THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT

WITH

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

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA.

PAGES 1 TO 322 INCLUSIVE, BY

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

PAGES 323 TO END, BY

OSCAR CHAPMAN BASS, - - - BARRISTER-AT-LAW.

VOLUME XI.

VICTORIA, B. C.
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1905.

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. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.
THE HON. LYMAN POORE DUFF.
THE HON. AULAY MORRISON.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. ELI HARRISON, - - - - - - - - - - - Nanaimo
HIS HON. WILLIAM NORMAN BOLE, - - - - - - New Westminster
HIS HON. THE HON. CLEMENT FRANCIS CORNWALL, - - - Cariboo
HIS HON. WILLIAM WARD SPINKS, - - - - - - - - - - Yale
HIS HON. JOHN ANDREW FORIN, - - - - - - - West Kootenay
HIS HON. ALEXANDER HENDERSON, - - - - - - Vancouver
HIS HON. FREDERICK McBAIN YOUNG, - - - - - - - - Atlin
HIS HON. PETER SECORD LAMPMAN, - - - - - - - - Victoria
HIS HON. WILLIAM HENRY POPE CLEMENT, - - Kootenay and Yale
HIS HON. PETER EDMUND WILSON, - - - - - - East Kootenay

ATTORNEYS-GENERAL:

THE HON. CHARLES WILSON, K. C.
THE HON. FREDERICK JOHN FULTON, K. C.

MEMORANDA.

On the 4th of August, 1905, His Honour Andrew Leamy, Judge of the County Courts of Kootenay and Yale, died at Grand Forks.

On the 14th of June, 1905, Frederick McBain Young, Barrister-at-Law, was appointed Judge of the County Court of Atlin, and a Local Judge of the Supreme Court of British Columbia.

On the 14th of June, 1905, Peter Secord Lampman, Barrister-at-Law, was appointed Judge of the County Court of Victoria, and a Local Judge of the Supreme Court of British Columbia.

On the 24th of August, 1905, William Henry Pope Clement, Barrister-at-Law, was appointed Judge of the County Courts of Kootenay and Yale in the room and stead of His Honour Andrew Leamy, deceased.

On the 11th of October, 1905, the territorial jurisdiction of His Honour Judge Forin as Judge of the County Court of Kootenay and Local Judge of the Supreme Court of British Columbia, was re-defined so as to embrace the County of West Kootenay.

On the 17th of October, 1905, Peter Edmund Wilson, Barrister-at-Law, was appointed Judge of the County Court of East Kootenay, and a Local Judge of the Supreme Court of British Columbia.

TABLE OF CASES REPORTED

IN THIS VOLUME.

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TABLE OF CASES CITED.

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REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA.

TOGETHER WITH SOME

CASES IN ADMIRALTY.

MUIRHEAD v. SPRUCE CREEK MINING COMPANY, LIMITED.

DUFF, J.

1904

Sept. 13.

MUIRHEAD v. SPRUCE CREEK MINING CO.

County Court—Stay of proceedings under section 34—Whether applicable to proceedings under mining jurisdiction—Prohibition.

Section 34 of the County Courts Act which provides, *inter alia*, that if in any action of tort the plaintiff shall claim over $250 and the defendant objects to the action being tried in the County Court and gives certain security, the proceedings in the County Court shall be stayed, applies to proceedings in the County Court under the mining jurisdiction of that Court.

APPLICATION for prohibition to the Judge of the County Court of Vancouver from further proceeding with an action. The facts are stated in the judgment.

The application was argued at Atlin in September, 1904, before DUFF, J.

Belyea, K.C., for the application.

Kappele, contra.

13th September, 1904.

DUFF, J.: This is an application by the Spruce Creek Mining Company, Limited, for an order prohibiting the Judge of the

Judgment

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1904

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County Court of the County of Vancouver from further proceeding with an action in that Court entitled *Muirhead* v. *The Spruce Creek Mining Co.*

In this action the plaintiff claims to recover against the defendant Company damages caused by the overflow of water on the plaintiff's property, resulting from a breaking of a ditch of the defendant Company. The amount claimed is in excess of $250. The defendant Company contends that under section 34 of the County Courts Act, it is entitled, by giving the notice referred to in that section, and providing the security referred to in that section, to have the proceedings in the County Court stayed. The notice has been given and the security has been provided. I have come to the conclusion that that section applies to proceedings in the County Court, under the Mining Jurisdiction of that Court.

The language of the section itself does not suggest that its application is limited in respect of the particular class of jurisdiction invoked in the action to which the section is sought to be applied. It is contended that the provisions of Part 10 of the Placer Mining Act are so sweeping in their character as to displace the operation of that section. I am unable to agree with that contention. It is true that section 133, which confers upon the County Court its special mining jurisdiction, does provide that the County Court shall in respect of the matters comprised within the sub-heads of that section have and exercise within the limits of its district all the jurisdiction and powers of a Court of law and equity. But that general provision is limited by section 135 of the same Act, which provides that "the provisions of all Acts for the time being in force regulating the duties of County Courts, County Court Judges, Registrars, Sheriffs and other officers, and regulating the practice and procedure in County Court shall so far as practicable, and not inconsistent with this Act apply to the mining jurisdiction of the County Court."

Judgment

The language of the last mentioned section is entirely without limitation, and I am unable to see that upon any proper principle of construction I should import into it any modification which would exclude from its operations the provisions of section 34 of the County Courts Act. My view is fortified by section 40 of

the County Courts Act. That section provides that "the County Court shall also respectively have and exercise, concurrently with the Supreme Court of British Columbia, all the power and authority of the Supreme Court of British Columbia in the actions or matters hereinafter mentioned." Then follows a series of sub-sections conferring jurisdiction in a large number of cases limited it is true as to value, but embracing within its sweep actions of almost every kind which would have come within the jurisdiction of a Court of Equity prior to the amalgamation brought about by the Judicature Act.

It is difficult to understand why if section 34 is not to apply to actions brought in the County Court, and invoking the mining jurisdiction of the County Court, the section should at the same time apply to actions brought invoking the equitable jurisdiction of the County Court. It may be said, of course, that the mining jurisdiction is conferred by a special Act, but there is ample authority that where you have special statutes dealing with cognate or allied subjects and these statutes are brought together in consolidation, as is the case here, the whole consolidation is to be read as one Act. Part 10 of the Placer Mining Act ought therefore to be read as if it were a part of the County Courts Act, and there has been no argument presented to me, and I am unable to see that there is any sound ground upon which one can establish any distinction between the mining jurisdiction and the equitable jurisdiction in that respect.

Judgment

It was pressed upon me, and I do not undervalue the importance of the point, that the effect of this view might be to deprive the County Court of its mining jurisdiction, or, at all events, to make the mining jurisdiction of the County Court conditional upon the consent of both parties. At first, I was inclined to think that the argument was a forcible one, but the consideration which I have been able to give to it in the time elapsing between the argument and this moment leads me to see that the consequences are not by any means so extensive as the argument presupposes.

Section 34 of the County Courts Act is limited to actions of contract, and actions of tort, in which the plaintiff claims the sum of in one case exceeding $500, and the other case exceeding

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$250. It is quite obvious that a very large number of cases which would come within the mining jurisdiction would not be affected by section 34—actions of ejectment, in which no sum is claimed; actions for declaration of right in which no sum is claimed; actions claiming simply an injunction, in which no sum is claimed; and others of which examples might be multiplied.

The application is for prohibition, as I have said. That remedy is in the discretion of the Court. During the argument I intimated that I should not grant the order except upon the term that the defendants should go to trial at once, and that will be made a term of the order.

Application for prohibition granted.

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1903

June 10.

REX v. HAYES

REX v. HAYES.

Criminal law—Grand jury—Constitution of—Motion to quash—Juror prejudiced—Cr. Code, Secs. 656, 662 and 746.

An objection to the qualification of an individual member of a grand jury is not an objection to the "constitution" of the grand jury within the meaning of section 656 of the Criminal Code, and so cannot be raised by motion to quash.

Per MARTIN, J.: The question as to whether or not a grand juror is prejudiced is for the Judge of Assize to decide and his decision cannot be reviewed on appeal.

IN the Supreme Court of British Columbia *in banc:* Crown Case reserved.

Statement

The accused was convicted at the May Assizes, held in the City of Victoria, of having obtained money by false pretenses, and was sentenced by DRAKE, J., the presiding Judge, to imprisonment for two years.

After the indictment was found and after the prisoner was arraigned, but before plea pleaded, a motion to quash the indict-

ment was made on the ground that one of the grand jurors was incompetent to act because he was the agent of the prosecutor in connection with the matter out of which the prosecution arose. Of the thirteen grand jurors summoned one was ill and unable to attend, and amongst the twelve who found the true bill was Charles Stewart Baxter, who it was alleged was incompetent to act. It appeared from an affidavit of the accused used on the motion that the transaction out of which the prosecution arose was in connection with the sale by him to Irving, the prosecutor, of an interest in a mining company prior to 15th April, 1901, and at that time or probably before, the said Baxter became Irving's agent in respect of that transaction; that on 15th April, 1901, Baxter on behalf of Irving wrote the accused giving him a memo of certain accounts in reference to the said transaction and stating that he was going to take charge of Irving's accounts, etc.; that on 18th April, he (Hayes) wrote Irving giving an account of assessments which he had paid on account of shares held for joint account, and in answer to that letter Baxter wrote him that Irving took exception to some of the amounts and giving particulars.

The affidavit of C. E. Wilson, a solicitor, shewed that on behalf of the accused he had endeavoured to obtain the grand jury list but was unable to do so.

The motion to quash was refused by the trial Judge on two grounds, *viz.*: Statement

(1.) That the objection to Baxter was not an objection to the constitution of the grand jury.

(2.) That even if the objection to Baxter was an objection to the constitution of the grand jury, the said Baxter stood indifferent between His Majesty and the accused and that consequently the accused had not suffered and would not suffer prejudice by said Baxter being a member of said grand jury.

The questions reserved (at the trial) were:

(1.) Was said objection an objection to the constitution of the grand jury?

(2.) If said objection was an objection to the constitution of the grand jury, did said Baxter stand not indifferent between His Majesty the King and the accused, and did the accused

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suffer prejudice or might he have suffered prejudice thereby.

The questions were argued at Victoria on 10th June, 1903, before WALKEM, DRAKE, IRVING and MARTIN, JJ.

Duff, K.C. (*G. E. Powell*, with him), for the prisoner: A grand jury may be objected to on practically the same grounds as a petit jury, the only difference being the form which the objection takes; where the names of the grand jurors are not known a challenge cannot be made. Under the Code pleas in abatement are abolished and motions to quash substituted. Baxter does not deny that he was acting in the matter as agent for the prosecutor; there was such a relationship as to give rise to a suspicion of bias and constituting a ground of challenge *propter affectum*: Blackstone's Commentaries, Vol. 3, Sec. 363.

The objection is an objection to the constitution of the grand jury; the right to object must exist or else the abolition of pleas in abatement abolishes also all a prisoner's right to object. He cited *Reg.* v. *Gorbet* (1866), 1 P. E. I. 262; *Rex* v. *Sheridan* (1811), 31 How. St. Tri. 543 at pp. 552 and 572; Crankshaw 778-9; *Reg.* v. *Duffy* (1848), 4 Cox, C. C. 172; *Reg.* v. *Morris* (1867), L. R. 1 C. C. 90 and *Reg.* v. *Mercier* (1892), 1 Que. Q. B. 541.

Maclean, D. A.-G., for the Crown: The grand jury is constituted the moment they go into the box and are sworn and any objection must be taken before they are sworn. He referred to *Rex* v. *Hayes* (1902), 9 B.C. 574; Bishop's Criminal Procedure, Vol. 1, Sec. 876 and *Rex* v. *Belanger* (1902), 6 C. C. C. 295.

Argument

In order for the prisoner to succeed the Court must be of the opinion that the objection is well founded and also that the prisoner has suffered prejudice; these were questions of fact for the trial Judge who has found adversely to the prisoner and his view on the facts will not be interfered with lightly: see *Reg.* v. *Wyse* (1895), 2 N.-W. T. Rep. 103 and *Reg.* v. *McIntyre* (1898), 3 C. C. C. 413.

The prosecution arose over representations made by the prisoner to Irving when they made their bargain, and Baxter had no connection with it except to straighten out the accounts. There has been a fair trial; the petit jury brought in a verdict

of guilty and even if Baxter were prejudiced no injustice has been done.

Duff, in reply: There has been no finding that Baxter was not prejudiced; that matter is entirely open yet. Section 746 (*f.*) leaves it to the Court to decide whether or not there has been any miscarriage of justice.

WALKEM, J., dissented from the opinion of the majority of the Court.

DRAKE, J.: I only came here to listen to the argument, because it is an interesting point on which I am very glad to have heard the argument. I think it is better for me, on the whole, not to give any judgment in the matter. When the matter came before me for trial I expressed my opinion, and I must say I see no reason to change it.

DRAKE, J.

IRVING, J.: I agree with the decision arrived at by the learned trial Judge. As I understand the constitution of the grand jury the individual opinions of one of the members of that body have nothing to do with the constitution of the jury. The jury is summoned by the King. The question is whether the jurors are indifferent as between the King and the prisoner, not between the private prosecutor, if there is a private prosecutor, and the prisoner. It is altogether contrary—and I think this case illustrates it fairly well—it is altogether and indisputably contrary to our system of jurisprudence that the question should be whether the jurors are indifferent as between the private prosecutor and the accused. If the objection to Baxter was an objection to the grand jury, Baxter stood indifferent between the King and the accused. And the accused did not and could not suffer any prejudice by reason of Baxter being a member of the grand jury. I would disallow the motion.

IRVING, J.

MARTIN, J., concurred and subsequently on 29th July, handed down the following written opinion:

There are two questions reserved for our consideration. The first is—Was said objection an objection to the constitution of the grand jury?

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It is contended by the Crown that it was not, but was, on the contrary one to the qualification of one of the individuals composing it, and my own decision, 9 B.C. 574, on section 656 in this prosecution at the Fall Assizes in 1902, quashing an indictment of a so-called grand jury is relied upon. It was then held that an objection that the Sheriff had not summoned the statutory number (thirteen in this Province) of grand jurors named in the panel was not really one to the constitution of a grand jury, because there was no such body in existence till the Sheriff had summoned that number which the statute (Jurors Act, Sec. 48; Jurors Amendment Act, 1899, Sec. 2) imperatively directed him to summon and return, and that the twelve only he did summon and who appeared at the opening of the Assizes formed a mere collection of irresponsible individuals unknown to the law and having no "constitution" in a legal sense that an objection could operate on, and consequently the proceedings of such a body were 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, was held to be no answer, for if it were possible to summon him, as it admittedly was, he should have been summoned; and 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. . . . It was further laid down that a grand jury is "constituted" after the thirteen had been summoned by the Sheriff and a sufficient number of persons (*i.e.*, seven under our present Act instead of 12 as formerly required by section 52 of the Jurors Act) so summoned had appeared and taken their places in the box ready to be duly sworn to discharge the duties of their office: Cr. Code, Sec. 662; B. C. Stats. 1899, Cap. 35, Sec. 2; *Reg.* v. *Girard* (1898), 7 Que. Q.B. 575, 2 C.C.C. 216 and *Reg.* v. *Cox* (1898), 2 C.C.C. 207 at p. 213.

