument at Vancouver on the 3rd and 4th of December, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

The Pacific Clipper Line's appeal was first argued.

Argument

Davis, K.C., for appellant: The effect of r. 201 is that if a defendant is setting up a counter-claim against a plaintiff and some other person, he stands in the same position as if he were bringing an action, and so the respondents must rely on Order XI., r. 1 (*g.*): *In re Luckie* (1880), W. N. 12; Y. P. (1903), 286. The facts shewing that an action has been "properly brought" against someone in the jurisdiction must be stated on oath, otherwise there is no jurisdiction: *Davies et al* v. *Dunn et al* (1901), 8 B. C. 68; *Yorkshire Tanning Co.* v. *Eglington Chemical Co.* (1884), 33 W. R. 162.

In the counter-claim no cause of action is disclosed against Trowbridge. As to payment to known agent see *Sadler* v. *Evans* (1766), 4 Burr. 1,984; Addison on Contracts, 9th Ed., 322; *Stephens* v. *Badcock* (1832), 3 B. & Ad. 354; *Mildred* v. *Maspons* (1883), 8 App. Cas. 874 at p. 886 and *Bamford* v. *Shuttleworth* (1840), 11 A. & E. 926.

Even if it should be decided that Trowbridge is open to attack this is not a counter-claim at all: *Harris* v. *Gamble* (1877), 6

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Ch. D. 748 and *Furness* v. *Booth* (1876), 4 Ch. D. 587.

Griffin, for respondents: The case is concluded in our favour by the decision of the Full Court on the former appeal. As to proper parties he cited *Massey* v. *Heynes* (1888), 21 Q.B.D. 330; *Macdonald* v. *Bode* (1876), W.N. 23; *Griendtoveen* v. *Hamlyn and Co.* (1892), 8 T.L.R. 231. Trowbridge is a mere shadow used by his principals.

We claim against Trowbridge the return of the draft we gave him and we have the right to join in the same action both Trowbridge and the Pacific Clipper Line: *Turner* v. *Hednesford Gas Co.* (1878), 3 Ex. D. 145; *Barber* v. *Blaiberg* (1882), 19 Ch. D. 473; *Tagart & Co.* v. *Marcus & Co.* (1888), 36 W.R. 469; *Witted* v. *Galbraith* (1893), 1 Q.B. 577. The Pacific Clipper Line can't take advantage of any defects in our pleadings against Trowbridge: *Byrne* v. *Brown* (1889), 22 Q.B.D. 657.

Cur. adv. vult.

The Trowbridge appeal was then argued.

L. G. McPhillips, K.C., for appellant: No cause of action is disclosed against Trowbridge: the counter-claim as against him should be struck out. He cited Smith's Master and Servant, 348; *Ex parte Byrne* (1866), 35 L.J., Bk. 43; *Threlfall* v. *Lunt* (1836), 7 Sim. 627; *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489; *Whincup* v. *Hughes* (1871), L.R. 6 C.P. 78 at p. 81.

Argument

Griffin, for respondent: Where the case is doubtful the counter-claim should not be struck out. We have a counter-claim against Trowbridge for the delivery up of the draft and our contention is that Trowbridge is practically the mere *prete-nom* of the Pacific Clipper Line and our counter-claim against them is therefore against him. This argument is fully borne out by *Montgomery* v. *Foy, Morgan & Co.* (1895), 2 Q.B. 321, and was urged before and approved by the Full Court in their first decision when they allowed us to deliver the very counter-claim which is now moved against.

Cur. adv. vult.

19th February, 1903.

HUNTER, C.J.: In my opinion this case is concluded by the former decision of the Full Court, 9 B.C. 171.

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The undisputed facts are that Trowbridge, the manager and agent within the Province for the Pacific Clipper Line, a Seattle corporation, commenced an action against McMillan, the agent of the Dawson and White Horse Navigation Company, on a bill of exchange drawn by McMillan on the Navigation Company in favour of the plaintiff. This bill was for the balance of freight moneys due under a charter-party entered into between the principals; and the Navigation Campany, having a claim for damages against the Clipper Line for delay in delivering the goods by reason of the unseaworthiness of the vessel, were added as party defendants, and leave given to set up this counter-claim against the plaintiff's principal, the Pacific Clipper Line.

This order was affirmed on the ground that the real parties in interest should be brought before the Court, and it is now objected that because the affidavit leading to the order for service out of the jurisdiction does not shew any cause of action or counter-claim against Trowbridge, such an order could not be made.

As to this, there was no necessity for the affidavit to say anything about Trowbridge, as the Full Court had already decided that Trowbridge was a person within the jurisdiction against whom an action, or, as here, a counter-claim, might be properly brought.

HUNTER, C.J.

No doubt the cases shew that a nominal defendant is not to be made a means for obtaining an order for service without the jurisdiction which could not otherwise be properly made, but there is a fallacy in supposing that the invariable test is that there must be a good cause of action against the person within the jurisdiction. All that is required is that there shall be a good cause of action, verified as provided by Order XI., r. 4, and that the action, or counter-claim, as the case may be, is one properly brought against some person duly served within the jurisdiction. The person within the jurisdiction may be a bare trustee, or an agent with or without a personal interest in the subject-matter of the litigation, and it depends on the circumstances as to whether it is right that the outsider should be brought in. Here the agent is the actor in the litigation, and he is clearly a proper, although perhaps not a necessary, party to the counter-claim.

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So far as the case being a proper one for the order is concerned, it is difficult to see how there could be one more so, as to allow a local agent to sue in the interest of a foreign corporation, and shut out any counter-claim arising out of the latter's dealings with the defendant in connection with the subject-matter of the suit merely because the agent was not a party thereto, would, in many cases lead to the grossest injustice.

The appeals should be dismissed.

DRAKE, J.: Mr. Justice IRVING, on 25th October, 1902, made an order granting leave to the plaintiffs by counter-claim to serve notice on the Pacific Clipper Line (a foreign corporation and doing business in the United States) of the defence and counter-claim. From this order both Trowbridge and the Clipper Line appeal. The plaintiff alleges that he has only been made a defendant for the purpose of enabling the defendants to take advantage of Order XI., r. 1 (*g.*) which is as follows: "Service out of the jurisdiction may be allowed whenever any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." In order to give the Court jurisdiction there must be an action properly brought against some person within the jurisdiction.

DRAKE, J.

The counter-claim alleged that in August, 1901, a charter-party was entered into between the defendants, the Pacific Clipper Line, of which Company the plaintiff was manager, for the defendants, the Dawson and White Horse Navigation Company and arranged for the carriage of freight to St. Michaels.

The counter-claim then charges the Pacific Clipper Line with negligence and claims damages. There is nothing to shew in this counter-claim any cause of action against the plaintiff. The fact that the plaintiff was the agent of the line does not do so. In order to give a right to serve a party out of the jurisdiction, there must be an action properly brought against a person in the jurisdiction. This means there must be a cause of action shewn in the pleadings. There is none here. The case of *The Duc D'Aumale* (1902), 19 T.L.R. 42, 87, shews this, there must be a real cause of action against the parties in the jurisdiction.

The case of *Massey* v. *Heynes* (1888), 21 Q.B.D. 330, is different from this case, the brokers in England had entered into a charter-party on instructions from their foreign principals, which was repudiated by the principals on the ground that their agent had exceeded their authority. Mr. Justice Wills held that where two persons were involved in the transaction against whom the plaintiffs had no joint remedy, or joint cause of action, then the service out of the jurisdiction was proper, and there must be a substantial cause of action against the party within the jurisdiction. See observations of Pearson, J., in *Yorkshire Tannery and Boot Manufactory* v. *Eglinton Chemical Co.* (1884), 54 L.J., Ch. 81; and in *Witted* v. *Galbraith* (1893), 1 Q.B. 577, Lindley, L.J., puts the case thus: "Supposing that both the defendant firms were resident within the jurisdiction would they both have been joined in the action? There is no plausible cause of action against the brokers, and I have come to the conclusion," he says, "that the brokers have been brought into the action simply to enable the plaintiff to bring the other defendants within the jurisdiction," and he refused the order.

That is the case here, there is no plausible cause of action brought in the jurisdiction against the plaintiff Trowbridge, and the order in question should be set aside.

In the second appeal by Trowbridge to set aside the counter-claim as shewing no cause of action against him, there is no cause of action set up against Trowbridge, his name only appears incidentally as the agent of the Clipper Line. No facts are stated which suggest any claim against him. He is not a contracting party, and no relief is asked. In *Republic of Peru* v. *Peruvian Guano Co.* (1887), 36 Ch. D. 489, it was held that a pleading could be struck out when in the opinion of the Court there was no reasonable prospect that the case raised by the pleading would succeed at the hearing *secus* if the pleadings present a substantial case; but evidence is not admissible to support the pleading.

DRAKE, J.

The defendants, however, rely on a previous order of the Full Court allowing service out of the jurisdiction made in March last. This order was based on the evidence then before the Court. Now that the statement of counter-claim is produced, which only can be looked at on this application, I am of opinion

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that there is no cause of action shewn against the plaintiff Trowbridge, and therefore the counter-claim against the Clipper Line has no foundation under our rules.

Both appeals should be allowed with costs.

MARTIN, J.: I concur in the judgment of my brother DRAKE that the appeal should be allowed, and need only add that the question as to whether the Pacific Clipper Line was resident within the jurisdiction or not, was not brought to the attention of this Court on the former appeal, nor was it considered.

Appeals allowed, Hunter, C.J., dissenting.

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Jan 7.

WALLACE v. WARD.

County Court—Examination of judgment debtor—Committal order—Conditional—Form of order—Service—Order XIX., rr. 13 and 14z.—Practice.

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An order to commit under section 193 of the County Courts Act must be absolute, not conditional.

Where an order to commit a party is made in his absence he must be served with a copy of the order before arrest.

Orders to commit should be drawn up and should contain the terms on which discharge out of custody may be obtained as required by Order XIX., r. 13.

Where a Registrar is present and takes a minute of an order, the minute so taken is conclusive, even though the Judge's recollection of the order is different.

Statement

AFTER the examination of the defendant, W. A. Ward, as a judgment debtor, an adjournment was taken so that the secretary of a joint stock company, of which the defendant was president, might be examined, and after such examination it was ordered that the defendant do pay on or before December 10th, 1902, the sum of $50 and thereafter monthly instalments of $50 each, and in default of the payment of the sum of $50 on or be-

fore the 10th of December, should be committed for ten days. The defendant, who was not present when the order was made, made default in the first payment, whereupon plaintiff's solicitor obtained from the Registrar the usual warrant of committal. Upon the service of the warrant, defendant's solicitor took out a summons to set aside the warrant and to vacate the order upon which it was based, firstly, on the ground that the order was conditional and therefore void, secondly, that no copy of the order had been served upon the defendant, and further, that the warrant be set aside and quashed for the reason that it was based upon a conditional order. No order was drawn up and no note of the order was made at the time by the Judge, who stated, however, that he did not make the order as it appeared from the Registrar's minute, but had made an absolute order for the issuance of the warrant forthwith, with the usual term of suspension. The only notice of the order received by the defendant was a letter from plaintiff's solicitors embodying the terms of the order as it appeared from the Registrar's minute.

G. E. Powell, for the application, cited *Chichester* v. *Gordon et al* (1866), 25 U.C.Q.B. 527 at p. 531; *Re Woltz* v. *Blakely* (1886), 11 P.R. 430; *Abley* v. *Dale* (1850), 14 Jur. 1,069; *Reg.* v. *Judge of Brompton County Court* (1886), 18 Q.B.D. 213; *Dews* v. *Ryley* (1851), 15 Jur. 1,159 and R.S.B.C. 1897, Cap. 52, Sec. 21. Argument

Alexis Martin, for plaintiff.

7th January, 1903.

DRAKE, J.: The Registrar's minute, however erroneous, is conclusive as to the terms of the order, which is conditional and therefore void, and the warrant of committal based upon it must be quashed: see *Dews* v. *Ryley* (1851), 15 Jur. 1,159.

Under section 21 of the County Courts Act, R.S.B.C. 1897, Cap. 52, it is the duty of the Sheriff where no direction to the contrary is given, to serve all orders, decrees, judgments and processes issued out of the County Court, and inasmuch as the order had been made in defendant's absence, and he had not been served with a copy of the order, it must be vacated. There is a difficulty in construing the County Court Rules on this head; by r. 13 of Order XIX., every order of commitment should contain Judgment

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certain statements and by r. 14z. no order for commitment shall be drawn up or served. I think effect should be given to r. 13 and that an order for commitment should be drawn up and served. The County Court Rules require revision and correction in many particulars.

Note—Rules 13 and 14z. of Order XIX., are as follows:

"(13.) In all cases of commitment for non-payment it should be made part of the order of commitment that on production of a certificate signed by the Registrar stating that payment or satisfaction of the sum, or of the instalment thereof and costs remaining due at the time of making the order for commitment, together with all subsequent costs, has been made, the defendant shall be discharged out of custody, without further leave of the Judge.

"(14z.) Every warrant of commitment shall bear date on the day on which the order for commitment was made, and shall continue in force for one year from such date and no longer, but no order for commitment shall be drawn up or served."

MARTIN, J.

1902

Dec. 16.

THURSTON v. WEYL

THURSTON v. WEYL.

Practice—Entry for trial—Order for—Peremptory.

An order that plaintiff set his action down for trial for a certain Sittings otherwise his action be dismissed without further order, is not a peremptory order for trial.

MOTION to postpone trial. On 25th October, 1902, on an application to dismiss the action for want of prosecution, an order was made by HUNTER, C.J., that "the plaintiff do enter this action for trial at the next Sittings of this Court to be held at the City of Nelson, and in default thereof, that this action be and the same is hereby dismissed with costs, without further order."

Statement

The action was accordingly entered for trial, but on the opening of the Court plaintiff's counsel moved for a postponement on the ground that the plaintiff was absent in New York.

S. S. Taylor, K.C., for the motion: The plaintiff has literally

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complied with the order in setting down the case for trial, and no reason exists why a further postponement may not be had, if good cause is shewn.

John Elliot, for defendant: The order amounts to a peremptory order for trial, and, although there is still a discretion to grant further postponement, such will only be granted in an extreme case. No such case is shewn here: *Falck* v. *Axthelm* (1889), 24 Q.B.D. 174; *Steuart* v. *Gladstone* (1877), 7 Ch. D. 394; *Holdcroft* v. *Lowndes* (1883), 27 Sol. Jo. 296.

MARTIN, J.: The order may have been intended to be peremptory, as is contended by Mr. *Elliot*, but the language does not bear that strict construction; nor is there anything tantamount to an undertaking to go to trial. The plaintiff has literally complied with the order, he has entered the case for trial. The trial will therefore be postponed, on the plaintiff undertaking to go to trial at the next Sittings and to pay the costs of and consequent upon the postponement within six weeks, otherwise the action to stand dismissed.

Judgment

(As costs of a prior interlocutory appeal were due from the defendant to the plaintiff, these were directed to be set off).

NIGHTINGALE v. UNION COLLIERY COMPANY OF BRITISH COLUMBIA, LIMITED LIABILITY.

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April 9.
NIGHTINGALE v. UNION COLLIERY CO.

Negligence—Railway company—Passenger—Mere licensee—Duty of company—Verdict—No evidence to support—Setting aside.

The relation of common carrier and passenger does not exist when a person travels on the locomotive of a coal train without the permission of some officer who has authority to give such permission, and if injured, such a person has no right of action unless injured through the *dolus* as distinguished from the *culpa* of the carrier.

Nightingale had a contract with defendant Company to repair a bridge, and while riding on the locomotive of the Company's coal train on his way

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to the work, he was killed by reason of the train falling through a bridge. The engineer in charge of the train (there being no conductor) had no authority to take passengers, and had instructions not to allow people to travel on the engine without permission from some competent authority, but the Company's officers and servants and other persons authorized by the manager and master mechanic used to ride on the coal train.

A few days before the accident Nightingale and the defendants' manager had gone down to the bridge on the engine of a coal train and returned the same way the same day.

In an action by Nightingale's representative to recover damages from the Company for his death, the jury held that the Company had undertaken to carry Nightingale as a passenger:—

Held, on appeal, setting aside judgment in plaintiff's favour, that there was no evidence to support such a finding, and that Nightingale was a "mere licensee."

Per HUNTER, C.J.: The power which a Judge has to take a case away from the jury should be exercised only when it is clear that plaintiff could not hold a verdict in his favour; if the matter is reasonably open to doubt the Judge should let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict can be supported.

ACTION by Margaret Nightingale, widow and administratrix of Richard Nightingale, for compensation for his death caused while travelling on the defendants' railway by reason of the train falling through a bridge on the Trent River.

Statement

The defendants own and work a colliery in Vancouver 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 in use 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, or by their master

mechanic, used to ride on these coal trains and a few days before the accident Nightingale had gone down from Cumberland to the bridge on the engine of a coal train in company with Little the manager of the Company, to make a preliminary examination and to see what was required to be done, and had returned on the engine with Little the same day. 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. The remaining facts are fully stated in the judgments.

The trial took place at Vancouver in February, 1902, before IRVING, J., and a special jury, who returned the following verdict:

(1.) Were the defendants negligent in the matter of repair, maintaining, or inspecting the bridge or the train? Yes.

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

(3.) Was it customary for persons to travel on the engine of the coal train to such an extent that Mr. Little, the superintendent, in the proper discharge of his duty must have known it? Yes.

(4.) Was it customary for the deceased to travel on the engine of the coal train to such an extent that Mr. Little, the superintendent of the Company, in the proper discharge of his duties must have known it? Yes.

Statement

(5.) Was the deceased at the time of the accident travelling on the train, in connection with defendants' contract, or on his own private affairs? In connection with defendants' contract.

(6.) 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 the Company's business? Yes.

(7.) Do you imply such consent was given? Yes.

(8.) Damages and how apportioned? $8,500.

Widow (plaintiff), $1,500; Emily (aged 18) and Mary (aged 15), $750 each; Albert (aged 5) and Florence (aged 3), $2,750 each.

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On the verdict judgment was entered in plaintiff's favour for $8,500 and costs.

The defendants appealed to the Full Court and the appeal was argued at Victoria on the 6th and 7th of January, 1903, before HUNTER, C.J., DRAKE and MARTIN, JJ.

Luxton, for appellant: There is no evidence to warrant the answers to questions 6 and 7. The plaintiff in order to succeed must shew that Nightingale with the Company's consent was a passenger, *i.e.*, within the meaning of that term as defined in Beven, 3rd Ed., 1,154 and Parsons on Railway Companies and Passengers, 36. A passenger train ran the same day, but not having taken it he was in the same position as the person who rides on the freight instead of the passenger elevator: see *Amerine* v. *Porteous* (1895), 63 N.W. 300.

Those in charge of the train had no authority whatever to carry passengers and the position of a carrier cannot be forced on anyone without his consent: *Wade* v. *Lutcher & Moore Cypress Lumber Co.* (1896), 74 Fed. 517; *Lygo* v. *Newbold* (1854), 9 Ex. 302; *Austin* v. *The Great Western Railway Co.* (1867), L.R. 2 Q.B. 442 and *Degg* v. *Midland Railway Co.* (1857), 1 H. & N. 773.

Argument

Even if Nightingale was going to his work the defendant Company is not liable; so far as he was concerned it was under no obligation to maintain the bridge: *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; *Graham* v. *Toronto, Grey, and Bruce Railway Co.* (1874), 23 U.C.C.P. 541; *Sheerman* v. *Toronto, Grey, and Bruce Railway Co.* (1874), 34 U.C.Q.B. 451; *Files* v. *Boston & A. R. Co.* (1889), 21 N.E. 311; *McCauley* v. *Tennessee Coal, Iron & Railroad Co.* (1891), 9 South. 611; *Virginia Midland R. Co.* v. *Roach* (1887), 34 Am. & Eng. R.R. Cas. 271 and Hodges on Railways, 545.

Nothing short of *dolus* will make a licensor liable and as to meaning of *dolus* see Bouvier, 599 and *Mitchell* v. *Crassweller*, (1853), 13 C.B. 237.

He was a licensee and took things at his peril: see *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; *Hounsell* v. *Smyth* (1860), 7

C.B.N.S. 731; *Gallagher* v. *Humphrey* (1862), 6 L.T.N.S. 684; *Bolch* v. *Smith* (1862), 31 L.J., Ex. 201.

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[HUNTER, C.J.: Assume a man is invited on an engine by a competent official and rides, what is the relation between them? Or, assume I am running a merry-go-round for hire and I take you for a ride without payment, and it breaks down and you get hurt, what is the position?]

I could not recover against you. The trial Judge refused to put the question as to whether the engineer had authority to let those who were on the engine ride, and what is necessary to constitute consent was not put: see *Beard* v. *London General Omnibus Co.* (1900), 2 Q.B. 530. The presumption is that a person on a freight train is not a passenger: *Eaton* v. *The Delaware, Lackawanna and Western Railroad Co.* (1874), 57 N.Y. 382 and *International & G. N. Ry. Co.* v. *Hanna* (1900), 58 S.W. 548.

At the trial the deposition of the witness Work (who died before trial) before the coroner's inquest was tendered and improperly ruled out: see *Sills* v. *Brown* (1840), 9 Car. & P. 601.

Nightingale knew or should have known the condition of the bridge: Roberts & Wallace on Employers, 252 and *Woodley* v. *Metropolitan District Railway Co.* (1877), 2 Ex. D. 384.

Macdonell, for the respondent: As to contributory negligence on the part of Nightingale, he was employed to build stone work or piers for a new bridge to take the place of the old one and so could not be supposed to know anything of the condition of the timbers of the old bridge.

Argument

Work's deposition was not admissible: Taylor on Evidence, 9th Ed., 339 and *Reg.* v. *Rigg* (1866), 4 F. & F. 1,085. It was taken on an inquiry, under section 569 of the Criminal Code, as to the cause of the death of Robert Walker and others, and the evidence before a coroner is on a different basis now from what it was when *Sills* v. *Brown, supra*, was decided.

He read from the evidence to shew Walker's authority and that it was competent to the jury to draw the inferences they did in arriving at their conclusion in regard to question 6; it was the custom for those in the employ of the defendants to travel on the train. As to invitation by an agent in charge of a

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carrier's conveyance he cited Am. & Eng. Encyclopædia of Law, Vol. 5, p. 495 and Fetter, 584.

Luxton, replied.

Cur. adv. vult.

9th April, 1903.

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HUNTER, C.J.: This is an action for compensation for the death of the plaintiff's husband caused while travelling on the defendants' railway by reason of the train falling through a bridge on the Trent River.

The deceased was a contractor under contract with the defendants to repair the foundations of the bridge which collapsed, and two or three days before the accident had gone down to the bridge on the engine of a coal train in company with Little, the manager of the Company, to make a preliminary examination and to see what was required to be done, and had returned on the engine with Little on the same day. He again went down on a coal train engine before the day of the accident, but without Little's knowledge or permission, and likewise on the day of the accident, being, as the jury found, on his way to work on the bridge.

The learned trial Judge had power to dismiss the action if he considered that there was no evidence on which the jury could reasonably find that the Company had received the deceased on the engine as a passenger (see *Hiddle* v. *National Fire and* HUNTER, C.J. *Marine Insurance Co. of New Zealand* (1896), A.C. 372; *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 318), but I think rightly allowed the case to go to the jury so as to obviate as far as possible the necessity for a new trial in the event of an Appellate Court holding a contrary opinion; and generally speaking, I think the power to take away the case from the jury ought to be exercised only when it is very clear indeed that the plaintiff could not hold a verdict in his favour. If the matter is reasonably open to doubt the Judge ought to let the case go to the jury, and then decide, if necessary, whether there is any evidence on which the verdict or findings can be supported, and give judgment accordingly, as was done in *Spooner* v. *Browning* (1898), 1 Q.B. 528 and *Hooper* v. *Holmes* (1896), 12 T.L.R. 537; 13 T.L.R. 6. See also *Peters*

v. *Perry and Co.* (1894), 10 T.L.R. 366; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,169 at p. 1,204.

The jury found all the questions in favour of the plaintiff, and fixed the damages at $8,500, and the Company appeal from the judgment entered on the verdict.

A number of points were discussed before us which I do not think it is necessary to enter into, as I am of opinion that the action fails on the ground that there was no evidence on which any jury could reasonably find that the relations of common carrier and passenger existed between the Company and the deceased at the time of the accident, and it was conceded both here and at the trial that there was no cause of action unless such relations did exist.

In approaching the consideration of the question whether any actionable negligence has been proved against the Company, it is well I think to have in mind the remarks of Lord Herschell in *Membery* v. *Great Western Railway Co.* (1889), 14 App. Cas. 179 at p. 190. He says: "I think that wherever there is a charge of negligence it is of the utmost importance, in order to avoid confusion and the danger of mistake, to remember that negligence implies the allegation of a breach of duty—a duty to take care—and to inquire at once what duty, if any, there was on the part of the persons charged with negligence to take care, and if there was any such duty, what was the extent of it at the time and under the circumstances which existed on the occasion when negligence is alleged to have been committed. Now, I do not for a moment doubt there was a duty incumbent upon the defendants towards the plaintiff at the time when he was upon their premises. They were not without duty towards him. But it is not enough to arrive at the conclusion that there was a duty or even a duty to take care; the extent of the duty requires to be determined." Similarly, Willes, J., says in *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371 at p. 374: "It is not enough to shew that the defendant has been guilty of negligence, without shewing in what respect he was negligent, and how he became bound to use care to prevent injury to others."

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Now, uncontradicted evidence was given that the deceased at

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the time of death was travelling on a locomotive attached to a heavy coal train; that he was on the engine without the knowledge or permission of the manager; that no other officer could give such permission; that the engineer (who was in charge, there being no conductor) had no authority to take passengers and had instructions not to allow people to travel on the engine unless they had permission from the manager, who could give permission to any person, or from the master mechanic who could give permission to workmen under his supervision; that the deceased paid no fare; that the Company although primarily a coal mining Company provided a train for passengers on the day in question, and that the deceased could have travelled on it had he wished to do so. If the matter rested here I do not see how any jury could reasonably find that the Company had received the deceased as a passenger on the locomotive; indeed it would be beyond controversy that he was at most a mere licensee who was travelling at his own risk. If I invite a contractor who is building my house into my carriage and drive him down two or three times to the place, this would not warrant him without my permission in getting into it because he saw my coachman driving in the direction of the house, and in holding me responsible in the event of an accident arising either from the coachman's negligence or by reason of some defect in the vehicle. Neither the vehicle nor the locomotive is operated for the common carriage of passengers, and I see no distinction in principle between them.

However, some half-dozen witnesses were called for the plaintiff to prove that they had frequently travelled up and down on the engines of coal trains, but it appeared that they were all workmen in the employ of the Company, with the possible exception of one Hay, as to whom it does not clearly appear whether he was in the employ of the Company or not. Therefore the testimony of these witnesses does not aid the plaintiff. Grant, the fireman, also testified that the number of people who travelled on the engine where he was fireman would average about two a week; but he also says that it was a common thing for employees of the Company to do so, so that it is quite consistent with his statement that nearly all, if not all, of those

persons who so travelled to his knowledge were employees of the Company. He also testified that at the time of the accident there were besides himself and the engineer on the engine two women and two Japanese, but as these may have been trespassers, or at most mere licensees equally with the plaintiff, I do not see how this fact carries the matter any further; in fact there is nothing in the evidence to negative the possibility that all who were shewn to have travelled on the engines were, with the exception of the deceased, employees of the Company, and not passengers.

The Company say in effect, and I think have a right to say, that we had no intention of carrying the deceased as a passenger. If we had we would not have carried him on a coal train, or at least we would have carried him at his own risk. Nor could he have compelled us to carry him as a passenger on the locomotive. The line was built primarily for carrying coal, and although it is true we carry passengers, it is only at times, and by vehicles appointed for that purpose, and we ought not to be assumed to have undertaken to carry passengers on the engines of heavy coal trains when we provided lighter trains with ample passenger accommodation, merely because it appears that employees and others travelled on the engines without objection on the part of the driver, although in opposition to our express instructions.

Upon what principle can the Company be held to have undertaken the duty of a carrier of passengers to a person who boards a coal train locomotive for his own convenience without the permission of any officer of the Company who has authority to give such permission? It seems to me that such a person can not be regarded in any sense as a passenger, but is at best a mere licensee, and that he is on the engine at his own risk. If he is a passenger then he would have a right to demand that the engine should be fitted for his carriage as a passenger, and if thrown out and hurt by a jolt on a curve he would have an action; but the mere statement of such a proposition is enough to shew that it is clearly untenable. If the Company owes him any duty at all, it is that he shall not be injured by the *dolus* as distinguished from the *culpa* of the Company.

HUNTER, C.J.

It is unnecessary for me to go minutely into the authorities.

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NIGHTINGALE v. UNION COLLIERY CO.

HUNTER, C.J.