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The course I then pursued was based upon the rule and practice that an indictment clearly found without jurisdiction will on motion be quashed at any stage: *Reg.* v. *Heane* (1864), 9 Cox, C.C. 433, followed in *Reg.* v. *Burke* (1893), 24 Ont. 64.

The grand jury in the case at bar has been properly summoned and there is no objection to its constitution as a body duly

empanelled, but to one of its members only, *i.e.*, the present objection if put forward as a challenge would not be to the array but to the polls, and had the juror objected to been a petit juror the challenge would have been "*propter affectum, i.e.*, on the ground of some presumed or actual partiality . . . . etc." Archbold's Criminal Pleading (1900), p. 184. At p. 178 that author says:

"Challenges are of two kinds: (1.) To the *array*, when exception is taken to the whole number empanelled; and (2.) To the *polls*, when individual jurymen are excepted against."

And to the same effect see 1 Chitty's Criminal Law, 533 (Am. Ed., 1847, from 2nd Eng. 1826) and sections 666 and 668 of the Criminal Code which define the nature and extent of challenges in Canada.

Now it has already been decided by two Judges of the Court of Queen's Bench in Quebec that no right of challenging the grand jury exists, either to the array or to the polls: *Reg.* v. *Mercier* (1892), 1 Que. Q.B. 541. This decision is based on a judgment of the Irish Court of King's Bench in the celebrated case of *Rex* v. *Sheridan* (1811), 31 How. St. Tri. 543, wherein three of the four Judges who sat agreed that no such challenge lay, or had ever lain, and that the proper course to adopt was to raise the objection by plea in abatement after indictment found. Much learning on the then practice of challenges to grand and petit jurors will be found in that case, which has not only never been questioned, but the course adopted by it has since been followed, *e.g.*, in *Reg.* v. *Mitchell* at the Dublin Assizes, in April, 1848, 11 L. T. J. 112, 3 Cox, C.C. 93; and in *Reg.* v. *Duffy*, also at the Dublin Assizes in December, 1848, reported in 4 Cox, C.C. 172. These cases are of special value because as is remarked in Archbold, *supra*, at p. 78, "the leading modern cases on the subject have occurred in Ireland." The objection to the grand juror in *Sheridan's Case* was that he was a placeman under the Crown (a divisional magistrate of police) which was tantamount to a challenge to the polls *propter affectum:* Archbold, *supra.*

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In regard to challenges to the array, in 1867 in the case of *Reg.* v. *Burke*, a trial in Dublin by special Commission before Whiteside, C.J., and Fitzgerald and Deasy, JJ., it was decided

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that "no ground for challenge to the array exists where the Sheriff has not been guilty of a fault," following the opinion of the House of Lords and the Judges who had been specially summoned in *O'Connell's Case* on a writ of error from the Irish Court of Queen's Bench (1844), 11 Cl. & F. 155, at pp. 247 and 323. The Lord Chief Justice stated, p. 247, that all the Judges were agreed that:

"The only ground upon which the challenge to the array is allowed by the English law is the unindifferency or default of the Sheriff."

And the Lord Chancellor said, p. 323:

"My Lords, if you look into our law books, you will find that the challenge to the array is only allowed on account of the position or conduct of the Sheriff or other officer by whom the jury is returned."

And in a judgment in the case of *Rex* v. *Edmonds* (1821), 4 B. & Ald. 471, 23 R.R. 350, which throws much light upon what was the practice of challenges to the array and to the polls towards the beginning of last century, Abbot, C.J., says, at p. 356:

"Such a challenge (to the array) is always grounded upon some matter personal to the officer by whom the jury has been summoned, and their names arrayed upon the parchment or panel whereon they are returned, in writing, to the Court."

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And this view of the law is now embodied in the Criminal Code, section 666, as follows:

"Either the accused or the prosecutor may challenge the array on the ground of partiality, fraud, or wilful misconduct on the part of the Sheriff or his deputies by whom the panel was returned, but on no other ground. The objection shall be made in writing, and shall state that the person returning the panel was partial, or was fraudulent, or wilfully misconducted himself, as the case may be."

So far, then, it is perfectly clear that the objection now taken to this grand juror could only have been taken by plea in abatement, and that it is of the same nature as a challenge to the polls, *propter affectum*. But since the 1st day of July, 1893, the day when our Criminal Code, 1892, came into force, all pleas in

abatement were abolished by a new section, 656, which enacts as follows:

"No plea in abatement shall be allowed after the commencement of this Act. Any objection to the constitution of the grand jury may be taken by motion to the Court, and the indictment shall be quashed if the Court is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise."

Though this section does not apply, as has been seen, to the case of a clear want of jurisdiction, yet one of the results of it is that if the objection is one which should formerly have been taken by plea in abatement it cannot now be entertained, unless it is one to the "constitution" of the grand jury. Hence the question which now arises—Is an objection to the qualification of an individual member of the grand jury an objection to the "constitution" of that body in the proper sense of the word?

In his note on this section, Mr. Justice Taschereau, now the Chief Justice of Canada, remarks (Taschereau's Criminal Code of Canada), p. 752, that the old repealed clause, R.S.C., Cap. 174, Sec. 142, applied only to certain pleas in abatement. But the new section includes all pleas of that nature. The same learned author remarks that "It is only objections to the *constitution* of the grand jury that this section provides for." The Code makes no provision regarding the constitution of the grand jury with the exception of section 662, which I shall refer to later.

MARTIN, J.

In support of the contention that the objection is to the constitution counsel for the prisoner cited the Prince Edward Island case of *Reg.* v. *Gorbet* (1866), 1 P. E. I. 262; wherein an indictment was on motion quashed by Mr. Justice Peters because of an objection to one of the grand jurors *propter affectum*, as being in the employment, as agent, of the person chiefly interested in the criminal proceedings. The learned Judge on p. 263 cites Chitty's Criminal Law as an authority for the proposition that a grand juror may be challenged, and on p. 264 states that "in a note to Chitty's Criminal Law 309 (Vol. 1, Am. Ed., 1847), it is said, 'There exists the same right of challenging for favour the grand jury as the petit jury. Burr's trial, 38.'"

As to this alleged right of challenge, it is only necessary to re-

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fer to *Sheridan's Case*, to reject it; the effect of that case has been overlooked by the learned Judge though he cites it on another point. And as to the American note on Aaron Burr's trial, it will be seen how dangerous it is to rely on American views of English criminal procedure by referring to the decision of the Supreme Court of the United States in the case of *United States* v. *Gale* (1883), 109 U.S. 65, where our law on the right to challenge the grand jury is incorrectly stated (p. 67) being based merely on a citation from the same text writer, Chitty (who overlooked the express decision in *Sheridan's Case*), and in apparent ignorance of the practice following it in the later cases hereinbefore mentioned. And this Court has already held that "it cannot be guided by American practice in criminal matters"—*Greer* v. *Regina* (1892), 2 B.C. 112, at pp. 120 and 129. In fact three years later in *Reg.* v. *Dowey* (1869), 1 P. E. I. 291, 293, Mr. Justice Peters himself doubted the applicability of the same American authority he had before cited. And in the same case he refers to *Sir William Withipole's Case* (1629), 2 Cro. 134, as though the grand jury had been challenged, whereas the report shews that the objection was duly raised by plea in abatement. Later also in *Reg.* v. *Lawson* (1881), 2 P.E.I. 398, and 401, he aptly says that "if they were all one way American cases would form no safe guide for us." In truth, on this branch of the case at bar these

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Prince Edward Island cases decided before the union with Canada (July 1, 1873), are of no practical assistance because there was in that colony a local statute which the learned Judge cites at p. 294 of *Dowey's Case*, which says "every objection to any grand jury panel, or individual grand juror, or challenge to the array, shall be made before pleading to the indictment, etc., etc." The local Act was also referred to by the Court in *Reg.* v. *Collins* (1878), 2 P. E. I. 249 at p. 254, Palmer, C.J., pointing out that it "gives to the Supreme Court of this Island much greater power than is given to the Criminal Courts of England by the Imperial Statute 14 & 15 Vict., Cap. 100, etc., etc." And note the remarks of Peters, J., at pp. 261-2.

But in any event these four cases, and that of *Reg.* v. *Cunard* (1838), 2 N. B. 500, cited in the last named, were before the

passing of section 656, and throw really no light on the meaning of "constitution," and the decision in *Mercier's Case* for the like reason affords us no assistance on this point.

Recently, on December 23rd, 1902, a somewhat similar question came with others before five Judges of the Court of King's Bench in Quebec in appeal in *Belanger* v. *The King* (1902), 12 Que. K. B. 69 (incompletely reported in 6 C. C. C. 295). The exact point there raised was on an objection that the grand jury had not been duly sworn, and on motion before plea the indictment was quashed on that ground, their proceedings being held null and void because till duly sworn they were not competent or "constituted" to act as a grand jury at all. The judgment of the Court was unanimous (see p. 104) that:

"The grand jury were not properly sworn, inasmuch as none of the other jurors were in the box at the time the foreman was sworn, and were only sworn afterwards to observe the same oath which their foreman had taken, without there being a certainty that the said oath submitted to their foreman had been heard by them."

Written judgments were delivered by Mr. Justice Hall and Mr. Justice Wurtele, and in so far as they go to shew that the objection taken was one to the constitution of the jury, the remarks of those learned Judges would not probably be excepted to because the objection was one which went to the capacity of the grand jury as a body to discharge any functions pertaining to that office till the oath likewise pertaining to that office had been duly taken. The situation was somewhat peculiar but it may fairly be put this way, that though the grand jury was so far regularly constituted that all its members were entitled as of right to enter the box assigned to them in the Court yet they could not exercise their powers till they had duly taken the prescribed oath of office; in that sense it may be said the "constitution" of the jury was affected. The point is a nice one but it was not precisely raised nor dealt with and is still open. If I may say so with all respect however, I should not feel warranted, for reasons already stated, in relying on any of the American authorities cited by the learned Judges, and in my opinion they should be discarded as tending to lead into error. Mr. Justice

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Wurtele makes some general observations upon the constitution of the grand jury and the qualification of its members which were cited by counsel on this argument, but they plainly, I think, are not intended to be exhaustive, nor are they necessary for the determination of the point then before the Court and so can only be treated as *obiter dicta*. Moreover the learned Judge's attention does not appear to have been called to sections 662 and 668 (4), (5) which have an important bearing on the point, and are hereinafter considered.

But whatever the view of any member of the Court may have been on this point of "constitution," I must confess that, since in answering the third reserved question (the necessity of the foreman initialling the names of the witnesses examined) the Court as a whole has not followed the ruling of the Supreme Court of Nova Scotia on that point in *Rex* v. *Townsend* (1896), 3 C.C.C. 29, nor of the Court of King's Bench of Manitoba in *Reg.* v. *Buchanan* (1898), 12 Man. 190, nor of this Court in *Rex* v. *Holmes* (1902), 9 B.C. 294, I should in any event feel some difficulty in knowing what weight should be attached to its ruling on other cognate points. It would be well if the matter were set at rest by the Supreme Court of Canada.

As the learned author before cited remarks, the only provision in the Criminal Code on this question of constitution is section 662, as follows:

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"Every person qualified and summoned as a grand or petit juror, according to the laws in force for the time being in any Province of Canada, shall be duly qualified to serve as such juror in criminal cases in that Province."

But with said section there should be read the curative section 735, as follows:

"No omission to observe the directions contained in any act as respects the qualification, selection, balloting or distribution of jurors, the preparation of jurors' book, the selecting of jury lists, the drafting panels from the jury lists or the striking of special juries, shall be a ground for impeaching any verdict, or shall be allowed for error upon appeal to be brought upon any judgment rendered in any criminal case."

To my mind the meaning of section 662 is clear and it is of

great assistance in determining the present case. It means that once a person is qualified to serve according to the laws of his Province, and has been summoned, then, subject to the challenges to petit jurors allowed by sections 666 and 668 sub-sections 4 and 5 he is qualified to serve in criminal cases in Courts having jurisdiction to try such federal cases, *i.e.*, the provincial juror is utilized for the purposes of the federal criminal law. Two things only are necessary (1.) the qualification by provincial law; (2.) the summoning after that qualification has been determined. If he is qualified under the laws of his Province for the time being in force and has been summoned, it is his duty to act in the capacity in which he has been so summoned, and unless excused by order of the Court, as hereinafter mentioned, or challenged, he must so act. The qualification here spoken of can, having regard to the context, mean only one thing—that is the obligation to the State imposed on him by the law of his Province to act in his proper capacity as regards all possible offenders against the Crown and its dignity. It does not and cannot, in view of the way jurors are selected in this Province at least, contemplate at that stage any possible personal incompetence in the juror as regards some individual, known or unknown who had transgressed or might transgress the laws a short or long time after or before the juror has been selected after being declared duly qualified. That this is and must be the true intent and meaning of the Act is shewn by the fact that all the grand jurors, including him now objected to, were duly qualified as regards all other accused persons at that assize than the present appellant. It is not suggested that the juror now objected to was not when selected in every way a qualified person under sections 5 and 6 of our Jurors Act. Such being the case it becomes at once apparent that the present objection *propter affectum* to a juror who is duly "qualified" in the statutory sense at least is not one to the qualification required by said section 662, for that was long ago determined, but to the personal incompetence of the individual juror *qua* the accused and is tantamount, it has been seen, to a challenge to the polls *propter affectum*. Such is not, in my opinion, having regard to the operation of sections 656 and 662 of our Jurors Act an objection to the con-

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stitution of the grand jury in the proper sense of that word, and therefore it cannot, in the absence of some such statutory provision as the cases hereinbefore cited shew existed in Prince Edward Island, be raised by motion to quash.

This conclusion is borne out by considering the application of section 662 and section 668 sub-sections 4 and 5 to petit jurors, and it should be noted that an objection to the statutory qualification of a petit juror is raised by a challenge to the polls *propter defectum*: Archbold, *supra*, 183. The effect of these sections is that after a juror "qualified" under section 662 has been summoned every ground of challenge is forbidden by sub-section 5 other than the four grounds reserved by sub-section 4 and the first of these grounds is that the juror's name is not on the panel. The other three grounds are—(*b.*) unindifference, (*c.*) conviction for certain offences, and (*d.*) alienage. Now though in our B.C. Jurors Act there are two other disqualifications, *viz.* (1.) persons infirm or decrepit and (2.) persons not in possession of natural faculties, yet nevertheless the result is that once the names of such persons appear on the panel the objection to their qualification is lost by the operation of sub-section 5 and they cannot be challenged and so are "duly qualified to serve as jurors" unless the Court should of its own motion see fit to take action as hereinafter mentioned.

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This important result of the sections relating to the petit jury is of much assistance in determining the question under consideration because it affords another illustration of the intention of Parliament to limit objections to jurors.

The appellant's counsel very properly contends that the Court will not hold, in the absence of clear statutory authority, that accused persons have lost the former right to object to individual grand jurors *propter affectum*, or otherwise. But here the Act has abolished in the clearest language the only method by which such an objection could formerly be raised, and in my opinion has omitted (whether intentionally or otherwise is immaterial) to substitute another apt form of procedure. Counsel for the Crown, on the other hand, contends that in view af the fact that both by law and in actual practice the powers of the grand jury have in recent years been much curtailed it may well be that

such was the intention of the Legislature. The learned author before cited (Taschereau's Crim. Code) p. 730 says, referring to one great change effected by section 641, "the grand jury are not now at liberty to find a bill upon their own knowledge only; and the right to go directly before them and prefer a bill against any one is taken away." Mr. *Duff* states that the result would be that even if a grand juror were bribed the accused could not raise such an objection. In regard to this I first remark that embracery is a criminal offence dealt with by the Code, Sec. 154, and a misleading of justice itself, and it might be well that, to prevent a crime being consummated within the very temple of justice, and in the presence of the Court by one of those summoned to aid in the administration of justice by the precept of the presiding Judge of Assize (or one of his brethren under section 28 of the Jurors Act), an adequate course would, on creditable suggestion of such a public disgrace, be taken by the Court of its own motion to preserve its own honour and meet such an extraordinary state of affairs, which so far be it noted has never been recorded in the legal annals of our country. It may here be opportunely remarked that a Judge of Assize has powers of a very unusual and ample kind, which, so far as I can find, have never been attempted to be defined, but which are undoubtedly such as properly appertain to the person of one who in the discharge of duties of the last solemnity represents the King himself (see *Reg.* v. *McGuire* (1898), 4 C.C.C. 12 at p. 24) and everything, in the case of an office of such dignity and antiquity, is presumed necessary for the occupant to see that the King's Justice is dispensed to the King's subjects. *Cf. Ex parte Fernandez* (1861), 10 C.B.N.S. 3, 30 L.J., C.P. 321. Nor is there any limitation upon such necessary powers except that which has been imposed by Parliament or the Court itself. An apt illustration of the exercise of this authority in the case of grand jurors is to be found in *Lord Headley's Case* (1806), R. & R. 117, at the County of York Assizes wherein the presiding Judge, Mr. Justice Chambre, pointed out to an Irish Peer, who had attended for the purpose of serving on the grand jury, the undesirability of his so doing, to which that grand juror acquiesced, though he was not strictly speaking

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disqualified, and the point was subsequently referred to all the Judges and the course adopted approved of. And I am further fortified in the view above expressed by the case of *Mansell* v. *The Queen* (1857), 8 El. & Bl. 54, wherein Lord Chief Justice Campbell said (p. 80) in delivering the judgment of the Court:

"We wish it to be understood that we by no means acquiesce in the doctrine boldly contended for at the bar, on the authority of Brownlow in an Anonymous (1 Brownl. & Gold 41) case, that a Judge, on the trial of a criminal case, has no authority, if there be no challenge, either by the Crown or by the prisoner, to excuse a juryman on the panel when he is called, or to order him to withdraw, although he is palpably unfit by physical or mental infirmity to do his duty in the jury box. We are not now to define the limits of this authority; but we cannot doubt that there may be cases, as if a juryman were completely deaf, or blind, or afflicted with bodily disease which rendered it impossible to continue in the jury box without danger to his life, or were insane, or drunk, or with his mind so occupied by the impending death of a near relation that he could not duly attend to the evidence, in which, although from there being no counsel employed on either side, or for some other reason, there is no objection made to the juryman being sworn, it would be the duty of the Judge to prevent the scandal and the perversion of justice which would arise from compelling or permitting such a juryman to be sworn, and to join in a verdict on the life or death of a fellow-creature."

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And Mr. Justice Willes says, at p. 109:

"The question mooted, as to whether a Judge has of his own motion power to set aside a juror, on a ground rendering him unfit to act as a juror, seems to me one of great importance. I must for myself protest against its being supposed he has not such power."

It consequently follows from all the foregoing that the first reserved question should be answered in the negative.

Having regard to this view of said first question, it is strictly speaking unnecessary for me to consider the second one dealing with the provision in the latter part of section 656, as to whether or no the accused has "suffered or may suffer prejudice" by

his objection not being given effect to, assuming that it was a valid one, but I think it desirable in a reserved case of this importance that I should do so.

And, first, I agree with the remarks of Mr. Justice Caron in *Reg.* v. *Poirier* (1898), 7 Que. Q.B. 483 at p. 485, that "*La loi donne beaucoup de latitude au juge,*" and this is consequent upon the aforementioned curtailment of the powers of the grand jury, whereby changes have been effected not only on the pages of the statute book, but in the actual work of the Assize Courts, as those of us who have occasion frequently to go on circuit cannot fail to observe. And I refer also to the power given to the Court by section 641, sub-section 3, to order a bill of indictment to be preferred.

In the case at bar it may well have been the opinion of the presiding Judge after seeing the depositions, as I did, that the case was so strong against the prisoner that it would only have been a waste of time and needless delay to send it back for the consideration of another grand jury. Even had that body gone so far as to ignore the bill it could be, and in this case should have been presented afresh, if not at the same sittings (*Reg.* v. *Simmonite, alias Newton* (1843), 1 Cox, C.C. 30-2, 2 M. & Rob. 503) at least at a subsequent one: *Reg.* v. *Austin* (1850), 4 Cox, C.C. 385. I do not go so far as to say that I should have done exactly as the learned trial Judge did here, but that is a very different thing from saying, particularly in criminal practice, that I should undo what he did do. What the Crown counsel urges upon us is that after an admittedly fair trial so far as the petit jury is concerned, the accused has been found guilty, and if that jury reached that conclusion after hearing his defence, how can it be said that he was really prejudiced by the action of a body whose duty it was to hear only that which was alleged against him? It is in truth rather an embarrassing situation, because it now is apparent that according to the verdict of the petit jury whatever took place before the grand jury could not have affected the result. And the affidavit of the prisoner himself (par. 3) shews that twelve grand jurors found the indictment against him, though the appearance and concurrence of seven only is sufficient, as has been seen. A much stronger case to appeal to

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the discretion of the trial Judge would have been made had the fact been that only seven jurors appeared, and one of them was objected to. It all comes to a question of degree in all the circumstances. And it is well open to argument, having regard to the great desirability in the public interest of a speedy determination of criminal trials, and the continuation of the enviable reputation which the administration of criminal justice in Canada now bears in that respect, that Parliament wished to make the presiding Judge, who necessarily has a far better appreciation of the surrounding circumstances than an appellate Court, the sole arbiter of this question of prejudice. This view is supported by the unusual and restrictive language used, *viz.*: "if the Court (*i.e.*, the Court to which the motion is made) is of opinion both that such objection is well founded and that the accused has suffered or may suffer prejudice thereby, but not otherwise." There must exist two things (1.) A well founded objection, and (2.) prejudice to be suffered thereby.

Now, the present objection to the grand juror being admittedly tantamount in the case of a petit juror to a challenge to the polls *propter affectum* that challenge would come within the scope of item (*b.*) of section 668, sub-section 4, *i.e.*, unindifferency, and sub-section 8 provides that in such case the issue so raised shall be summarily disposed of by two triers appointed as therein directed and "if the Court (*sic*) or the triers find against the challenge the juror shall be sworn." The trial thereafter proceeds and there is no appeal from the finding of the triers on such an issue of fact (as it is declared to be in the case of a challenge to the array in section 666) because it is manifest from the surrounding circumstances, course of procedure at assizes, and context of the statute that such issue is not one which it is open to review by an appeal under the proviso in sub-section (*f.*) of section 746. The issue given to the triers is a trial within a trial, as the procedure (*vide* Archbold's Criminal Evidence, *supra*, pp. 182-3) shews. No case that I have been able to discover exists to shew that the finding of the triers upon such an issue has ever been inquired into by any Court, nor did any one during the argument venture to suggest that such a thing had ever happened, or should

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happen, and under such circumstances no question of "improper disallowance" can arise.

[Note.—Since the above was written, I find that in *Rex* v. *Carlin* (1903), 12 Que. K.B. 368, 483, the Court of King's Bench for Quebec has decided, in appeal, that the findings of triers cannot be appealed from.]

But even assuming that this finding of the triers could be questioned on appeal as a challenge which though "tried" was improperly disallowed, that does not assist the present appellant because it is quite plain that such an objection could not have been entertained on appeal unless saved by said proviso and subsection (*f.*) and there is no section giving leave to appeal on the like ground *i.e.*, the fact of unindifferency—when that objection is raised by motion to quash.

If then a challenge *propter affectum* to a petit juror may be finally determined by triers, why may not the same objection to a grand juror taken by motion to quash be likewise determined by the Court itself under section 656? Every argument that applies to the case of a petit juror applies with redoubled force to a grand juror, because the former has to be one of twelve unanimous jurors who have the responsibility of the final determination of the guilt or innocence of the accused laid upon them, whereas the latter is only one of a body of thirteen whose whole functions are merely preliminary in their nature, who are forbidden even to attempt to try the case, who hear only one side of it, and the concurrence of only one more than half of whose number is sufficient to find a true bill. And when these questions of degree of responsibility and consequent result of the action taken by the respective bodies differ to such a startling extent, why should it be assumed that in the case of so much the less gravity *i.e.*, a grand juror, Parliament would not leave the determination of such a question to the Court, assuming it ever intended to leave such an objection open? I do not hesitate to say as the result of my experience that even in the case of a petit juror the question of unindifferency would be at least as satisfactorily determined by the Court as by the triers.

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As the result of these views, and construing the Act in the light of the surrounding sections which bear upon it, and having

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regard to the procedure which it is to take effect on and be applied to I have come to the conclusion that it is the intention of section 656 that the question of prejudice shall be determined solely by the Court of Assize, and in the absence of any direct provision giving an appeal from the exercise of such discretion the decision arrived at cannot be reviewed.

It follows that the second reserved question should be answered in the negative in this sense, *viz.*, that the question of prejudice having been determined by the Court of Assize adversely to the prisoner it must be presumed by this Court that he has suffered none.

Conviction affirmed, Walkem, J., dissenting.

FULL COURT

1904

Nov. 11.

LARSEN v. CORYELL

LARSEN v. CORYELL.

Small Debts Court—Appeal from—Finality of—R.S.B.C. 1897, Cap. 55, Sec. 29; B. C. Stat. 1899, Cap. 19, Sec. 2 and County Courts Act, Secs. 164 and 167.

An appeal from the Small Debts Court either to a Judge of the Supreme Court or to the County Court is final.

Statement

THIS was an appeal from a judgment in the County Court of Yale, pronounced by LEAMY, Co. J., dismissing an appeal by the plaintiff from a judgment in a Small Debts Court. Leave to appeal had been given by the County Judge.

The appeal came on for argument at Vancouver on the 11th of November, 1904, before HUNTER, C.J., DUFF and MORRISON, JJ., when

Argument

Kappele, for respondent, took the preliminary objection that no appeal lay: he referred to B.C. Stat. 1899, Cap. 19, Sec. 2, which provides that after judgment in the County Court the papers shall be remitted to the Small Debts Court, and contended that section 167 of the County Courts Act had reference only to

actions and matters originating in the County Court: he cited *Re Lambert* (1900), 7 B.C. 396 and *In re Vancouver Incorporation Act* (1902), 9 B.C. 373.

Clement, for the appellant: The decision in the County Court is a matter falling within the meaning of section 167 and that section requiring the leave of the Judge before the appeal could be brought provides a safeguard against frivolous appeals.

HUNTER, C.J.: Speaking for myself, I am clearly of the opinion that the Legislature did not intend that an appeal should lie to this Court in respect of a matter originating in the Small Debts Court. If it did, the grotesque consequence would be that with the leave of the County Court Judge an appeal involving a matter of $5 could be brought to this Court, while a Judge of the Supreme Court who is constituted a co-ordinate appellate tribunal could not give leave, and that appeals involving matters of importance in the County Court of under $100, but outside of the jurisdiction of the Small Debts Court would be subject to more limited conditions than would matters of the most trumpery nature. But I think the short ground on which we can put our decision is this: that when a special Act creates a Court of petty jurisdiction and not of record and provides a choice of tribunals to which appeals may be taken, we are not to read into such legislation clauses in other Acts giving a general right of appeal from one of such tribunals to a still higher tribunal especially when the special Act is of later origin than the clauses in question.

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DUFF, J.: I am very glad that the majority of the Court has arrived at the conclusion that this appeal is not competent, because I agree that the result of allowing the contention of the appellant would be to establish a very undesirable class of appeals. However, I must say I am not able to agree with the conclusion at which the Court has arrived. I think the language of the section 167 by which an appeal is given by the leave of a Judge of the County Court from any action, suit or matter in which an appeal is not otherwise allowed to the Full Court is so perfectly clear as to leave no escape from the conclu-

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sion that an order made by a County Court Judge on appeal from the Small Debts Court is within its scope.

In my opinion the right of appeal to the County Court from the Small Debts Court is simply a special jurisdiction conferred upon the County Court; and, notwithstanding the inconveniences to which such a construction clearly leads, I am not satisfied that there is anything in this statute which justifies the cutting down of section 167 to such an extent as to deprive us of jurisdiction to hear this appeal.

MORRISON, J. MORRISON, J.: I concur with the learned Chief Justice.

Appeal dismissed with costs, Duff, J., dissenting.

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REX v. HUTCHINSON

Criminal law—Conspiracy to defraud—Indictment—Necessity to set out overt acts—Evidence to discredit party's own witness—Acts of individual conspirators—Evidence of—Preliminary proof of acting in concert necessary.

In an indictment charging a conspiracy to defraud it is not necessary to set out overt acts done in pursuance of the illegal agreement or conspiracy, nor is it necessary to name the person defrauded or intended to be defrauded.

Before the acts of alleged conspirators can be given in evidence there ought to be some preliminary proof to shew an acting together, but it is not necessary that a conspiracy should first be proved.

A party may not introduce general evidence to impeach the character of his own witness, but he may go on with the proof of the issue, although the consequences of so doing may be to discredit the witness.