So far as I know there is no case decided in England which is close in its facts to this case, but the principles to be collected from the cases of *Lygo* v. *Newbold* (1854), 9 Ex. 302; *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115; *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371, in my opinion fully warrant the views above expressed. In Canada the nearest cases appear to be those of *Blackmore* v. *Toronto Street Railway Co.* (1876), 38 U.C.Q.B. 211; *Sheerman* v. *Toronto, Grey, and Bruce Railway Co.* (1874), 34 U.C.Q.B. 451 and *Graham* v. *Toronto, Grey, and Bruce Railway Co.* (1874), 23 U.C.C.P. 541, in the latter of which will be found a judgment of Hagarty, C.J., to which I would particularly refer. On the other hand there is a mass of authority in the United States which is closely in point, and in harmony with these views, of which it may be sufficient to refer to *Files* v. *Boston & A. R. Co.* (1889), 21 N.E. 311; *Powers* v. *Boston & M. R. Co.* (1891), 26 N.E. 446; *Eaton* v. *The Delaware, Lackawanna and Western Railroad Co.* (1874), 57 N.Y. 382; *Morris* v. *Brown* (1888), 111 N.Y. 318; 7 Am. St. Rep. 751; *Virginia Midland R. Co.* v. *Roach* (1887), 34 Am. & Eng. R.R. Cas. 271; *Snyder* v. *Natchez, Red River and Texas R. Co.* (1890), 44 Am. & Eng. R. R. Cas. 278; *International & G. N. Ry. Co.* v. *Hanna* (1900), 58 S.W. 548; *McCauley* v. *Tennessee Coal, Iron and Railroad Co.* (1891), 9 South. 611; *Evansville & R. R. Co.* v. *Barnes* (1894), 137 Ind. 306; 36 N.E. 1,092, most of which were brought to our attention by Mr. *Luxton* in his careful argument.

I think the appeal must be allowed with costs, and the action dismissed with costs.

DRAKE, J.

DRAKE, J.: I agree.

MARTIN, J.

MARTIN, J.: This is a case of unusual interest and one in which there is danger of confusion of principles unless the main facts are kept clearly in mind.

The defendant Company operates a line of railway on its own lands on Vancouver Island, between the town of Cumberland (Union Station) and Union Wharf, a distance of ten and a half miles. About seven miles from Cumberland the Trent River was crossed by a railway bridge, the breaking of which caused the death of the deceased. At the time of the accident the said

bridge could also be reached from Cumberland or from Union Wharf by a good road some seven miles long, the distance from Cumberland to said bridge by said road being about five miles, and from Union Wharf to the bridge about two miles. There was adequate hotel accommodation both at Cumberland and Union Wharf, and there was a suitable place for a working party to camp at said bridge, and the weather was fine.

The deceased had a contract with the defendant Company to build two piers to support said bridge, and at the time of the accident, Wednesday, 17th August, 1898, some of his workmen who were engaged upon the contract were camped below the bridge.

Though the home of the deceased was at Nanaimo, he was then boarding at the Union Hotel in Cumberland, and at 7 a.m., or a little later, on the day above mentioned he, with five others (two women, a white man and two Japanese), got into the cab of the locomotive of the defendants' freight train (consisting of twenty cars of coal and one of lumber) going to Union Wharf. The crew of the train consisted of the engineer (Walker), a fireman (Grant), and two brakemen. There was no conductor, but the engineer practically also acted in that capacity, being in charge of the train and giving all necessary orders.

On entering upon the bridge the train had been slowed down in order to let deceased off at a convenient place at the far end, but when about half-way across the train fell through it, a fall of about 90 feet, killing the deceased and others.

It is alleged that the defendant Company is liable in damages because the deceased was its passenger, or if not so in the strictest meaning of that term, then alternatively, that he was so lawfully upon the train that the duty to safely carry him was imposed upon the defendant Company to as great an extent as if he were a passenger, and that, consequently, the defendants were guilty of negligence in not maintaining and keeping said bridge in a proper state of repair.

For the defence it is contended, first, that the deceased was a trespasser who, in defiance of the regulations of the Company boarded the freight train to suit his own convenience, and neither paid nor offered to pay his fare, and so should have been put off

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by the train hands if they had carried out their orders, and consequently the Company was under no obligation to carry him safely, or at all. Second, and alternatively, it is urged that if not a trespasser the deceased could, in the most favourable light be only regarded as a bare licensee who assumed all the risks of such a status and to whom the defendant Company owed no duty whatever, and was liable for nothing short of wilfully inflicted injuries, or at the most, negligence of a gross character, of which, it is submitted, there is no evidence at all.

Up to March, 1896, the Company had no passenger train on its line, and apparently the freight trains were largely used by the general public, but on and after that date passenger trains ran on two mornings a week between Union Station and Union Wharf, on Wednesdays at half-past eleven, and on Fridays at half-past seven. The coal train continued to run daily, leaving Union Station at about 7 a.m. In going to the scene of his contract on the day of the accident, the deceased could either have got to Trent Bridge at the time his men began work at seven by taking the road, or later at half-past eleven by taking the passenger train and paying his fare; but to suit his own convenience he took the freight train at seven or a little later. Or had he boarded at Union Wharf, only two miles away by the road, or camped at the place where he was performing his contract, there would have been, even from his point of view, no reason

MARTIN, J.

to resort to that freight train. Under the above circumstances the presumption of law is that the deceased was a trespasser on the coal train and the onus of rebutting that presumption is on the plaintiff. If authority is needed for a proposition so self-evident it will be found in *Eaton* v. *The Delaware, Lackawanna and Western Railroad Co.* (1874), 57 N. Y. 382; *Blackmore* v. *The Toronto Street Railway Co.* (1876), 38 U.C.Q.B. at pp. 210-11; and *Waterbury* v. *New York C. & H. R. R. Co.* (1883), 17 Fed. 671.

There is no doubt that it was a rule of the Company that no one should be allowed to ride on its locomotives or freight trains, and that conspicuous notices to that effect had been posted up on the old freight engine (No. 3), and probably also one at first on the new one (No. 4) when it was put on that run

some three months before the accident—see the evidence of J. B. McLean, Appeal Book pp. 137-8—but engine No. 4 was broken up in the wreck, and it is not shewn that the notice was there at the time of the accident, and McLean says that he had to replace the notices "many a time" on the old engine because they were torn off. The effect of the fireman's (Grant) evidence is that it was not on the new engine, No. 4, at that time.

It is clear that pursuant to the rule of the Company people had been put off the engine, but it is likewise clear that there is evidence to go to the jury that the rule had been relaxed by the engineer in the presence of the defendants' manager himself in a very few instances, and it was constantly relaxed in his absence in favour of a number of persons—sometimes as a matter of right in the case of orders to carry the defendants' employees for particular purposes—sometimes in the case of persons who found favour with the engineer, who was a good-natured man and often gave free transportation to his friends—and also sometimes in the case of persons whose status is not defined but who apparently thought they either had a right by virtue of general tacit permission to ride on the said train, or at least had no immediate reason to fear being ejected therefrom.

On the question of the extent of such usage or custom being permitted by or known to the Company, certain questions (3 to 7 inclusive) were put to the jury. It is necessary to consider them briefly because it has been argued that there was no evidence at all to go to the jury on those points.

MARTIN, J.

After a careful review of all the evidence, I am of the opinion that there was such evidence as regards the third question, but it is so framed that it is of no practical assistance in determining the real question herein, because it fails to touch the precise point, which is not whether "persons" as mentioned therein were more or less accustomed to travel on the engine (which could not be denied), but whether "passengers," or the "public" as distinguished from the Company's own servants or those who had express permission or some contractual right, did so. As the question stands answered, it is uncertain and inconclusive. And it is also to be noted that there is neither evidence nor finding to shew that any of those "persons" had before the day

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of the accident been carried on the freight train on the days the passenger train was running, though this is an important feature of the case.

On the fourth and fifth questions I am of opinion that there was evidence to go to the jury.

On the sixth and seventh, I am of opinion that there was no evidence to go to the jury, but quite the reverse, and consequently they must be disregarded.

On the questions of negligence—Nos. 1 and 2—there was evidence to go to the jury.

I see no reason to interfere with the finding as to the amount of damages, if the defendants are liable therefor.

Seeing then that the defendant Company was negligent in maintaining and repairing the bridge, and could have detected the cause of the accident by ordinary skill and care, the question is what duty did the defendants owe the deceased? Before this can be answered, the exact position of the deceased towards the defendants must be ascertained.

After examining in the light of the facts a great number of authorities, both British and American, I am of the opinion that the deceased cannot be regarded in a more favourable light than that of a bare or mere licensee as distinguished from a licensee, the distinction being pointed out in *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254, wherein it was found as a fact that there had been an invitation to use the defendants' flagged walk which was not maintained in a proper condition.

MARTIN, J.

In the case of a bare licensee—to quote the singularly apt language of Mr. Baron Martin in *Bolch* v. *Smith* (1862), 31 L.J., Ex. 201 at p. 204: "The only right acquire(d) is the right of not being treated as a trespasser. The plaintiff had the option of going one of two ways, this being one; he voluntarily chose this, and he has no right of action against the defendant because the way is out of order, and he ought to have been non-suited at the trial."

I pause here to say that however limited the extent of the right of a bare licensee may be, it nevertheless renders inapplicable to this case decisions in England of the class of *Lygo* v. *Newbold* (1854), 9 Ex. 302; in Ontario of *Graham* v. *Toronto*,

Grey, and Bruce Railway Co. (1874), 23 U.C.C.P. 541; and *Sheerman* v. *Toronto, Grey, and Bruce Railway Co.* (1874), 34 U.C.Q.B. 451; and in the United States of *Baltimore & O. S. W. Ry. Co.* v. *Cox* (1902), 26 Am. & Eng. R.R. Cas. N.S. 939, which are all really based on the person injured being an unlawful intruder, *i. e.*, a trespasser. The status of a bare licensee is midway between that of a trespasser and a passenger in the various, and sometimes conflicting and misconceived senses of the last term, as to which the following authorities (in addition to those elsewhere cited herein, and at the bar) may be consulted—Hodges on Railways (1888), 594-6; 5 Am. & Eng. Enc. of Law (2nd Ed.) 486-516; Fetter on Carriers (1897), at pp. 210 *et seq.*; *Gradert* v. *Chicago & N. W. Ry. Co.* (1899), 20 Am. & Eng. R. R. Cas. N.S. 118; *Compton* v. *Marshall* (1894), 27 S.W. 121; *Louisville & N. R. Co.* v. *Hailey* (1895), 29 S. W. 367; *Philadelphia and Reading Railroad Co.* v. *Derby* (1852), 55 U.S. 467; *Steamboat New World* v. *King* (1853), 57 U. S. 469 at p. 473; *Pennsylvania Company* v. *Roy* (1880), 102 U. S. 451; and *Waterbury* v. *New York C. & H. R. R. Co.* (1883), 17 Fed. 671.

Instead of the presence of the deceased on the engine being at the invitation, express or implied, or for the benefit of the defendant Company, the fact is that it was undesired and a hindrance to the proper running of the engine and train. He was there solely for his own convenience and benefit and without any necessity for so being for the purpose of performing his contract. True it is that so long as he was allowed to remain he could not accurately be called a trespasser, but whatever his status was it could be summarily determined, and at any convenient point on the line the engineer could have stopped the train and lawfully ejected him without his having any just cause for complaint. Until he was ejected, his presence was simply tolerated. In the operation of the railroad there was nothing in the nature of "allurement," as it has been styled in some cases, by the defendants or any concealment of defects in the line or anything in the nature of a trap.

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The general rule of law governing such circumstances I find conveniently stated in Vol. 19 of the Ruling Cases, p. 60, where three leading cases on the subject are considered, *i. e.*, first,

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Southcote v. *Stanley* (1856), 1 H. & N. 247; second, and in particular, *Indermaur* v. *Dames* (1866-7), L.R. 1 C.P. 274; 2 C.P. 311; and, third, *Heaven* v. *Pender* (1883), 11 Q.B.D. 503. The rule is as follows:

"A person who invites another to come on his premises upon a business in which both are concerned is bound to take care that his premises and all appliances provided by the owner as incident to the use of his premises are safe for that other person to come upon and use them as required; or else to give due warning of any danger to be avoided. But where the stranger comes as a guest or by a bare licence, the owner of the premises is only bound to warn him of anything in the nature of a trap upon the premises."

To the same effect are *Hounsell* v. *Smyth* (1860), 7 C.B.N.S. 731; *Gallagher* v. *Humphrey* (1862), 6 L.T.N.S. 684; and *Gautret* v. *Egerton* (1867), L.R. 2 C.P. 371; all of which shew that in the case of a bare licensee, as Mr. Justice Willes puts it in the last named, "to bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty; otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. It may be, as in *Corby* v. *Hill* (1858), 4 C.B.N.S. 556, that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way; but I cannot conceive that he could incur any responsibility merely by reason of allowing the way to be out of repair."

MARTIN, J.

In *Moffatt* v. *Bateman* (1869), L.R. 3 P.C. 115, the Lords of the Privy Council held that the plaintiff was not entitled to recover for injuries received by the breaking of the king bolt of the carriage in which the defendant, his employer, had invited him to drive. That was a stronger case for the plaintiff than this, but it was held that the defendant would be liable if at all only for negligence of a gross description—"a term which is sufficiently descriptive of the degree of negligence which renders a person performing a gratuitous service for another, responsible."

The rule laid down in *Moffatt* v. *Bateman* was applied by the Court of Queen's Bench in Ontario in Appeal in *Blackmore* v. *The Toronto Street Railway Co.* (1876), 38 U.C.Q.B. 172 at p. 207, in the case of a news-boy who was held to be on the car of the defendant company as a bare or mere licensee, and therefore no action lay against the company because of a defective step on the platform of the car. Mr. Justice Burton, p. 214, says:

"It is clear that there was no duty on the part of the defendants as regards the deceased to have the step of the cars in any other condition from that in which he found it when he availed himself of the permission to enter. He acquired no right, and whatever may have been the obligation of the defendants as regards their passengers, they owed no duty to the deceased to keep the steps of the car in repair."

And at p. 215 Mr. Justice Moss, afterwards Chief Justice of Ontario, says:

"The licensee must take the vehicle as it is. He cannot claim that it should have been safer or stronger or better. He cannot insist that it should have been repaired before he entered it, or hold the carrier responsible because it was not as safe as it would have been if something had been done which has been left undone."

The case at bar bears, in my opinion, a close resemblance to that of *Ivay* v. *Hedges* (1882), 9 Q.B.D. 80, wherein an action was brought by a tenant against his landlord for injuries received by the tenant through falling off the flat roof of a house whereon he was exercising a privilege that he had, in common with other tenants, of drying linen. In removing such linen, the plaintiff slipped and fell through the guard rail round the roof, which was out of repair to the knowledge of the landlord. It was held that the plaintiff was a mere licensee, and not entitled to recover. Lord Chief Justice Coleridge pointed out that the position of the parties was as though the landlord had in fact said "I let you certain rooms, and, if you like to dry your linen on the leads, you may do so—in that case the tenant takes the premises as he finds them."

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And Mr. Justice Grove said: "I am of the same opinion. There was clearly no duty cast by law upon the landlord under

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the circumstances of this case to fence his roof in the way suggested. There would be no end of these cases if we were to hold that there was evidence fit to be left to a jury."

This case was approved by the Court of Appeal in *Batchelor* v. *Fortescue* (1883), 11 Q.B.D. 474, and I draw attention to this decision because it is a very strong one in which all the seven Judges who sat, both at the trial and on appeal, arrived at the same conclusion. On the facts they held that the plaintiff, who had been injured by the breaking of certain machinery on premises on which he had entered, was in the position of a bare licensee, and in such case Mr. Justice A. L. Smith states, at p. 476: "The plaintiff stood where he did subject to all the risks attending his being where he was . . . . and that there was no duty cast upon the defendant to take due and reasonable care of him."

And again, p. 477, on the question of negligence in such case the same learned Judge states: "As to the second point argued, *viz.*, whether there was any evidence of negligence on the part of the defendant's servants, we think that, though slender, coupled with the admission in the pleadings that the chain was somewhat worn, it could not properly have been withdrawn from the jury; but, inasmuch as the plaintiff failed to establish by evidence a duty on the part of the defendant to take due and reasonable care of the deceased, in our judgment the learned Judge did not misdirect the jury, and the verdict and judgment entered by him (in favour of the defendant) must stand, and this rule must be discharged with costs."

MARTIN, J.

In view of the above authorities and facts, I am of the opinion that, to apply the language of Mr. Justice Willes in *Indermaur* v. *Dames, supra,* to the case of the deceased, "A complaint on the part of such an one (a bare licensee) may be said to wear the colour of ingratitude, as there (was) no design to injure him." And as Mr. Justice Moss said in *Blackmore* v. *Toronto Street Railway Co. supra,* p. 217: "I am glad not to be called upon to exercise the cruel kindness of sending this case back for a new trial," because as the result of the two trials which have already been had there is no probability of the status of the deceased being put on a higher plane than it has heretofore appeared to be.

In my opinion, judgment should be entered in favour of the defendant Company with costs here and below.

Appeal allowed with costs.

IN RE THE LENORA MOUNT SICKER COPPER MINING COMPANY, LIMITED.

Winding-up—Leave to bring action—Secured creditors—Proving claims—R.S.C. 1886, Cap. 129, Secs. 62 et seq.

A secured creditor has a right to apply for and obtain leave to bring an action to enforce his security.

It is not optional for a secured creditor to either prove his claim in a winding up or else proceed with an action to enforce it, and if he does commence an action it is still compulsory on him to proceed before the liquidator under sections 63 *et seq.* of the Act.

SUMMONS on behalf of John Bryden and Sir C. H. Tupper, for leave to commence a foreclosure action against the Company which on the 19th of November, 1902, was ordered to be wound up. The applicants were the joint holders of three different mortgages of the lands and assets of the Company and under which they entered into possession on the 28th of October, and were still in possession; they also held a chattel mortgage covering the personal property of the Company. The summons was argued before DRAKE, J.

Statement

Peters, K.C., for the summons.

Oliver, for the liquidator.

W. J. Taylor, K.C., Bodwell, K.C., and *Fell*, for unsecured creditors.

Belyea, K.C., for holders of mechanics' liens.

DRAKE, J.

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IN RE LENORA

23rd December, 1902.

DRAKE, J.: Mr. *Peters* asks on behalf of the mortgagees leave to commence an action of foreclosure under section 16 of the Winding Up Act, 1886. He contends that a mortgagee is entitled to exercise an option to come in under the Winding Up Act or not, but if he does not he then requires leave of the Court to commence his action. He cited several English authorities in support of his proposition, but these cases when examined do not, in my opinion, apply to the Dominion Winding Up Act. They are founded on the express wording of section 12 of the Bankruptcy Act (Imperial), 1869: see *In re David Lloyd & Co.* (1877), 6 Ch. D. 339, followed in *In re Longdendale Cotton Spinning Co.* (1878), 8 Ch. D. 150. I may here point out that section 63 of the Winding Up Act is almost identical with section 84 of the Insolvent Act of Canada, 1875. My attention has not been drawn to any authorities since 1875 which give an option to a secured creditor to enforce his securities without reference to sections 63 *et seq.* In my opinion, this section is compulsory on all secured creditors and there may be very good reasons adduced for its existence in the statutes, for instance, if the mortgaged property is of considerable value in excess of the amount for which it is pledged, it gives the liquidator an opportunity of realizing such surplus for the benefit of unsecured creditors. I, however, see no objection to the mortgagees proceeding with their proposed action. They have the power by summary petition under section 39, but as these claims may be disputed it is perhaps better to proceed in the usual way. The mortgagees, however, will as soon as the accounts are taken, proceed under section 63. The reason for this is that it has been held in the case of *Bell* v. *Ross* (1885), 11 A.R. 458, that under section 84 of the Bankruptcy and Insolvent Act if the assignee in bankruptcy assents to the retention of the security that the creditor thereby becomes a purchaser freed from the equity of redemption. Whether the same reasons will apply to section 63 is a matter for consideration. The order will go.

Judgment

Order accordingly.

ALASKA PACKERS ASSOCIATION v. SPENCER.

HUNTER, C.J. (In Chambers)

1902

June 4.

ALASKA PACKERS ASSOCIATION v. SPENCER

Practice—Particulars—Of matters in opposite party's knowledge.

Particulars are ordered for the purpose of forwarding the applicant's case and not to hamper the party ordered to give them.

When a plaintiff is ordered to give particulars of negligence which are essentially within the defendant's knowledge, the order may provide that the plaintiff should not be confined at the trial to the particulars given.

SUMMONS for particulars. This was an action for damages for the negligence of defendant, his servant and agents, who were handling a tug which attempted to tow the plaintiffs' ship from a dangerous position at Trial Island near Victoria. The plaintiffs alleged that the equipment and machinery of the tug were insufficient for the purposes for which they were attempted to be used with the result that the ship was allowed to drift on the rocks. The defendant applied for particulars of the insufficiency and want of equipment and the summons was argued before HUNTER, C.J.

Statement

J. H. Lawson, Jr., for the plaintiffs, said it was impossible for them to give the particulars as all the facts were in the knowledge of the defendant.

Griffin, for the defendant: A plaintiff is not entitled to go to trial with a fishing case, but must allege every item of negligence which he desires to prove.

Argument

4th June, 1902.

HUNTER, C.J.: I must order the plaintiffs to give such particulars as are in their power, but as it is plain from the nature of the case that the defendants must know more than the plaintiffs about the condition of their own machinery and equipment, the order will go on the terms that the plaintiffs are not to be confined at the trial to the particulars given. Particulars are ordered to forward the applicant's case and not to hamper the opponent's case.

Judgment

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ELSON v. THE NORTH AMERICAN LIFE ASSURANCE COMPANY.

ELSON
v.
NORTH
AMERICAN
LIFE

Insurance, life—Policy—"Signed, sealed and delivered"—When complete—Insured taking hazardous employment without permission—Retention of premium paid after with knowledge of facts—Estoppel—Incontestable clause.

A policy of insurance "signed, sealed and delivered" by the President and Managing Director of an insurance company is complete and binding as against the company from the date of execution though in fact it remains in the company's possession, unless there remains some act to be done by the other party to declare his adoption of it.

A life policy was subject to a condition making it void if the insured took a hazardous employment without the written permission of the President, Vice-President or Managing Director of the Company. The assured did take such employment without the written permission of any of the officers named, but with the assent of the Company's Provincial agent, and after the change of occupation paid a premium which was retained by the Company with knowledge of the change of occupation :—

Held, that the Company was estopped from taking advantage of the forfeiture clause.

Remarks as to the nature of incontestability clauses in Insurance policies.

Decision of MARTIN, J., reversed.

APPEAL from the judgment of MARTIN, J., dismissing an action on a life policy by the mother of the insured, George William Elson, who was killed on the 30th of September, 1897, by the explosion of a locomotive boiler while engaged as a brakeman on the Canadian Pacific Railway. The amount of the insurance was $1,000 and at the time the application for insurance was made Elson was a bandsaw setter.

Statement

The application for insurance was dated on the 18th of September, 1894. The receipt for the first premium was issued on the same day, a note (which was paid at maturity) being accepted in payment. The policy was issued on the 27th of September, 1894, and forwarded by mail to the Company's agent at Winnipeg, for transmission to Vancouver for the

insured. The subsequent premiums were paid annually on the 28th of September, 1895, the 20th of September, 1896, and the 9th of September, 1897; and the defendants retained all the premiums. In August, 1897, the insured, whose previous occupation was that of a bandsaw setter, became employed on the railway.

The policy contained *inter alia* the following clauses:

"After being in force three years, the only conditions which shall be binding upon the holder of this policy are that he shall make the payments hereon as herein provided, and that the provisions as to residence, travel, occupation, proofs after death and limitation of time for action or suit shall be observed. In all other respects, after the expiration of the said three years, the liability of the Company under this policy shall not be disputed.

"No provisions of this contract can be changed, waived or modified, or permit granted, except by a written agreement signed by the President, a Vice-President or the Managing Director of the Company," and the policy was indorsed with certain conditions—one of which was:

"If any statement made in the application and therein declared to be material to the contract be untrue; or if any premiums, note, cheque or other obligation given on account of a premium, be not paid when due; or if, without a permit, the insured engage as an occupation (1.) in blasting, mining, submarine labour, the production of any explosive material, or in any naval or military service (except in the militia or volunteer corps in defence of Canada); or (2.) engage in aerial or arctic voyages or in employment on a railroad, a steamboat or other vessel; or (3.) reside elsewhere than in Canada, Newfoundland, Europe or the United States; or (4.) between the 15th days of June and November in any year reside in any part of the United States south of the thirty-sixth degree of north latitude, or in Europe south of the forty-second degree, this policy shall be void, and all payments made upon it shall be forfeited to the Company."

Statement

At the trial before MARTIN, J., and a jury, the learned Judge being of the opinion that there was nothing to leave to the jury, discharged them and dismissed the action.

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The plaintiff appealed and the appeal was argued at Vancouver in April, 1902, before HUNTER, C.J., WALKEM and IRVING, JJ. The facts are fully set out in the judgment of the learned Chief Justice.

Duff, K.C., and *Cowan*, for appellant.
Davis, K.C., for respondents.

21st April, 1902.

HUNTER, C.J.: Action on a life policy by the mother of the insured, who was killed on September 30th, 1897, by the explosion of a locomotive while engaged as a brakeman on the Canadian Pacific Railroad.

The application for insurance is dated the 18th of September, 1894, and a receipt for the first premium was issued on the same day, the mode of payment being by note met at maturity. The policy was issued at Toronto on the 27th of September, 1894, and forwarded by mail to the Company's agent at Winnipeg for transmission to Vancouver for delivery to the insured. The subsequent premiums were paid annually on the 28th of September, 1895, 20th September, 1896, and 29th September, 1897, and the Company although disputing the liability, have retained all the premiums. About five months before his death, the insured took employment on the railroad, which is one of the hazardous employments prohibited by the policy.

HUNTER, C.J. In June, 1897, Elson went to Faulkner, General Agent for the Province, and informed him of his change of occupation, and evidence was also tendered to shew that Faulkner about the same time had a conversation with Elson's father, in which he stated that the Company did not consider that the occupation was any more dangerous than the one in which Elson had been engaged—that is, of bandsaw setter.

All evidence tendered as to this was ruled inadmissible, notwithstanding that it was pressed by the plaintiff's counsel both as evidence of notice to the Company from the Provincial agent, and as evidence to go to the jury of an admission by the Company that it had waived the breach. In view of the fact that Mr. *Davis*, for the Company, got all this evidence ruled out, and steadily insisted that there were no facts in dispute, I am

strongly inclined to think that we might take it as admitted that the statement was made by the agent as alleged, and that it would not be open to the Company to object to the Court drawing any inferences of fact necessary for the disposal of the case instead of sending it to another jury; and if this is so, I think that the correct inferences to draw would be that knowledge of the change of occupation must be imputed to the Company through Faulkner, that it had waived any breach of the policy thereby caused, and that it had, by him, acknowledged such waiver. But if the course taken by the Company at the trial does not amount to such admission, and to a consent that the Court should have power to draw all the inferences of fact necessary to dispose of the case, and a new trial would have to be ordered, then the Company should pay all the costs thrown away by reason of such new trial being necessary. But I think that on the material before us it is not necessary to have a new trial, and that our judgment should be for the appellant.

In the first place, the estoppel arising from the conduct of the Company in retaining to this day the premium which it took after knowledge that the breach, if any, had occurred, is strong enough to prevent the Company from taking advantage of any condition in the policy with respect to the alleged breach: see *Wing* v. *Harvey* (1854), 5 De G. M. & G. 265; *Phœnix Life Insurance Co.* v. *Raddin* (1887), 120 U.S. 183; and this even assuming that the condition as regards notice affects the question, which I do not think is the case, as it is more reasonable to hold that this only prescribes the particular kind of notice emanating from the insured which is to affect the Company, than that it was intended to shield the Company from the consequences of knowledge gained through the medium of a general agent.

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In the next place the Company is, I think, precluded from raising this question by the incontestable clause assuming that the policy came in force three years before Elson's death. There is no doubt that the obligation of the Company commenced under this policy on the 27th of September, 1894, the date of its delivery at Toronto. The premium had been accepted, and there is nothing in the contention that the policy was only an escrow

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until it got into the hands of the insured: *Xenos* v. *Wickham* (1866), L.R. 2 H.L. 296.

It was argued by Mr. *Davis* that the incontestable clause fell with the rest of the policy as it became void by the engagement in a prohibited occupation. If this were so, then any event which would within the three years avoid the policy if the incontestable clause were absent would avoid the policy in spite of its presence: therefore it would practically be delusive surplusage; but in my opinion the object of the clause is to provide an automatic cutting off at the end of the *triennium* of all defences arising after the coming into force of the policy except such are as reserved in the clause itself. The origin and *raison d'etre* of this kind of clause are fully explained in the judgment of Mr. Justice Sedgewick in *The Manufacturers Life Insurance Co.* v. *Anctil* (1897), 28 S.C.R. 103, and it is of the highest importance both to the companies and to the insured, as well as to those who deal in this class of security, that the protection which this clause is designed to afford should not be frittered away by casuistical decisions, even if such were open to us.