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

Statement

On the 31st day of March, 1904, the above named Joseph Garner Hutchinson was convicted upon the indictment following, namely:

The jurors for our Lord the King present that Joseph Garner Hutchinson at the City of Vancouver, in the County of Vancouver, in the Province of British Columbia, on or about the second day of November, in the year of our Lord one thousand nine hundred and three, unlawfully, fraudulently and deceitfully did conspire and agree with one George Howell to induce merchants who should thereafter deal with the "B. C. Supply Co. (Limited Liability)," to sell and deliver merchandise to said Company upon credit by falsely and deceitfully representing to such merchants that the said Company was free from debt and was a Company to which credit for merchandise bought by and delivered to said Company could safely be given, whereas the said Joseph Garner Hutchinson and George Howell then well knew the said Company was so heavily in debt that it was insolvent, and was not a company to which credit for merchandise bought by and delivered to said Company could safely be given, and, by such representations and inducements to defraud such merchants, against the form of the statute in such case made and provided, and against the peace of our Lord the King, his crown and dignity.

On the 7th day of April, 1904, prior to sentence being passed, the said Joseph Garner Hutchinson, through his counsel, moved an arrest of judgment upon the following grounds, namely:

(1.) That the charge as laid in the indictment is too general.

(2.) That the alleged conspiracy being an agreement or conspiracy to do an act not illegal *per se*—but only by reason of the conspiracy—overt acts in pursuance of the alleged illegal agreement or conspiracy should have been set out in the indictment.

(3.) That at the time the indictment was found the alleged conspiracy, if any, having being executed, the indictment should have charged it as an executed conspiracy, and set out the overt acts by which it was carried into effect, charging that false representations were actually made in pursuance of the alleged conspiracy, by whom, to whom, and what such false representations were; that such representations were false to the knowledge of the makers, and were made for the purpose of defrauding the persons to whom they were made; and that such persons believed the said representations and acted upon them to their loss and detriment, and were thereby actually defrauded; and the indictment should have set out the christian and surnames of the persons so alleged to have been defrauded.

Statement

(4.) That the indictment did not furnish sufficient particulars of the offence charged.

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(5.) That the indictment is not framed under or in conformity with the Criminal Code of Canada, and more particularly does not comply with section 394 of said Code.

(6.) That the indictment is bad in law and in substance; and no amendment was asked or granted, or particulars furnished or ordered.

(7.) And on other grounds sufficient in law for quashing said indictment as bad in substance.

I overruled the said motion and afterwards reserved the following questions for the opinion of the Court of Crown Cases Reserved:

(1.) Whether the said indictment does or does not state an indictable offence.

(2.) Whether I erred in permitting the Crown to give evidence of overt acts, and of particular representations to particular individuals, when such overt acts and particulars were not set out in the indictment, but said indictment charged merely an agreement to make false representations for the purpose of defrauding, without alleging the actual making of any such false representations, or the actual defrauding of any person or persons.

(3.) Whether or not I erred in permitting the Crown to give evidence which the counsel for defendant contended was in contradiction of and tending to discredit evidence of the Crown's witness, Howell, after said witness had stated on cross-examination that if any such representations as charged were made, they were made without his knowledge and consent; that the accused had by agreement with him assumed all the liabilities of the Company and that there was absolutely no such agreement, concerted action or conspiracy as charged.

Statement

(4.) Whether or not I did err in defining as applied to this particular case an "insolvent" as a person who could not pay his debts as they came due.

Annexed hereto is a transcript of the stenographer's notes of the proceedings at the trial of the said Joseph Garner Hutchinson, including my charge to the jury.

The first question was argued at Victoria on the 6th of July, 1904.

McCaul, K.C., for the prisoner: The making of representations was merely a lie but not a fraud; the indictment to be good must go to the extent that the Company intended to make use of the representations: he cited *Commonwealth* v. *Eastman* (1848), 55 Mass. 189 at p. 204.

[IRVING, J.: I think it is a mistake to go to American cases, especially in criminal law in which the decisions may be founded on statutes the terms of which are unknown to us.

HUNTER, C.J.: Counsel may of course make the decision he is quoting part of his argument.]

Rex v. *Richardson* (1834), 1 M. & Rob. 402; Russell on Crimes, p. 519 (*r.*); *O'Connell* v. *The Queen* (1844), 11 Cl. & F. 155 at p. 234; *Wright* v. *The Queen* (1849), 14 Q.B. 148 at pp. 165-7. It cannot be possible that a mere agreement to make false representations as to credit is a crime without anything ever being done.

It is not alleged that any representations were ever made and overt acts by which representations could be carried out are not set out in the indictment, which is therefore bad: Russell, Vol. 1, p. 516; *The King* v. *Seward* (1834), 1 A. & E. 706; *Wright* v. *The Queen, supra* and *The Queen* v. *Peck* (1839), 9 A. & E. 686. Where the acts are not illegal *per se*, the overt acts must be set out: *Reg.* v. *Gompertz* (1846), 9 Q.B. 824; *Rex* v. *Fowle* (1831), 4 Car. & P. 592; *Reg.* v. *Orman and Barber* (1880), 14 Cox, C.C. 381 and *White* v. *The Queen* (1876), 13 Cox, C.C. 318.

Argument

[IRVING, J.: These old cases decided before the Code are not of much assistance.

HUNTER, C.J.: They emphasize the necessity for the provisions of the Code.]

The conspiracy to commit a crime becomes an executed crime when someone has been defrauded: see Wright, pp. 27 and 28; *The Queen* v. *Warburton* (1870), L.R. 1 C.C. 274 and *Commonwealth* v. *Eastman, supra.*

Davis, K.C., on the same side: The Crown has undertaken to allege fraud done in a certain way and not in the language of the statute; acts which will amount to a fraud must be alleged; if an offence is not set up then overt acts which will make an offence must be set up; Russell, 514 and *The Queen* v. *Peck*

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(1839), 9 A. & E. 686. Concert among Howell, Hutchinson and the Company should have been shewn; no matter what the two did it was impossible to get anything from anybody; it is not an offence to state falsely that a man is good for anything without being connected with the person to get it: he cited *Reg.* v. *Orman and Barber* (1880), 14 Cox, C.C. 381.

Maclean, D.A.-G., for the Crown, was not called on.

HUNTER, C.J.: The old cases on a question of this kind are useless. Section 394 of the Code makes it an offence to conspire to defraud by means of deceit, or falsehood, or other fraudulent means, and section 611 enacts that an indictment is sufficient if it follows the language of the enactment or uses "any words sufficient to give the accused notice of the offence with which he is charged." The objection that the indictment is bad because it unnecessarily condescends to state the details of the proposed fraud is clearly untenable. The offence is the conspiracy to defraud by fraudulent means; the description of the means is mere surplusage so far as concerns the sufficiency of the indictment.

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As to the objection that no person is named as the intended victim of the fraud, the section itself expressly provides that it is an offence equally in the case of ascertained and of unascertained persons, and section 613 enacts that the failure to state the name of the person injured, or intended to be injured, shall not vitiate the count, and also that the Court may order particulars if satisfied that it is necessary for a fair trial.

The general effect of the provisions with regard to these matters is to wipe out technicalities and to make a criminal trial a simple and business-like proceeding.

DRAKE, J.: I agree. As to the necessity to allege overt acts, I think the cases cited by Mr. *McCaul* have but little bearing, as section 611 of the Code gives the procedure which is now sufficient; it is an indication of how indictments may now be drawn. Formerly more strictness was necessary. I don't think it was necessary to set out any overt acts; if the prisoner wanted more information he could have obtained it, as the Code provides for particulars.

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IRVING, J.: I think that having regard to the rules respecting criminal pleadings that this indictment is good, and it is certainly good since the verdict, as any defects there might have been in it are cured by the verdict: see *Stennel* v. *Hogg*, 1 notes to Saunders by Williams, 261 and *The Queen* v. *Goldsmith* (1873), L.R. 1 C.C. 74.

The common law rules of pleading are in force notwithstanding the Code.

On the 7th of July the Court allowed a motion for leave to appeal, and subsequently a case was stated by DUFF, J., as follows:

"Pursuant to the directions of the Court of Appeal, the following question is stated for the opinion of said Court:

Is all or any portion of the testimony given at the trial of Joseph Garner Hutchinson upon the charge herein of conspiracy with George Howell to defraud, which testimony is found at pages 43, 44, 45, 46, 50, 51, 53, 54, 57, 58, 60, 62, 63, 69, 74, 190, 191, 192, 193, 194, 195, 196, 197, 198, 198a, 298, 336, and 391 of the stenographer's notes of evidence, not evidence against the said Hutchinson upon said charge on the ground that, at the time the same was given, sufficient evidence of conspiracy or concerted action between said Hutchinson and Howell had not been adduced?

Statement

Before the evidence set out at p. 43 had been given I had come to the conclusion that sufficient foundation had been laid by proof of an understanding between Howell and Hutchinson as to the management of the business, and as to obtaining credit in connection therewith."

The B. C. Supply Company was carried on by Hutchinson, who owned 368 out of the 370 shares issued; in November, 1903, Howell, who was Hutchinson's brother-in-law, bought from Hutchinson the stock on the shelves, the fixtures in the store and the horse and wagon used in the business for $500. According to the Crown's evidence the liabilities of the Company were largely in excess of the assets. Howell was called as a witness by the Crown and testified as to the transaction, which he said was carried out by his paying the consideration and assuming

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the rent and wages amounting to about $320 and Hutchinson transferred the 368 shares to him. Howell swore that he did not assume any liabilities of the Company, but he admitted that after purchasing he paid off numerous small accounts incurred by the Company before the date of his purchase, and as to some large accounts he paid portions on account and gave the note of the Company for the balance; this was done he said "to help Hutchinson out" and at his request and on his promise to repay him. He also gave Hutchinson blank orders for goods on the Company and these Hutchinson would take to tradesmen and get goods and fill in the amount and the Company would issue goods to the extent of the order on presentation. The value of these orders so used by Hutchinson was about $1,400. The Company assigned for the benefit of creditors in January, 1904.

After the above facts were brought out in evidence, Howell was asked (p. 43 of the appeal book), how much he himself had received out of the business, when counsel for Hutchinson objected that the question was not admissible on the ground that sufficient basis of concerted action between Howell and Hutchinson had not been laid to enable any acts of Howell's to be evidence against Hutchinson, unless present at the time. The objection was disallowed.

Statement

The other portions of evidence which are referred to in the case stated pursuant to the directions of the Court of Appeal were answers by the bookkeeper for the Company shewing the assets and liabilities of the Company according to the Company's books of account, and that the latter were largely in excess of the former; also that Howell interested himself in the book debts and endeavoured to collect them; that Howell for his household accounts sometimes gave the Company's cheque in payment, and also made use of orders on the store in settling tradesmen's accounts and in all he received about $1,000 in value from the Company; and the evidence of Jacobs, a wholesale tobacconist, that Howell when giving him an order told him that the Company started with a clean sheet, didn't owe a cent and was free from encumbrances. Hutchinson had introduced Howell to Jacobs and then withdrew, the conversation being in Hutchinson's absence.

The questions remaining undisposed of came on for argument on the 11th of July, before the same Court.

McCaul, K.C., for the prisoner: The Crown is bound by Howell's statement that he bought the business without the liabilities and it should not have been allowed to shew that he attempted to pay off liabilities, and therefore that he must have bought with liabilities; it was a direct attack on his credibility: he referred to *Wright* v. *Doe dem. Tatham* (1837), 7 A. & E. 313; *Baron de Rutzen* v. *Farr* (1835), 4 A. & E. 53; *Stanley Piano Co.* v. *Thomson* (1900), 32 Ont. 341; Greenleaf on Evidence, 16th Ed., Para. 442; *Melhuish* v. *Collier* (1850), 19 L.J., Q.B. 493; *Ewer* v. *Ambrose* (1825), 3 B. & C. 750; *Bradley* v. *Ricardo* (1831), 8 Bing. 57 and *Richardson* v. *Allan* (1819), 2 Stark. 334.

As to the admissibility of Hutchinson's statements to Jacobs and others, the effect of the ruling is that there was *prima facie* sufficient evidence of conspiracy to allow subsequent acts to be given in evidence, but up to that time there was no evidence to shew conspiracy. In Stephen's Digest of the Law of Evidence, it is said in Article 4 that: "Evidence of acts or statements deemed to be relevant under this article may not be given until the Judge is satisfied that, apart from them, there are *prima facie* grounds for believing in the existence of the conspiracy to which they relate." No illegal purpose is disclosed anywhere in the first 43 pages of evidence; no undertaking to shew conspiracy was given: see Taylor's evidence, 1879, Am. Ed., 591. He cited Phillips on Evidence, 9th Ed., 199; *Reg.* v. *Blake* (1844), 6 Q.B. 126 at p. 135; Archbold's Cr. Pleading and Evidence, 19th Ed., 1,105-6 and *Reg.* v. *Connolly and McGreevy* (1894), 25 Ont. 151; 1 C.C.C. 468.

Argument

Maclean, D.A.-G. (called on to argue only as to the last point), for the Crown: The names of all the witnesses were on the back of the indictment and that coupled with the opening to the jury is tantamount to the undertaking mentioned in Taylor on Evidence; the trial Judge then assumed that the conspiracy would be proved; he referred to the facts and cited *People* v. *Van Horn* (1897), 51 Pac. 538; *Ford* v. *Elliott* (1849), 4 Ex. 78; *Reg.* v. *Murphy* (1837), 8 Car. & P. 297 at pp. 302, 310 and Russell, 533.

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HUNTER, C.J.: The distinction is clear. You may not introduce general evidence to impeach the character of your own witness, but you may go on with the proof of the issue, although the consequence of so doing may be to discredit the witness in whole or in part. If it were otherwise the tribunal would in many cases be deciding on false and perhaps perjured evidence, instead of on credible and proper evidence.

As to the remaining point, notwithstanding the strenuous argument of Mr. *McCaul*, I am of opinion that he has failed to shew that his client is entitled to any relief. You cannot build a wall all at once; you must lay one brick upon another, and you ought to commence from the bottom up and not from the top down. So it is with the proof of a conspiracy. Evidence is given at the outset in a great many cases of conspiracy, and necessarily in some cases of conspiracy, which may at first sight appear to have little or no bearing on the charge, but as the trial proceeds the connection becomes more and more apparent, until finally a case is built up which is convincing, in proportion to the care with which the evidence is marshalled, and the credibility of the witnesses. The mode in which the evidence is marshalled is in the discretion of the prosecution, subject to the control of the Court. For instance, to take the present case, if evidence of statements made to Jacobs by Howell in the absence of the accused was offered before the proof of any other facts by the Crown, the trial Judge might very well, and, probably, would have inquired as to how it was relevant without some evidence being given to shew that the accused and Howell were acting together, but if he got the undertaking of counsel that other facts would be given in evidence which would shew the bearing of it as an act done in pursuance of a conspiracy, and therefore allowed it to be given, I do not think he would have ruled improperly, for where a piece of evidence which may for the time being appear to be irrelevant, is made competent and relevant by the introduction of other competent and relevant evidence, no harm has been done. The most that can be said is that the natural order of proof has been inverted, but it would be an extraordinary thing if the evidence which at first sight

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was apparently irrelevant would have to be proved over again in order to bring it in in its more natural order.

As to the statement in Stephen that a *prima facie* case of conspiracy must be shewn before evidence can be admitted of the particular acts of persons as parties to the conspiracy, he does not cite any decision, nor has any case been brought to our notice which so lays down the law.

In the case of *Ford* v. *Elliott* (1849), 4 Ex. 78 at p. 81, Baron Alderson said: "It is a mistake to say that a conspiracy must be proved before the acts of the alleged conspirators can be given in evidence. It is competent to prove insulated acts as steps by which the conspiracy itself may be established."

Mr. Justice Coleridge said practically the same thing in his charge to the jury in the case of *Reg.* v. *Murphy* (1837), 8 Car. & P. 297 at p. 310: "Although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design, and to pursue it by common means, and so carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing, and neither law nor common sense requires that it should be proved."

Mr. Justice Williams said, in *Reg.* v. *Blake* (1844), 6 Q.B. 126, at p. 138, "I agree that it is not necessary that the charge of conspiracy should be made out *per saltum*."

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Chancellor Boyd says in *Reg.* v. *Connolly and McGreevy* (1894), 25 Ont. 151 at p. 164, "There is no unvarying rule that the agreement to conspire must first be established before particular acts of the individuals implicated are admissible." And again, at p. 165, "It was competent for the jury to group the detached facts and view them as indicating a well-understood or concerted purpose on the part of all the actors and privies."

If the statement in Stephen could be interpreted as meaning that as a general rule there ought to be some preliminary evidence to shew an acting together (but not necessarily the purpose) by way af exhortation to follow the normal order of proof it would not be open to objection, but it is impossible to say that

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merely to invert the natural order of proof is to cause a mistrial.

I might go farther, and say that in this particular case even if there was any necessity for introducing *prima facie* evidence of a conspiracy, which I do not think is necessary, there was ample evidence adduced as evidence was led at the outset to shew that there was an understanding between Howell and Hutchinson as to the management of the business and the obtaining of credit.

The conviction must be affirmed.

DRAKE, J.: I agree. The only question is with regard to the mode in which the evidence for the prosecution should be marshalled. It was proved to the satisfaction of the learned trial Judge that there was a personal as well as a business relationship between the parties and a nominal sale was effected which would enable the vendor to take possession of the goods alleged to be sold for the non-payment of the purchase money and a mutual agreement by which the vendor would get his debts paid to the detriment of the other creditors. A conspiracy can be proved by extrinsic acts as well as by conversations, and it is not necessary for the prosecution to limit their evidence to the opening or closing of the case as long as the facts are clearly placed before the Court and jury before the case is closed. I fail to see any prejudice to the prisoner in the course that was adopted and as it is only the mode in which the evidence was adduced that is objected to, and not the evidence itself, I think the application should be dismissed.

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IRVING, J.: I agree.

Conviction affirmed.

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County Court—Speedy judgment—Affidavit leading to—County Courts Act, Sec. 94.

The materials used in support of a motion for speedy judgment in a County Court action in which the plaintiff sued on an account stated, were an affidavit of the plaintiff verifying his cause of action, and an affidavit of plaintiff's solicitor verifying defendant's signature to the account and stating that he believed the plaintiff had a good cause of action and that the defendant had no defence:—

Held, that the materials were sufficient to support a judgment for plaintiff.

Quaere, whether an affidavit of plaintiff verifying his cause of action and an affidavit of his solicitor stating that defendant had no defence would be sufficient under section 94 of the County Courts Act to support a speedy judgment.

APPEAL from an order of FORIN, Co. J., directing final judgment to be entered for the plaintiff.

On 28th June, a plaint was issued out of the County Court of Kootenay holden at Nelson, at the instance of the plaintiff against the defendant, and the particulars of the plaintiff's claim were stated as being "$123.60, being the amount due him by the defendant for teaming done by the plaintiff for the defendant during the months of December, 1901, and January, 1902, amounting to $130.10, less a contra account of $6.50 for assaying, leaving a balance due the plaintiff by the defendant of $123.60, which balance the defendant has certified in writing to be correct.

Statement

"Particulars:

"1901			
"Dec. 31	Hauling 4535 lbs. groceries, etc., at $8.00	$ 18	65
	" 18 cords of wood at $1.25	22	50
"1902			
"Jan. 31	Hauling 3600 lbs. iron at $1.75	3	15
	" 40 cords wood at $1.25	50	00
	" 8957 lbs. groceries, etc., at $8.00	35	80
		$130	10
	"To assaying	6	50
	"By balance	$123	60

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"And the plaintiff claims $123.60."

In an affidavit sworn on 29th June, leading to a garnishee summons, the plaintiff stated that the defendant was justly and truly indebted to him in the sum of $123.60 as appeared in the particulars of his claim attached to the plaint.

The defendant filed a dispute note and a motion was then made on behalf of the plaintiff for speedy judgment. The material used on behalf of the motion consisted of the plaintiff's affidavit which had already been used to obtain the garnishee summons and of an affidavit of the plaintiff's solicitor who in paragraphs 2, 3 and 5 of his affidavit stated as follows:

"(2.) At the time I entered the plaint and issued the summons herein I had in my possession a statement of the plaintiff's claim herein, being the statement of account as appears in the plaint herein, and the said statement of account was approved and acknowledged to be correct by the defendant, the letters 'O. K.' being at the bottom of said account with the defendant's signature in his own handwriting appended thereto.

Statement

"(3.) That I know the defendant's handwriting and the signature 'P. J. Nichols' that was appended to the said account below the said letters 'O. K.' was in the proper handwriting of the said defendant P. J. Nichols.

"(5.) That I believe the plaintiff has a good cause of action on the merits and the defendant has no defence thereto."

The appeal was argued at Vancouver on 11th November, 1904, before HUNTER, C.J., DUFF and MORRISON, JJ.

W. A. Macdonald, K.C., for appellant: A solicitor is not a person who can swear positively to a cause of action; the person to swear that there is no defence must be the same one who swears as to the cause of action; there is nothing on the face of the account shewing that it is against defendant and for anything that appears to the contrary it may have been against some mining company or partnership for whom defendant was the foreman; it is not usual for a man to O. K. an account against himself; he referred to section 194 of the County Courts Act.

Argument

Sir C. H. Tupper, K.C., for respondent, was not called on.

HUNTER, C.J.: The appeal must be dismissed. The cause of action is clearly stated in the plaint to be upon an account stated, and the solicitor in terms identifies the cause of action, referring to it as an action on an account stated, and swears to having the document in his hands, and states that he knows the signature of the defendant. He also states in positive terms that he believes the plaintiff has a good cause of action on the merits, and that the defendant has no defence. The affidavit, to my mind, is in substantial compliance with the requirements of section 94; and it is mere hypercriticism to suggest that more exact language should have been used in one of the phrases that occur in it.

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DUFF and MORRISON, JJ., concurred.

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Appeal dismissed.

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Mining law—Location—By agent—Approximate compass bearing—No. 1 post on occupied ground—Mineral Act Amendment Act, 1898, Sec. 16, Sub-Secs. (f.) and (g.)

The location of a mineral claim is not invalid merely because the No. 1 post is placed on the ground of an existing valid claim if the facts bring the locator within the benefit of sub-section (g.) of section 16 of the Mineral Act as amended in 1898.

A free miner may locate a mineral claim by an agent.

The direction of the location line was stated in the affidavit of location as south-easterly when as a fact it was south 52° 50″ west:—

Held, that the discrepancy was of a character calculated to mislead.

APPEAL from the judgment of IRVING, J., in an action of adverse claim tried at Nelson in October, 1903, before him.

Statement

The plaintiff was the owner of the Colonial mineral claim located by his agent on the 7th of October, A.D. 1900. The

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defendant located over the same ground the Wild Rose Fraction on the 4th day of September, A. D. 1902, and having advertised for purposes of obtaining a certificate of improvements, the action to adverse such application was commenced.

The facts are stated in the judgments.

S. S. Taylor, K. C., for the plaintiff.

W. A. Macdonald, K. C., and *A. M. Johnson*, for the defendants.

27th October, 1903.

IRVING, J.: This is an action brought by the owner of the Colonial to adverse the Wild Rose. The location of the Colonial on the 7th of October, 1900, was proved. Unless it is shewn to be invalidated on one or other of the following grounds it is a good location.

The first ground is: was the Cody a live claim on the 7th of October, 1900? The second point is: was the location of the Colonial invalidated by putting its No. 1 post on the Chicago, which had been Crown granted some three months previous, namely, the 23rd of July, 1900; and by the location line of the Colonial being on the Freddie Lee and the Chicago.

Dealing with the first point, I find that the Cody was recorded on the 3rd of August, 1896, as running its location line from its No. 1 to its No. 2, in a south-easterly direction. The declaration required to be deposited with the Recorder so states that in words, and the map or plan on the back of the declaration shews the location line ran from west to east. It was staked according to Biggar, the original locator, whose evidence I accept, south-westerly—to be exact—south 52° 50″ west. There is a difference there allowing a good margin for the expression "south-east" of some 77° 50″. No evidence of what was actually on the stakes has been produced here at this trial; I must assume therefore that the writing on the stakes agreed with the writing in the declaration filed in the Recorder's office.

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I have come to the conclusion that this discrepancy is of a character calculated to mislead. The No. 2 stake as recorded would be one-third of a mile away from the No. 2 post actually staked and almost at right angles to it.

Coming now to the second ground: The Colonial No. 1 is

some 290 feet in on the Chicago Crown granted land. Travelling from the No. 1 post of the Colonial, the next 290 feet is on the Chicago; the next 109 feet is on the Colonial ground; the next 640 feet is across the Freddie Lee, Crown granted in August, 1894, and the next 60 feet is on the Joker ground, and the balance, 350 feet, on the vacant Crown land. I state these figures because I think the whole pinch of this case depends on this one point. It has been the practice to recognize as good locating the planting of the No. 1 post on occupied land. I am not aware that the matter has ever been raised before in Court, but for years that has been accepted as good locating, and it seems to me to expect anything else—to hold that it was bad locating—would be unreasonable. It is unreasonable to expect a miner to go on unoccupied ground before he plants his stakes. It is impossible for him to do that, having regard to the conditions in a great many cases. I have not been shewn any case that says this would be bad locating, and on the other hand I have not been shewn any case in which it would be declared to be a good location.

I have arrived at the conclusion that sub-section (*g.*) is the clause to cover that. I find as a fact that the locator has actually discovered mineral in place, that there was a *bona fide* attempt on his part to comply with the provisions of the Act, and this blunder (if it may be called a blunder) is not of a character calculated to mislead other persons desiring to locate claims in that vicinity.

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Now then, as to the Wild Rose, located on the 4th of September, 1902: I find that it was duly located and mineral in place discovered. If the ground was already occupied by the Colonial he can take nothing.

In the course of his argument Mr. *Macdonald* referred to the No. 1 of the Cody being on the Freddie Lee; he drew a distinction between a fractional and a whole claim. In view of what I have said, it is not necessary for me to discuss that further, nor need I discuss at length Docksteader's statement or the statement made by the two Docksteaders, that Callahan was in 1896, working on the Chicago ground as part of the Cody Fraction. It is sufficient for me to say now, that that part of their case involves a charge against Callahan; to support a charge of fraud there must

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be very strong evidence and I am not satisfied that they have made that charge out. I do not wish to say anything further on that point.

Judgment will be then, that the Colonial is a valid location and the Wild Rose an invalid location.

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The appeal was argued at Vancouver on the 20th and 21st of April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

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Davis, K.C. (*W. A. Macdonald, K.C.*, with him), for appellant: The Cody Fraction was a valid existing claim at the time of the location of the Colonial; the approximate compass bearing was wrong, but anyone going on the ground would not have been misled by it because the blazed line correctly marked the line along the ledge between 1 and 2 posts; it was not along the direction as shewn by the compass bearing; such a defect is curable under sub-section (*g.*) of section 16.

The Colonial claim was not located by plaintiff personally, but by an agent; the Act gives no right of location by an agent: see sections 3 and 12 of R.S.B.C. 1897, Cap. 135.

As to the No. 1 post being planted on occupied ground: It is a pre-requisite to a valid mineral claim that it should be staked on land open to location; it can't have its root of title on land where the miner has no right to locate; there is no power to plant posts except under sections 15 and 16; there was no evidence to support the Judge's finding as to custom and there is a decision to the contrary: see *Waterhouse* v. *Liftchild* (1897), 6 B.C. 424.

Argument

The provisions of the Act as to location are imperative and any non-compliance with them invalidates the location: see *Manley* v. *Collom* (1902), 32 S.C.R. 371 at p. 374; *Connell* v. *Madden* (1899), 30 S.C.R. 109; *Snyder* v. *Ransom: Ransom* v. *Snyder* (1903), 10 B.C. 182; *Pellent* v. *Almoure* (1897), 1 M.M.C. 134 and sub-section (*f.*) of section 16 of the Amendment of 1898. Sub-section (*g.*) of section 16 is not applicable to such a defect as this and even if it were the non-compliance is one calculated to mislead.

S. S. Taylor, K.C., for respondent: The evidence shews that the No. 1 post was put on the Chicago because the first survey of that claim did not include the ground on which the post was

put: a difference of 290 feet is not calculated to mislead unless the ground is very rough or very heavily timbered and it is not; on this point the finding is in our favour and the Court should not disturb it, and besides there is no suggestion that the defendant was actually misled; the locator made a *bona fide* attempt to comply with the requirements and any defect is cured by sub-section (*g.*); suppose the posts were only six inches on occupied ground—it would be absurd to say that the whole claim was bad in consequence; he cited *Doe* v. *Tyley* (1887), 14 Pac. 375 at p. 376; *West Granite Mountain Min. Co.* v. *Granite Mountain Min. Co.* (1888), 17 Pac. 547 and Lindley, 2nd Ed., 363 (*a.*), 1,552.

As to the Cody Fraction: the approximate compass bearing was misleading and has been so found; that defect invalidated the claim; see *Manley* v. *Collom* (1901), 8 B.C. 153, (1902), 32 S.C.R. 371 and *Callahan* v. *Coplen* (1899), 7 B.C. 422, 30 S.C.R. 555. A claim may be staked by an agent: see note to Form S, Appendix A to Act.

Davis, replied. *Cur. adv. vult.*

22nd November, 1904.

HUNTER, C.J.: This is an adverse action, the decision of which depends on the validity of the Colonial mineral claim.

The No. 1 post of this claim, which was located as a full-sized claim, was admittedly placed on the Chicago, for which the Crown grant had already issued, about 290 feet from the western boundary of that claim. Starting then at No. 1 post the Colonial location line traverses the Chicago for a distance of 290 feet; proceeds thence north-westerly for 109.6 feet until it crosses the boundary of the Freddie Lee, another Crown granted claim; thence across this claim for about 640 feet; thence about 460 feet to the No. 2 post. HUNTER, C.J.

Two principal points were taken in support of the attack on this location. The first was that the location of the No. 1 post on ground not open to location at a distance of 290 feet from the boundary of a surveyed claim is necessarily calculated to mislead other prospectors, and therefore not within the saving powers of sub-section (*g.*) of section 16.