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The appeal should be allowed with costs, and judgment given for the plaintiff for the amount of the policy with interest and costs.

WALKEM, J.

WALKEM, J.: I concur.

IRVING, J.

IRVING, J., dissented, being of the opinion that there should be a new trial.

Appeal allowed, Irving, J., dissenting.

THE McCLARY MANUFACTURING CO. v. H. S. HOWLAND SONS & COMPANY AND THE GREENWOOD HARDWARE COMPANY.

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Bill of sale—Possession by grantee—Defeasance or condition—Fraudulent preference—Pressure—Authority of partner to execute bill of sale—Right to attack.

Where the goods comprised in a bill of sale are within twenty-one days after execution of the bill of sale *bona fide* taken possession of by the grantee, the Bills of Sale Act does not apply, and it is immaterial even though the bill of sale was given subject to a defeasance not contained in it.

D. B., A. O. B. and T. G. W., carried on business in partnership as hardware merchants under the name of the Greenwood Hardware Company, the money being supplied by D. B. and A. O. B. and the business being managed by W. The firm became indebted to both the McClary Company and the Howland Company, and the latter under threat of commencing an action, obtained on the 27th of June, 1900, a bill of sale by way of mortgage of all the firm's assets and immediately took possession. The bill of sale was executed on behalf of the firm by W. and also by W. personally, D. B. and A. O. B. both being absent; when A. O. B. returned he protested against the execution of the bill of sale, but subsequently withdrew his protest and consented to a sale of the goods on the understanding that plaintiffs and defendants should share *pro rata* in the proceeds. The arrangement that plaintiffs and defendants should share in the proceeds was not carried out. On the 27th of July, 1900, the McClary Company recovered a judgment in respect of their claim against the firm and obtained judgment under Order XIV., the judgment being entered up against D.B. and A.O.B., and also against the Greenwood Hardware Company, although not a party to the action, and an execution issued was returned *nulla bona*. The McClary Company thereupon sued to have the bill of sale set aside on the ground that it was fraudulent and void as being given with the intent to defeat and delay creditors, and that W. had no authority to give it on behalf of the firm. Under an order of Court the goods were sold and the proceeds paid into Court to abide the result of the action.

The Howland Company recovered a judgment in January, 1901, against the firm for the amount of its indebtedness to them and an execution issued thereunder was returned *nulla bona*.

At the trial in July, 1902, MARTIN, J., dismissed the plaintiffs' action, holding that the bill of sale was not a fraudulent preference, but was given *bona fide* under pressure:—

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Held, on appeal, affirming decision of MARTIN, J., that the bill of sale was not a fraudulent preference, but was given *bona fide* under pressure.

Per HUNTER, C.J., and DRAKE, J.: W. had implied authority to execute the bill of sale.

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Per IRVING, J.: W. was not the agent of his partners to execute the bill of sale, but they had either ratified his act or become estopped from denying his authority.

Per HUNTER, C.J.: The plaintiffs had no *locus standi* to attack the bill of sale on the ground that it was executed without proper authority.

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Per DRAKE, J.: The McClary Company's judgment against the firm was invalid and hence the Company had no *locus standi* to attack the bill of sale.

ACTION for a declaration that a certain chattel mortgage was fraudulent and void as against the plaintiffs and for the delivery up and cancellation of the said mortgage. The facts appear in the headnote and judgments.

Statement

The action was tried at Vancouver in July, 1902, before MARTIN, J., who gave judgment as follows:

31st July, 1902.

MARTIN, J.: There can be no doubt that whatever was the true position of Watson as regards his co-partners, he was to the public the managing partner of the business, though doubtless the defendants understood that he would as a prudent business man consult with his partners when they were in Greenwood, though they both were engaged in another business which frequently caused them to be absent from that place. As regards David Beath, he was out of this Province from December 15th, 1899, to August 13th, 1900, while the matters complained of occurred in June and July, 1900; so with him we are not practically concerned in respect of the actual giving of the chattel mortgage.

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It recites an indebtedness of $5,224.11, and was given on the 27th of June, 1900, and is signed by Watson in the name of the partnership firm or Company and in his own name, and is payable on demand, and the defendants by their agent Drew forthwith took possession of the stock. Alexander Beath who was temporarily absent returned the next day and had frequent if not daily interviews with Drew with the object of furnishing security so that the defendants would cancel said mortgage, and he finally on the 9th of July caused a notice to be served on

Drew protesting against the taking of possession and repudiating the giving of the mortgage. The only other unsecured creditor was the plaintiff Company which had supplied, roughly speaking, about one-fifth of the stock, the defendant having supplied the balance. Though Alexander Beath had served the formal protest, yet in view of his subsequent conversations with Drew it is hard to say what his attitude really was towards it. But one thing is quite clear, that his sole concern was to see that the Bank already fully secured did not also absorb the stock in trade and thus completely shut out the other two creditors, and so he wished an opportunity to be given to the two unsecured creditors to derive proportionate benefits from the mortgage on payment of their proportionate shares but if the plaintiff Company would not do this (which he considered fair) then "let them whistle!" as he expressed it. With this intention present to his mind, Drew shewed him the defendants' telegram of July 11th, and on that Beath was satisfied that his equitable intentions would be carried out, and consequently withdrew whatever objection he had to the mortgage and signed the consent to dispose of the stock by private sale with the object of saving expense. This proceeding renders it unnecessary to discuss the question of Watson's authority.

Under the foregoing circumstances, it cannot, I think, be successfully contended that there was any intention to prefer the present defendants. On the contrary, the manifest desire of the debtor was that they should share their benefits with the plaintiff, and on the facts as represented to him he thought he had so arranged matters that his object would be accomplished. In such case the validity of the transaction cannot depend upon the *bona fide* dispute which consequently arose between the parties in regard to the amount of the expenses which each should bear.

There being then no intent to prefer, the question of pressure becomes immaterial. The latest decisions on this point seem to be *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314, and *Codville* v. *Fraser* (1902), 14 Man. 12.

It was further urged that not only had Watson no power to execute the mortgage without Alexander Beath's consent, but that Beath having made his election against the mortgage could

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not ratify it later. As I have already said it is difficult to say what election, if any, Beath did make. I incline to the view that, despite the formal notice, he really came to no definite conclusion in his own mind on the subject till after he saw the telegram, when he decided to adopt the mortgage as a valid instrument. Now this was more than two weeks before the plaintiff Company placed its writ in the Sheriff's hands, so I am unable to see how it is entitled to complain of the ratification or, how the doctrine of election, even if there were any, could be invoked in its favour.

Then as to the point that the mortgage is void as being given "subject to a defeasance . . . . not contained in the body thereof" contrary to the provisions of section 5 of the Bills of Sale Act, in that on payment of the two notes for the amount of which (plus some other small items) the mortgage was given it would be discharged. One of the notes for $2,520.23 had been overdue since the 29th of May, and the other would mature on the 29th of July. The position was therefore that at the date of the mortgage the mortgagors were actually indebted to the mortgagees for the full consideration mentioned, but that one of the notes was not due. Now I know of nothing to prevent a creditor who is owed two sums—one overdue and the other maturing—from getting security from his debtor for the whole amount. Surely he is entitled to say "If you refuse to give me

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security for the money falling due as well as that overdue I shall take immediate action against you." That is practically what happened here, though I perhaps should note that this point not being raised till toward the end of the argument, the evidence was not directed to such an issue. But from such facts as are in evidence I draw the inference that it was contemplated that possession should be immediately given to the mortgagees.

On the section in question, I have been referred chiefly to *Ex parte Southam* (1874), L.R. 17 Eq. 578 and to *Simpson* v. *Charing Cross Bank* (1886), 34 W.R. 568. The former turns on the fact as found that there was a secret agreement that the security should not be enforced if weekly instalments were paid, and as Chief Justice Bacon said: "that creditors are prejudiced by the agreement is upon the very surface." The payment of

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the instalment in such case would postpone another creditor, but in this case the payment of the notes would, if the plaintiffs' contention be correct, have just the contrary effect and would promote his interests. In *Simpson* v. *Charing Cross Bank* there was, as Mr. Justice Wills puts it, "clearly a device to conceal an exorbitant stipulation." In this Court the point has been considered in *Doll et al* v. *Hart et al* (1890), 2 B.C. 32 and *Matheson* v. *Pollock* (1893), 3 B.C. 74. In the former case there was a condition that if the mortgagor paid $500 the mortgage would be "returned" to him; and in the latter it was laid down that "it is clear from section 3 that (the Act's) policy is to compel the registration of bills of sale, in cases where the property remains in the possession of the grantor, for the better protection of creditors." The condition in that case was an agreement for future advances though the bill of sale was absolute in form.

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In the case at bar I find none of these aforementioned elements, nor can I discover anything which would justify me in declaring this mortgage to be void. The circumstances are unusual and I have experienced some difficulty in arriving at a conclusion satisfactory to myself which is that judgment should be entered in favour of the defendants with costs.

The plaintiffs appealed to the Full Court, the appeal being argued at Victoria on the 12th of January, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Argument

Wilson, K.C., for the appellants: The goods have been sold and the money is now in Court to abide the event of the action. We attack the bill of sale on the grounds (1.) The other partners are not bound as the utmost Watson could do was to bind his own interest in the mortgaged premises; (2.) It was given collusively and is fraudulent and void; (3) It was given subject to a defeasance not appearing on the face of the bill of sale and is void under section 5 of the Bills of Sale Act—the money was not all due then, as one promissory note was not yet then due—if they fail on demand it becomes absolute, and it is idle to talk about possession when they took possession at once. The clause respecting disposition of proceeds in case of sale is senseless—

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it is either an absolute sale or else a resulting trust and then void under sections 4 and 5 of the Act. It contains three seals, but it is only the deed of Watson who could not bind his partners by deed. One partner cannot execute an assignment for the benefit of creditors without the assent of his co-partners: see *Cameron* v. *Stevenson* (1862), 12 U.C.C.P. 389. The law of partnership is now codified: see sections 6, 7 and 8 of the Partnership Act. Howland knew Watson had no money and his position generally. Watson stated to Howland he could not sign notes without authority: see section 25, subsection 8 of the Act; *Ex parte Agace* (1792), 2 R.R. 49; *Fraser* v. *McLeod* (1860), 8 Gr. 268; *Raba* v. *Ryland* (1819), 21 R.R. 806, Gow, 132; *Brettel* v. *Williams* (1849), 4 Ex. 622 and *Barton* v. *Williams* (1822), 24 R.R. 448, 5 B. & Ald. 395 at p. 405.

As to assignment by partner, and this document being under seal see *Hamilton Provident and Loan Society* v. *Steinhoff* (1896), 23 A.R. 184 and *Paterson* v. *Maughan* (1876), 39 U.C. Q.B. 371. The bill of sale is fraudulent and void both under our Act and under the Statute of Elizabeth as being given with the intention to defeat and delay creditors—it covers all of the property of the partnership—both parties knew that the money could not be paid on demand—it was made by the partner least in authority, as the mortgagees knew—it was not for a proper consideration—it was to secure an antecedent debt and it accelerated payment of one of the notes not yet due—the assignors were insolvent to the knowledge of the assignees—the mortgage was immediately due and possession was taken at once—it was conditioned with a power to sell for a debt not due—nothing in the mortgage obliging grantee to sell—no trust for any surplus, if any—no proviso for re-conveyance, or in other words, no equity of redemption. All these are evidences of fraud. The other side will contend there was pressure; the pressure was of a visionary nature as the grantor by acceding to the pressure put himself in a worse position and demand was made by the mortgagees to cover up their tracks.

Argument

As to what is *bona fide* pressure see *Doll et al* v. *Hart et al* (1890), 2 B.C. 32 and *The Meriden Silver Company* v. *Lee and Chillas* (1882), 2 Ont. 451.

When Beath withdrew his objection he was not acting under advice, and after once having elected to pursue one course he cannot change to the detriment of the other creditors: see Bigelow on Estoppel, 5th Ed., 673 and Bigelow on Fraud, 436-7.

At the time of the bill of sale one note was not due, so there is an untrue recital, and that is an evidence of fraud: see section 5 of the Act and *Ex parte Southam* (1874), L.R. 17 Eq. 578. All securities must be set out with the utmost care: see *Counsell* v. *London and Westminster Loan and Discount Co.* (1887), 19 Q. B.D. 512; *Simpson* v. *Charing Cross Bank* (1886), 34 W.R. 568; *Edwards* v. *Marquis* (1894), 1 Q.B. 587 and *Doll et al* v. *Hart et al, supra.*

On the question of resulting trust see *Cooke* v. *Smith* (1890), 45 Ch. D. 38, (1891), A.C. 297, and commented on in (1892), 8 L. Q.R. at p. 108 and *Spencer* v. *Slater* (1878), 4 Q.B.D. 13.

Duff, K.C. (*Cowan*, with him), for the respondents: As to defeasance. None of the cases cited apply to this case: see sections 5 and 15 of the Act; from the time of taking possession to the time of the sale the mortgagees never went out of possession and the Act has no application; it was intended to deal with transfers of goods that remained in possession of the grantor after the execution of the bill of sale. The cases cited are not applicable as in them possession was not taken till long after the time for registering the bills of sale had expired. In *Ex parte Southam, supra,* the mortgagee did not take possession; the report in the Law Times Reports gives the true facts: see 30 L.T.N.S. 132.

Argument

As to the suggestion that the transaction could be attacked under Elizabeth. The Statute of Elizabeth has nothing to do with preferences: as to this and as to the meaning of preference see *Alton* v. *Harrison* (1869), 4 Chy. App. 622 at p. 626; *Mulcahy* v. *Archibald* (1898), 28 S.C.R. 523 at p. 528; *The Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88 at pp. 94 and 95; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446 at pp. 454, 455 and 463 and *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314.

As to the transaction being without authority. The act was one of a kind of acts which one partner could do: What Watson did was done within the scope of the partnership business

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and not in violation of good faith. He cited *The Bank of Australasia* v. *Breillat* (1847), 6 Moo. P.C. 152 at pp. 192, 193 and 194; *Butchart* v. *Dresser* (1853), 4 De G. M. & G. 542 at p. 544; *In re Clough* (1885), 31 Ch. D. 324; Lindley (1893), 152-3; *Raba* v. *Ryland* (1819), 21 R.R. 806, Gow, 131, 137; *Baird's Case* (1870), 5 Chy. App. 725 at p. 733; *Barton* v. *Williams* (1822), 5 B. & Ald. 395 at p. 405; *Fox* v. *Hanbury* (1776), 1 & 2 Cowp. 445 at p. 448 and Pollock on Torts, 297-8.

The principle is well put in some American decisions: *Tapley* v. *Butterfield* (1840), 1 Metc. (Mass.) 515 at p. 518; *Anderson et al* v. *Tompkins* (1820), 1 Fed. Cas. 851 (No. 365) and *H. B. Clafflin Co.* v. *Evans* (1896), 45 N.E. 4. See also *Egberts* v. *Wood* (1832), 24 Am. Dec. 236 at p. 241; *Williamson* v. *Cuningham* (1866), 3 W.W. & A'B. 188 at p. 204; *Hovey* v. *Whiting* (1887), 14 S.C.R. 515 (on appeal from 13 A.R. 7 and 9 Ont. 314); *Harrison* v. *Sterry* (1809), 5 Cranch, 289 at p. 300 and *Taylor* v. *Chichester and Midhurst Railway Co.* (1867), L.R. 2 Ex. 356 at pp. 378, 379 and 380.

As to document being under seal see *Marchant* v. *Morton, Down & Co.* (1901), 2 K.B. 829 at p. 832. *Cameron et al* v. *Stevenson* (1862), 12 U.C.C.P. 389, relied upon by appellant, is altogether inconsistent with *Hovey* v. *Whiting, supra.* As to the status of the McClary Company, *Cameron* v. *Stevenson* is against me, but it cannot prevail against *Hovey* v. *Whiting.* See Chitty's Forms, p. 539 as to style of cause. Beath *et al* were not partners as a firm. The old law by section 24 of the Partnership Act is wiped out. The McClary's never were judgment creditors.

Argument

Wilson, in reply: It is immaterial if possession is taken immediately or within the twenty-one days: see the *Southam Case* where possession was taken before the proceedings were taken; so also in *Simpson's Case* and in *Counsell's Case.*

As to fraud and collusion and pressure. The Court will look at all the surrounding circumstances and see if there really was fraud and collusion: see *In re Ridler* (1882), 22 Ch. D. 74 at p. 82 and *Green* v. *Paterson* (1886), 32 Ch. D. 95 at p. 105. The Howlands knew Watson's limited authority. We have one authority that one partner cannot assign all the assets for the creditors. He distinguished *Clough's Case, supra; The Bank of*

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Australasia v. *Breillat, supra*; *Hovey* v. *Whiting, supra* and *Cameron* v *Stevenson, supra*, and referred to *Bowker* v. *Burdekin* (1843), 11 M. & W. 128.

David Beath could now go back and maintain trover against the Howlands: see *O'Regan* v. *Williams* (1892), 24 N.S. 165 and *Pitfield* v. *Oakes et al* (1893), 25 N.S. 116. We have a judgment against the Greenwood Hardware Company and it was obtained on the order of a Judge. The writ was served on two of the partners.

[HUNTER, C.J.: Isn't a judgment void as against a party who was not a party to the record?]

Howland cannot impeach the judgment; it stands and cannot be set aside on these proceedings. The order granted the judgment stands and was never appealed against.

Cur. adv. vult.

9th April, 1903.

HUNTER, C.J.: This is an action brought by a creditor to impeach a bill of sale given to another creditor under the following circumstances.

The debtors, A. O. Beath, David Beath and Thomas Watson, formed a partnership for the purpose of carrying on a hardware business at Greenwood, and appointed Watson, who alone had a practical knowledge of the business, the managing partner. The firm got goods on credit from the defendants, Howland & Co., for which they gave two promissory notes signed on behalf of the firm by Watson on January 26th, 1900, one for $2,520.23 (due in four months), and the other for $2,622.96 (due in six months). They also became similarly indebted on open account to the plaintiffs to the extent of some $1,485.14, in respect of which debt the plaintiffs duly recovered judgments on July 27th and August 24th, 1900, and issued executions to which there were returns of *nulla bona*. On June 27th, 1900, the firm gave a bill of sale of all its goods and chattels to the defendants Howland & Co. to secure their said indebtedness to them (the amount being stated to be $5,224.11), and judgment was recorded against them for such amount on 4th January, 1901, in respect of which executions have been issued, but not satisfied. The bill of sale was executed on behalf of the firm

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by Watson and also by Watson personally, and it is attacked by the plaintiffs on several grounds.

The first ground was that it was void under the Bills of Sale Act, as it was given subject to a defeasance not contained in it; in other words, because it does not state that it was given on the condition that it should be void on the payment of the notes of which no mention is made. I do not think it necessary to go into this, as, even if it is to be considered as having been given subject to an undisclosed defeasance, about which I express no opinion, it is not avoided thereby, inasmuch as the debtors had ceased to have possession either apparent or real of the property before the twenty-one days allowed for registration had expired; see *Ex parte Saffery* (1881), 16 Ch. D. 668; *Matheson* v. *Pollock* (1893), 3 B.C. 74; *Brackman* v. *McLaughlin* (1894), *Ib.* 265. The object of the Act is to require the bill of sale to set forth the whole agreement if the property is left after the twenty-one days in the real or apparent possession of the grantor. But if, before the lapse of the twenty-one days, the property has, in the words of the thirteenth section, " been *bona fide* delivered to and retained by the grantee," then the statute is satisfied and its provisions no longer affect the bill of sale. Nor is *Ex parte Southam* cited by Mr. *Wilson*, a decision to the contrary, as it appears from the report in (1874), 30 L.T.N.S. 132, that the grantee had not taken possession within the time allowed for registration.

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The next ground was that there was a fraudulent preference, but the evidence is clear to the effect that there was a *bona fide* pressure by Drew, acting on behalf of Howland & Co., and that the bill of sale was given in consequence of the pressure, and such being the case the attack fails: *The Molsons Bank* v. *Halter* (1890), 18 S.C.R. 88, at pp. 94, 95; *Stephens* v. *McArthur* (1891), 19 S.C.R. 446, at pp. 454, 455; *Adams and Burns* v. *Bank of Montreal* (1899), 8 B.C. 314, affirmed (1901), 32 S.C.R. 719; and it is also clear that it was the declared intention of A. O. Beath in ratifying the act of Watson that the plaintiffs should share *pari passu* with the defendants.

13 Eliz., Cap. 5, was also invoked; but it is well settled that this statute does not avoid a transfer on the ground that it

was intended to prefer one creditor to another save in the case where the object was to allow the debtor to keep a benefit for himself: *Wood* v. *Dixie* (1845), 7 Q.B. 892; *Alton* v. *Harrison* (1869), 4 Chy. App. 622; *Middleton* v. *Pollock* (1876), 2 Ch. D. 104; *Ex parte Games* (1879), 12 Ch. D. 314; *Maskelyne and Cooke* v. *Smith* (1903), 19 T.L.R. 270.

Then it is said that Watson had no authority to give the bill of sale on behalf of the firm. I do not see how the plaintiffs have any *locus standi* to assail the deed on this ground as this is an objection that could only be raised by one of the partners, and the transaction has not been repudiated by any of them. But even if the plaintiffs had any *locus standi* I think there is no doubt that it was within the implied authority of Watson, as managing partner, to give this security even if it is to be regarded as an assignment for benefit of creditors: See *Whiting* v. *Hovey* (1886), 13 A.R. 7, affirmed (1887), 14 S.C.R. 515; which though a case dealing with the power of directors of a company to give such a security without the express authority of the shareholders, is a binding decision on us in the case at bar as it is shewn by the remarks of the Judicial Committee in *Bank of Australasia* v. *Breillat* (1847), 6 Moo. P.C. 152, at p. 193, that directors occupy an analogous position to that of managing partners in a firm.

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I agree with the judgment of the learned trial Judge, and think it should be affirmed with costs.

DRAKE, J.: The facts which resulted in this action are practically not in dispute. The Greenwood Company was established for the purpose of dealing in hardware in the town of Greenwood; the partners consisted of Alexander O. Beath, Thos. G. Watson and David Beath. The Beaths were the only monied men. Watson was taken into the partnership for the purpose of managing this particular business. The others having other matters to attend to, left the control of this business entirely with Watson. Watson and David Beath went to Toronto and made arrangements with Howland for the purchase of hardware; and notes dated January 26th, 1900, for $2,500.23 and $2,622.96 were given—payable in four and six months.

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The last note was due on the 29th of July, 1900, and both notes were signed Greenwood Hardware Co., per T. G. Watson.

When the first note was about to become due, Watson wrote to the defendants giving a statement of the affairs of the Company—shewing a large surplus—and, in that statement, real estate, mining interests, horses, wagons, etc., were included, and the liabilities were confined to the Howlands, McClary & Co. and the Canadian Bank of Commerce. The account shewed a surplus of $17,490.56; but this was entirely fictitious. With such a surplus, it appeared to Howland that the due note ought to be met, and he sent out Mr. Drew to try and arrange the matter. Mr. Drew made inquiries with regard to the bank debt and security, and he then demanded payment of the note—or security. Watson at first refused, as Mr. Beath was absent; but the next day he consented, and the bill of sale was prepared and executed by Watson. This bill of sale purports to be made for money payable by the firm to Howland, and no mention is made of the notes. As a fact, the last note was not then due; and Mr. *Wilson* contends that the bill of sale is void owing to this fact; and in this, in view of the authorities, he is right: see *Ex parte Southam* (1874), L.R. 17 Eq. 578; and *Simpson* v. *Charing Cross Bank* (1886), 34 W.R. 568. Here the acceleration of the payment of the debt is prejudicial to the other creditors, and if the defendants were left in possession of the property, it would be a bar to their hope of recovering anything.

DRAKE, J.

But the defendants do not rely on their bill of sale. They took possession the next day and locked up the store. In *Matheson* v. *Pollock* (1893), 3 B.C. 74, it is said the policy of the Act is to compel registration where the property remains in possession of the grantor. When Mr. Beath first returned he protested against the assignment, but subsequently withdrew his protest and assented to the possession taken by the defendants, on the understanding that the defendants would share *pro rata* with the plaintiffs. To this proposal the defendants assented on condition that the plaintiffs shared in the expense incurred by the defendants in obtaining possession of the goods. The plaintiffs' agent refused to pay any expenses, and the matter dropped.

The plaintiffs have brought this action for the purposes of obtaining a declaration that the chattel mortgage is void against the plaintiffs. The first question is, what right have the plaintiffs to intervene in this matter? Under section 15 of the Bills of Sale Act, if a bill of sale be not registered, the same shall as regards all officers seizing any chattels comprised in such bill of sale be void after the expiration of twenty-one days. Here the plaintiffs issued a writ against the defendants Alexander Beath and David Beath and obtained judgment by default; they entered up judgment not only against the defendants parties to the writ, but the Greenwood Hardware Co. as well, who were not parties to the action. How this judgment was obtained we do not know, but it is clear on examining the writ that the Greenwood Hardware Co. were not parties to the action as originally constituted.

We are told that we cannot look at the writ but are bound by the judgment. I do not assent to any such proposition. All the documents in Court are open to the Court, and they are bound to take notice of what there appears. If the plaintiffs had commenced an action against the Greenwood Hardware Co. they would be entitled to issue execution against the members of the partnership who had been served under r. 465, but having issued their writ against the members of the Company they cannot claim a judgment against the Hardware Company until the creditors of that Company have been paid. The result is that the plaintiffs have no *locus standi* to set aside this bill of sale.

Now whether Watson had authority to sign this bill of sale or not I think it is clear that under the authorities he had such power: see *In re Clough* (1885), 31 Ch. D. 324, where an equitable mortgage by a surviving partner for a partnership debt was held valid; and *Ex parte National Bank* (1872), L.R. 14 Eq. 507. Mr. *Wilson* contends that even if Watson had an implied authority as agent for his co-partners to execute this bill of sale, yet this document being under seal, there is no implied authority authorizing one partner to bind his co-partners by deed. *Harrison* v. *Jackson* (1797), 7 Term Rep. 207. If there is consent to the execution it will be good: *Brutton* v.

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Burton and Mills (1819), 1 Chit. 707. On the other hand, a deed by one partner of real estate binds him personally, although his co-partners refuse to execute: *Bowker* v. *Burdekin* (1843), 11 M. & W. 128.

But with regard to personal property, it is beyond dispute that a partner has an implied authority to pledge the personal property of the firm for money borrowed for the firm, or for antecedent debts of the firm: see *In re Patent File Company* (1870), 6 Chy. App. 83, and *In re Clough, supra.* It therefore follows that an assignment of chattels followed by possession to secure an antecedent debt is binding on the other members of the firm, and such being the case, the appeal should be dismissed with costs.

IRVING, J.: On the authority of *Cameron* v. *Stevenson* (1862), 12 U.C.C.P. 389, I should be disposed to hold as a matter of law that Watson in this case was not the agent of the other members to execute the deed of the 27th of June, 1900, but having regard to events subsequent to that date, I think we must take it that his action has, as a matter of fact, been ratified by the others or the others are now estopped from denying his authority.

IRVING, J.

As to the question of fraudulent preference, after looking at the circumstances surrounding the execution of the deed I am unable to say that there was a fraudulent preference.

As to the suggestion that the bill of sale was void by reason of the defeasance not being correctly stated, I think the answer is that the defendant cured any defect in the bill of sale by taking possession.

Appeal dismissed.

FALL v. KLONDYKE BONANZA, LIMITED.

DRAKE, J.

1903

March 24.

FALL v. KLONDYKE BONANZA, LIMITED

Practice—Writ of summons—Foreign corporation—Insufficient address—Irregularity—Application to set aside—By whom may be made.

A Writ of summons describing the defendant Company as "doing business in the Province of British Columbia" was served upon J. G. McLaren, the manager of the defendant Company, who was passing through British Columbia en route to Dawson.

Held, that the service was irregular. Also that it is not necessary that a person who has been served with a writ should be a real defendant to entitle him to apply to set it aside.

SUMMONS to set aside a writ and the service thereof. A writ of summons was issued by the plaintiff against The Klondyke Bonanza, Limited, a Company incorporated in England, and neither registered nor licensed in British Columbia, the plaintiff's claim being partly for wages alleged to be due to the plaintiff as an employee of the defendant Company, and partly in respect of matters pertaining to certain options on mineral claims in Atlin District, British Columbia, which the plaintiff alleged he obtained as agent for and at the instance and for the benefit of the defendant Company.

Statement

The writ described the defendant Company as follows: "To The Klondyke Bonanza, Limited, doing business in British Columbia."

After the issue of the writ, and after the plaintiff had taken steps to effect service thereof under the provisions of The Companies Act, Part VII., relating to "process against unregistered Foreign Companies" J. G. McLaren, the manager of the defendant Company, was passing through Victoria en route to Dawson and whilst there was served with a copy of the writ. McLaren applied by summons under r. 70 to set aside the writ and service on him on the ground that the same was irregular.