The question as to whether a deviation from any of the directions contained in section 16 is calculated to mislead is obviously

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one of fact depending on the nature of the *locus in quo*; and the learned trial Judge after hearing all that was urged came to the conclusion that the position of the No. 1 post was not calculated to mislead. It has not been shewn to us that in this he was clearly wrong, and therefore the finding cannot be disturbed.

The other point is that as No. 1 post was placed on ground not open to location the claim is void.

It is first necessary to consider what the law was before the insertion of sub-section (*f.*) in section 16 by the Act of 1898, and then what was intended by that sub-section.

There were frequent changes enacted in the requirements providing for the mode in which quartz or lode claims were to be taken up or located, until in 1892 the mode of locating by means of two posts was prescribed, and this has continued down to the present time with some immaterial variations in the details. Now, it is clear that from a very early period in the history of lode mining the Legislature never regarded it as necessarily invalidating a location that it should in part overlap a previous location and, so far as I am aware, this view has always been acted on by the Land office in issuing Crown grants. Section 48 of the Act of 1891 (passed when lode mining was in its infancy, and being the first statute to deal specially with lode claims), enacted that "if an adverse claim shall only affect a portion of the ground for which a certificate of improvements is applied the

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boundaries of such portion shall be shewn by a plat of the entire adverse claim, and the applicant may relinquish the portion covered by the adverse claim and still be entitled to a certificate of improvements for the undisputed remainder of his claim upon complying with the requirements of this Act." This section, the germ of which may perhaps be discovered in the words "or such portion thereof as the applicant shall . . . . appear to rightly possess" in section 83 of the Consolidated Act of 1888, does not *ex facie* limit the right of the applicant to those cases where, if he is the subsequent locator, his posts and his location line are placed outside of an elder location, and there is no reason for supposing that the right was intended to be so limited. On the contrary, the evidence is strong to shew that the intention was the other way, as in 1896, the affidavit, which by that law

was first required to be made by the locator to obtain his record, and which is still required, contains a positive statement that he has discovered mineral in place; but, on the other hand, only avers that to the best of his knowledge and belief the ground comprised within his claim is unoccupied by any other person as a mineral claim; and in section 15 of the Act of 1898, the section appears re-drafted in the following more sweeping and explicit terms:

"If an adverse claim shall only affect a portion of the ground for which a certificate of improvements is applied the applicant shall nevertheless be entitled to a certificate of improvements for the undisputed remainder of his claim upon complying with the requirements of this Act."

I think that the course of the legislation as thus developed shews that the Legislature was fully cognizant of the difficulties which surround the proper and accurate staking of a claim in rugged and densely wooded districts, where indeed mineral in place is mostly found, and intended to make every allowance for it. The locator is and always has been entitled to measure his claim horizontally, irrespective of the irregularities of the ground. Now, suppose a prospector locating a claim on a 45 degree slope. He would be entitled if placing his posts up and down the slope to put No. 2 not 1,500 feet away from No. 1, but 2,121.32 feet, and the steeper the slope the greater the distance to which up and down the slope he would be entitled measured upon the ground. How is the man who follows, and who finds, say, 2,500 feet between the two posts and judges that to be too great a distance having regard to the slope, going to be able to tell with anything approaching accuracy where the other's No. 2 ought to be? He does not wish of course to go on ground which is not open to him, but neither does he wish to leave any ground untaken next to the former location. So also the distance claimed to the right or left of the location line is measured horizontally. Suppose the location notice claims 750 feet to the left which is a steep downward slope. How is the man who wishes to locate alongside going to tell what measurement on the ground would represent this 750 feet unless he was a surveyor and had the instruments? I think the argument is altogether too bold which admits that the Legislature gives a man on condition of paying

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a special fee the privilege of locating a mineral claim but at the peril of finding that his time and money have gone for nothing, because he may have mistaken the limits of his neighbour's claim, and inadvertently set one of his location posts perhaps only a few inches on the wrong side of the boundary. The argument that because a post happens to be set in ground already duly located or Crown granted, the claim is void as founded on trespass is feeble. In the first place, all that the locator obtains on the completion of his title is a grant of the mineral in fee with the right to use the surface and timber thereon only for the purpose of winning the mineral—he does not get the fee simple—and therefore there is no trespass except so far as his limited right to use the surface has been interfered with, and while no doubt the assertion of the claim on No. 1 if set on close ground, savours of trespass, no real injury is done unless and until the other's right to win the mineral is interfered with or his title questioned by the trespasser applying for a certificate of improvements. Then again on what principle can C complain that B's claim is void as founded on trespass against A? If A does not complain about B's post being on his ground, what concern is it of C's? If B's No. 1 post is put for his convenience a few inches over A's line with A's leave, why should C interfere? Then on what principle is C's right to locate to be dependent on whether or not A gave B leave so to set his post or condoned the inadvertence?

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At the same time no doubt the Legislature does not sanction the idea of jumping or of interfering with the locations of others, or of making pretended locations. Therefore it was necessary to provide an irreducible minimum to constitute a valid location. What is this irreducible minimum? I do not think it is constant but varies, and was intended to vary with the local circumstances, and that it is indicated in sub-section (*g*). The effect of that sub-section is that a free miner's location is good if (1.) he has discovered mineral in place; (2.) if he has *bona fide* tried to comply with the provisions as to marking and describing the claim; and (3.) that his non-compliance (if any) was not calculated to mislead other persons seeking to locate in the vicinity. For example, while ordinarily a claim which had

not been marked by a No. 1 and No. 2 post would be void, a case might easily happen where it would not be so. Suppose a prospector desires to locate ground near a chasm. He puts in No. 1 post at 1,000 feet distant from the edge. What is there in the Act which compels him, or was intended to compel him, to abandon that portion of the mineral, if any, situate beneath the chasm? Why should not his claim be good if his notice claims 1,500 feet from his No. 1 and he clearly marks his location line to the brink and states the direction of such line on his No. 1 post? What more could he do? Again, suppose he is in a locality where no timber is available out of which he can obtain posts which will face four inches square, but only three inches square. Would it not be against the spirit of the Act to hold a claim so staked in such a locality to be void? The fact is that sub-section (*g.*) is an emphatic affirmation of the truth that the grand equity belongs to the discoverer who is first upon the ground and makes an honest attempt to comply with the Act and does nothing likely to mislead other prospectors and that all other considerations so far as concerns the actual locating are of minor importance.

But then it was urged that as sub-section (*f.*) which was introduced in 1898 expressly provides that a fractional claim shall not be invalid by reason of a post being on a previously located unsurveyed claim, the whole question was necessarily brought to the attention of the Legislature, and that it has chosen to excuse the setting up of posts only in unsurveyed claims and only when fractions are being located. This argument looks more formidable than it really is as it amounts to nothing more than an attempt to apply the maxim *Expressio unius est exclusio alterius.* The treacherous nature of this maxim has often been pointed out and for my part I think that the so-called "*exclusio*" very often exists rather in the imagination of the learned counsel who is called upon to expound the statute (in this case an amending Act) than in that of the draughtsman who drew it or of the Legislature which passed it.

In *London Joint Stock Bank* v. *Mayor of London* (1875), 1 C.P.D. 1 at p. 17, Lord Coleridge, speaking for himself and Brett, Grove and Lindley, JJ., says:

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"The general principle that *Expressio unius est exclusio alterius* cannot indeed be questioned; but it applies with a force differing in different cases; and in this instance it seems much more reasonable to hold that the two great corporations above mentioned prevailed upon Parliament to prevent all questions as to themselves by direct enactment, than to hold that Parliament by such special enactment in these two cases meant to determine this question in all other cases adversely to corporations."

Chitty, L.J., says in *Thames Conservators* v. *Smeed, Dean & Co.* (1897), 2 Q.B. 334 at p. 351:

"To an Act, drawn as this is, I think it would be dangerous to apply the rule of *expressum facit cessare tacitum*. I decline to draw the inference that because shores are mentioned in (*d*) they are excluded from (*a*), (*b*), and (*c*)."

Lord Campbell says in *Bostock* v. *North Staffordshire Railway* (1855), 4 El. & Bl. 798 at p. 832:

"Much stress was laid upon prohibitions to do specific acts, which would amount to the use of the land for a different purpose from that of feeding the canal. But I do not think that the express prohibtion to do these acts amounts to a cancelling of the restriction, or has the effect of confining it to the Acts expressly prohibited. The express prohibition may be *ex abundanti cautela*. . . . . In construing instruments so loosely drawn as these local Acts, we can hardly apply such maxims as that 'the expression of one thing is the exclusion of another,' or that 'the exception proves the rule.'"

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If it needs any demonstration to shew that this Act is one of the most ill-drafted pieces of legislation to be found in the whole Statute book, I need only refer to some sections which more or less overlap each other, *e.g.*, sections 50 and 130, 53 and 147, 134 and 139, section 16 sub-section (*h.*) and 143. Indeed, section 16 itself as finally revised in 1898 is not a model of careful draughtsmanship. How, for instance, can the provisions of sub-section (*g.*) apply to sub-sections (*b.*), (*e.*) and (*f.*)? Again, the section provides that all the particulars required to be put on the posts shall form part of the record, but the form of record given by the Act makes no provision for the insertion of such particulars. I therefore think that we would be falling into serious error if we were to hold that the inference which is plainly deducible from the unfettered terms of section 47, which as already stated first appeared in 1891, and from the form of the affidavit leading to the record which was first required in 1896, and from sub-section (*g.*) first enacted in 1896

was impliedly nullified by the insertion of this sub-section (*f.*) passed in 1898, and that the true view is that this sub-section was enacted rather for the purpose of expressly encouraging the taking up of all available fragmentary parcels of mining ground as fractional claims in order to avoid small gores and angles, and the consequent expense of unnecessary surveys, than for the purpose of discouraging and handicapping the taking up of full sized claims, which section 15 expressly invites to be taken up wherever possible, and the maxim *abundans cautela non nocet* applies to the case rather than the one in question.

Then it was said that this question has in effect been settled in favour of the appellant by *Manley* v. *Collom* (1902), 32 S.C.R. 371; but according to *Quinn* v. *Leathem* (1901), A.C. 495 and numerous other authorities, a case is authority only for the points actually decided, and the only passage that I can find which might be construed to have any bearing on the matter is the statement that the prospector must beware of staking on ground already staked, but which I take to mean merely that if a man stakes over such ground, he will, generally speaking, take nothing by the proceeding.

Lastly, regard should be had to the consequence of a decision that the placing of No. 1 or No. 2 on ground not open to location, *ipso facto*, avoids the claims. Such a decision would no doubt destroy a large number of claims located in good faith and on which much time and money have been expended, and would be a direct invitation to that class of ghouls known as "jumpers" to rob others of the fruits of their lawful enterprise under the mask of law.

For these reasons I think the judgment should be affirmed.

MARTIN, J.: Both the conflicting claims in this adverse action, *i.e.*, the Colonial and the Wild Rose Fraction, are substantially over-locations of the Cody Fractional mineral claim which was located and recorded on the 3rd of August, 1896. The Colonial is the senior location, having been located on the 7th of October, 1900, and recorded on the following day; the Wild Rose Fraction was not located till the 4th of September, 1902, and was recorded on the same day.

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Unless the Wild Rose Fraction is invalid because of its conflicting with the Colonial it is otherwise a valid location.

In order to clear the ground it will be necessary to decide the question as to whether or no the Cody Fraction was a valid location at the time the Colonial was located thereupon. On this point I have no difficulty in accepting the finding of fact of the learned trial Judge that on the evidence the grave error in the compass bearing was of a character calculated to mislead other persons desiring to locate claims in the vicinity. The consequence is that the Cody Fraction was an invalid location at the time the Colonial was located over it, and therefore on that ground the Colonial is not open to attack.

The second ground upon which the Colonial is sought to be declared invalid is that its initial post is placed 290 feet within the ground of the Chicago mineral claim, then a valid location and to which a Crown grant had been issued on the 23rd day of July previous.

This raises definitely for the first time, so far as now known, the important question as to whether or no a location is invalid solely because its initial post has been placed upon the ground of an existing valid location.

Before considering the matter from a purely legal standpoint, there is a remark in the judgment of the learned trial Judge which the appellant submits should not receive the sanction of this Court, *viz:*

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> "It has been the practice to recognize as good locating the planting of the number one post on occupied land. I am not aware that the matter has ever been raised before in Court, but for years that has been accepted as good locating, and it seems to me that to expect anything else—to hold that it was bad locating—would be unreasonable."

It is contended that as there is no evidence of the existence of any such practice among free miners it should not be relied upon, because, assuming it existed, their opinions and actions are outside the record; and, further, that as a fact there is no such practice, and the danger of placing an initial post on another valid location has been so well recognized that it is never knowingly done, and when inadvertently done, not relied upon, which would account for the point never having been decided before in this Court.

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Seeing that there is no evidence of the alleged practice having received any judicial or statutory sanction, or even having been recognized by free miners, it would in most cases be unnecessary to consider his Lordship's remarks, but this being a point of unusual importance and far-reaching effect which may come before a higher tribunal outside this Province, it seems desirable as a matter of precaution to state that I, as one member of this Court, have never heard till this appeal of the alleged practice of its being "accepted as good locating" either by lawyers or others having a knowledge of mining matters; for years I have understood the point to be a moot one with the better opinion being against the validity of such a location. Indeed, six years ago the objection was raised before Mr. Justice WALKEM in *Connell* v. *Madden* (1899), 6 B.C. 531, 1 M.M.C. 359, against the plaintiff's mineral claim, the Boundary No. 2, but not decided because the Good Enough claim was not shewn to be a valid location. Consequently, with every respect, I beg to differ from the view of the practice expressed by the learned Judge.

Turning then to the cases and authorities cited, I remark, first, that there was some reference to American decisions on the location of lode claims during the argument, and to ascertain their application to the point in question I have at some length considered them, and others, and the statutes on which they are based. These statutes, of the various mining States, will be conveniently found in Lindley on Mines, 2nd Ed., par. 374. The requirements of some of them are very precise, noticeably North Dakota, and their object is to supplement the vague Federal Statute, for, as regards acts of defining the location, all it requires (Sec. 2,324) is that the "location must be distinctly marked on the ground so that its boundaries can be readily traced": Lindley, pars. 371, 373; Bar. & Adams, pp. 227-34, 798. In not one of these statutes are the provisions for location so similar to ours that a case decided on them would be of any safe guidance whatever in the construction of our own statute on the present question. It is noticeable that, with one exception, they all require corner posts to define the location, but there is now nothing of the kind in our statutes, though there formerly was—Goldfields Act, 1859, Rule 2, 1 M.M.C. p. 547;

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and even so late as the Mineral Act Amendment Act, 1893, Sec. 15, corner posts were again required, in addition to the others, but were abolished next year. Indeed, that in some States even after location the boundaries may be changed appears by the case of *Shreve* v. *Copper Bell Min. Co.* (1891), 28 Pac. 315 at p. 316, wherein the Supreme Court of Montana held as follows:

"The discoverers do not usually make an accurate survey of the premises; and the notices of location contain a description in general terms and by name. When the true course of the vein has been ascertained by development, the boundaries are sometimes changed to protect the interests of the claimants. The owners of the Edna lode mining claim availed themselves of this privilege, which is valid under certain conditions."

In the United States discovery is that which is primarily relied upon in establishing title, and as is stated in Lindley, *supra*, 330:

"It has been frequently held that discovery is the source of the miner's title."

Thus, *e.g.*, the Supreme Court of Colorado, in *Beals* v. *Cone* (1900), 62 Pac. 948 at p. 952, has laid it down that—

"It is upon that act (discovery) that the very life of a mineral location depends."

There is, fortunately, no doubt about what is the root of title to a lode claim under our distinctive Act. That point has been settled by this Court in *Connell* v. *Madden, supra*, wherein it was clearly laid down that the claim "takes its root" in its initial post. This decision was affirmed by the Supreme Court of Canada and so it stands as the law on the subject, and I may say that there is nothing in the argument in the case at bar which would cause me to alter the opinion I expressed in *Connell* v. *Madden*, even were it open to me to do so.

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But, despite that decision, it was argued that there is no peculiar virtue in the initial post and that all that was said in regard to it might as well apply to the No. 2 post. I am unable to take this view for many reasons, chief among which is that the statute itself has created several marked distinctions. I refer, first, to the prohibition in section 16 which says:

"It shall not be lawful to move No. 1 post, but No. 2 post may be moved by the Provincial Land Surveyor when the distance between Nos. 1 and 2 posts exceeds 1,500 feet in order to place No. 2 post 1,500 feet from No. 1 post on the line of location. When the distance between posts Nos.

1 and 2 is less than 1,500 feet the Provincial Land Surveyor has no authority to extend the claim beyond No. 2."

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There is a penalty of fine or imprisonment, or both, for contravention of this provision: section 136, and section 16 of the Mineral Act Amendment Act, 1898, and it shews the importance attached to the fixity of the initial post which, as the very beginning and foundation of location, must, under all circumstances, even when being surveyed for a Crown grant, stand as originally placed. Second, it is now by reference to it only that the width and boundaries of the claim and the compass bearing of the location line, which is defined as being the "straight line between posts numbers one and two," can be ascertained, for upon it those particulars are directed to be placed. Third, the statute does not merely refer to it as the No. 1 post, in the same way as it does the No. 2 post, but also gives it a name, the "initial post," which is directed to be written on it, so that all may know it is the beginning, *i.e.*, the initiation of the location. This designation was first given to it by the Mineral Act Amendment Act, 1892, and is important because theretofore the claim was marked by three posts down the centre line, all of which had the same information on them and none could be moved—Mineral Act, 1891, Sec. 15. But in the Amendment of 1892 this was changed to two posts only, the initial post, so first named, and the No. 2, and the present distinctive information was directed to be written on the initial post alone and leave first given for the surveyor to move No. 2. It is true that the discovery post is also given a name, but it is the creation and innovation of a later statute, the Mineral Act Amendment Act, 1893, Sec. 3, and is of a different class from Nos. 1 and 2 and has nothing to do with the actual location in the strict sense of that term, *i.e.*, the mere marking out and defining the limits of the claim on the ground. This, indeed, clearly appears from the statute itself, for the provision requiring the erection of a discovery post comes after that which requires the location line to be marked, and this cannot be done till after Nos. 1 and 2 posts are erected. The section says: "When a claim has been located, the holder shall immediately mark the line, etc." "When" here can, and in view of the

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history of the legislation, does only mean "after," and assumes that at that time the physical act of location in the limited sense above mentioned, has been accomplished, which of course was the case before discovery posts were thought of. And hence it is significant, but not strange, that the reference is now for the first time to the "holder" of the claim, instead of "free-miner" or "locator." Nor is it even necessary that the discovery post should be "as near as possible on the line of the ledge or vein" as the other posts must be, but merely "at the point where he (locator) has found rock in place." By the above observations I do not wish it to be understood that I regard the provisions relating to marking the location line and placing the discovery post as being any less imperative than any other; they are all equally open to attack by one having an adverse right, who may set up the various objections contemplated by section 131, as follows:

"If any person shall in any suit or matter claim an adverse right of any kind to the mineral claim comprised in any record, or to any part thereof, or shall claim that any record is invalid or has been improperly obtained, or that the holder thereof has not complied with the provisions of the Act under which the location and record were made, or has not prior to the obtaining of such record made a good and valid location of such mineral claim according to law, the onus of proof thereof shall be on the person so claiming an adverse right, or so claiming that such record is invalid and has been improperly obtained as aforesaid, and in default of such proof judgment shall be given for the holder of such prior record in so far as such action, suit or matter relates to any of the matters aforesaid."

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And section 27 is to a similar effect:

"In case of any dispute as to the location of a mineral claim the title to the claim shall be recognized according to the priority of such location, subject to any question as to the validity of the record itself, and subject, further, to the free miner having complied with all the terms and conditions of this Act."

When using the word in its broad sense, that in which it is generally employed by miners, the "location" is not now deemed to be complete till after the location line has been marked and the discovery post erected.

Bearing in mind the three foregoing statutory distinctions of the initial post, it is, in my opinion, impossible to even plausibly contend that the No. 2 post is of like consequence; and I can

well understand that much may be said in favour of the validity of an otherwise valid location the objection to which is that its No. 2 post has inadvertently been erected upon an existing valid claim. The statute itself, for example, shews that being wrongly placed by reason of excess of length in the location line is not a ground for invalidation; in other words, that surplusage may be rejected.

I pass then to the area open to location. By sections 12 and 15 a free miner seeking to locate a lode claim upon Crown lands cannot enter or locate upon "any land lawfully occupied for mining purposes other than placer mining." Nevertheless that is what the locators of the Colonial did when they encroached upon the Chicago ground and placed their initial post thereon, and the writing upon it was public notice that the owners of the Colonial claim sought to appropriate to themselves a large portion of the "land lawfully occupied for mining purposes" by the Chicago claim. The contention is that the initial post so placed is of no effect and cannot be regarded as one *de jure* though it is one *de facto*, and that there consequently, in a legal sense, is not now, and never was any foundation for the claim called the Colonial, and that the result is really the same as in *Connell* v. *Madden*.

There are two provisions in section 16 regarding the position of the posts which deserve attention. The first is as follows:

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"But in case either No. 1 or No. 2 post be on the boundary line of a previously located claim, which boundary line is not at right angles to said location line, the Provincial Land Surveyor shall include the fraction so created within the claim being surveyed; provided always, that the whole claim does not exceed an area of 51.65 acres."

This deals with the case of the posts of a full sized claim being placed on a boundary line of an existing adjoining claim, and there is consequently a common boundary line (section 15). It is significant that while the Legislature is so careful to provide for such a situation it does not safeguard the case of the posts being within the boundary line of an existing claim. A not strained inference is that the Legislature did not intend to protect a careless locator in such circumstances. This is made more plain by reference to sub-section (*f.*), which, in dealing

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with the more difficult question of the location of fractional claims, provides that the location of such

> "Shall not be invalid by reason of the location posts of the fractional mineral claim being on such previously located mineral claims, and the owner of such fractional mineral claim may, by obtaining the permission of the Gold Commissioner of the district, move the posts of the fractional mineral claim and place them on the surveyed line of the adjoining previously located mineral claims."

But be it noted that the remedial effect of this sub-section can only be invoked when the fractional claim "has been located between previously located and unsurveyed mineral claims." If the locator of a fraction places his posts on an existing surveyed claim, which doubtless means the survey for a certificate of improvements mentioned in section 36 (*b.*), he must abide by the consequences of his error, and this despite the fact that sub-section (*d.*), recognizes the difficulties of location of a fractional claim to such an extent that it is only required to be "marked by two legal posts placed as near as possible on the line of the previously located mineral claims," instead of "as near as possible on the line of the ledge or vein" as in the case of full claims.

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While I agree with my Lord that the maxim *expressio unius est exclusio alterius* should not be pushed to undue lengths, yet in proper cases it admittedly has force and application as is even shewn by the decisions he cites relating to the special exemptions of certain corporations. In my opinion if it is to have any force at all it should have it in the case of a public statute of far-reaching effect, such as the Mineral Act, and particularly where the section (16) thereof in question is one which relieves prospectors from the consequences of failure to conform to the imperative requirements of an immediately preceding section, 15. Such a situation nearly approximates the case of *Hamilton* v. *Baker* (1889), 14 App. Cas. 209, on the Merchant Shipping Act, wherein Lord Watson, at p. 217, says:

> "When a variety of personal and unsecured claims are dealt with in a single clause, and, it is expressly declared that one of them shall bear a lien, there arises a strong presumption that a similar privilege is not to attach to the rest; and that presumption cannot be overcome except by very plain implication."

On this point of forbidding the encroachment of a new location upon an existing one the Act is specific and imperative. Section 15 is declaratory of the right of a free miner to make a location, yet also declares that right to be "subject to the provisions of this Act with respect to land which may be used for mining," and it provides (*c.*) that

"No mineral claim of the full size shall be recorded without the application being accompanied by an affidavit or solemn declaration in the Form S, made by the applicant or some person on his behalf cognizant of the facts: That the legal notices and posts have been put up; that mineral has been found in place on the claim proposed to be recorded; that the ground applied for is unoccupied by any other person as a mineral claim. . . . ."

Before, therefore, a locator undertakes to make the required affidavit he should examine the neighbourhood carefully, for a record obtained on a misrepresentation of fact is one which has been "improperly obtained" and invalid within the meaning of section 131; and it is also contrary to section 27 above quoted.

It is now beyond question that all the conditions of the Act which govern location are imperative, and that a location in which they are lacking is invalid when in conflict with the rights of free miners lawfully exercised, unless the defect is cured by the remedial sections, and there is a long line of reported cases to that effect beginning with *Atkins* v. *Coy* (1896), 5 B.C. 6, 1 M.M.C. 88, and ending with the decision of the Supreme Court in *Manley* v. *Collom* (1902), 8 B.C. 153, 1 M.M.C. 487; in the note to which latter case a list of them is given, p. 504. Speaking of section 10 of the Mineral Act of 1891, and section 9 of the Mineral Act Amendment Act of 1892, which correspond to the present sections 12 and 27, it was said in this Full Court in *Atkins* v. *Coy* by Mr. Justice McCREIGHT that they

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"give no encouragement to locate on land lawfully occupied for mining purposes, but, on the contrary, practically prohibit it. In short, I do not think sec. 9 of the Mineral Act (1891) Amendment Act, 1892, was intended to encourage one miner to trespass on the location of another; in other words, to do what may be known, perhaps questionably in forensic language, as "jumping." I gather the meaning of the Legislature to be that there shall be a good location not obtained of course by trespass (see sec. 10 of the Mineral Act, 1891), and a good record, made of course within the time required by law."

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The general principle is that where a statute creates a system of licences and the machinery to carry it into effect its provisions must be complied with: *Newfoundland Steam Whaling Co.* v. *Government of Newfoundland* (1904), A.C. 399, 403, and, indeed, as I noted the argument, it was conceded that the situation of the initial post invalidated the location unless subsection (*g.*) could be invoked, and it was claimed that it did apply to cure the defect. It does apply if the defect is one which is caused by a "failure on the part of the locator . . . to comply with the foregoing provisions of this section" (16), but not otherwise. It must be remembered that there are omissions and mistakes before and after location which it does not even purport to cure. I refer to one, which is of the first importance, namely, the failure to record within the time limited by section 19. No one has ever questioned that this is an imperative provision and that failure to comply with it is followed by the loss of the claim; that has been to my knowledge conceded in open Court as beyond question, quite apart from the decision in *Francoeur* v. *English* (1897), 6 B.C. 63, 1 M.M.C. 203. And yet it might be argued that it is a great hardship that a prospector should lose his claim because he was delayed an hour by a swollen river or met with an accident in the mountains on his way to the Recorder's office. But the Legislature has not yet seen fit to come to the miner's relief in such a notorious instance, though it has done so where the miner records in the wrong office (section 22). The relaxing of the rigour of the old restrictions has only been gradual; some of the chief instances are mentioned by Mr. Justice WALKEM in *Peters* v. *Sampson* (1898), 6 B.C. 405 at p. 412, 1 M.M.C. 252. Those which have not been modified must be construed as strictly as before.

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Here, the objection is not to the post itself, which is only rendered necessary by section 16 and not by sections 12 or 15, but to the land in which it is placed; in other words, that it stands within a proscribed and consequently unlawful area where it is legally impossible to erect one.

The question thus depends upon the true construction of sections 12, 15 and 16. I take the meaning of the expression

"locate" a mineral claim in sections 12 and 15 to be that out of any lands available for mining purposes the free miner may appropriate to himself for such purposes a plot of ground of the size and shape specified in section 15. Having obtained that right under those sections, he must to give effect to it resort to section 16 which alone specifies the manner in which the physical act of marking out his appropriation, called location, of the "plot of ground" conferred upon him by section 15 shall be performed. These sections not only do not clash, but the last implements the two preceding, and provides the only machinery for acquiring the right they confer. But he can only resort to section 16 for the purpose of employing it to obtain a location within the area prescribed by sections 12 and 15; in other words, the machinery of that section can only be employed in the furtherance of a lawful purpose and not to aid a trespass upon the prior segregated areas of other licensees of the Crown. And if he make a mistake in his choice of the area open to him under sections 12 and 15 I am unable to see how he can summon to his aid a section which does not relate to the selection of areas. There is to my mind a clear line of demarcation between the declaratory and operative sections, if I may so term them; and no principle of law has been suggested which would warrant us in holding that a prospector may in defiance of the statute invade the proscribed area and then shield himself from the consequences of his unlawful acts therein committed by invoking a section which pre-supposes a lawful entry upon unoccupied Crown lands.

After a full consideration of the matter, the only conclusion I can come to consistent with the Act and decisions thereon, is that the placing of an initial post within the boundaries of an existing valid location is an illegal act contrary to both the letter and spirit of the Mineral Acts, and that a location so-called which has its initial post so placed has no root of title and never was and never can become a valid location; and that sub-section (*g.*) cannot be invoked to cure an imperfection in a location which was one in name only and not in law nor in fact.

Much was said on both sides as to the hardship that would result from our decision whichever way it went, and there is not

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a little to be said from both points of view, *e.g.*, on the one hand it is urged that it would be a hard thing if a miner were to lose his claim because he had inadvertently placed his initial post a foot over the boundary; and on the other hand that constant annoyance and embarrassment would result to a valid locator if even after survey of his claim and Crown grant thereof, as in the present case, he was never to be free from adverse locators and the necessity of being drawn into litigation with those who designedly or inadvertently trespassed upon and sought to appropriate a portion of his ground by planting posts thereon with notices advancing claims of ownership which it would be dangerous to ignore, and that for the Court to countenance such practices, whether arising from carelessness or design, would be to put a premium on confusion and discord, if not worse.