Prior, for McLaren in support of the application: The writ and service thereof on McLaren must be set aside inasmuch as the former is irregular in not stating the address or residence

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of the defendant Company in accordance with the forms prescribed in Appendix A., Rules of Supreme Court. The words "doing business in British Columbia" are merely descriptive and are ambiguous: see *Pilbrow* v. *Pilbrow's Atmospheric Railway and Canal Propulsion Co.* (1848), 5 D. & L. 730; *The W. A. Sholten* (1887), 13 P.D. 8; *Sedgwick* v. *Yedras Mining Co.* (1887), 35 W.R. 780.

It is not necessary that a person applying to set aside service on him of a writ of summons should be a real defendant. Any person served is, for some purposes at least, *e.g.*, for applying to set aside service on him of the writ, to be considered a defendant: *Stevenson* v. *Thorne* (1844), 13 M. & W. 149.

Argument

L. Crease, for the plaintiff: The writ sufficiently complies with the forms prescribed as regards address. The rule does not demand it and the form requires it only for identity of the party which is not in question here. McLaren is not a party to the action and is not entitled to apply to set aside the writ or service. He is the manager of the defendant Company and the handing of the copy of the writ to him is not contended to be a "service." Steps are now being taken to effect service of the writ on the defendant Company under the provisions of the Companies Acts, Part VII., R.S.B.C. 1897, Cap. 44, Secs. 146, *et seq.*

24th March, 1903.

Judgment

DRAKE, J.: McLaren having been served with the writ is entitled to apply to set it and the service thereof upon him aside. As the plaintiff is taking steps to effect service on the defendant Company under the provisions of the Companies Act, Part VII., R.S.B.C. 1897, I will not set aside the writ itself.

A person served with a writ, even though he is not a real defendant, is entitled to make an application to set it or the service thereof aside.

Service set aside with costs.

IN RE VANCOUVER INCORPORATION ACT, 1900, AND B. T. ROGERS.

DRAKE, J.

1903

Feb. 14.

IN RE VANCOUVER INCORPORATION ACT

Assessment—Improvements—Valuation of—Vancouver Incorporation Act, 1900, Secs. 38 and 56, Sub-Sec. 3.

The measure of value of improvements for purposes of taxation prescribed by section 38 of the Vancouver Incorporation Act, 1900, is the actual cash selling value and not the cost.

In re Municipal Clauses Act and J. O. Dunsmuir (1898), 8 B.C. 361, followed.

In re Vancouver Incorporation Act, 1900, and B. T. Rogers (1903), 9 B.C. 373, not followed.

APPEAL from the decision of the Court of Revision for the City of Vancouver, confirming the assessment of improvements belonging to the appellant, B. T. Rogers, the amount of the assessment being $46,000.

The appeal was argued before DRAKE, J., on the 13th of February, 1903.

Plunkett, for appellant, cited *In re The Bell Telephone Company and the City of Hamilton* (1898), 25 A.R. 351 at pp. 354 and 358; *In re London Street Railway Company Assessment* (1900), 27 A.R. 83 at p. 87 and *In re Municipal Clauses Act and J. O. Dunsmuir* (1898), 8 B.C. 361.

Argument

Hamersley, K.C., for the City, cited *In re Toronto Electric Light Co. Assessment* (1902), 3 O.L.R. 620 at p. 627 and decision of IRVING, J., on a former appeal in this same case and since reported *ante* at p. 373.

14th February, 1903.

DRAKE, J.: The appellant has built himself a large stone house which has been assessed for its cost or nearly so. The Act under which the assessment is made defines the basis on which property is to be valued, and that is as it would be appraised in payment of a just debt by a solvent debtor, and by a subsequent section the Legislature has sought to limit the question to be appealed "whether or not the assessment is or is not equal and

Judgment

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ratable with the assessment of a similar property having equal advantages of situation against which no appeal has been taken." This latter section can hardly be considered in this appeal because the evidence shews there is no other house approximately like it, smaller houses there are, belonging to persons who have not appealed, but the very size of this house prevents comparison.

Now, this language is most difficult to construe, it is not the value to the owner, for he may have sentimental reasons against selling, even if an offer was made, he may have expended large sums in interior decorations and adornment which would not impress a would be purchaser. A house might be built with such bad taste as to detract greatly from its value. The language of the Act apparently sets all these matters aside and leaves the value to be appraised by some person in case it was to be handed over in payment of a debt by a solvent debtor. Who that appraiser is to be, is not stated; it may be the assessor, but as this dispute is between his actions and the taxee, he would hardly be the proper appraiser. Mr. Hope states on oath that valued in this way the house in question should be assessed at $20,000. The evidence to the contrary is that of the assessor, who states in a general way that it was rated the same as similar property, while at the same time he admits there is no other similar property.

Judgment

The instances he gives are small wooden or partially wooden houses, not half the size of the one in question.

The cost of the house is not the criterion given. By the statute the question is, what is it worth to purchasers, and Mr. Hope says $20,000 would be an outside value, and this is not disputed.

I therefore reduce the assessment to that sum.

The view I take is in accordance with Mr. Justice WALKEM'S judgment in the *Dunsmuir* case reported in 8 B.C. 361, and which is an almost similar case to this.

REX v. McCORMACK.

HUNTER, C.J.

1903

March 5.

REX v. McCORMACK

Criminal law—Vagrancy—Conviction insufficiently describing offence—Cr. Code, Secs. 207, 208 and 611.

Accused was charged with, and convicted of being "a loose, idle person or vagrant":—

Held, per HUNTER, C.J., that the conviction was bad in that it did not set out the facts constituting the offence.

Under section 207 of the Code various acts constituting vagrancy are specified, and an information charging vagrancy should shew the particular facts on which the prosecution relies to establish the offence.

APPLICATION for *habeas corpus*. The prisoner was charged before J. A. Russell, Police Magistrate for the City of Vancouver, with being a loose, idle person or vagrant, and on the 27th of January, 1903, was convicted and sentenced to six months' imprisonment at hard labour. The offence was stated in the conviction and commitment in the same words as in the information. On the 4th of March, 1903, on an application for a writ of *habeas corpus* an order *nisi* was obtained returnable on the following day.

Statement

On the 5th of March, 1903, on the return of the order *nisi* for the issue of a writ of *habeas corpus* the papers were brought up, that is, the conviction, the information and the commitment.

A. D. Taylor, for the application: The commitment is bad as it does not disclose any specific offence and it cannot be amended as the conviction is equally bad. There are ten sub-sections of section 207, each providing specific cases of the general term "vagrancy." The information should have been laid for one of these and the conviction following the information would in the same way have been for a specific offence stating the facts which constituted it.

Argument

He referred to the forms given in the Code: see Crankshaw, 594 and Seager's Magistrates' Manual, 356. The practice has always been in case of vagrancy to specify in the information and conviction the grounds constituting the accused a

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vagrant. *Reg.* v. *Daly* (1888), 12 P.R. 411; Paley on Convictions, 178; *Smith* v. *Moody* (1903), 1 K.B. 56. This case is exactly in point. It was held in it that the provision that the description of any offence in the words of an Act creating the offence, or in similar words shall be sufficient, does not do away with the necessity of setting out in a conviction the facts which are a necessary ingredient of the particular offence in question. As Wills, J., puts it, the old rule must prevail that whatever is necessary to shew that the person convicted has done something which brought him within the words of the statute must still be specified. The conviction and commitment in the present case are therefore bad.

T. R. E. McInnes, for the Crown: The conviction and commitment are sufficient, as they follow the general words of the Code creating the offence: sections 207 and 208. This is all that is required under section 611.

HUNTER, C.J.: The conviction is clearly bad. You might as well charge a man generally with being a thief. The accused was entitled to know under what sub-section of section 207 he was charged, that is, what the facts were on which the prosecution relied. The conviction and commitment must therefore be quashed and the prisoner discharged, it being a term of the order that no proceedings be brought against the magistrate or gaoler.

Judgment

Order absolute.

ROBITAILLE v. MASON AND YOUNG.

FULL COURT

1903

Jan. 19.

ROBITAILLE v. MASON

Malicious prosecution—County Courts Act, Secs. 23 and 31—Waiver of objection to jurisdiction—False imprisonment.

Plaintiff took possession of Mason's float, which he found adrift on a lake. Mason, although aware that plaintiff claimed a lien for salvage, made no move towards recovering the float until after twelve weeks, when he in company with a constable, demanded it, and on plaintiff refusing to give it up without compensation, he was arrested without a warrant and taken to gaol, and subsequently an information laid against him under section 338 of the Code for taking and holding timber found adrift, was dismissed:—

Held, on the facts, affirming FORIN, Co. J., that the arrest was the joint act of Mason and the constable, and that Mason was therefore liable for damages for false imprisonment.

An action for malicious prosecution was tried in the County Court without objection by either party and judgment given in favour of plaintiff:—

Held, by the Full Court, that the question of the jurisdiction of the County Court could not be raised on appeal.

APPEAL from the judgment of FORIN, Co. J., in an action for damages for malicious prosecution and false imprisonment. The facts are stated in the following judgment of the learned County Judge:

19th February, 1902.

FORIN, Co. J.: The facts are: In April, 1901, the plaintiff found a float adrift on the lake opposite the City of Nelson. He, like others along the shore, caught any driftwood which they found afloat and reduced it to firewood or kept it as floats, as in this case. If not taken from the water all such driftwood was carried down the stream and into the rapids and disappeared. The float in question consisted of logs nailed together, covered with some rough boards. The plaintiff hauled the float ashore opposite to the cabin in which he lived and secured it to the shore. On June 29th, the defendant Mason claimed the float, as he wished to use it at the Park for landing purposes on July 1st, when some aquatic sports were held. The defendant Mason admits that he knew that the plaintiff had possession of the float

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and had never troubled himself about it. When the float was first claimed, the plaintiff demanded compensation for his trouble in saving the float and asked for some proof of ownership. Thereupon the defendant invoked the assistance of the Provincial police, and in company with a constable, the defendant Young and some others, returned to the plaintiff's place and on his refusal to give up the float he was handcuffed, placed on board a steam tug, which also took the raft in tow, carried down to the Park, about one mile away, where the float was tied up, then brought back to the city and taken to the gaol by the constable accompanied by defendant Mason, being kept handcuffed all the time.

After the plaintiff's arrest a warrant was issued against him by the Police Magistrate of Nelson, who subsequently, after hearing the evidence on a charge of fraudulently taking and holding timber found adrift, under section 338 of the Criminal Code, dismissed the case.

The action of the defendant Mason in procuring the arrest of the plaintiff was clearly unjustifiable and without reasonable or probable cause.

Wishing to recover a float which he knew had been in the plaintiff's quiet possession for weeks, and the title to which there was a dispute, the defendant Mason should have proceeded by civil action, and not by the harsher methods provided by the Criminal Code. In the one case he would have had little trouble in obtaining possession of the property and proving its ownership, in the other case he acted wrongfully and is liable for damages.

FORIN, CO. J.

It is not necessary for me to comment on the cases cited.

As to damages the plaintiff was put to the expense of procuring counsel at the Police Court. This was proved to be $35.00. He was exposed to physical discomfort in being handcuffed and carried up the lake without protection, and if an accident had happened in which he had been thrown into the water, he would surely have been drowned. He was marched up the streets in the same manner, which to a person of his good character, was keenly humiliating.

I will assess the damages at $100 and give judgment against defendant Mason for $100 and costs.

This action must be dismissed against defendant Young, as no notice in writing of the intended action was given to him as required. See sections 975 to 980 of the Criminal Code.

The defendant Mason appealed to the Full Court and the appeal was argued at Vancouver on the 18th and 19th of November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

W. A. Macdonald, K.C., for appellant: There is no jurisdiction in the County Court to try an action of malicious prosecution; section 31 of the Act provides for the conferring of jurisdiction by consent which must be given by means of a signed memorandum. He cited *Austin* v. *Dowling* (1870), L.R. 5 C.P. 534. There was reasonable and probable cause; the plaintiff brought the trouble upon himself by his desire to keep the float; all the defendant did was to submit the facts to the police. He cited Stephen on Malicious Prosecution, 123; *Flewster* v. *Royle* (1808), 1 Camp. 187; *Chivers* v. *Savage* (1855), 5 E. & B. 696; *Grinham* v. *Willey* (1859), 4 H. & N. 496 and 7 W.R. 463.

Argument

S. S. Taylor, K.C., for respondent: The facts shew clearly that the arrest was the act of the defendant. He cited Stephen, 49 and *Childers* v. *Woller* (1860), 29 L.J., Q.B. 129.

On the question of jurisdiction he cited section 36 of the County Courts Act; An. (C.C.) Practice (1901), 85; *Lawford* v. *Partridge* (1857), 26 L.J., Ex. 148; *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244; *Gelinas et al* v. *Clark* (1901), 8 B.C. 42.

Macdonald, replied.

Cur. adv. vult.

19th January, 1903.

HUNTER, C.J.: I think the judgment must be affirmed.

As to the point that there was no jurisdiction to try the count for malicious prosecution, this objection was not taken at the trial, and the learned Judge being empowered by section 31 of the County Courts Act to try by consent, did try and give judgment without any objection being raised by either party. In *Ex parte Pratt* (1884), 12 Q.B.D. 334 at p. 341, Bowen, L.J., says: "There is a good old-fashioned rule that no one has a right so

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to conduct himself before a tribunal as if he accepted its jurisdiction, and then afterwards, when he finds that it has decided against him, to turn round and say, 'you have no jurisdiction.' You ought not to lead a tribunal to exercise jurisdiction wrongfully;" and in *Wilson* v. *McIntosh* (1894), A.C. 129 at p. 134, the Judicial Committee appear to have held that Windeyer, J., was correct in saying "That where although the Court has no jurisdiction, the parties have allowed it to exercise jurisdiction and to go to the length of pronouncing judgment, the unsuccessful party cannot then turn round and deny the jurisdiction of the Court;" but that he was wrong in considering that the principle had no application to the case he was dealing with.

As to the false imprisonment. The test is, was it the act of the constable acting on his own authority, or was it the joint act of both defendants? If that of the former, the plaintiff is without remedy, for as the learned Judge says the statutory notice was not given. I think, however, that it was as much the act of the defendant Mason as of the constable. He organized the expedition to recover the float and provided the tug, proceeded with the constable to the plaintiff's place and told the plaintiff, to use his own words, that "I was Mason of the Tramway Company, and we have come for the raft, and we asked him if he had altered his decision since the morning." He then says, "We made a movement to clear the raft—he (*i.e.*, the plaintiff) was obstreperous and excited;" and in answer to the question, "Did he allow you to get your property?" says "After we got the handcuffs on him, but not before." Now, it is quite true that Mason did not personally assist in putting the handcuffs on the plaintiff, but he evidently adopted the proceeding, and as is perhaps natural in a young man of 27, was eager to share in the glory, and should not now complain when called upon to partake of the responsibility. He also, still in command of the expedition, remained on the tug which carried the plaintiff about unnecessarily all the while in handcuffs, instead of taking him at once to the goal, and finally accompanied the constable to the goal with the plaintiff, although not requested by the constable to do so, as was the defendant in *Grinham* v. *Willey*, as appears by the report in (1859), 7 W.R. 463. Having regard to the fact

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that Mason knew two months before this that the raft was in the plaintiff's possession, that in fact he had chosen to leave it in the latter's care, and that he knew the latter claimed a lien on it for salvage, I think he should consider himself fortunate in not having been amerced in a much larger amount than that which the learned Judge has awarded.

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IRVING, J.: I think the judgment of the learned County Court Judge does substantial justice between the plaintiff and defendant, and as the parties elected to go before him that we should not now entertain the question of jurisdiction.

IRVING, J.

I notice that there were a great many objections taken at the trial to the admissibility of evidence. Many of them were quite unnecessary, and none of them argued before us. Unnecessary objections of this kind should be discouraged. They tend to prolong the trial unduly, and to distract the attention of the Judge and others from the real matter at issue.

MARTIN, J.: I concur.

MARTIN, J.

Appeal dismissed with costs.

REX v. GEISER.

IRVING, J.
1903
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REX v. GEISER

Practice—Certiorari—Second application after dismissal of first.

Where an application for a writ of *certiorari* has been dismissed the Court will not entertain another application for the same purpose, although the first was dismissed on a preliminary objection.

TWO applications for writs of *certiorari* to remove into the Supreme Court two convictions made by John Boultbee, Police Magistrate at Rossland, B. C., whereby the applicant, Albert Geiser, was convicted of two offences against the Act to restrict

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the importation and employment of aliens, 60-61 Vict., Cap. 11, 61 Vict., Cap. 2, 1 Edw. VII., Cap. 13.

On the 29th day of August, 1901, an information was laid by one McDonald against the applicant, Albert Geiser, before John Boultbee, Police Magistrate for the City of Rossland, that the said Geiser did on the 21st day of August, 1901, "assist and encourage the importation or immigration into Canada of Neal Stevenson, an alien, under contract made previous to the importation or immigration of the said Neal Stevenson, to perform labour in Canada." On the 30th of August, a similar information was laid by the same informant against the said Geiser for a similar offence in assisting and encouraging the importation or immigration into Canada of one J. H. Andrew, an alien, under similar circumstances, both informations being laid under the provisions of the Act to restrict the importation and employment of aliens.

On the 17th of September, 1901, Geiser was convicted of both offences.

The applicant appealed from both convictions by way of stated case, and both appeals on coming on to be heard before WALKEM, J., on the 14th of October, 1901, were dismissed upon the preliminary objection that the applicant had not entered into a recognizance as required by section 900, sub-section 4 of the Criminal Code. He had, however, deposited in Court a marked cheque for $100 in lieu of the recognizance, but this His Lordship held to be not a sufficient compliance with the requirements of the section (see 8 B.C. 169).

Statement

The applicant then applied for writs of *certiorari* and his applications came on for hearing before IRVING, J., on the 23rd of October, 1901, and they were likewise dismissed upon the preliminary objection that no recognizance as required by r. 5 of the Supreme Court Rules, 1896 (Crown side), had been entered into by the applicant.

The applicant then on 3rd December, 1901, made fresh applications for writs of *certiorari*, which coming on to be heard before MCCOLL, C.J., at the Rossland Sittings on 10th December, 1901, were referred by him to IRVING, J., for hearing.

In pursuance of this order the applications for writs of *certi-*

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orari came on for hearing before IRVING, J., at the Rossland Sittings, on February 26th, 1903.

Hamilton, for Geiser.

MacNeill, K.C., for W. L. McDonald, took the preliminary objection that a second application for writs of *certiorari* would not lie. He referred to *Reg.* v. *Mayor, &c., of Bodmin* (1892), 2 Q.B. 21; *Reg.* v. *Manchester and Leeds Railway Co.* (1838), 8 A. & E. 413 and *Reg.* v. *Pickles* (1842), 12 L.J., Q.B. 40.

Hamilton, for applicant, argued that the previous application for a *certiorari* was dismissed under a misapprehension of the effect of the Crown Office Rules, citing *Todd* v. *Jeffery* (1837), 7 A. & E. 519; *The King* v. *The Inhabitants of Abergele* (1836), 5 A. & E. 795.

IRVING, J., gave effect to the preliminary objection and dismissed both applications with costs, following the rule laid down in *Reg.* v. *Mayor, &c., of Bodmin.*

Judgment

TAM v. ROBERTSON.

IRVING, J.

1902

May 10.

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Jan. 20.

TAM v. ROBERTSON

Assignment for benefit of creditors—Preferential claim—"Wages or salary of persons in employ" of assignor—Creditors' Trust Deeds Act, 1901, Secs. 36 and 37.

The plaintiff contracted with cannery proprietors (*a.*) to supply labour and pack salmon at a stated price per case, *i.e.*, by piece work; and (*b.*) to act as foreman of the labourers supplied by him at a salary of $50 per month.

The proprietors having assigned for the benefit of creditors plaintiff sought to enforce the preference given by section 36 of the Creditors' Trust Deeds Act in respect to both of the salary and the piece work:—

Held, that the preference must be restricted to the salary.

APPEAL from the judgment of IRVING, J., dismissing plaintiff's action in which he sought to establish as a preferential claim

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within the meaning of sections 36 and 37* of the Creditors' Trust Deeds Act, 1901, a claim against the estate of the Clayoquot Fishing and Trading Company, which Company carried on business at Clayoquot and also in the City of Victoria, and which had made an assignment for the benefit of creditors to the defendant Arthur Robertson.

The plaintiff and the Company had entered into the following agreement:

"This agreement made this 10th day of June, 1898, between Ah Tam of the City of Victoria, B. C., hereinafter called the party of the first part and the Clayoquot Fishing and Trading Co., hereinafter called the parties of the second part, Witnesseth that the parties of the first part in consideration of the covenants on the part of the said parties of the second part hereinafter contained, hereby covenant and agree to and with the parties of the second part in the following manner, viz.:

"That they will at any and all times during the canning season of 1898, supply to the parties of the second part all skilled labour required by them or their manager at their cannery at Clayoquot, in the work of making cans and for the purpose of packing their salmon and doing all the work in and about the cannery required as hereinafter mentioned by the parties of the first part.

"That they will when required proceed without delay to Clayoquot with a sufficient number of skilled workmen, not less than twenty-five and sufficient without the help of Indian labour

Statement

* Sections 36 and 37 of the Creditors' Trust Deeds Act, 1901, are as follows:—

"(36.) Whenever an assignment is made of any real or personal property for the general benefit of creditors, the assignee shall pay in priority to all claims of the ordinary or general creditors of the person making the same, the wages or salary of all persons in the employment of such person at the time of making such assignment, or within one month before the making thereof, not exceeding three months' wages or salary, and such persons shall be entitled to rank as ordinary general creditors for the residue, if any, of their claims.

"(37.) The preceding section shall apply to wages or salary, whether the employment in respect of which the same shall be payable be by the day, by the week, by the job or piece, or otherwise."

to can four hundred (400) cases per day. If Indian labour can be obtained the daily output to be increased in proportion, and all the Indian labour thus employed to be charged to the parties.

"That they will at any and all times during the canning season of 1898, take fish from the fish boats at the wharf, prepare fish for canning, fill cans, all to weigh twenty-one (21) ounces standard weights, boil and properly test and lacquer cans so filled and label same, pack in cases, nail and make ready for shipment.

"That they will at all times during the progress of the said work use all diligence and care in putting up the said salmon and do all in their power to make the same of the best marketable value, and do all the said work as aforesaid in a workmanlike manner, under the direction and supervision and to the entire satisfaction of the manager for the time being and that they will also do all repairing to coppers used and required by them in the execution of the aforesaid work.

"And the parties of the second part in consideration of the covenants of the said parties of the first part, hereinbefore contained do covenant and agree with the said parties of the first part as follows:—

"That they furnish all necessary material and tools for the work, carry and land same on wharf.

"That they will pay to the parties of the first part for all the said work to be done by them as aforesaid the sum of fifty-two cents for each case of salmon in tall cans so put up and ready for shipment as aforesaid with a deduction of two cents per case for the use of the Company's wiping machine.

Statement

"And it is mutually agreed between the parties hereto and provided that if the work shall not be commenced and proceeded with to the satisfaction of the parties of the second part or their manager for the time being it shall be lawful for the said parties of the second part, or their manager aforesaid, to give notice requiring the parties of the first part to enter upon and regularly proceed with the said work, and in case the said parties of the first part shall immediately after such notice given make default in commencing or regularly proceeding with the said work, the parties of the second part may

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employ any other workmen by contract or otherwise and pay them out the money remaining due to the parties of the first part, and the parties of the first part shall be liable for all losses that the parties of the second part may sustain through want of sufficient labour to carry on the work of the cannery for the season of 1898.

"That in case the manager for the time being shall disapprove of any of the labourers or workmen the parties of the first part shall be obliged to remove and substitute others.

"In the event of any dispute arising between the parties of the first part and the parties of the second part concerning any of the matters aforesaid the parties of the first part shall and will abide by, observe, perform, fulfil, keep, and in all things obey the decision in writing of the manager for the time being.

"And if more than one-eighth of one per cent. of the contents of cases ready for shipment are rejected by the manager for the time being of the said Company, the said parties of the first part shall pay to the parties of the second part an amount equal in value to all excess of said one-eighth of one per cent, and that the said parties of the second part shall not be bound to pay for any work rejected by the manager of said cannery.

"And the parties of the first part shall pay to the parties of the second part an amount equal in value to all light cans caused by imperfect filling.

Statement

"The parties of the second part agree to pay transportation of the men one way.

"The aforesaid Ah Tam agrees to act as foreman for the Chinamen and to devote all his time in carrying out the work specified in this contract. For his services as foreman he is to receive wages at the rate of $50 per month.

"All empty cans remaining in stock at the end of the season to be paid for at the rate of two dollars and fifty cents ($2.50) per thousand cans.

"And in the event of the said parties of the first part selling, disposing of, or causing to be sold or disposed of, whiskey or any other intoxicating liquors to white men or Indians during the fishing season of 1898, they shall forfeit and pay the sum of one thousand dollars ($1,000) to the parties of the second part.

"The said parties of the second part further covenant and agree to and with the parties of the first part anything to the contrary hereinbefore contained notwithstanding, that if the total pack on account of a small run of salmon, should fall short of the quantity estimated they will pay them at least twenty-five hundred dollars ($2,500) for the work performed by them."

In the years 1899, 1900 and 1901, the plaintiff and the Company continued under an agreement in the same terms, and on the 27th of November, 1901, the Company made an assignment for the benefit of creditors to the defendant.

During the canning season of 1901, under the terms of the agreement and within three months next preceding the said 27th of November, 5,209 cases of salmon were put up by the plaintiff ready for shipment and to the entire satisfaction of the cannery manager, and at the end of the season 1,000 cases of empty cans were handed over to the manager by the plaintiff.

The plaintiff fulfilled the terms of the agreement until the end of the season and personally performed some work and labour in fulfilling its terms.

The particulars of the plaintiff's preferential claim were as follows:

Statement

"To 3 months' wages as foreman.....	$ 150 00
" putting up 5,209 cases of salmon at 50 cents per case	2,604 50
" 1,000 cases of empty cans at $2.50 per 1,000 cans.....	120 00
	$2,874 50"

The defendant admitted the preferential claim of $150 for wages.

The action was tried before IRVING, J., on a case stated in which the question for the opinion of the Court was whether the plaintiff is a person in the employment of the said Clayoquot Fishing and Trading Company, Limited Liability, within the meaning of sections 36 and 37 of the Creditors' Trust Deeds Act, 1901, and as such entitled thereunder to a preferential claim amounting to the said sums of $2,604.50 and $120 or either of said sums.

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Alexis Martin, for plaintiff.

W. J. Taylor, K.C., for defendant.

On 10th May, His Lordship delivered the following judgment:

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IRVING, J.: The agreement is twofold. The greater portion is taken up with the terms of the contract for the supply by the plaintiff to the defendant of skilled labour. The employment of the plaintiff personally at $50 a month is also arranged for. By the last paragraph in the contract there is a stipulation that if the total pack shall fall short of the quantity estimated the plaintiff will receive $2,500 in any event.

The language of the Statute, Sec. 36 requires the assignee to pay in priority "the wages or salary of all persons in the employment (of the assignor) at the time of making such assignment, or within one month before the making thereof, not exceeding three months' "wages or salary." By section 37 the preceding section applies to wages or salary where the employment in respect of which the same will be payable be by the day, by the week, by the job or piece, or otherwise.

From these two sections it is clear that the preference is given to persons working for *wages* or *salary*.

There is an essential distinction between "wages or salary" which are the recompense for personal services and the profits of a contract. It seems to me that the plaintiff in this case is applying for something more than wages. His application is really for remuneration for his own services, plus the amount payable to his own helpers, and plus also his own profits thereon. The Act does not contemplate a case of this kind at all. It contemplates a preferential claim for wages only, not wages and something else. In my opinion the case stated ought to be answered in favour of the defendant on the ground that the Act was not intended to, and does not give to a person a preference for profits made by him by the employment of other people under him, even if he himself works along with them.

I have referred to the cases decided under the Truck Acts and also under the Bankruptcy Acts, in particular to the case of *Ex parte Hollyoak* cited by Mr. *Alexis Martin*. In that case it was admitted that Hollyoak was not a contractor. In this present

case there is no doubt that the plaintiff is a contractor as well as a workman. In *Hollyoak's* case he could not select his men; he was engaged by the week, and was liable to be discharged on a week's notice, and further, there was absent from his case the minimum contract price such as is provided for in the last paragraph of this contract.

Judgment for defendant with costs.

The plaintiff appealed to the Full Court and the appeal was argued at Victoria on the 19th and 20th of January, 1903, before HUNTER, C.J., WALKEM and DRAKE, JJ.

Alexis Martin and *Welby-Solomon*, for appellant: The plaintiff must establish that he was "in the employ" of the Company and that his pay was "wages or salary."

Employ does not generally mean to find actual employment; it rather means to retain and pay a person, whether employed or not but if employed then to be employed in the work only in respect of which the contract is made: Stroud's Jud. Dict. 243. "The requirement of actual service is distinct from the employment": see Parke, B., in *Elderton* v. *Emmens* (1848), 17 L.J., C.P. 307 at p. 309; affirmed in (1852), 4 H. L. Cas. 624.

Here the plaintiff agreed "to devote all his time in carrying out the work specified in this contract" though it is admitted in the terms of the special case that "plaintiff personally performed some work and labour" if it were necessary to prove actual service. What the plaintiff was to be paid for was "for all the said work to be done by them (him) as aforesaid the sum of 52 cents for each case," etc. (The contract speaks of the parties of the first part, the plaintiff, as being of the plural instead of the singular number).

Argument

Section 37 of the Act says that the preference given by section 36 "shall apply to wages or salary whether the employment in respect of which the same shall be payable be by the day, by the week, by the job or piece, or otherwise." Wages therefore includes what is earned by job or piece work by statutory definition.

Even without this special definition it was settled law that a workman may employ others under him making his profit or

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commission on their labour and still not lose his character of workman: see *Ex parte Hollyoak* (1887), 35 W.R. 396; *In re Earle's Shipbuilding and Engineering Co.* (1901), W.N. 78; *Lowther* v. *Earl of Radnor* (1806), 8 East, 113; *Whiteley* v. *Armitage* (1864), 13 W.R. 144; *Ex parte Allsop: Re Disney* (1875), 32 L.T.N.S. 433.

The reasons of the trial Judge are opposed not only to the plain meaning of the statutory definition but also to the settled law of nearly 100 years.

The Act is even wider than the English Bankruptcy Act* from the fact that it uses the word "employ" and a larger and not a more restricted application should be given to it.

[The Chief Justice referred to the arbitration clause in agreement as indicating that the plaintiff was an independent contractor.]

An arbitration clause is usual in a written agreement of employment for foreman at a salary: see Wilkinson's Precedents in Conveyancing, No. 27, p. 46, when the foreman agrees to give up all his time and obey orders as in this case.

The best test of the existence of the relationship of master and servant is, did the man agree to give up his whole time to the work and to obey the orders of his employers. "He was engaged to work exclusively for his master": judgment of Wightman, J., in *Ex parte Gordon* (1855), 3 W.R. 568 at p. 569;

Argument

"They were to serve the appellant exclusively": judgment of Erle, C.J., in *Lawrence* v. *Todd* (1863), 11 W.R. 835 at p. 836; "There may indeed be a service not for any specific time or wages, but to be within the statute (the Master and Servants Act, 4 Geo. IV., c. 34) there must be a contract for service to the party exclusively": Judgment of Parke, J., in *Lancaster* v. *Greaves* (1829), 9 B. & C. 628 at p. 631. This is the real test

* Section 40 (*c.*) of the Bankruptcy Act, 1883 (Imperial), is as follows:—

"(40.) In the distribution of the property of a bankrupt there shall be paid in priority to all other debts,—

"(*c.*) All wages of any labourer or workman, not exceeding fifty pounds, whether payable for time or piece-work, in respect of services rendered to the bankrupt during four months before the date of the receiving order."

and where exclusive service has been contracted for in every such case the man has been held to be employed as servant.

The Company were to supply all material. All that the plaintiff was to supply was "skilled labour" and "work" upon the Company's material, its tin and cases, and its salmon.

The plaintiff agreed "to do all the said work . . . . under the direction and supervision and to the entire satisfaction of the manager of the Company, and to change any workmen that the manager should "disapprove of." In the event of any dispute whatever plaintiff agreed to "obey the decision in writing of the manager." He was tied hand and foot and had not the liberty of an independent contractor.

[DRAKE, J.: The Company had not the power of dismissing him until the end of the season.]

In no "job or piece work" can there be the power of dismissal before the job is finished, but the contract provides in this case for the Company employing "other workmen by contract or otherwise" if the plaintiff's work was not satisfactory. The plaintiff was paid partly by time and partly by piece, but the method of payment is immaterial as by section 37 it may be "by the job, or piece or otherwise."

Argument

It may be by wages and by a 5 per cent. commission on wages of those under him (*Whiteley* v. *Armitage, supra*), or partly by salary and partly by commission upon the work done *(In re Earle's Shipbuilding and Engineering Co., supra).*

HUNTER, C.J.: We are all agreed that the appeal must be dismissed. Ah Tam occupied a dual position, being a servant so far as he was employed as foreman and an independent contractor in respect of the rest of the matters mentioned in the contract. The document points to the theory that the intention of the parties was that he should be an independent contractor. The language of the clause in which plaintiff agrees to supply skilled labour is the language of an independent contract and not the language one would expect to find in a contract between master and servant; the language of the clause in which plaintiff agrees to use due diligence is not the language one would naturally expect to find in a contract between master and ser-

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vant; the language of the clause in which plaintiff agrees to pay losses occasioned by the want of sufficient labour is the language one would expect to find in an agreement with an independent contractor and not with a servant. Then the fact that plaintiff had the sole right to say who should work and who should not, and that the Company could reject work, both point to the conclusion that plaintiff was an independent contractor. To come within section 36 of the Act the relation of master and servant must be shewn beyond a doubt.

WALKEM and DRAKE, JJ., agreed that the appeal should be dismissed.

Appeal dismissed.

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Feb. 6.

NOBLE FIVE CONSOLIDATED MINING AND MILLING COMPANY, LIMITED *ET AL* v. LAST CHANCE MINING COMPANY, LIMITED.

NOBLE FIVE
v.
LAST
CHANCE

Mining law—Extralateral rights—Trial—Adjournment of—Mineral Act, 1891, Sec. 31.

Appeal—Extension of time—Jurisdiction.

In an action between the owners of adjoining mineral claims respecting extralateral rights, the parties claiming the extralateral rights will not be forced on to trial without being given a fair opportunity of doing such development work as may be necessary to determine the position of the apex of the vein in question.

Quaere, whether *Sung* v. *Lung* (1901), 8 B.C. 423 was rightly decided.

APPEAL from an order of DRAKE, J.

Statement

The plaintiffs were the owners of the World's Fair mineral claim in Kootenay District, and brought an action claiming damages and an injunction against the defendants, who they alleged were running a tunnel from an adjoining claim on to their (the plaintiffs') claim. The defendants in their statement of defence

pleaded that they owned the Last Chance and Blue Jay claims which were located under the provisions of the Mineral Act, 1891, and so were entitled to extralateral rights, and that the top or apex of the vein on which the said work in the World's Fair mineral claim was done is found upon the surfaces of the Last Chance and Blue Jay claims, and that in its course downwards departs from the perpendicular and extends into the World's Fair claim.

The trial was fixed for the July, 1902, Sittings in Victoria, but the Full Court (on an appeal from the order of WALKEM, J., who refused defendants' application for an adjournment) granted a postponement until the October Sittings, with liberty to defendants to apply before said Sittings for a further postponement on producing proof to the satisfaction of the Court or a Judge that a postponement was necessary, and that they had complied with the terms of the order, the term material to be stated here, being that work on their claims be prosecuted with due diligence by the defendants for the purpose of supporting their claim to extralateral rights as alleged in the pleadings. In October, on the defendants' application, the trial was further adjourned until the December, 1902, Sittings. In November, the defendants applied for a further adjournment and shewed by affidavit that they had commenced the work ordered by the Full Court as soon as it could conveniently be commenced and had prosecuted it with diligence until stopped by snow; that it would not be possible to do any more of the work before the 1st of June, 1903, and in some places before about August, 1903, and that the work required to be done to establish definitely the continuity of the vein from the apex would take three or four months or more. For the plaintiffs it was contended that defendants were then mining in their ground and taking ore therefrom.

Statement

On the 20th of November, an order was made by DRAKE, J., as follows:

"It is ordered that the trial of this action be and the same is hereby postponed until the Session of the Court to be held at the City of Victoria, in the month of July, 1903, peremptory;

"And it is further ordered, that the defendants do pay to the

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plaintiffs such damages as they shall suffer by reason of the delay caused by the postponement of the trial hereby ordered;

"And it is further ordered that the costs of this application be costs to the plaintiffs in any event of the cause."

This order was not settled until the 1st of December, 1902. On 24th November, defendants served a notice of appeal against so much of the order as ordered the date set for the trial to be peremptory, the grounds of appeal being, that the learned Judge should not have imposed the term complained of and that the term complained of is contrary to the direction contained in the Full Court order, dated the 30th day of June, 1902.

On the 1st of December, defendants served an additional notice of appeal against so much of the said order as ordered that they should pay to the plaintiffs such damages as the plaintiffs might suffer by reason of the postponement, the grounds of appeal being the same as in the former notice.

The appeal came on for argument on the 5th of February, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Bodwell, K.C., for appellants.

Luxton, for respondents, took the preliminary objection that the second notice of appeal was out of time as the time begins to run from the time of the pronouncement of the order.

Argument

Bodwell: If it is held that the notice was given late I ask for leave to extend the time.

[MARTIN, J., referred to *Sung* v. *Lung* (1901), 8 B.C. 423, and said the Court had already held it had no jurisdiction to extend the time.]

I would like to argue the point as it seems to me the Court has the power to extend the time; the matter may still be reconsidered.

[HUNTER, C.J.: Where the Court is the Court of ultimate appeal it can set aside a former decision, as we are not bound to perpetuate error; there are numerous examples of it in the Privy Council, in the Appeal Courts and in the Supreme Court of the United States.]

The argument on that part of the appeal of which notice had been given in time was then proceeded with, the Chief Justice

announcing that if it became necessary to consider the other part of the appeal the Full Bench would be summoned to consider whether or not the Court had power to extend the time.

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Bodwell: The peremptory clause should not have been put in the order; it will be impossible for us to go to trial in July, and we should have an opportunity to apply for an adjournment again in July.

Luxton: The Judge's discretion should not be interfered with: see r. 356. They are not entitled to the extralateral rights claimed—if a vertical plane extended were drawn through the easterly end lines of the Blue Jay extended, the workings in the World's Fair would be beyond.

[HUNTER, C.J.: There is an appropriate way of getting that decided.]

I can mention it here to shew that the appellants wish to delay us.

Judgment was reserved till the 6th of February, when the following oral judgments were pronounced.

HUNTER, C.J.: It is not necessary to consider the second branch of the appeal, because the defendants are entitled to the postponement and it should not have been made peremptory, because the peremptory postponement till July was useless to the defendants. By the time of the October Sittings the defendants will probably have had ample time to ascertain the necessary facts and a strong case will have to be shewn by them in order to get a further postponement. The whole order falls. The appeal should be allowed with costs.

HUNTER, C.J.

IRVING, J.: The appeal should be allowed in terms of the first notice.

IRVING, J.

MARTIN, J.: I agree. Rule 683 renders it unnecessary for us to consider the second notice at all, and in any event the whole order stands or falls together, nor can there be any separation of its terms. In any event a direction for payment of damages is now inconsistent with the order we are making on this appeal; if defendants are entitled to an adjournment till October without paying damages it would be absurd to say that they should

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pay damages for an adjournment till July, which is worse than useless.

Ordered that so much of the order as ordered that the date set for the trial of the action be peremptory be set aside, and that the respondents pay to the appellants the costs of the appeal.

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KINGSWELL
v.
CROW'S NEST

KINGSWELL v. CROW'S NEST PASS COAL COMPANY.

Practice—Pleadings—Particulars.

In an action for damages for personal injuries, paragraph 5 of the statement of claim contained allegations of negligence which might or might not have been particulars of the negligence alleged in paragraphs 3 and 4. Plaintiff refused to comply with defendants' demand for particulars of the negligence alleged in paragraphs 3 and 4:—

Held, that he must give the particulars or else state that they were to be found in paragraph 5.

ACTION for damages for injuries sustained by plaintiff while employed as a coal miner in one of the defendants' mines at Michel, the injury being caused by a fall of roof.

Paragraph 2 of the statement of claim alleged a defect in the condition of the ways and premises of the defendants and particularly that the roof was not properly timbered. Then followed the three following paragraphs:

Statement

"(3.) In the alternative said injuries were sustained by the plaintiff as such employee by reason of the negligence of Daniel Evans, the defendants' mine superintendent of said mine No. 4; or in the alternative by reason of the negligence of Charles Symester, the defendants' overman of said mine No. 4, or in the further alternative by reason of the negligence of F. W. Collins, the defendants' fireboss of the said room 15 in said mine No. 4 (then in charge of all for the defendants of the mining operations

carried on in said mine No. 4, including timbering of said room No. 15 and the furnishing of timber for the miners working in said room No. 15) then, to wit, on the 28th day of March, A.D. 1902, in the service of the defendants as aforesaid, who has superintendence entrusted to him whilst in the exercise of such superintendence.

"(4.) In the further alternative, said injuries were sustained by the plaintiff as such employee by reason of the negligence of said Daniel Evans, as such mine superintendent, or in the alternative of the said Charles Symester as such overman of said No. 4 mine, or in the alternative of the said F. W. Collins as such fireboss of said room 15 then, to wit, on the 28th day of March, A.D. 1902, in the service of the defendants as aforesaid, to whose orders and directions the plaintiff at the time of the injury was bound to conform, the said injuries having resulted from the plaintiff so conforming.

"(5.) The said Daniel Evans, as such mine superintendent of said No. 4 mine, or in the alternative the said Charles Symester, as such overman of said No. 4 mine, or in the alternative the said F. W. Collins as such fireboss of said room 15, was guilty of negligence in that he having ordered and directed in his said official capacity the plaintiff to pass to his work as such miner and work under the roof of the said room No. 15, and at the face of the said room left the roof of the said room No. 15 and at the point aforesaid without stulls, timber supports or lagging, and refused and neglected to supply or furnish to the plaintiff or the miners working in the said room No. 15 timber, or in the alternative sufficient timber or other material with which to support or lag the said roof of said room No. 15, and in particular at the point aforesaid, and refused and neglected to daily inspect the said working place, or make any report thereof as required by Rule 30 of section 82 of the Coal Mines Regulation Act knowing, or as he should have known, the danger and risks he was thereby allowing the plaintiff to incur, which he the said Daniel Evans as such mine superintendent as aforesaid, or in the alternative which he the said Charles Symester as such overman as aforesaid, or in the alternative which he the said F. W. Collins as such fireboss as aforesaid, was more capable of appreciating

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than the plaintiff, and in not remedying the said negligent acts or warning the plaintiff thereof."

Paragraph 8 contained an allegation of liability on the part of the defendants apart altogether from the Employers' Liability Act.

Defendants applied for particulars of the negligence referred to in paragraphs 3 and 4 of the statement of claim, either of Evans, Symester or Collins, and on the summons coming on before IRVING, J., the particulars asked for were ordered.

The plaintiff appealed to the Full Court, the appeal being argued at Victoria on the 26th of January, 1903, before HUNTER C.J., DRAKE and MARTIN, JJ.

S. S. Taylor, K.C., for appellant: The pleading follows the form given in Ruegg, 4th Ed., 311; paragraph 5 gives the particulars.

Davis, K.C., for respondents: If paragraph 5 only refers to paragraphs 3 and 4 and they rely on nothing else, we are satisfied.

[HUNTER, C.J.: On the face of it there is nothing to connect 5 with 3 and 4.]

Argument

Taylor: We have followed the form in Ruegg.

[HUNTER, C.J.: When you got the demand for particulars, why didn't you say that they were to be found in 5?]

We are not bound to give any more particulars than have been given.

[HUNTER, C.J. and DRAKE, J.: This Court is not bound by Ruegg.

MARTIN, J.: If your pleading was right you were not called upon to answer their letter in reference to particulars; I agree with you that Ruegg is a reliable authority, but you have not followed his form strictly.]

Section 8 comes later on in the statement of claim.

[HUNTER, C.J.: Ruegg is dealing only with an action under the Employers' Liability Act, and you are mixing them up.

MARTIN, J.: The position of the paragraphs in the statement of claim does not control the allegations.]

Judgment

Per curiam: The appeal is dismissed with costs.

JONES *ET AL* v. GALBRAITH AND SONS.

IRVING, J.

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JONES *v.* GALBRAITH AND SONS

Patent of invention—Combination—Novelty—Infringement.

A patent for a mechanical combination is not infringed unless the combination is taken in essence and in substance.

APPEAL from the judgment of IRVING, J.

Action by the owners of a patent for improvements in wood turning machines for damages against the defendants, who had in the month of April, 1901, constructed a machine containing a set of knives, graduated or fixed cutters, alleged to be similar to those used in the plaintiffs' machine and by means of which they were manufacturing goods.

The particulars of the alleged infringement were as follows:

(1.) The Jones machine comprises a series of fixed graduated cutters with a rotary block carrier for moving the blocks against the said cutters and means for rotating the blocks relative to the carrier. In the Jones machine the blocks of wood from which the floats are made are held in the spider frame, which spider revolves, bringing the revolving blocks in contact with the series of knives, which knives are so shaped that the first knife in contact with the block removes the rough or outer surface and starts to form a block to shape of float; the next knife is so shaped to remove more of the wood, bringing the block nearer in shape to the shape of a float when finished, and so on until the last knife perfects the float; the wood still moves and the knives are so shaped that by the time the block has passed over the series of knives it has been turned or shaped by the knives into a perfect float. The knives being arranged so that they are fixed or stationary as to one another.

Statement

In the Galbraith machine a series of knives of graduated shapes and sizes are used to operate as in the case of the Jones machine, the difference being that in the Jones machine revolving blocks are carried against the fixed knives, and in the Galbraith machine the fixed knives are carried against the revolv-

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ing blocks. The essence of the Jones machine is comprised in a series of fixed cutters or knives mounted on a rigid frame which knives gradually shape the wood into a float when the wood is brought in contact with them and the means of bringing the block and cutters together thus forming a float, or shaping the wood gradually in the manner desired, and the Galbraith machine infringes the Jones patent in all these points as well as in the principle of the machine.

2. The particulars of the specifications set out in the plaintiffs' patent alleged to be infringed are as follows, being the claims secured by the said letters patent.

(I.) A wood-turning machine comprising a series of fixed cutters, a rotary block carrier for moving blocks against said cutters, means for rotating the blocks relatively to the carrier, a saw for severing a block from the strip, means for imparting a back and forth motion to said saw, means for moving a block forward and a reciprocating frame for holding and operating a boring tool substantially as specified.

(II.) A wood-turning machine comprising a main shaft, a saw-carrying frame mounted to swing relatively to said main shaft, a circular saw carried by said frame, means for rotating the saw from the main shaft, a carriage for moving a sawed block forward, a bit-carrying carriage movable at right angles to the block-moving carriage, means for operating both of said carriages, a rotary carrier, chucks and spindles mounted in said carrier and adapted to rotate relatively thereto and cutter blades arranged near the carriage for engaging with and cutting or turning the blocks, substantially as specified.

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(III.) A wood-turning machine comprising a main shaft, a saw-carrying frame mounted on and adapted to rock with the frame, a pulley on the arbor of said saw adapted for engagement with a band extended from a band-wheel on the main shaft, guide rods arranged at one side of the saw, a carriage on the said guide rods, pushing fingers on said carriage and adapted to swing relatively thereto, a fulcrumed lever having a link connection with the carriage, an eccentric for rocking said lever, a boring device forward of the saw, a block carrier forward of the boring device and cutter blades, substantially as specified.

(IV.) In a wood-turning machine the combination with cutter blades and a carrier for moving blocks of wood against the same of chucks and spindles mounted on said carrier and adapted to rotate relatively thereto, means for rotating the chucks relatively to the carrier, a bit-carrying frame movable transversely of the block-carrier, a fulcrumed lever having a link connection with the said bit-carrying frame, an eccentric rocking said lever, an elongated roller mounted in the bit-carrying frame and adapted to be engaged by a band extended from a band-wheel on the main shaft of the machine, a rotary saw and means for forcing a block forward to the saw, substantially as specified.

(V.) In a wood-turning machine, the combination with a carrier for blocks, of a segmental plate concentric with said carrier, guide plates mounted to swing on segmental plate, cutter blade shanks adjustable longitudinally in said guide plates and means for securing them as adjusted, substantially as specified.

(VI.) In a wood-turning machine the combination with sawing and boring devices of a block carrier, chucks carried by said block carrier and adapted to rotate relatively thereto, a ring plate having beveled portions for moving the chucks into and out of engagement with blocks, spindles mounted on and adapted to rotate relatively to the said block-carrier, a ring plate having beveled portions adapted to move said spindles into and out of engagement with a block and cutters arranged adjacent to the block-carrier, substantially as specified.

Statement

(VII.) In a wood-turning machine the combination with a block-carrier of a segmental plate concentric to the block-carrier, guide plates having pivotal connection near their inner ends with said segmental plates, screw threaded lugs on said guide plates passing through arc slots in the segmental plate, set nuts on said lugs and knife-carrying shanks adjustable in said guide plates, substantially as specified.

The trial took place at New Westminster on the 16th of May, 1902, before IRVING, J.

Davis, K.C. (*Corbould, K.C.*, with him), for plaintiffs, contended that defendants infringed the plaintiffs' patent by the use of the said graduated series of fixed cutters in combination with other

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mechanical equivalents used in the plaintiffs' patent and cited the following cases: *Proctor* v. *Bennis* (1887), 57 L.J., Ch. 11; *Federation Brand Salmon Canning Co.* v. *Short* (1900), 31 S. C.R. 378; *Clark* v. *Adie* (1877), 2 App. Cas. 315; *Lister* v. *Leather* (1858), 27 L.J., Q.B. 295 and *Sellers* v. *Dickinson* (1850), 20 L.J., Ex. 417.

Reid (*Howay*, with him), for defendants, contended, first, that the graduated series of fixed knives were not covered by the claims in the patent; second, that the plaintiffs' patent was shewn by the evidence to be a secondary invention and hence should be construed strictly; third, that plaintiffs' invention was for a combination which constructed net floats automatically; and fourth, that a graduated series of fixed cutters was not novel and cited *Clark* v. *Adie, supra*; *Curtis* v. *Platt* (1863), 3 Ch. D. 135; *Harrison* v. *Anderston Foundry Co.* (1876), 1 App. Cas. 574 at p. 578; *Dudgeon* v. *Thomson* (1877), 3 App. Cas. 34; *Carter & Company* v. *Hamilton* (1894), 23 S.C.R. 172 and *Seed* v. *Higgins* (1860), 8 H.L. Cas. 550.

21st May, 1902.

IRVING, J.: The plaintiff claims as the essential feature of his machine the arrangement in a series of a number of knives graduated so as to reduce a rough block of wood into the finished article.

As I read the patent, I do not think the plaintiff made a claim for this novelty. To my mind his patent is for a "combination."

IRVING, J.

If I am wrong on that point I must also decide against him on the ground that I am unable to distinguish the essential features claimed by him from the essential features to be found in the guage lathe and in the spool machine described by Mr. Russell as being used in 1889.

I give my conclusion with a great deal of diffidence. Action will be dismissed. Costs follow event. Execution stayed one month.

The plaintiffs appealed to the Full Court and the appeal was argued at Vancouver on the 5th of December, 1902, before HUNTER, C.J., DRAKE and MARTIN, JJ.

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Wilson, K.C. (*Corbould, K.C.*, with him), for appellants, cited

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in addition to the cases already mentioned, *Oxley* v. *Holden* (1860), 8 C.B.N.S. 666; Frost, 242; *Griffin* v. *Toronto Railway Co.* (1902), 7 Ex. C.R. 411 and *The Queen* v. *La Force* (1894), 4 Ex. C.R. 14.

Reid, for respondents, cited in addition to those cited by him at the trial, the following authorities: *Ticket Punch and Register Company, Limited* v. *Colley's Patent, Limited* (1895), 11 T.L.R. 262; *Proctor* v. *Bennis* (1887), 36 Ch. D. 740; *Hinks & Son* v. *Safety Lighting Co.* (1876), 4 Ch. D. 607; *Macfarlane* v. *Price* (1816), 1 Stark. 199 and *Lusk* v. *Miller* (1872), Mich. T., N.B.

Wilson, in reply, cited *Newton* v. *Grand Junction Railway Co.* (1846), 20 L.J., Ex. 427 at p. 429.

Cur. adv. vult.

19th January, 1903.

HUNTER, C.J.

HUNTER, C.J.: I think that this appeal should be dismissed, and substantially for the same reasons as are given in the judgment of Mr. Justice DRAKE, which I have had the advantage of reading.

Fixed cutters are not new, or claimed by the plaintiff so to be. In his machine the wood is turned against fixed cutters projecting at various distances from a curved arm; in the defendant's, a straight bar with fixed cutters is pulled by hand against the wood. The effect of the plaintiff's contention is that because he has invented a machine with fixed cutters which automatically produces the finished product, such product cannot be produced in whole or in part by any other machine with fixed cutters without infringing his invention, a proposition which is clearly not law.

DRAKE, J.

DRAKE, J.: The appeal in this case is from the judgment of Mr. Justice IRVING, who decided that the defendants had not infringed the plaintiff's patent, both in respect of the want of novelty, and also in the fact that the plaintiff made no claim for the arrangement of a series of graduated cutters in his specifications as a novelty.

The plaintiff's machine is stated to be an improvement in wood turning. It is entirely automatic in its operations, and as a whole is an ingenious machine. It cuts wood into blocks, bores a hole through them, and carries the blocks on to a spindle which rotates them against a series of knives fixed in a curved arm.

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These knives or cutters are adjustable by screws, and can be varied at pleasure, and thus convert the blocks into finished floats for nets. These floats are egg shaped and the operation of cutting is two-fold, rounding the block and reducing the ends. From beginning to end the whole operation is automatic.

The plaintiff alleges an infringement by the defendants. The defendants' machine is an ordinary lathe. The blocks have to be cut by hand, and the corners removed. The block is then placed in a lathe and pulled by hand against a series of cutters which are embedded in a flat surface, and are not removable or adjustable, and the cutters attain the same result in shaping the blocks into a float, but there are only five knives used instead of ten, as in the Jones machine. The infringement alleged is in the use of these knives or cutters. No other part of the defendants' machine is objected to.

The first question we have to consider is whether or not the plaintiff has claimed in his patent as new these cutters in his machine. In claim 1 he describes his machine as comprising a series of fixed cutters, a rotary block-carrier for moving blocks against the cutters; means for rotating the blocks relatively to the carrier; a saw for severing a block from the strip; means for imparting a back and forth motion to the said saw; means for moving a block forward, and a reciprocating frame for holding and operating a boring tool. In fact this statement in general covers the whole machine. In claims 2, 4, 6 and 8, he refers to the cutters. In 6, he says cutter-blade shanks are adjustable longitudinally in the guide plates; and means for securing them as adjusted. He says there is nothing novel in the shape of any of the knives. The specifications are in reality a combination of well-known principles for attaining a new result. Knives or cutters set in frames for the purpose of shaping blocks of wood are not new. Whether the mode of adjusting the knives by screws is new is not in question, as in Galbraith's machine the cutters are set solid and not adjustable.

DRAKE, J.

There is no doubt that the plaintiff's machine is entitled to a patent, it does the work more economically, and speedier than any previous machine.

In *Parkes* v. *Stevens* (1869), 38 L.J., Ch. 627 at p. 631, James,

V.C., says the cases establish that "'a valid patent for an entire combination for a process gives protection to such part thereof as is new and material for the process' . . . . . and the question in every case is a question of fact; is it really and truly a substantial part of the invention?" And in *Flower* v. *Lloyd* (1877), W.N. 132, in order to constitute an infringement of a patent for a combination there must be an infringement of the whole combination, not necessarily of every step of the combination, but there must be an adoption of that which constitutes the essence of the combination.

The law governing patent cases seems rather different in England to that governing Canadian patents.

In *Lusk* v. *Miller* (1872), Mich. T., N.B., it was held no infringement to use part of a combination.

In England it is not necessary that every element should be taken: *Miller* v. *Clyde Bridge Steel Co.* (1891), 9 R.P.C. 470.

In Canada if an element is dropped out of a claim, infringement is avoided.

The plaintiff admits that the shape of the cutters is not new, and there were machines like the defendants' but with one knife only.

We then find from Mr. Russell's evidence that in machines for making spools a fixed series of cutters was used for shaping the spools, and the principle seems to me to be very much the same as in both these machines. That being so, the enlargement of the cutters for doing larger work does not make the plaintiff's cutters a novelty.

DRAKE, J.

I therefore think that the plaintiff has failed to make out a case of infringement. This is not a case of mechanical equivalents to do that which the plaintiff's machine effects. I further think he has not anywhere shewn that the fixed knives are claimed as a novelty; the means of adjusting them may be, but that is not in question here, and I further think that the evidence shews that as a fact fixed cutters are no novelty, and therefore dismiss the appeal with costs.

MARTIN, J.: I concur.

MARTIN, J.

Appeal dismissed with costs.

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IN RE UNITED CANNERIES OF BRITISH COLUMBIA, LIMITED.

Winding-up—Petition by shareholder—Insolvency—R.S.C. Cap. 129, Sec. 5 (c.) and 62-63 Vict., Cap. 43, Sec. 4.

By section 5 (*c.*) of the Winding Up Act (Dominion) a company is deemed insolvent "if it exhibits a statement shewing its inability to meet its liabilities:—

Held, that the inability to meet liabilities means liabilities to creditors as distinguished from liabilities to shareholders.

On the hearing of a petition based on such a statement the statement must be accepted as correct.

Remarks as to company balance sheets.

PETITION to wind up a company. The facts appear fully in the judgment.

Wilson, K.C., for petitioners.
Joseph Martin, K.C., contra.

1st April, 1903.

IRVING, J.: This is the hearing of a petition filed, under section 8 of chapter 129, as amended in 1899, Cap. 43, Sec. 4, by certain shareholders for a winding-up order on the ground that the Company is insolvent. The insolvency is to be inferred from the Company "having exhibited a statement shewing its inability to meet its liabilities," R.S.C. 1886, Cap. 129, Sec. 5 (*c*).

Judgment

The Company was incorporated under the Companies Act, 1897, and Amending Acts, in November, 1899, with a nominal capital of $500,000, of which $255,000 is paid up.

In March, 1903, the statement relied on by the petitioners, was exhibited. It purports to be a balance sheet as at 31st December, 1902. The liabilities to creditors are stated at $176,498.79; in addition to that liability there is also $255,000 subscribed capital.

The assets are scheduled in the balance sheet $386,152.10, the difference between the two totals some $45,000 odd being shewn

on the credit side of the balance sheet as the loss in 1900 and 1902, after deducting the profit in 1901.

Mr. *Wilson* contends that he is at liberty to shew that the balance sheet is incorrect, in that it over values the assets and under estimates the liabilities. I am of opinion that when a petition is filed under sub-section (*c.*) the statement must be accepted as correct. If a person desires to petition on any other ground, wherein the statement would be used as evidence such other ground should be specified.

It was suggested in argument that sub-section (*d.*) of section 5 might be brought into play, by reason of the charges of over valuation made in the petition, but I think not, *secundum allegata et probata* being the rule.

The statement clearly shews that the gross assets fall some $45,544.69 short of the total liabilities to the public and shareholders. In other words, if the assets were taken to meet the liabilities to the creditors, the shareholders would have only $209,455.31 against the $255,000 subscribed by them.

During the argument the form of this balance sheet received some criticism from counsel for the petitioners, but after studying it for some time, I am inclined to think that it is framed so as to be what a balance sheet should be. A balance sheet is not necessarily a statement of liabilities and assets with the present market value of each item. That is the popular idea of a balance sheet, but it is not correct.

Judgment

The debit side which should be headed " Capital and Liabilities " includes the capital of the company as abstracted from the ledger, the liabilities to creditors, also any reserve, and any surplus brought from the revenue of profit and loss, shewing the amount available for dividends. The credit side of a balance sheet must, as this does, shew in addition to the assets (using that word in its ordinary sense) an entry for work in progress or expenditure in advance of next season's work. In order to give full information to shareholders, there must also be shewn on the same side the result of a loss (if any) on the trading. The deficiency in this case is $45,544.69 and properly appears on the credit side of the balance sheet; but it certainly is not an asset on property available to satisfy a debt. Whenever this defici-

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ency item appears on the credit side, no dividend can be paid to the subscribers out of revenue.

Now, is every company which puts forward a statement shewing that it has been trading at a loss to be regarded as "exhibiting a statement that it is unable to meet its liabilities" so as to amount to a declaration of insolvency within the meaning of section 5 of the Winding Up Act? I do not think that is the idea of the statute.

Sub-section (*c.*), of section 5, for the convenience of creditors, declared that the exhibition by a Company of a statement of inability to meet liabilities should be deemed an act of insolvency; the liabilities there referred to mean in my opinion, liabilities to creditors and did not in any way refer to liabilities to shareholders. In my opinion, in 1899, when Parliament conferred on the shareholders, the power to petition (1899, Cap. 43, Sec. 4), it did not intend that the word "liabilities" in sub-section (*c.*) should have any more extended meaning than that which it then had by virtue of the Act of 1886, or that in 1899, the test of insolvency should be measured by liability to shareholders and creditors instead of by its liability to creditors.

But apart from that, the making of a winding-up order on the petition of a shareholder is a matter of discretion. In view of the fact that by section 5, of the Provincial Statute, 1898, Cap. 14, Sec. 5, the Companies Winding Up Act, 1898, there is a provision to make an order for winding up in case the Court is of opinion that it is just and equitable that the company should be wound up. I think a Judge should be very slow to order a speculative company to be wound up on the ground mentioned in sub-section (*c.*) of the Dominion Act, Cap. 129, at the instance of a shareholder, especially a cannery company, at this season of the year.

Judgment

But I rest my decision on the ground that the inability to meet liabilities in sub-section (*c.*) means liabilities to *creditors* as distinguished from liabilities to *shareholders.*

Petition will be refused with costs.

CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND MINERS UNION *ET AL.*

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CENTRE STAR v. ROSSLAND MINERS UNION

Practice—Embarrassing plea—Striking out—Privilege—Particulars of. Costs—Of appeal when appellant only partially successful.

It is open to either party to an action up to the time of the trial to attack the other's pleadings.

In an action against a labour union for damages in respect of a strike, the union pleaded that "they were not a company, corporation, co-partnership or person, and not capable of being sued in this or any action."

Held, bad plea.

Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing.

An appellant who is substantially successful is entitled to the costs of appeal.

The fact that a respondent is successful in some parts of an appeal is not sufficient to deprive an appellant who is substantially successful of his costs.

APPEAL from an order of MARTIN, J.

This was an action against several labour unions and their officers, and the plaintiffs claimed an injunction and damages sustained by them on account of a strike in Rossland in the summer of 1901.

Statement

The original statement of claim was delivered on 21st October 1901, and the statement of defence on 22nd November, 1901, and subsequent to the latter date, the plaintiffs proceeded with examinations for discovery and other interlocutory proceedings, and on 28th May, 1902, they obtained leave to amend their writ and statement of claim, the amended statement of claim being delivered on the 17th of June, and on 26th November, after an interlocutory appeal* in respect to the amended statement of claim had been disposed of, the defendants delivered their defence.

The amended statement of defence contained the following paragraphs:

"(16.) The defendants, Rossland Miners Union No. 38, Western Federation of Miners, say that they are not a company,

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corporation, co-partnership or person, and are not capable of being sued in this or any action.

"(17.) A like allegation as to the Carpenters and Joiners Union No. 1, of Rossland.

"(18.) A like allegation as to the Blacksmiths and Helpers Union.

"(19.) A like allegation as to the Rossland Co-operative Association.

"(22.) In the alternative the defendants say, and each of them says that all matters, doings, sayings and communications complained of in the plaintiffs' statement of claim as having taken place during the meetings of each of the defendants, the Rossland Miners Union No. 38, Western Federation of Miners, the Carpenters and Joiners Union No. 1 of Rossland, the Blacksmiths and Helpers Union, the Rossland Co-operative Association, Limited, and Western Federation of Miners Rossland Branch, or their members, trustees, executive officers, officers, or committees, or the members, trustees, officers, executive officers, or committees or any of them (none of which matters, doings, sayings or communications are admitted, but are denied) are privileged."

"(26.) An alternative allegation on behalf of all the defendants, that the acts of commission and omission alleged in the statement of claim, if committed at all, were wholly unauthorized and committed without authority.

Statement

"(27.) The defendants and each of them claim the benefit of the provisions of Chapter 66 of the Statutes of the Province of British Columbia for the year 1902, being an Act entitled an Act to Amend the Law relating to Trade Unions."

Paragraphs 16, 17, 18 and 19 of the amended statement of defence were identical with like paragraphs of the original statement of defence in respect of which the plaintiffs never made any objection, but they now applied on summons to strike out paragraphs 16, 17, 18, 19, 22, 26 and 27 as tending to prejudice, embarrass and delay the fair trial of the action.

The summons was dismissed by MARTIN, J., who held that the plaintiffs by allowing the pleadings to be closed originally without objection could not now object in respect to pleas which were in the defence as first delivered.

The plaintiffs appealed to the Full Court, and the appeal was argued at Victoria on 26th and 27th January, 1903, before HUNTER, C.J., WALKEM and IRVING, JJ.

Galt, for appellants: The application was made under rr. 174 *et seq.*: r. 181 says that the application may be made at any time: he cited *Cross* v. *Howe* (1892), 62 L.J., Ch. 342. At any rate the pleadings were opened up by the order giving leave to amend, and the amendments were made.

The pleas (16, 17, 18 and 19) are embarrassing: an outline of the facts on which the defendants are going to rely should be given: see rr. 158 and 167; Odgers, 72; *Heugh* v. *Chamberlain* (1877), 25 W.R. 742; *Davy* v. *Garrett* (1878), 7 Ch. D. 473; *Stokes* v. *Grant* (1878), 4 C.P.D. 25; *Knowles* v. *Roberts* (1888), 38 Ch. D. 263; *Lumb* v. *Beaumont* (1884), 49 L.T.N.S. 772, and *Walters* v. *Green* (1899), 2 Ch. 696.

As to paragraph 22 they must shew in what respect the privilege exists: see Odgers, 220.

As to paragraphs 26 and 27: they are for the purpose of taking advantage of the Trade Unions Amendment Act, B.C. Stat. 1902, Cap. 66, which is clearly not retrospective: he cited Maxwell, 298, and *Liardet* v. *Hammond Electric Light and Power Co.* (1883), 31 W.R. 710.

S. S. Taylor, K.C., for respondents: The defendants never objected to our pleadings for several months, so in putting in the new defence we thought they were satisfied with the pleas which were in the original defence: the Court should not in the exercise of its discretion now order these pleas struck out. He cited *Taff Vale Railway Co.* v. *Amalgamated Society of Railway Servants* (1901), A.C. 426 at pp. 429, 439 to shew that a mere association of people is not suable: if we are not suable we must shew why in our pleading.

Argument

[*Per curiam*: Paragraphs 16, 17, 18 and 19 are bad pleas.

HUNTER, C.J.: As to delay, either party is allowed to attack pleadings up till the time of the trial.]

As to paragraph 22, the plaintiffs have never demanded particulars of the privilege claimed: see An. Pr. 260.

As to paragraphs 26 and 27: questions of law going to the merits of the case should not be decided on such an application

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as this, which is applicable only to questions of form: see *Golding* v. *Wharton Saltworks Co.* (1876), 1 Q.B.D. 374.

Gault, in reply, cited *Cave* v. *Torre* (1886), 54 L.T.N.S. 515; *Gardner* v. *Irvin* (1878), 4 Ex. D. 49, and *Liardet* v. *Hammond Electric Light and Power Co., supra*, judgment of Bowen, L.J.

HUNTER, C.J.: Sections 16, 17, 18 and 19 should be struck out: pleadings should be concise and positive with no ambiguity. As to paragraph 22, the defendants must set out the particulars of privilege within fourteen days, otherwise that plea will be struck out. Paragraphs 26 and 27 should be struck out, as the Trades Union Act is clearly not retrospective, and I think we can decide the question of law now, and that it is not necessary to have a point of law set down for argument.

HUNTER, C.J.

WALKEM, J.: I agree except as to paragraphs 26 and 27: the defendants should be allowed to set up the statute as a defence, if they so desire, and the Act can then be construed by the trial Judge from whose judgment there is an appeal to this Court with a further appeal to the Supreme Court of Canada. If we decide it now on this interlocutory appeal, there would be no appeal from our decision.

WALKEM, J.

IRVING, J.: I agree with the Chief Justice as to paragraphs 16, 17, 18, 19 and 22, and with my brother WALKEM as to paragraphs 26 and 27.

IRVING, J.

The question of costs was reserved until later in the day when the following opinion of the Court was read by

IRVING, J.: The plaintiffs took out a summons to strike out certain paragraphs in the statement of defence.

In Chambers the defendants raised the point that the plaintiffs' application was too late, and the learned Judge gave effect to this objection.

Judgment

The same point was raised before us, and we overruled it.

From this it will be seen that it was the defendants who compelled the plaintiffs to bring this appeal to obtain a decision on the pleadings, which matter could have been determined more conveniently and much more economically below.

Before us the plaintiffs succeeded on two, and failed on one, of the points involved in the question of pleading.

In our opinion the plaintiffs have been substantially successful, and we think they should have the costs of the appeal.

We think that parties cannot by snatching at a judgment below compel the other side to come here, at the risk of losing the costs of appeal if they fail in a single item.

The costs below will be the plaintiffs' costs in the cause in any event: they will recover the costs of this appeal.

Appeal allowed (in part) with costs.

HUTCHINS v. THE BRITISH COLUMBIA COPPER COMPANY, LIMITED.

County Court—Practice—Setting aside judgment and granting new trial—Power of Judge.

A County Court Judge has no power to grant a new trial merely because he is dissatisfied with the verdict: he is to be guided in granting a new trial by the same principles as the Full Court.

Held, on the facts (reversing LEAMY, Co. J.), that there was evidence to support the verdict and a new trial should not have been granted.

APPEAL from an order of LEAMY, Co. J., granting a new trial.

The plaintiff entered the employ of the defendants as a mining superintendent in August, 1899, at a salary of $175 a month, and continued in their employ until the 1st of May, 1902, when he was dismissed by the manager without notice. Plaintiff then sued the defendants for $1,448.25, the particulars of his claim being:

Statement

"To arrears of wages from 1st November, 1899, to 1st November, 1900, 12 months, at $25 per month... $ 300 00

To arrears of wages from 1st November, 1900, to 1st May, 1902, 18 months, at $50 per month..... 900 00

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To damages for wrongful dismissal as follows:

To salary for month of May, 1902 ..... $225 00

To fuel, house rent and light for May, 1902 ..... 23 25

$1,448 25"

Plaintiff alleged that at the time of his engagement it was agreed that he was to be furnished with a house and fuel, and that as the number of men under him was increased he was to be paid an increased salary, and for such increase he made a claim under the head of arrears in the particulars. Plaintiff was paid $175 each month, and signed the pay roll.

On the 30th of April, the plaintiff gave notice that he would quit his employment at the end of May, but on the 1st of May, after a heated interview with the manager, he was summarily discharged.

The defendants contended that plaintiff's salary was fixed at $175 per month, and at the time of the hiring the manager told him that if things improved he hoped to increase his wages, but that they had never been increased since; that they agreed to furnish plaintiff a house, but that fuel and light were not mentioned, although, as a matter of fact, they had supplied him with them; and in justification of the dismissal, they contended that plaintiff had misconducted himself in wilfully disobeying orders, and that his conduct was likely to seriously injure their business.

Statement

At the trial before LEAMY, Co. J., and a jury, a verdict in favour of plaintiff for $175 was returned, and judgment was entered accordingly.

Subsequently the defendants applied on summons to the trial Judge for a new trial, which was granted on the ground that the verdict was against the weight of evidence.

The plaintiff appealed, and the appeal was argued at Vancouver on the 24th and 25th of November, 1902, before HUNTER, C.J., IRVING and MARTIN, JJ.

Davis, K.C., for appellant: The appellant abandons the claim for arrears of wages, but will rely on the claim for damages for wrongful dismissal. The power to grant new trials conferred upon the Judges of the County Court by section 159 of the

Argument

County Courts Act is not greater than that of the Full Court: the corresponding section in the English Act gives the Judge power to grant a new trial "if he shall think just": "fit" is no wider than "just." He cited *Murtagh* v. *Barry* (1890), 24 Q.B. D. 632. There was evidence to justify the verdict.

L. G. McPhillips, K.C., for respondents: The Court will not interfere with the discretion exercised by the County Court Judge unless it appears that he was clearly wrong: see *Hunter* v. *Vanstone* (1881), 6 A.R. 337; *Wilson* v. *Brown & Wells* (1882), 7 A.R. 181; *Fournier* v. *Canadian Pacific Railway Co.* (1896), 33 N.B. 565 and *Reg.* v. *County Court Judge of Greenwich and Moxon* (1888), 36 W.R. 668-9.

The verdict was perverse, and justice will not be done unless there is a new trial. The rules applicable to Supreme Court Appeals apply: see section 164 County Courts Act, and the rule is explained in *Jones* v. *Spencer* (1897), 77 L.T.N.S. 536. The question of condonation was not in issue at the trial.

It would have been injurious and even dangerous for the defendants to have kept the plaintiff in their employ, and they had a right to dismiss him as they did: see Smith on Master and Servant, 150; *Spain* v. *Arnott* (1817), 19 R.R. 715; *Belanger* v. *Belanger* (1895), 24 S.C.R. 678 at p. 681, and *Pearce* v. *Foster* (1886), 17 Q.B.D. 536 at pp. 539 and 542.

Here the Judge has exercised his discretion, and the most clear and satisfactory grounds for disturbing it must be shewn: the County Court Judge is virtually the Court of Appeal: see *Humphrey* v. *Nowland* (1862), 15 Moo. P.C. 343 at p. 368, and *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133 at p. 136.

Argument

The County Judges frequently do grant new trials on the ground that the verdict is against the weight of evidence: see *How* v. *London and North Western Railway Co.* (1891), 2 Q.B. 496 at pp. 500-1 affirmed on appeal (1892), 1 Q.B. 391.

There were two issues left to the jury; one for $1,200 for arrears of wages, and another for $248.25 for damages. The jury returned a verdict for one whole sum only, *i. e.*, $175, without specifying how this was to be applied to the issues, whether to one only or to both.

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No one but the jury is entitled to apportion the verdict, and as plaintiff's counsel has expressly abandoned one of the issues, the judgment cannot stand.

Davis, in reply: The rule is that a verdict will not be set aside if it is one which reasonable men could reasonably find. The rule is laid down in *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152.

[HUNTER, C.J.: See also *Phillips* v. *Martin* (1890), 15 App. Cas. 193.]

Even if plaintiff was guilty at one time of misconduct justifying his dismissal, there has been condonation: see *McIntyre* v. *Hockin* (1889), 16 A.R. 498 and *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339.

Cur. adv. vult.

19th January, 1903.

HUNTER, C.J.

HUNTER, C.J.: *Murtagh* v. *Barry* (1890), 24 Q.B.D. 632, cited by Mr. *Davis*, is an express decision upon the limits within which a County Judge may move in granting new trials under section 159 of the Act. It is there laid down by Lord Coleridge, C.J., that he is to be guided by the same principles as the Court of Appeal, and that he cannot grant a new trial merely because he is dissatisfied with the verdict. This, indeed, would seem somewhat obvious, as if it were otherwise it would soon come to pass that the jury would be a mere machine to register the opinions and decrees of the Judge. *Hunter* v. *Vanstone* (1881), 6 A.R. 337, an earlier decision of the Court of Appeal in Ontario, cited by Mr. *McPhillips*, seems directly opposed to *Murtagh* v. *Barry*. However, it is not necessary to investigate the statutes and rules on which it was decided, as even if it were well decided it cannot prevail against the English decision.

Then having regard to the rules which guide this Court in granting new trials, I think the learned Judge was in error in granting a new trial. There is sufficient evidence to support the finding that the dismissal was wrongful. The plaintiff gave a month's notice to quit on April 30th, 1902, and on the next day was dismissed as the result of a heated interview between himself and the manager, who had in the meantime discharged a number of men without saying anything to the plaintiff, and

otherwise ignored the plaintiff, whose duty it was to superintend the work in the mine. Although there had been a difference of opinion some two months before between them as to the advisability of working the mine on the contract system, the manager evidently yielded to the opinion of the plaintiff as being a practical and experienced mining superintendent, and the manager admits that he "Did intend to let him remain and take the thirty days." It was therefore quite open to the jury to take the view that the dismissal was the result of the manager's anger, and either that the charge of misconduct was trumped up as a defence to the claim for the month's salary, or, that if there had been any misconduct, it had been condoned.

The order for the new trial should be set aside with costs here and below.

IRVING, J.: I accept as correct the proposition that the County Court Judge in exercising his jurisdiction in granting a new trial is bound by the same limitations that bind us, that is to say, the limitations laid down in *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152.

IRVING, J.

The question for consideration at the trial was, was the plaintiff persistent in disobeying the master's orders? I think he was persistently setting himself up in opposition to his senior officer, and that he was properly dismissed. The jury found otherwise.

The question for our consideration on this appeal is, was the County Court Judge right in granting a new trial? I think he was, and that his decision can be supported by *Metropolitan* v. *Wright*.

I do not agree with the "condonation" doctrine. An employer in my opinion, may very properly invoke as grounds for dismissal certain acts which at one time he was willing to overlook: see *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (1888), 39 Ch. D. 339.

MARTIN, J., agreed that the appeal should be allowed.

MARTIN, J.

Appeal dismissed, Irving, J., dissenting.

HENDERSON, CO. J.

1902

Dec. 20.

THOMPSON v. HENDERSON

THOMPSON *ET AL* v. HENDERSON.

County Court—Practice—Commission to take evidence of party to suit.

In an action on a promissory note for $65.40, the defendant pleaded that the note was obtained from him under duress, and the plaintiffs, who lived in Ontario, applied for a commission to take their evidence there:—

Held, that as the probable expenses of the commission would not exceed a quarter of the expenses of the plaintiffs' attending the trial, and the appliction was made *bona fide*, it should be granted.

APPLICATION for a commission to take evidence of witnesses resident in Ontario.

Harris, for the application.
Killam, contra.

20th December, 1902.

HENDERSON, CO. J.: This is an application by the plaintiffs for a commission to examine witnesses in Ontario. The witnesses sought to be examined are the plaintiffs themselves.

The application is opposed by the defendant, whose counsel, Mr. *Killam*, contends that under the authority of the cases cited by him, *viz.*, *Ross* v. *Woodford* (1894), 1 Ch. 38 at p. 42; *Lawson* v. *Vacuum Brake Co.* (1884), 27 Ch. D. 137; *Light* v. *Governor and Company of the Island of Anticosti* (1888), 58 L.T.N.S. 25 and *Tollemache* v. *Hobson* (1897), 5 B.C. 216, the examination should not be granted, particularly where the witnesses to be examined are the plaintiffs themselves.

Judgment

The amount sued for in the action is $65.40, being the amount of a promissory note made by the defendant in favour of the plaintiffs for $50 and interest thereon from 20th August, 1897, amounting to $15.40.

The defendant in an affidavit used in opposing a motion for speedy judgment made in this Court, admits the making of the note, but swears that the note was obtained by the plaintiffs from him under duress. In his dispute note filed in the action a similar allegation is made. This allegation is denied by both

plaintiffs in their respective affidavits used on the present application.

It is, I think, reasonably clear that the expenses of the plaintiffs coming to this Province to attend on the trial would not fall short of $250, while the expenses of the commission asked for should not exceed a quarter of that sum.

Although the question of expense should not be the sole consideration, it is nevertheless a proper question to be considered in an application of this nature.

With respect to the argument that the plaintiffs have chosen their forum and ought not to be allowed to have their evidence taken by commission, I may point out that the plaintiffs have made out a *prima facie* case, and would have succeeded on the application for judgment had not the defendant set up the defence that the note in question was signed under compulsion and threats.

Lord Esher, M.R., in delivering judgment in *Coch* v. *Allcock & Co.* (1888), 21 Q.B.D. 178 at p. 181, uses the following language: "It is clear that, according to the established practice, it (the granting of a commission) is a matter of judicial discretion, and the commission ought only to be granted on reasonable grounds being shewn for its issue. It must depend on the circumstances of the particular case. The Court must take care on the one hand that it is not granted when it would be oppressive or unfair to the opposite party, and on the other hand that a party has reasonable facilities for making out his case, when, from the circumstances, there is a difficulty in the way of witnesses attending at the trial."

Judgment

With regard to the plaintiff asking for a commission to examine himself, it is established in the same case that that also is a matter of discretion, but the discretion will be exercised in a stricter manner, and the Court ought to require to be more clearly satisfied that the order ought to be made. I am satisfied that the application is made in good faith and not for the purpose of delay and embarrassment, and in my view of the case there is nothing to warrant my refusing the order. In the exercise of my judicial discretion I therefore order that a commission issue as asked, but the costs will be in the discretion of the Judge who tries the case.

DRAKE, J.

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March 21.

MACDONELL v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY.

MACDONELL v. B. C. ELECTRIC RY. CO.

Municipal corporation—Vancouver Incorporation Act and Amendment of 1895—Street Railway Company—Grading street—Damage to land adjoining—Support.

A street railway company in grading a street in Vancouver in accordance with an agreement entered into with the corporation pursuant to the Vancouver Incorporation Act and Amendment of 1895, is not liable for damages for loss of support caused to lands adjoining the street.

ACTION for damages tried in Vancouver on 1st March, 1902, before DRAKE, J. The facts are stated in the judgment.

Macdonell, for plaintiff.

L. G. McPhillips, K.C., and *A. E. McPhillips, K.C.*, for defendants.

21st March, 1902.

DRAKE, J.: The first of these actions, M. 51, was commenced on the 24th of January, 1900, and the claim on the plaintiff's writ was for wrongfully lowering the grade of Davie Street in front of lots 12 and 13, block 38, Vancouver. The second action was brought by the same plaintiff against the defendants on the 18th of January, 1901, for the same tort in respect of the same lots, with the addition of lot 11 in same block.

Judgment

The statement of claim in the first action alleged that in December, 1899, the defendants wrongfully excavated and lowered Davie Street, and carried away earth therefrom, without leaving any support to the lots from the soil of the said street, and in not erecting a retaining wall preventing the soil of the lots falling into the street.

The statement of claim in the second action alleges the same injury to the plaintiff's land, and further, that they lowered the grade of Davie Street and excavated the same without legal authority, and also trespassed on the plaintiff's lots, and removed earth therefrom between 24th January, 1900, and 18th January, 1901.

The plaintiff, in support of her alleged causes of action, called the City Engineer, who produced a profile of Davie Street shewing the grade adopted by the Corporation, and he stated that the defendants excavated the street for their tram line to the intended grade by authority of the Corporation. The street at the time the defendants commenced to construct their tram line was in the rough, full of boulders and stumps, and had never been graded. He further stated that no grade had been given to the plaintiff when she commenced to build on the lots in question. The defendants had entered into an agreement with the Corporation authorizing them to construct a tram line on this street. This agreement was dated the 3rd of February, 1899, and duly executed; and by it the defendants' track was to conform to the grade of the street as defined by the City Engineer, and to be laid where directed by him. The City Engineer has no complaint to make respecting the work done by the defendants under the agreement.

The by-law confirming this agreement was passed on the 3rd of February, 1899.

All streets are vested in the Vancouver Corporation by their Act, Cap. 32 of 1886, Sec. 213, and no one can interfere with the streets without permission of the City Engineer. The Corporation by section 30 of Cap. 68, 1895, can regulate the plans, level and surface of roadways, and establish a general grade for the City, and specify what streets can be used for tramway purposes, and regulate the terms of user.

Judgment

The plaintiff produces no evidence controverting the right of the Corporation to establish a grade and enter into agreements for the construction of a tram line over the street in question. Her evidence is confined to an attempt to shew that the defendants in cutting the street down to the grade for the purpose of their line, also removed the earth alongside the plaintiff's lots, and caused the damage complained of. The Corporation are no parties to this action, and it is not therefore necessary to consider their position, or the rights and liabilities which their Act of Incorporation gives or imposes on them. I have to deal with this case on the evidence adduced. Wm. Lindsay, who had been foreman for the Corporation in April, 1900, stated that he

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made a sidewalk five feet from the lot line, and he said he noticed that the street was cut away past the plaintiff's line. He stated his instructions were to make a roadway beside the track, but that the excavation was almost complete before he went there. He did not plough the surface, but used teams to haul earth away.

The other witness is Stockwell. He says he was working in April and May, 1900, taking out gravel for the Tram Company, and some gravel was taken from the front of these lots; and he worked up to the line in some places. There was no sidewalk when he left work, but the cuttings seem now in further than when he left off working. The evidence of these witnesses is not satisfactory. They disagree as to the construction of the sidewalk, and cannot speak as to the exact locality of the alleged trespass. On the other hand, the defendants shew that in May 1900, the defendants' road-bed had been excavated not more than 20 feet from centre line of the street, which would leave 13 feet between the defendants' excavation and the plaintiff's line, and at this time the City was doing work and making the grade on the side between the defendants' track and street line. Morgan, and other witnesses say that in June the City was ploughing and blasting rock under Lindsay, and the earth had been removed right up to the plaintiff's line, but it was not done by the defendants' men. The rest of the defendants' evi-

Judgment

dence is to the same effect, and the result is that the weight of evidence preponderates in the defendants' favour. There is no direct evidence of trespass; it is a mere matter of surmise. The portion of the street between the lot line and the defendants' track was left in its natural state until the City took charge, and by ploughing and blasting cut the remainder of the road down to its correct grade. Whether they trespassed on plaintiff's land in so doing is not a question for me. The plaintiff had no fence on her line, and nothing apparently to mark the boundary beyond a post, which was stated to be in the lot line, but only one post was spoken of. Under these circumstances, I am of opinion that there is not sufficient evidence to shew that it was the defendants who trespassed on the plaintiff's lots. With regard to the street having been graded below the level of the

plaintiff's lots, the evidence of the defendants shewed that this was not the work of the defendants, but was done by the Corporation; the right of the Corporation to grade the streets is a statutory right, and is not in question in these actions. I therefore dismiss these actions with costs.

Actions dismissed.

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English law—Stamp Act, 1853, Sec. 19 (Imperial)—Not applicable to British Columbia—Bills of Exchange Act—Intention of was to modify and alter as well as codify the law.

Section 19 of the Stamp Act, 1853 (Imperial), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement is inapplicable to British Columbia, and hence did not come into force by virtue of the English Law Act.

Even if it were brought into force, it was annulled by the repugnant legislation of the Bills of Exchange Act, although not mentioned in the repealing schedule to the Act.

The Canadian Bills of Exchange Act was intended to modify and alter as well as to codify the law relating to bills of exchange, cheques and promissory notes.

A local manager of an incorporated company, who was authorized only to indorse cheques for deposit with the Bank of British Columbia, indorsed and cashed at the Bank of Montreal cheques payable to the Company drawn on that Bank:—

Held, the Bank of Montreal was liable to the Company for the amount of the cheques so cashed.

ACTION tried at Vancouver before HUNTER, C.J., on 7th November, 1902. The facts appear in the judgment.

Sir C. H. Tupper, K.C., and *Griffin*, for plaintiffs.
Wilson, K.C., and *Bloomfield*, for defendants.

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HINTON ELECTRIC CO. *v.* BANK OF MONTREAL

21st January, 1903.

HUNTER, C.J.: In this case the material facts are practically undisputed. One Cutler was the local manager of the plaintiff Company at Vancouver, and on the 4th of May, 1900, the following resolution was passed by the directors: "that in the absence of the managing directors from Vancouver all bills, notes, receipts, acceptances and indorsements, cheques and negotiable instruments be signed on behalf of the Company by George Cutler in the following form, 'The Hinton Electric Co., Limited, *per* George Cutler;'" and the resolution also authorized the opening of an account at the Bank of British Columbia, and that the signature of either of the managing directors should be sufficient authority to the Bank for payment of money, withdrawal of securities, etc.

On the 28th of July, 1900, this authority was cut down by the following resolution: "It was on motion resolved that the authority given to the Bank of British Columbia relative to the acceptance of George Cutler's signature for the Company be cancelled as from September 6th, 1900, except so far as relates to the indorsement of cheques for deposit to the Company's account."

This Bank, which afterwards became amalgamated with the Bank of Commerce, was the only Bank which the plaintiffs had any dealings with.

Judgment

In October, 1901, Cutler absconded with the proceeds of some cheques which he had indorsed and cashed, two of such cheques being cashed by the defendant Bank, the first being for $135, made by Boyd, Burns & Co., in favour of the plaintiffs, and the one in question in this action.

At the time of his indorsing the cheque, Cutler had only the limited authority stated, namely, to indorse for deposit only, but he indorsed the cheque generally, using for this purpose a bill or receipt stamp in the following form: "The Hinton Electric Co., Limited.....Manager Vancouver Branch," and inserting his signature.

Some evidence was given to shew that the defendant Bank had previously cashed other cheques bearing this indorsement, but none such were produced, and the evidence was of too un-

satisfactory a character to enable me to regard the fact as proved.

The decision of the case then depends on the question as to whether it was the duty of the defendant Bank (it being admitted that no inquiry was made) to inquire into the authority of Cutler to indorse the cheque in the way he did, as, of course, if he had a general authority to indorse, the case would then have been one of embezzlement from the plaintiffs, and not one of fraud upon the defendants.

By section 24 of the Bills of Exchange Act, subject to the provisions of the Act, a forged or unauthorized signature is wholly inoperative, and gives no right to return the instrument unless the other party is estopped from alleging the forgery or want of authority. Here no question of estoppel arises, because, as already stated, there were no dealings between the plaintiff and defendants; nor was there any satisfactory evidence to shew that there had been any holding out.

Mr. *Wilson*, however, contends that section 19 of Cap. 59 of the Imperial Acts of 1853 (16 & 17 Vict.), which exonerates bankers from liability if they pay on what purports to be an authorized indorsement, came into force in British Columbia by reason of the English Law Act, R.S.B.C. 1897, Cap. 115, and that it is still in force because it has not been repealed by the Bills of Exchange Act.

Judgment

I cannot assent to this. In the first place, I do not think this section ever came into force in this Province. It is a proviso inserted in a Stamp Act dealing only with inland bills of exchange, as appears by reference to the Act of the succeeding year, which deals also with foreign bills of exchange. Now there can be no doubt that this Stamp Act itself cannot be deemed to have been introduced into the Colony, having regard to the principles laid down in *Jex* v. *McKinney* (1889), 14 App. Cas. 77; and *Cooper* v. *Stuart*, *ib.* 266. In the latter case, a passage from Blackstone is cited with approval, in which it is stated that police and revenue laws amongst others are not introduced into a new colony by the fact of occupation on the ground of their inapplicability, and this same test of applicability is laid down by the English Law Act itself. Nor

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is it any more admissible to contend that while the whole Act may not have been brought into force, yet section 19 alone was brought in force, any more than it would be to contend that section 2 of 9 Geo. II., Cap. 36, commonly called the Mortmain Act, was introduced into British Honduras in the face of the fact that the Act itself was decided in *Jex* v. *McKinney* not to have been so introduced, although taken *per se* there appears to have been no reason for saying that section 2 was inapplicable to British Honduras.

But even if it were granted that the section was brought in force in British Columbia, I think there can be no doubt that it has not been in force since the passage of the Bills of Exchange Act.

Mr. *Wilson* laid stress on the fact that no mention is made of it in the repealing schedule, and possibly it was overlooked by the draftsman of the Act, but, although in strictness the Parliament of Canada has no power to formally repeal Colonial or Provincial Acts, or the declarations of other Legislatures, and such Acts or declarations can become annulled only by repugnant legislation, which the Parliament is competent to pass (see *per* Lord Watson in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. at p. 366), yet at the same time the formal repeal must be construed *quantum valeat*, and as equivalent to a declaration that, so far as the Parliament of Canada has power to enact, the enactments referred to in the schedule are no longer to be deemed to express the law on the subject of bills of exchange and promissory notes.

Judgment

Then assuming that the section did come in force, the argument is that, no mention being made of it in the schedule, Parliament must be considered as having intentionally abstained from making any declaration on the subject, and therefore as having intended to leave it in force. To this, I think, there are two or three answers. It is now regarded as an admissible, but, of course, not infallible, method of attempting to arrive at the intention of the Legislature, to examine the parent law, if any, from which the legislation is derived, or on which it is modelled, and the decisions thereon, even though the parent law may have been enacted by another Legislature. For instance, in *Harding*

v. *Commissioners of Stamps for Queensland* (1898), A.C. 769 at p. 774, the Judicial Committee say, "Nearly thirty years after the later decision the Queensland Legislature passed their Succession Duty Act in terms identical with those of the English Act of 1853. It is impossible to suppose that they did not intend those terms to be read in the sense affixed to them by the English tribunals, and in which they would be read by every lawyer conversant with the subject-matter." See also *Casgrain* v. *Atlantic and North-West Railway Co.* (1895), A.C. 282 at p. 300; *Cushing* v. *Dupuy* (1880), 5 App. Cas. 409 at p. 416.

This being so, when we turn to the Imperial Bills of Exchange Act, of which our Act is admittedly a transcript with slight modifications, we find that although section 19 of the Stamp Act appears re-cast as section 60 of the Imperial Act, constituting, as Chalmer says, p. 209, an exception to section 24, yet it does not appear in the Canadian Act. Now, as we cannot reasonably suppose that the Canadian Parliament intended that there should be a different law prevailing throughout the Provinces on this subject (in fact, no doubt the chief reason of the B.N.A. Act conferring jurisdiction on the Parliament of Canada to make laws relating to bills of exchange and promissory notes was to secure uniformity of legislation) we must conclude that section 60 of the Imperial Act was advisedly omitted from the Canadian Act.

Then again, Lord Herschell says in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 at pp. 144, 145: "My Lords, with sincere respect for the learned Judges who have taken this view, I cannot bring myself to think that this is the proper way to deal with such a statute as the Bills of Exchange Act, which was intended to be a code of the law relating to negotiable instruments. I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view.

Judgment

"If a statute, intended to embody in a code a particular

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branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated." And again, at p. 145, "that an appeal to earlier decisions can only be justified on some special ground," and again, "the Act was certainly not intended to be merely a code of the existing law. It is not open to question that it was intended to alter, and did alter it in certain respects. And I do not think that it is to be presumed that any particular provision was intended to be a statement of the existing law, rather than a substituted enactment." To the same effect, *per* Lord Halsbury, p. 120; *per* Lord Selborne, p. 130; *per* Lord Watson, p. 134; *per* Lord Macnaghten, pp. 160, 161. If all this is so, then it is unreasonable for me to suppose that the Parliament intended that the code should remain silent on this question, and that the bankers' liability should be determined by the pre-existing law.

Lastly, the language of section 24 itself shews, I think, the intention of the Legislature. It says, "subject to the provisions of this Act." If it was intended that we were to look outside the Act, as well as at the Act itself, the natural expression in the case of a codifying Act would have been "subject to the laws and statutes now in force and to the provisions of this Act": but we are not to read into the Act limitations not to be found there: see *per* Lord Halsbury, *Bank of England* v. *Vagilano Brothers*, *supra*, at p. 120; *per* Lord Selborne, *ib.* pp. 129, 130; *per* Lord Herschell, *ib.* p. 146; *per* Lord Macnaghten, pp. 160, 161; see also *per* Lord Halsbury in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 34. I have not overlooked the fact that the caption of the Imperial Act calls it an Act *to codify the law* relating to bills of exchange, etc., and that the expression *to codify the law* has been left out of the title of the Canadian Act, but this omission, if it makes either way, seems to me to make in favour of the theory that the Canadian Act was intended to modify and alter as well as codify the law.

Judgment

For these reasons, I think the plaintiff is entitled to judgment with costs, which I should have allowed only on the County Court scale were it not for the fact that I am given to understand the action is a test one.

HOSKING v. LE ROI No. 2, LIMITED.

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LE ROI

Master and servant—Common employment—Former servant's negligence—Employers' Liability Act—Trial—Party bound by course of.

Where a party frames an action for negligence at common law and also under the Employers' Liability Act, but at the trial attempts to develop a case at common law and fails, he will not be granted a new trial in order to try to establish a case under the Employers' Liability Act.

In an action for personal injuries the jury found that the defendants were negligent in not providing proper and accurate working plans of a mine, and that such neglect was the cause of the accident, but they did not specify what person or official was guilty of the negligent act. The plans were prepared by the defendants' engineers who were competent, and who had left the defendants' employment before the injured person entered their employment.

Held, the defendants were not liable either under the Act or at common law.

Per IRVING, J.: The doctrine of common employment is applicable where the servant because of whose fault the accident happened had left the employer's service before the injured servant entered his service.

Decision of MARTIN, J., affirmed.

APPEAL from the judgment of MARTIN, J., at the trial dismissing the plaintiff's action.

This was an action brought by the widow and children of Charles Hosking, a miner, who was killed while working in a shaft of a mine belonging to defendants, to recover damages for the death of the said miner, the action being framed under the Employers' Liability Act and also at common law.

Statement

Hosking when killed was working with three other men at a point about 165 feet below the 700 foot level in what was called the Josie shaft.

What was known as the Annie shaft was in another section of the mine, and about 400 feet distant from the Josie shaft and above the 300 foot level. The sinking of the Annie shaft had been discontinued in November, 1900, but shortly before the accident operations on it had been begun; it was partly filled

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with water (about 75 feet of water in a sectional area of about 96 square feet) and an upraise to connect with it was begun from the roof of the 300 foot level. When the upraise had been run about twelve and a half feet above the 300 foot level the water broke through into the Annie shaft and rushed along the 300 foot level to the Josie shaft and down it on to Hosking and his fellow workmen with the result that Hosking and another were killed.

The course of the trial, which took place before MARTIN, J., and a jury at Nelson, was directed towards establishing a case against the defendants at common law. The jury returned the following verdict:

(1.) Have the defendants, or their servants, done anything which persons of ordinary care and skill under the circumstances would not have done, or have they or their servants omitted to do anything which persons of ordinary care and skill under the circumstances would have done? Yes.

(2.) If yes; what was it? Failure of the defendant Company to provide proper and accurate working plans of the Annie shaft shewing the distance between the roof of the 300 foot level and the bottom of the Annie shaft.

(3.) Have the defendants or their servants by such act of commission or omission caused injury to the plaintiff? Yes.

(4.) If you find in answering the first question that the Company or its servants was or were guilty of any act or omission, who was or were the person or persons, if any, who did such act or made such omission? The defendant Company.

Statement

(5.) Damages, if any? Total $5,000, divided as follows: Elizabeth Jane Hosking (widow), $3,000; William John Hosking (son), $1,150; Stanley Hosking (son), $850.

On the motion for judgment His Lordship gave judgment as follows:

In giving judgment on this motion, I think it only necessary to say this case has given me not a little difficulty, but as the result of the application of the findings of the jury to the cases cited, I am unable to do otherwise than allow the motion to enter judgment in favour of the defendant Company; in so doing I make use of the language used by Chief Justice Erle in

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the somewhat similar case of *Searle* v. *Lindsay* (1861), 31 L.J., C.P. 106 at p. 109: "I can only say that the conclusion of law was forced on me both at the trial and now, for I never remember having had a case which more moved my feelings and made me desire that the plaintiff should have compensation for the injuries he has sustained." There will be judgment in favour of the defendant Company.

Since the discontinuing of the work on the Annie shaft in November, 1900, Mr. Thompson had been appointed general manager by the defendants, and amongst the old plans he found a plan of the shaft which had been prepared in the course of their duties by either Mr. Stewart, who was the first engineer of the mine, or by Mr. Turnbull, his successor, and both of whom had left the employ of the Company before Mr. Thompson was appointed manager and before Hosking commenced work. In re-commencing work on the shaft this plan was used, and on account of an inaccuracy in it the accident happened.

Statement

The evidence shewed that each of the engineers was competent.

The appeal was argued at Victoria on the 27th and 28th of January, 1903, before HUNTER, C.J., WALKEM and IRVING, JJ.

S. S. Taylor, K.C., for appellant: The cause of the accident was the wrong information given to Mr. Thompson by the Company; the plan lacked a vertical projection of the shaft. The Company is liable both at common law and under the Employers' Liability Act.

At common law they are liable because they gave Thompson improper data; if it should be held that this inaccurate plan was not the proximate cause, but that Thompson should have caused an examination to be made then the plaintiff's action under the Act is sustained. He cited *Blyth* v. *Birmingham Water Works Co.* (1856), 11 Ex. 784; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193 at p. 203; *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S.C.R. 110 at p. 113, and *Crafter* v. *Metropolitan Railway Co.* (1866), L.R. 1 C.P. 300 at p. 305.

Argument

The defence of common employment is not open to the Company because both Turnbull and Stewart had left before either

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Thompson or Hosking came: see Eversley, 963-4; Pollock on Torts, 6th Ed., 97-99; Lord Cairn's judgment on this point in *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326; 19 L.T.N.S. 30. is not agreed with by the other members of the Court and see *Johnson* v. *Lindsay & Co.* (1891), A.C. 371 at pp. 378, 380, 383, 386, where parts of his judgment are questioned; he cited also Smith's Master and Servant, 382; *Gilbert* v. *Corporation of Trinity House* (1886), 17 Q.B.D. at p. 799; *Warburton* v. *Great Western Railway Co.* (1866), L.R. 2 Ex. 32, 33; *Perkins* v. *Dangerfield* (1884), 51 L.T.N.S. 535 and *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B.C. 561, where cases are collected. The Court can find any fact it chooses in a case like this where no facts are in dispute.

Davis, K.C., for respondents: The doctrine of common employment is not the law, it is only an example of the law, and the employer is only liable if he does not supply proper machinery, etc., and whether the accident was caused by the negligence of a former servant makes no difference; Lord Cairn's judgment on this point was not questioned in *Johnson* v. *Lindsay & Co.*, *supra*. He cited *Webster* v. *Foley* (1892), 21 S.C.R. 580; *Rajotte* v. *Canadian Pacific Railway Co.* (1889), 5 Man. 365; *Wood* v. *Canadian Pacific Railway Co.*, *supra*, and 30 S.C.R. 113, and *Lloyd* v. *Woodland Brothers* (1902), 19 T.L.R. 33.

Argument

At the trial, counsel for plaintiff confined himself almost entirely to making a case at common law; he never took the position that Thompson was negligent in not making a survey because that would have defeated his common law action; his two positions were inconsistent, so he elected to take that at common law, and he is bound by it; the plaintiff can't get a new trial in order to get an answer on some other point about Thompson being negligent.

If the Company did not supply Thompson with proper information it was the negligence of either Turnbull or Stewart, as theirs was the only report that could be looked at, and they occupy the relation of fellow servants with Hosking; see *Rudd* v. *Bell* (1887), 13 Ont. 47; *Matthews* v. *Hamilton Powder Co.* (1887), 14 A.R. 261; *Howells* v. *Landore Steel Co.* (1874), L.R. 10 Q.B. 62 and *Hedley* v. *Pinkney & Sons Steamship Co.* (1894), A.C. 222.

[HUNTER, C.J.: Assuming Mr. *Taylor* has put himself in such a position as to be estopped from asking for a new trial, what powers has the Court itself ?]

Your Lordship thinks it a hardship on the plaintiff, but "hard cases make bad law." A party must be bound by the position he takes at the trial; the only ground on which this case could be sent back for a new trial would be on the ground that the verdict was perverse, but that can't be argued as it is the one counsel wanted and the Judge was satisfied with it.

Taylor, in reply: The principle in reference to common employment is that the injured person and the one whose negligence caused the injury were in a common service working together at the same time. He cited *Connecticut Mutual Life Insurance Co. of Hertford* v. *Moore* (1881), 6 App. Cas. 644 at p. 653 and *Thurburn* v. *Stewart* (1871), 7 Moo. P.C.N.S. 334.

HUNTER, C.J.: Although disposed to enter judgment in this case in favour of the plaintiff, I do not see any legal ground on which it can be done. So far as the liability of the defendant Company is concerned under the Employers' Liability Act, there is no act of negligence found by the jury in respect of which this Act would make the Company liable.

The whole course of the trial was directed towards establishing a case against the defendant Company at common law, no doubt with a view to larger damages than could be awarded under the Act. But the findings, which it was argued established the liability at common law, do not, when viewed in the light of the evidence, amount to a finding that the Company was negligent in not providing adequate materials or plant, etc., but rather to a finding that some employee was negligent or inaccurate in his work on the plans. What plans there were were made either by Stewart or Turnbull, and there is no evidence to shew that either was incompetent, but, on the contrary, the evidence shews that both were competent, and it is well settled that at common law the Company is not liable for the negligence of a competent employee.

It was suggested rather than argued that we should send the case down for a new trial, although there is no complaint on the

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score of mis-direction, or non-direction. As to this, a new trial is not granted to try a case in a new way: *Glasier* v. *Rolls* (1889), 42 Ch. D. 436 at p. 459.

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Not only so, but, although it was open on the pleadings to prosecute the attack under the Act, counsel plainly elected to develop a case at common law.

The appeal must be dismissed.

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WALKEM, J.: I agree. This case is very similar to *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B.C. 561, for the notes of the evidence and of the course adopted by the plaintiff's counsel at the trial, and address of counsel for the plaintiff plainly shew that more reliance was placed upon the liability of the defendant Company under its common law phase than under the Employers' Liability Act. In fact, the plaintiff's counsel, in addressing the learned trial Judge, laid particular stress on the plaintiff's common law right to a verdict; and the verdict being for much more than would have been allowed under the Act tends to shew that the jury acted in view of counsel's observations.

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IRVING, J.: I agree. I also wish to point out that the questions submitted to the jury were not the questions usually asked in an action under the Employers' Liability Act.

Of those submitted, the first and third are questions usually put in a common law action, as suggested by Brett, M.R., in *Bridges* v. *Directors, &c., of North London Railway Co.* (1873-4), L.R. 7 H.L. 213. The fourth is a "defence," its object is to bring into play the doctrine of common employment.

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I accept the dictum of Cairns, L.C., that an employers' exemption from liability for an accident to a servant happening because of the fault of a fellow servant is applicable to a past servant not in the employ of the employer at the time of the accident; because the doctrine of common employment depends not upon the common employment as one would suppose, but upon the contract entered into by the master with his servant.

As to the so-called right of the jury to return a general verdict, I think a general verdict would only be proper where the

trial Judge has by his charge prepared the way for such a verdict. Whether he will charge the jury with a view to obtaining answers to questions, or for a general verdict is a matter of discretion for the Judge.

Appeal dismissed.

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RE IBEX MINING AND DEVELOPMENT COMPANY OF SLOCAN, LIMITED LIABILITY.

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Winding up—Mechanic's lien—Priority—Jurisdiction of Court to order—Notice to parties affected—Order made without jnrisdiction—Substantive proceeding or appeal from.

The holders of mechanics' liens filed against mineral claims owned by a company which was subsequently ordered to be wound up, recovered judgment thereon in the County Court the same day the winding-up order was made. In the list of creditors made up by the liquidator the lien claimants did not appear as secured creditors, but as judgment creditors. The winding-up order was made on the petition of Holmes, a surveyor, who held the field notes of the survey made by him and who afterwards proposed that he advance the moneys necessary to obtain Crown grants of the claims and retain a lien on them until he was paid: the liquidator applied to the Court for leave to accept the proposal and an order was made, without notice to the lien holders, giving Holmes a first charge on the claims for his debt and the amount advanced by him: afterwards, on Holmes' application, an order was made, on notice to the liquidator but without notice to the lien holders, that the claims be sold to pay his charge.

The lien holders did not appeal from either of the last orders, but applied for leave to enforce their security and that they be declared to have priority over Holmes:—

Held, by the Full Court (reversing DRAKE, J., who dismissed the application), that the order giving Holmes priority over the lien holders was made without jurisdiction and the lien holders were not bound by it.

APPEAL from an order of DRAKE, J.

On the 17th of August, 1897, the applicant Adams and

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others filed mechanics' liens against the Ibex mineral claim, one of the claims owned by the Company, and on 19th November, 1897, they recovered judgment thereon in the County Court of Kootenay, the amounts of the liens aggregating $1,406.26. On 13th November, 1897, a petition for the winding up of the Company was filed on behalf of W. J. H. Holmes, who had a claim against the Company for $520.65 for surveying and locating some of the Company's claims, including the Ibex.

The petition for the winding up shewed that Adams and others had commenced an action in the County Court to enforce mechanics' liens. On 19th November, a winding-up order was made. In the course of the winding up proceeding a list of creditors was made up by the liquidator, but the lien claimants did not appear in the list as secured creditors but only as judgment creditors and as entitled to the three months' preference on account of wages. The affidavit of Adams filed with the liquidator verifying his claim was as follows:

"The Ibex Mining and Development Company of Slocan, Limited Liability, is justly and truly indebted to me in the sum of $205.50, and judgment was, on the 19th day of November, 1897, recovered by me against the said Company for that amount.

"I hold as security for the payment of the said sum, judgment for a lien on the Ibex mineral claim, the property of the said Company, which security I value at the full amount of my said claim.

Statement

"As a part of said judgment the said Company are justly and truly indebted to me in the sum of $166 for work done and labour performed by me for the said Company from and after the 19th of August, 1897."

Some of the other judgment creditors filed similar affidavits and as to some others it did not appear how they verified their claims. On 28th November, 1898, Holmes proposed to the liquidator that he be allowed to pay for and obtain Crown grants for the Ibex and three other mineral claims owned by the Company, and in consideration of his so doing that he should be allowed to retain possession of the Crown grants until such time as he should be paid his debt and the moneys advanced. The

liquidator applied to the Court on 13th March, 1899, for leave to accept the proposal and an order was made by DRAKE, J., which after reciting the proposal and that Holmes had a lien on the field notes without which Crown grants could not be obtained, ordered that Holmes should have a first charge on the claims for the amount of his claim, and also the Crown grant fees (subject only to the claim of the Crown for $100, the Company's free miner's certificate fee), and that the grants when issued should be deposited in the Bank of B. N. A., to the joint order of the liquidator and Holmes pending payment. It did not appear that Adams and the other lien holders had notice of the liquidator's application for leave to accept the Holmes proposal.

Mr. Whealler acted as the solicitor for Adams and the other lien holders in the mechanic's lien action in the County Court, and he was also solicitor for Holmes in presenting the winding-up petition, and after the order for winding up was made he became the solicitor for the liquidator.

Holmes obtained the Crown grants which were deposited in the Bank in accordance with the order, and on 21st May, 1902, upon his application an order was made by DRAKE, J., ordering that the claims be sold to pay Holmes' charge. This order was dated 21st May, 1902, but was not settled and taken out until 30th August, following. The liquidator was notified of this application but it did not appear that Adams and the other lien holders were notified. Adams did not appeal against the order of 13th May, 1899, but on 21st July, 1902, a summons was taken out on his behalf asking that he and the other lien holders be allowed to enforce their security and that they be declared to have priority over Holmes.

Statement

The summons came on for hearing before DRAKE, J., who dismissed it, his reasons for judgment being as follows:

In this matter the petition for winding up was filed 13th November, 1897, and an order was made by the Chief Justice on 19th November winding up the Company.

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The winding up proceedings went on in due course, the list of contributories was made and approved by the Court, shewing a large nominal amount due by a considerable number of persons.

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What steps have been taken by the liquidator to realize does not appear on these proceedings.

The debts and claims were duly advertised for in January, 1898, and the present applicants on 23rd February, 1898, claimed that they held security as lien holders in the Ibex claim. The liquidator did not deal with the claim under sections 62 or 67, and the claim does not appear in the list of claims as a secured claim. The claims were finally settled and these persons simply appear as judgment creditors on judgments obtained 19th November, 1897.

According to a decree made by Judge FORIN, before whom the actions were tried, these parties were entitled to mechanics' liens upon the Ibex mineral claim, which is one only of the five claims belonging to the Ibex Company.

The first question which has to be decided is whether these parties have any priority over the general body of creditors by having obtained their judgments on the same day the order for winding up the Company was made.

Mr. *Peters* claims that these parties are secured creditors as lien holders, and are entitled to carry out the decree of 19th November, 1897, by a sale of the property.

Under section 7 of the Winding Up Act the winding up of the business of the Company commences at the time of service of notice of the presentment of the petition for winding up.

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This apparently was on 13th November, 1897, and by section 13 the Court may, on application after presentment of the petition, restrain further proceedings in actions or suits, but after the order is made all proceedings in actions or suits are stayed, see section 16, and every proceeding to obtain execution is void; and by section 66 no lien shall be created by the issue of any writ of execution, or by the filing or registering of any memorial or judgment or the issue of any attachment or garnishee order or other process or proceeding, if before the payment of the moneys under such writ or other proceeding, the winding up was commenced.

Under these sections no steps can be taken to enforce Judge FORIN'S order without leave of the Court.

But have these parties any priorities as secured creditors owing to the fact that their mechanics' liens were declared to be

proved on the same day the Company was ordered to be wound up? I have pointed out that by section 7 the winding up had commenced on 13th November, and although no application was made to restrain these proceedings, yet in my opinion the Court could not give a priority to creditors after the commencement of the winding up; they were entitled to carry on their proceedings to judgment, and I think if the liens had been adjudicated upon prior to the winding up these men would stand in the position of secured creditors. But whether the presentment of a winding-up petition bars the remedy, or whether it requires a winding-up order, I am equally of opinion that the position of these lien holders cannot be asserted against the other creditors of the Company. The day on which the order was made for winding up cannot be dealt with in fractions, to do so would lead to endless confusion. Judge FORIN'S order was made about 600 miles east, namely, at Nelson, and the winding-up order was made in Victoria. In my opinion the whole day must be considered as covered by the order, and therefore the winding up supersedes all other proceedings directed against the assets of the Company. There is another point which was not touched upon, but seems to me material. There has been a lapse of four and a half years and no steps have been taken to assert the right which is now so strongly insisted on. The liquidator has been incurring expenses which would not have been done if, as he says, the only available asset is this Ibex mine. Orders have been made under the view that the assets should be sold under the winding-up proceedings, and the laches of the present applicants would, in my opinion, bar the present application.

A further question was discussed with regard to W. J. H. Holmes' position. He was the petitioning creditor, and he also obtained a lien for his debt in consideration of his giving up certain documents he had in his possession, which were necessary to enable the liquidator to obtain Crown grants of the mines, and thus save the expenses of working the claims, which would have become a serious charge and which there was no money to meet. I am not clear that all the circumstances necessary for the Court to adjudicate were placed before it when the order was made granting a first charge to Holmes; but whether that was so or

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not, I do not think it necessary to decide that question on this summons. I therefore dismiss this summons with costs.

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Adams appealed to the Full Court and the appeal was argued at Victoria, on 6th February, 1903, before HUNTER, C.J., IRVING and MARTIN, JJ.

Peters, K.C., for appellant: At the time the Company went into liquidation Adams and his associates had a valid lien under the Mechanics' Lien Act: they acquired the lien by doing the work and all necessary steps were afterwards taken to preserve it. The presumption is that the County Court judgment was obtained at a time when it could be legally obtained: where it is necessary to determine rights the Court will inquire into fractions of a day: see *In re North: Ex parte Hasluck* (1895), 2 Q. B. 269; *Broderick* v. *Broatch* (1888), 12 P. R. 561 and *Clarke* v. *Bradlaugh* (1881), 8 Q. B. D. 63.

A mortgagee or lien holder should be given leave to proceed with his action unless the liquidator can shew that he will get the same relief in the winding up: see *In re David Lloyd & Co.* (1877), 6 Ch. D. 339.

The order giving Holmes a prior charge was made without notice to Adams and was made without jurisdiction.

Liens are preferential claims in winding up proceedings: see *Re the Empire Brewing Co.* (1891), 8 Man. 424.

Argument

Duff, K.C., for Holmes: The order of 13th March, 1899, gave Holmes a charge, and the order of 21st May, 1902, directed a sale under his charge and there has been no appeal from either order: the order of 13th March can't be ignored and Adams allowed to proceed with his action: in order to have a right to proceed he must shew that he has a valid lien on these claims and that the order of 13th March was one the Judge could not make under any circumstances that could arise in this case: *In re Padstow Total Loss Assurance Association* (1882), 20 Ch. D. 137.

In winding-up proceedings where an order is made on the application of the liquidator by the Judge who has the conduct of the proceedings, it must be presumed to be regular.

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Adams' claim is on a wrong basis: it only amounts to a preferential claim for wages.

The County Court judgment was obtained in defiance of the Act which says that all actions are stayed when the winding-up order is made: the winding up relates back to the first moment of the day and takes priority. Fractions of a day are not counted in respect of judicial process.

Peters, in reply: We are not bound by the liquidator's action in not entering our claims properly in list. He referred to *In re Regent's Canal Ironworks Co.: Ex parte Grissell* (1875), 3 Ch. D. 411.

9th April, 1903.

HUNTER, C.J. (after stating the facts, proceeded): There is nothing to shew that the lien holders were notified of the application to give Holmes a first charge on the claims, or that they were aware of its being made; and very probably if they had been made aware of it they would have appeared and objected on the very reasonable ground that however equitable, as against the Company, it might have been to give him a first charge against the Ibex claim (the only claim with which they were concerned) it was not equitable as against them to give him a charge as against that claim for his services in connection with the other claims. On the other hand, although the list of creditors does not shew that they were lien claimants under the Mechanics' Lien Act, that fact was made known to the Court, if not by the affidavits already referred to, then at any rate by the petition for the winding-up order, the 13th paragraph of which sets forth their claims in full.

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Technically, no doubt, the order of the 13th of March, 1899, was made on the application of the liquidator in the general interests of the estate, but it is also beyond doubt that the application was made in the particular interest of Holmes, in fact, could not have been made without his consent. That being so, it seems to me that he was concerned to see to it that any person who might be interested in, or prejudiced by the order, was notified of the application, or else that he took the benefit of it at the risk of such parties afterwards objecting that they should not be bound not having been heard; and I apprehend that the

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fundamental principle that no man is bound by an order which he has had no opportunity to contest is of as much force in winding-up proceedings as in any other proceedings, other than proceedings *in rem*.

Then again, it is quite clear that if the lien holders had been notified, and had come in and contested the application, the Court could not have taken away the priority which they had acquired under the statute by the filing of their liens. It is beside the mark to say that the order was a salvage order, as they could have said, "We prefer, so far as we are concerned, to leave the Ibex claim in *statu quo*, and to take our own course as to how we shall guard our interest in the property, and if anyone else wishes to go to any expense in the matter it must not be at the expense of our priority." Possibly if they had been notified, having come into the winding-up proceedings, they would have been bound by the order on the ground of acquiescence, so long as it stood. But not having been notified, what is their position? It was said that they had acquiesced in the order, but I see no trace of this on the material before us, for as Turner, L.J., says in *Stewart's Case* (1866), 1 Chy. App. 587-8, "Acquiescence is founded on knowledge, and a man cannot be said to acquiesce in a transaction if he is not proved to have had knowledge of it."

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Now I do not see any proof that they were aware of what was being done. It cannot be said that because Mr. Whealler, who was the solicitor who filed their claims, and who afterwards became the solicitor for the liquidator, knew what was going on his knowledge was their knowledge, as, when he began to act for the liquidator, he began to act in the interest of the entire body of creditors, and his duty to them might have compelled him to call the lien holders' claim to priority in question. There being nothing to shew that he had ever informed them of what was going on, or that they knew from any other source, until long after the time for appealing had expired and shortly before they took out their summons, it is impossible to hold that they acquiesced in the proceedings.

On the 21st of July, 1902, they took out a summons to be allowed to enforce their security before an order for the sale of

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the claim to realize Holmes' charge which had been made on his application, but without any notice to them, had been drawn up, and this summons was dismissed on the ground that they were barred by their laches, and also on the ground that their liens could not take priority over the general body of creditors, as judgment therefor was recovered on the same day that the winding-up order was made. But, as I have already said, I do not see how they can be held to have been guilty of laches, and their liens took effect from the date of the filing and not from the date of the judgment, as will appear by perusal of sections 4, 6, 8, 17 and 24 of the Act.

Then it was contended by Mr. *Duff*, in the course of a vigorous argument, that the lien holders could not get on until they had got rid of the order, and that the only way to get rid of it was by way of appeal, and as they had not appealed their summons was rightly dismissed. I think not. In the first place, according to the decision in *Sung* v. *Lung* (1901), 8 B.C. 423, this Court would have had no power to extend the time for appeal, in which case the result would be that a man might lose his rights of property by reason of his being unable to appeal against an order affecting those rights, because he had no knowledge, until after the time for appealing had lapsed, that any application had been made. But, of course, it may be said that this decision was erroneous, and that if certain rules had been brought to the attention of the Court the decision might have been the other way. However, it is not necessary to go into this, as, for the purpose of the argument, I will assume that this decision was wrong, and that this Court, if moved, had the power to extend. Even then, I do not think that the lien holders were bound to go to the expense of an appeal in order to have it formally declared that the Court had no jurisdiction to take away their priority without their consent, but I think that both they and the Court were entitled to regard the order as having been made without prejudice to their rights, especially as the existence of their security had been made known to the Court by Holmes himself in his petition. Nor is the case of *In re Padstow Total Loss and Collision Assurance Association* (1882), 20 Ch. D. 137, invoked by Mr. *Duff*, opposed to this view, as that was a case in

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which it was held that if a shareholder, and possible contributory, wished to escape the consequences of a winding-up order made by a Court of competent jurisdiction, his right course was to appeal. Some language is used in the judgments from which one would gather that the reason is that a winding-up order is really an order *in rem*; but this idea is dispelled by the case of *In re Bowling and Welby's Contract* (1895), 1 Ch. 663, which shews that a winding-up order does not bind strangers to the proceedings. Moreover, the shareholder was not even bound to appeal, as according to *In re National Permanent Building Society, Ex parte Williamson* (1869), 5 Chy. App. 309, he might have got leave to move to discharge the order. But however this may be, I do not see upon what principle every order made in the subsequent proceedings can be held to bind everyone, whether notified or not, unless appealed against. If the order was intended to put aside the priority of the lien holders, then it was *pro tanto* made without jurisdiction, and therefore void as against them, and the lien holders were not bound to get rid of it by an appeal or other proceeding before taking out their summons: see *per* Jessel, M.R., in *Cape Breton Company* v. *Fenn* (1881), 17 Ch. D. 198 at p. 202; also *McLeod* v. *Noble* (1897), 28 Ont. 528, where it was held that an injunction issued without jurisdiction was void, and could be disobeyed with impunity.

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I therefore think that the appeal should be allowed; that the list should be amended so as to shew that the lien holders claim under their liens; and that the summons should be referred back to the learned Judge with a declaration that the order of the 13th of March does not affect the priority of the lien holders under their liens. The appellants should have their costs of the appeal, but the costs of the summons should be reserved to be dealt with below.

IRVING, J.

IRVING, J. (after stating the facts, proceeded): This salvage proposal had certain advantages for the Company, and on the 13th of March, 1899, the liquidator obtained the leave of the Court to accept it, but Adams was not a party to that application. It is contended now that the order thus obtained is a good

and sufficient order binding on Adams, and that it had the effect of giving Holmes a lien in priority to the lien of the applicant.

Holmes, acting on the order, obtained the Crown grants and deposited them in the Bank, and in May, 1902, applied for leave to enforce the lien conferred upon him by the order of the 13th of March, 1899.

In July of 1902, Adams brought the present application by summons, following the practice laid down in *In re Regent's Canal Ironworks Co.: Ex parte Grissell* (1875), 3 Ch. D. 411.

DRAKE, J.
1902
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April 9.
RE IBEX COMPANY

Mr. Justice DRAKE refused this application, and from his decision the present appeal is taken. It seems to me to be plain beyond question that Adams' security cannot be interfered with or displaced unless he has waived it, and there is no evidence of such waiver. It is suggested, but not on affidavit, that Adams was present or signed a consent to the order of the 13th of March, or, at any rate, that he stood by after learning of the order, but I do not think that it is sufficient that a suggestion like that should be made in argument without more. There is, in fact, no foundation whatever on which such a suggestion can be based. I think that as the order of the 13th of March omits to state that Adams was in any way a party to the application, the onus is now on Holmes to shew, by affirmative evidence, that Adams has done something to lose his priority.

IRVING, J.

It is said that the application was not made by Homes; that it is binding on all parties because it was made by the liquidator. The answer is Holmes was at liberty to refuse to part with his money until he was satisfied that Adams was bound by the order of the 13th of March.

I think the appeal should be allowed with costs.

MARTIN, J.: It was admitted during the argument that the question turned on the fact of notice, or not, to Adams. If he had notice, actual or constructive, then the order complained of (dated 13th March, 1899), being one the learned Judge had power to make, should not now be interfered with, especially as it was one which, in my opinion, was in the interest of the estate as a whole as regards the great bulk of the property which was preserved or saved by its effect.

MARTIN, J.

DRAKE, J.
1902
Aug. 7.
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1903
April 9.
RE IBEX COMPANY

In determining this question of notice to Adams, it is necessary to ascertain on whom lies the onus of proving it. If the order recited the fact that Adams appeared at the hearing or had notice, then the onus would be on Adams to establish in the clearest manner the incorrectness of such recital. But the order shews on its face that it was made on the application of the liquidator at the instance, and primarily for the benefit of Holmes, and it is not suggested therein that Adams had notice thereof, though Holmes knew that Adams had a mechanic's lien, and so stated in paragraph 13 of his winding-up petition.

The onus therefore being on Holmes to establish the fact that Adams had notice, I have examined the documents and rules referred to to see if it could reasonably be said that Holmes had satisfied that onus, with the result that I have come to the conclusion, after some hesitation, that he has not done so.

MARTIN, J.

I may add that it would have been of much assistance had the solicitor who acted for both Adams and the liquidator at various stages of the proceedings been able, in his affidavit of 17th July, 1902, to define more exactly his relationship to those persons at stated times, and generally given more definite information, but the matter must now be dealt with on the evidence before the Court.

I agree with what the learned Chief Justice says as to the disposition of this appeal and costs.

Appeal allowed.

REX v. AH WOOEY.

MARTIN, J.

1902

Oct. 26.

Evidence—Witness—Form of oath for Chinese witness—King's, or "Chicken" oath.

Form of Chinese oath settled for cases of gravity.

REX v. AH WOOEY

Westminster Assizes, October 26th, 1902, before MARTIN, J. Trial of the accused, a Chinaman, for murder.

Bowser, K.C., and *Fell*, for the Crown.
Wilson, K.C., and *Bloomfield*, for the prisoner.

On a Chinese witness, Chong Fon Fi, not a Christian, being called for the Crown, it was proposed to swear him through the interpreter in the manner generally adopted in the Courts of this Province, *i. e.*, by writing his name on a piece of paper and burning it, at the same time declaring that he would tell the truth: the consumption of the paper by fire signifying the fate of his soul if he should fail to do so. Statement

Wilson, K.C.: I object to this form of oath and am instructed that there is another form of greater solemnity and which will be more binding on the witness' conscience; it is commonly called in this Province the "Chicken" oath, and I ask in a case of this gravity that it be administered.

Whereupon His Lordship interrogated the local interpreter, Charlie Loo Fook, and also the official interpreter from Victoria, Yip Wing, who was present in Court assisting the Crown, and instructed them to examine the witness on the point, which being done, they informed the Court that the oath which is known to the Chinese in British Columbia (almost all of whom come from the Province of Canton) as the King's oath, or, as the white people call it, the "Chicken" oath, was the more binding. Argument

Per curiam: Let the witness be sworn by the King's Oath.

Witness sworn accordingly.

MARTIN, J.

1902

Oct. 26.

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A discussion arising on the form of said oath, it was finally settled by the interpreters, and written on yellow Chinese paper as follows:

(Translation.)

King's* oath made by .....(Witness signs his name here.)

(Recites charge against accused, and proceeds.)

Being a true witness, I shall enjoy happiness and my sons and grandsons will prosper forever.

If I falsely accuse (prisoner) I shall die on the street, Heaven will punish me, earth will destroy me, I shall forever suffer adversity and all my offspring be exterminated. In burning this oath I humbly submit myself to the will of Heaven which has brilliant eyes to see.

The 27th year of the reign of Kwang Su, the 16th day, the 9th Moon. (Witness also signs here.)

The witness having signed his name twice, and a cock having been procured, the Court and jury adjourned to a convenient place outside the building where the full ceremony of administering the oath was performed, as follows: By a block of wood, punk sticks, not less than three, and a pair of Chinese candles were stuck in the ground and lighted. The oath was then read out loud by the witness, after which he wrapped it in Joss-paper as used in religious ceremonies, then laid the cock on the block and chopped its head off, and then set fire to the oath from the candles and held it until it was consumed.

* The word "King" is here used by the Chinese in a religious sense, tantamount to Almighty, King of Heaven, King of Kings.

Note:—This report is taken from the notes of the learned trial Judge, and His Lordship wishes it to be added that Chinese witnesses in this Province have in some cases also been sworn by breaking a Chinese saucer accompanying that act with the form of words set out in Best on Evidence, 12th Ed., 140-50, and note (g.); Roscoe's Criminal Evidence, 12th Ed., 105; Crankshaw's Criminal Code, 2nd Ed., 703. The "Saucer" oath would appear to be of the same degree of solemnity as the "Paper" oath now in general use.

EX PARTE NEW VANCOUVER COAL MINING AND LAND COMPANY.

DIVISIONAL COURT

1890

Nov. 29.

Right of non-registered foreign company to be registered as the owner of lands.

Decision of Sir M. B. Begbie, C.J., reported in 2 B. C. 8, holding that the Registrar was justified in refusing to register a non-registered foreign company as the owner of land, reversed.

Ex Parte New Vancouver Coal Co.

Appeal from judgment of Sir M. B. Begbie, C.J. The report of the application as stated in (1890), 2 B. C. 8 is as follows:

"Application for an order directing the Registrar to register the applicants, a non-registered foreign company, as the owner of certain lands. The company is alleged to be duly formed in England under the English Acts. On applying to the Registrar, he declined to register the purchase, claiming that the company, not being registered in British Columbia, had no *prima facie* right to hold lands at all.

"*Helmcken*, for the applicants; *the Registrar-General, contra.* February 3rd, 1890. Sir M. B. Begbie, C.J.:

"This appears to be a foreign company in the sense in which a judgment in the Court of Queen's Bench in England or Ontario would be called a 'foreign' judgment here; or a judgment of the County Court of Oxfordshire would be called a 'foreign' judgment in Bow and Stratford. I think the company ought to comply with the Provincial enactments relating to foreign companies.

Judgment

"*Application dismissed.*"

The appeal was argued before a Divisional Court consisting of Walkem and Drake, JJ., who on 29th November, 1890, gave their decision allowing the appeal.

Helmcken, appeared for the appellants, and the *Registrar-General, contra.*

IRVING, J.

1901

Dec. 21.

RE SOUTH VANCOUVER TAX SALE.

Municipal law — Tax sale — Order confirming — Petition for — Notice of — Practice.

RE SOUTH VANCOUVER

An order, under section 151 of the Municipal Clauses Act Amendment Act of 1898 and amendments of 1899 and 1900, confirming a tax sale, will not be made without notice of the petition for the order being given to the persons whose property is being sold.

PETITION for an order confirming a tax sale. The facts appear in the judgment.

Harris, for the petition.

21st December, 1901.

IRVING, J.: This is an application on the part of the South Vancouver Corporation for an order under the Municipal Clauses Act, confirming the tax sales made by the Collector of that Corporation in the year 1901. By section 151 as enacted in 1898, and amended in 1899 and 1900, it is provided that the Collector after selling any land for taxes shall give to the purchaser a certificate stating what property has been sold, with the description of the same and prices, etc., and stating further that a deed conveying the property to the purchaser will be executed at any time after the expiration of one year from the day on which the order may be made by a Judge of the Supreme Court confirming the sale, if the land has not been redeemed in the interval.

IRVING, J.

The section then goes on and provides that such confirming order shall be made on petition by the Collector on proof being made to the satisfaction of the Judge that the Collector gave the following notices: first, a general notice by advertising in the newspapers prescribed; second, notice by letter to the individual owners, if known, then by posting a notice on the premises; third, by sending notice by letter to the individuals having *registered charges* against any of the land.

The petition filed under this section states that the Collector has complied with these requirements and I am asked now to confirm the sale upon an affidavit sworn to by the Collector in

which he says that the allegations contained in the petition are true.

The petition has not been served upon any one, and it is suggested by counsel for the Municipality that I should proceed *ex parte*, and having examined the affidavit filed in support of the petition and without more, make an order confirming the sale. In other words, it is said that the duty imposed on the Judge under this section is simply to check over the proceedings taken by the municipal authorities, and if the municipal officers have carried out (or say on affidavit that they have carried out) the prescribed proceedings relating to notices, advertisement, etc., then, that the Judge should confirm the sale.

Now, it must be apparent to anybody that an examination of the kind suggested on the material filed, must be of a most perfunctory character. If a person is really anxious to check the work of his clerk, he is not going to be satisfied with a formal statement from his clerk, that the work has been well and properly performed in the manner prescribed in the Rules—that would be an empty formality. He would go to the original material, he would require to see the original advertisement, the copies of the letters sent and compare them with the Assessment Roll, and it would be necessary to examine the register of letters posted, in short, he would make a thorough examination of the original material in the office of the Collector. I do not think that that was ever contemplated. If the duty imposed by the section is not to be a mere perfunctory one or a clerical one, such as I have described, it must be a judicial duty; I do not see how a Judge can perform a duty of that character without giving notice to the persons concerned. *Audi alteram partem* is a good old maxim, founded on the plainest principles of justice and ought to be observed by every Court. Willes, J., said in *Cooper* v. *Wandsworth Board of Works* (1863), 14 C.B.N.S. 180 at p. 190: "A tribunal which is by law invested with power to affect the property of one of Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds."

IRVING, J.

The proper order for me to make is, that the hearing of this petition do stand over until the persons affected thereby are ser-

IRVING, J.

1901

Dec. 21.

RE SOUTH VANCOUVER

ved with notice of it having been filed and that it will be heard on a certain day.

The object of the Legislature in authorizing the sale of lands for arrears of taxes is the collection of the tax—the statutes are not passed for the purpose of taking any lands from the legal owners, but to compel those owners who neglect to pay their taxes, to pay by sale, of a portion of their lands. If the object of the Legislature can be attained more quickly and at a less cost to the tax-payers who are willing to pay, and with greater certainty of title to the purchaser in one way than in another, then that one way ought to be adopted—I think these advantages will be secured if I insist upon the rule *audi alteram partem* being observed.

IRVING, J.

The order therefore will be that the hearing of this petition stand over until the 21st of January, 1902, and notice therefor in the meantime must be given to the persons whose property will be sold.

MARTIN, J.

1902

Oct. 3.

REX v. HAYES.

Criminal law—Grand jury—Constitution of—Cr. Code, Sec. 656—Jurors' Act and Amendment of 1899, Sec. 2.

REX *v.* HAYES

A Sheriff when about to summon, pursuant to section 48 of the Jurors' Act, one of the jurors drafted to serve on a grand jury ascertained that the juror was demented and did not summon him:—

Held, that the grand jury was not legally constituted and that an indictment found by the jurors who had been summoned must be quashed.

A motion to quash such an indictment is not an objection to the constitution of the grand jury within the meaning of section 656 of the Criminal Code.

MOTION to quash an indictment found by a grand jury at the Victoria Criminal Assizes.

Statement

It appeared that the Sheriff when about to summon, pursuant

to section 48 of the Jurors' Act, one of the jurors drafted to serve on the grand jury, ascertained that the juror was demented, and after inquiring from the juror's medical attendant, the Sheriff concluded not to summon him.

Duff, K.C. (*Peters, K.C.*, and *G. E. Powell*, with him), for the accused: Thirteen grand jurors have not been returned as required by section 2 of the Jurors' Act Amendment Act, 1899, and the indictment should be quashed: he cited Churchill, 128.

Davis, K.C. (*Harold Robertson*, with him), for the Crown: Under section 656 of the Code the accused must shew that he has suffered or may suffer prejudice: he cited *Reg.* v. *Poirier* (1898), 7 Que. Q.B. 483; *Reg.* v. *Belyea* (1854), 2 N.S. 220; Taschereau, 752.

Argument

Duff, in reply: Section 656 applies only to the constitution of the grand jury; here the jury has never been constituted at all and there is no jury on which this curative section could operate.

Per curiam: This is not really an objection to the constitution of the grand jury within the meaning of section 656, because there is no such body in existence till the Sheriff has summoned that number, *i.e.*, thirteen, which the statute (Jurors' Act, Sec. 48; Jurors' Act Amendment Act, 1899, Sec. 2) imperatively directed him to summon and return; the twelve he did summon and who now appear form a collection of individuals unknown to the law and have no "constitution" in a legal sense that an objection could operate on, and consequently their proceedings are absolutely void *ab initio*. The fact that in the opinion of the Sheriff it was useless to summon the missing juror because he had become demented is no answer, for if it were possible to summon him, as it admittedly was, he should have been summoned; it would be a dangerous precedent to substitute the discretion of the Sheriff for the positive requirement of a statute which aims at excluding all discretion. For the purpose of criminal procedure in this Province, a grand jury is "constituted" after the thirteen have been summoned by the Sheriff and a sufficient number of those (*i.e.*, seven under our Act) so summoned have appeared and taken their places in the box, ready to be duly sworn to discharge the duties of their office.

Judgment

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

ASSESSMENT ACT *In re* THE (p. 209).—Reversed by the Judicial Committee of the Privy Council, November, 1903.

BELCHER *et al* v. MCDONALD (p. 377).—Reversed by Supreme Court of Canada, 5th May, 1903. See 33 S.C.R. 321. Leave to appeal to Privy Council granted.

BOOKER v. WELLINGTON COLLIERY COMPANY, LIMITED (p. 265).—Affirmed by Supreme Court of Canada, 6th November, 1902.

D'AVIGNON v. JONES *et al* (p. 359).—Affirmed by Supreme Court of Canada, 18th November, 1902. See 32 S.C.R. 650.

DUNSMUIR v. THE COLONIST PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY (p. 275).—Reversed by Supreme Court of Canada, 17th November, 1902. See 32 S.C.R. 679.

ELSON v. THE NORTH AMERICAN LIFE ASSURANCE COMPANY (p. 474).—Affirmed by Supreme Court of Canada, 22nd April, 1903. See 33 S.C.R 383.

HARRIS v. DUNSMUIR (p. 303).—Appeal allowed and new trial ordered by the Supreme Court of Canada, 30th November, 1903.

HOSKING v. LE ROI (p. 551).—Appealed to the Supreme Court of Canada and standing for judgment.

MCKELVEY v. LE ROI MINING COMPANY, LIMITED (p. 62).—Reversed by Supreme Court of Canada, 17th November, 1902, and the Judicial Committee of the Privy Council in February, 1903, refused leave to appeal. See 32 S.C.R. 664.

MCNAUGHT v. HARVEY, VAN NORMAN & CO. *et al* (p. 131.)—Affirmed by Supreme Court of Canada, 17th November, 1902. See 32 S.C.R. 690.

OPPENHEIMER v. THE BRACKMAN & KER MILLING COMPANY, LIMITED (p. 343).—Reversed by Supreme Court of Canada, 17th November, 1902. See 32 S.C.R 699.

PAULSON v. BEAMAN *et al* (p. 184).—Reversed by Supreme Court of Canada, 17th November, 1902. See 32 S.C.R. 655.

PITHER & LEISER v. MANLY (p. 257).—Affirmed by Supreme Court of Canada, 17th November, 1902. See 32 S.C.R. 651.

TURNER v. COWAN (p. 301).—Reversed by Supreme Court of Canada, 30th November, 1903.

WILSON v. THE CANADIAN DEVELOPMENT COMPANY, LIMITED (p. 82).—Reversed by Supreme Court of Canada, 18th May, 1903. See 33 S.C.R. 432.

HOSKING v. LE ROI (p. 551).—Since the printing of the preceding page, judgment has been delivered by the Supreme Court of Canada (10th December, 1903), allowing the appeal and ordering a new trial.

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PRACTICE—*Continued.*

PRACTICE—*Continued.*

38.——*Pleading—Striking out as embarrassing—Privilege—Particulars of.*] It is open to either party to an action up to the time of the trial to attack the other's pleadings. In an action against a labour union for damages in respect of a strike, the union pleaded that "they were not a company, corporation, co-partnership or person, and not capable of being sued in this or any other action." *Held*, bad plea. Questions of law going to the merits of a case will not be decided on an application to strike out pleadings as embarrassing. CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND MINERS UNION *et al.* - - - **531**

39.——"*Proper*" *parties—Order XI.*] T. the British Columbia agent for the P. C. Line of Seattle, sued McM. the agent of the D. & W. H. N. Co. on a bill of exchange drawn by McM. on the Company in favour of T. This bill was for the balance of freight moneys due under a charter-party entered into between the principals; and the Company having a claim against the P. C. Line for demurrage obtained an order adding them as party defendants, and giving them and McM. leave to deliver a counter-claim and serve it upon the P. C. Line. This order was affirmed by the Full Court (*ante* p. 171) on the ground that the real parties in interest should be brought before the Court. An order was then made by IRVING, J., giving leave to McM. and the Company to serve notice on the P. C. Line of the defence and counter-claim:—*Held*, on appeal *per* DRAKE and MARTIN, JJ. (HUNTER, C.J., dissenting), that as no cause of action or counter-claim against T. was shewn there was no "action properly brought against some other person duly served within the jurisdiction," and hence there was no jurisdiction to make the order. TROWBRIDGE v. MCMILLAN. - - - - - - **443**

40.——*Special indorsement—Action on foreign judgment—Interest till judgment—Liquidated demand.*] By WALKEM, J., at trial: In an action on a Yukon Territory judgment, the writ may be specially indorsed within Order III., r. 6, with a claim for interest on the judgment. It is not necessary in such an indorsement to state that the interest is due by statute. By Full Court on appeal: A claim for interest "until payment or judgment" is not a claim for a liquidated demand, within the meaning of Order III., r. 6, except for example, where the cause of action is in respect to negotiable instruments, in which case the interest is by section 57 of the Bills of Exchange Act, deemed to be liquidated damages. Interest claimed under a statute cannot be the subject of special indorsement unless it is stated in the indorsement under what Act the interest is claimed. A specially indorsed writ should state specifically the amount due, and when a claim is made for the taxed costs of a foreign judgment, the date of the taxation should be stated. MACAULAY BROTHERS v. VICTORIA YUKON TRADING COMPANY. - - - **27, 136**

41.——*Special indorsement—Interest till judgment—Order XIV.—Amendment—Re-service or re-delivery.*] In an action for principal and interest due upon a covenant in a mortgage, a claim for interest until payment or judgment is not the subject of special indorsement within the meaning of Order III., r. 6. Where on an application for judgment under Order XIV., it appears that part of the claim is not the subject of special indorsement, it is not open to plaintiff to obtain amendment and proceed, but a new summons must be taken out. Where the indorsement of a writ has been amended, re-delivery but not re-service is necessary. Remarks as to necessity for amending the Supreme Court Rules. PIKE v. COPLEY. - - - - - - - **52**

42.——*Special indorsement—Note payable at particular place—Duly presented.*] The statement of claim indorsed on the writ alleged that the note sued on was payable at a particular place named, and in the same paragraph that the note was duly presented and dishonoured:—*Held*, a good special indorsement. *Cunard et al v. Symon-Kaye Syndicate* (1894), 27 N.S. 340, distinguished. UNION BANK OF HALIFAX v. WURZBURG AND COMPANY, LIMITED. **160**

43.——*Summons—Returnable in Registry other than where issued—Title.*] After the issue of the writ in an action a summons was taken out entitled "In the matter of an intended action." *Held*, by IRVING, J., dismissing the summons, that it was wrongly entitled. A Judge has power to direct a summons to be issued and be returnable in a Registry other than that where the writ was issued. TANAKA *et al* v. RUSSELL. - - - - - - - - **24**

STATUTE—*Continued.*