"Between these conflicting views," to adopt the language of the House of Lords in *Hamilton* v. *Baker, supra*, p. 227, "I do not venture to express any opinion. I have only to state what in my judgment the law really is. It is for the Legislature to alter the law if Parliament in its wisdom thinks an alteration desirable." The responsibility for the legal results of the Mineral Acts rests not upon this Court, but upon the Legislature which enacted them, and that body may if it please extend the remedial section to meet such cases as this in future, and thus allow the same margin for mistakes in locating full claims as in fractions. But I feel bound to say that the situation of the present plaintiff who carelessly crossed the boundary line of a recently surveyed claim, and went no less than 290 feet upon its ground before planting his post, does not appear to me to entitle him to anything like as much consideration as locators in such cases as *Pellent* v. *Almoure* (1897), 1 M.M.C. 134, who, before the remedial sub-section (*g.*) was passed, lost their claims according to the statute because certain faces of their posts were one inch too narrow—and see also *Creelman* v. *Clarke* (1898), 1 M.M.C. 228 and *Clark* v. *Haney and Dunlop* (1899), 8 B.C. 130, 1 M.M.C. 281. And before that sub-section was passed locators were often placed in the unfortunate position of losing their claims even when it was physically impossible to comply with the conditions, especially in attempting to mark the location

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line, or, as it was first called, the centre line, which rendered it necessary to pass a special section to modify the requirements in certain cases; I refer to section 17 of the Mineral Act of 1891, now substantially section 18. The decision of this Court in *Callanan* v. *George* (1898), 8 B.C. 146, 1 M.M.C. 242, is a good illustration of what I mean. The present plaintiff must be presumed to have known the danger, pointed in *Manley* v. *Collom*, of hastily planting posts without carefully searching for the boundaries of adjoining claims, and, as the Supreme Court said, "he must beware of staking there."

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In regard to section 48 of the Mineral Act of 1891 and section 15 of the Act of 1898, which were not referred to on the argument, it seems desirable that I should give my view thereon, and it is that they are not of real assistance in determining the present point. They relate to the proceedings upon applications for a certificate of improvements (originally the application was for a Crown grant direct) and the special provisions of the procedure upon adverse claims. This is peculiar to our mining laws and was first introduced in 1884 by sections 68 and 70 of the Mineral Act of that year. Section 70 provided that after the adverse claim was filed all proceedings on the application for certificate should be "stayed until the controversy shall have been settled or decided according to law, or the adverse claim waived," and that after the judgment of the Court had been given and a copy filed with the Government agent then "a Crown grant shall issue thereon for the claim or such portion thereof as the applicant shall appear, from the decision of the Court, to rightly possess." It is important to note that the only way the applicant could get rid of the adverse claim was either by getting a judgment in his favour, or by his adversary waiving it; the applicant could not avoid the serious delay caused by the stay of proceedings and the compulsory litigation by a withdrawal of a part of his application, it had to be an abandonment of all or none. This procedure was continued in the Consolidated Mineral Act of 1888 in sections 81 and 83, and it was not till 1891, by section 48, that the applicant was given relief in this respect, *i.e.*, he was then provided for the first time with the means whereby he could decline to contest with the adverse

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claimant the title to a disputed portion of the ground, relinquish his pretensions thereto, and thereupon obtain a certificate for the unassailed balance.

This is a valuable privilege, for he may have various reasons for not wishing to enter into litigation with the adverse claimant, *e.g.*, his title to the disputed portion may be defective from causes quite outside of acts of location—a secret defect, for instance, in his paper title arising from one of many weaknesses known to conveyancers, such as an error in the record, or an outstanding interest, or a doubtful document, to draw attention to which might imperil the whole claim, and so it would be more prudent to lose a part rather than a whole. Or again, it may be that the disputed ground is of no value and not worth the trouble and expense of a law suit. In any one of these cases, or others that might be imagined, the privilege of being able to abandon is of value to him, for without it the Crown officers would be forced to take the position that before the certificate could issue he must carry on to judgment the adverse litigation begun under section 37 of the Mineral Act, which, be it noted, is not restricted to overlapping claims or to boundaries but is "an adverse right of any kind either to the possession of the mineral claim referred to in the application for certificate of improvements or any part thereof, or to the minerals therein contained." Bearing in mind the history and object of this peculiar

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procedure there is nothing in any of the said sections which, in my opinion, warrants us in assuming that it was the intention of the Legislature to countenance in any way the mischievous results of the haphazard location of conflicting claims or to encourage over-lapping consequent upon failure to observe the statutory conditions. On the contrary it is clear to me, at least, that the intention was to extricate the applicant for a certificate from the awkward position in which he was often placed in attempting to comply with the sections relating to the special procedure to be followed in obtaining such certificate. Indeed, in the Act of 1884, Sec. 31, when title depended upon priority of record, it was declared that titles to claims in dispute were "subject to any question as to the validity of the record itself, and subject further to the terms, conditions and privileges con-

tained in section 27 of this Act." (relating to record); and this requirement was in 1891, when the question of title was altered to depend upon priority of location instead of record, expanded (section 18) into requiring compliance "with all the terms and conditions of this Act," and so it now stands as section 27 of the Mineral Act. It should also be borne in mind in considering the intention and application of the said adverse sections that claims have been measured horizontally since 1867 (Gold Min. Ord. 1867, Sec. 57); and also that before and at the time the said adverse sections were passed, owners of lode claims possessed extra lateral rights which were productive of such endless conflicts as regards apex, boundaries and otherwise, that they were, without prejudice to existing rights, abolished by the Mineral Act Amendment Act of 1892, Sec. 5.

Further, it is manifest that so far as concerns the exact and chief point raised in this appeal—*i.e.*, the effect of the initial post being placed on an existing valid location—none of the said adverse sections which have been considered is of any real assistance in determining the point, because at the time they were first enacted in 1884, initial posts had not been thought of, and claims were then simply marked (sections 58 and 63) by three centre posts where all were of the same kind and not distinguished by name or number, and bore the same notice.

In view of the opinion hereinbefore expressed, it is unnecessary to go into the other questions raised on the appeal; but I think it is due to the appellant to say, in case it should be held by a higher Court that sub-section (*g.*) does apply, that in my opinion the very fact that an initial post was planted so far within a surveyed claim as this was would in itself be a strong piece of evidence to shew that such a location was of a nature calculated to mislead other prospectors, because unless there is evidence to the contrary, and there is none, it must be assumed that a survey made under section 36 (*c.*), as this was, conformed to that section, and therefore that, as the section directs, the surveyor "accurately defined and marked the boundaries of such claim upon the ground, and indicated the corners by placing monuments or legal posts at the angles thereof. . . ." It is scarcely credible that a prospector of even slight experience

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would look within the boundaries of a surveyed claim for initial posts placed thereon after its location. The survey lines and the surveyor's statutory notices on the corner posts would put him off his guard and he would not expect a junior conflicting claim to emerge from that surveyed area.

The result is that the Wild Rose Fraction is declared to be a valid, and the Colonial an invalid location.

The appeal should be allowed with costs.

Appeal dismissed, Martin, J., dissenting.

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BAILEY v. CATES.

Shipping—Vessel moored to another—Negligence—Extraordinary storm—Act of God.

While plaintiff's tugboat the Vigilant was tied to a wharf in Vancouver harbour, defendant brought his tugboat the Lois alongside and tied her to the Vigilant. The next night (Christmas) a violent storm arose—a storm of which there were no indications and which was the severest ever experienced in the harbour—and the Lois, whose crew was absent, bumped against the Vigilant and damaged her:—

Held, in an action for damages for negligence, reversing IRVING, J., that it had not been shewn that the defendant's act of so mooring his tug was negligent and that on the evidence the accident was due to the act of God.

APPEAL by defendant from judgment of IRVING, J.

The plaintiff was the owner of the tugboat Vigilant and the defendant was the owner of the tugboat Lois.

Statement

During the afternoon of the 24th of December, 1901, the Vigilant came in to Keefer's wharf in Vancouver harbour and tied up, and later in the same afternoon the Lois came in and tied up outside the Vigilant and with her lines on the Vigilant. The engineers of both boats went ashore and steam was not

kept up. The next day being Christmas, the tugs remained as they were, and that night the captain and cook of the Vigilant slept on board her; the cook and a man who was not a member of the crew slept on board the Lois. During the night a violent wind storm arose which caused the Lois to bump against the Vigilant and damage her.

Nearly all the ships in Vancouver harbour were damaged in the same storm and some of them had their full crews aboard at the time The evidence shewed that there were no indications of the storm; that it was the severest ever experienced in that harbour, and that no ordinary precautions would have prevented the damage. There was some evidence that these two tugs had been in the habit of tying up to each other, but the plaintiff's contention was that it was only done in the daytime when steam was up and the crews on board.

Statement

The plaintiff sued for $615.96 damages to his tug.

The defendant denied negligence and pleaded that the damage was caused by the act of God.

The action was tried in Vancouver before IRVING, J., who gave judgment in favour of the plaintiff and directed a reference to the District Registrar to ascertain the damages. The following are his Lordship's reasons for judgment given orally at the conclusion of the trial:

This is an action for negligence. The main facts are really not much in dispute. The Vigilant came in to Keefer's wharf and moored at the head of it on the afternoon of the 24th. Later on, the same day, the defendants brought in their vessel, the Lois, and anchored her or moored her outside of the Vigilant. The captain of the Lois and the engineer of the Lois went away about six o'clock on the night of the 24th, returning only for a short time, the 25th, leaving no person in charge of the Lois except a Chinaman cook and a man who was not one of the crew, but who seems to have been a friend of the engineer and had the privilege of sleeping on board, not an engineer, not one of the crew, but a handy man. Practically they went away and left the Lois to take care of herself, permitting the fires to go out. It is said it is the custom of boats, not of all boats, but of those boats of which the crew are married men to go away and leave

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their vessels in this way. All I can say is, if that is the custom, it is one that is not reasonable. The fact of the matter is that they just elected to take chances of some accident not happening. Of course it is all right as long as nothing does happen, but the moment an accident does happen the question comes up, did they take that care which they ought to have taken under the circumstances? I do not think those on board the Lois did take that care they ought to have taken. They moored her on the outside of a boat already moored, they left no one in charge; they knew or ought to have known that there was a risk of a change in the weather. It was in the winter months; the glass, according to the captain of the Vigilant, was low. The real truth of the matter was that the people on the Lois did not take the precautions that they ought to have taken. Having elected to moor her at a place there, outside, and where she would bump into the Vigilant in the event of any storm coming, they ought, I think, probably to have taken the precaution of keeping the fires up and keeping men on board. A different degree of care is required when you moor your vessel in a place of danger, or where there is likely to be danger. There is no question that that was an unusual storm and more damage was done then than is usually done by storms, but the onus is on the defendants to establish that it was of such a character as to amount to *vis major*, and the defendant's evidence has not impressed me with the terrific nature of that storm, nor have they impressed me with the fact that it was of such a character as could not be reasonably anticipated, nor have they satisfied me that they could not have prevented the consequences of their mooring there, if they had taken reasonable care.

This seems to me like the case of the railway company that had a car on top of the hill, and instead of applying the brakes that would make it sure under all the circumstances, they only used such appliances as came convenient to them. The result was that certain boys playing there, as was to be anticipated, loosened some of those brakes and let the car go down the hill, and it was held that under the circumstances the company ought to have taken precautions, having regard to the likelihood of the danger and the position taken up by the car.

The defendant appealed to the Full Court and the appeal was argued at Vancouver on the 25th and 26th of April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

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Bowser, K.C., for appellant: The evidence shews that the storm could not reasonably have been anticipated; the damage was caused by the act of God and defendant is not liable. The burden is on the plaintiff to make out a case of negligence. He cited *Sharp* v. *Powell* (1872), L.R. 7 C.P. 253; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743; *The Marpesia* (1872), L.R. 4 P.C. 212 and *Nitro-Phosphate, &c., Co.* v. *London and St. Katharine Docks Co.* (1878), 9 Ch. D. 503 at p. 519.

Argument

A. D. Taylor, for respondent: The custom as to tugs lying alongside each other was limited to times when the crews were on board and even then they would only stay alongside each other for a few minutes. The Lois had no right whatever to tie up where she did. He cited *Romney Marsh* v. *Trinity House* (1870), L.R. 5 Ex. 204.

HUNTER, C.J.: The Court is unanimously of the opinion that the appeal must be allowed, and the action dismissed. As far as I am concerned, I am inclined to think, on the balance of the evidence, that there was a case of leave and licence; but it is not necessary in my opinion to decide that, as assuming that that was not so, the action has not been brought for the bare trespass, but for damages occasioned by reason of the defendant's negligence; and it is quite clear upon the evidence that the mere act of tying one vessel to another in port is not negligence *per se*; and the plaintiff failed to shew that it was a negligent act for the defendant to moor his vessel to that of the plaintiff in the way he did. That being the position, if the action lay at all it lay only for the naked trespass. It has, however, been brought for special damage; and it is quite clear on the evidence that the defence of *vis major* was a good defence to any claim for special damages. In fact, the plaintiff himself says it was the severest storm he had seen on the Inlet, and I think it is in the personal recollection of most of us that the storm was one of extraordinary violence.

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MARTIN, J.: I am also of the same opinion. A perusal of the judgment of his Lordship shews that it proceeded upon the assumption that the mere mooring alongside placed the vessel in a position of danger. This is shewn by his remarks on p. 67, where he says: "A different degree of care is required when you moor your vessel in a place of danger, or where there is likely to be danger." That, if I may be allowed to say so, without disrespect, is where a misconception occurs, namely, that the mere fact of mooring as was shewn here was negligence *per se*, or, in other words, bad seamanship. Now, that is not the case, for the Court would not, on the lack of evidence, presume that a mooring of that nature was improper, or, as I said before, bad seamanship, and that is really the foundation of the whole case, because unless it could be shewn that it was bad seamanship so to moor, there can be no inference of negligence based on such mooring in the state of affairs in evidence, and yet such negligent mooring is the real ground work of the whole action. This question of seamanship might best have been decided by that class of nautical evidence to which I alluded during the argument, but it is wanting, and therefore there is no evidence, or at best no sufficient evidence to support the judgment.

DUFF, J.: I have nothing to add, except to say I think there is no evidence, at all events, not sufficient evidence to shew that the damage which occurred was within the ordinary consequences of the act complained of. That would be sufficient to justify the dismissal of the action; but I concur with my Lord in the view that, if necessary, the defence of *vis major* has been amply proved.

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NOTE.—An appeal to the Supreme Court of Canada was dismissed on 21st November, 1904.

LAMBERTON v. VANCOUVER TEMPERANCE HOTEL COMPANY, LIMITED.

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LAMBERTON v. VANCOUVER TEMPERANCE HOTEL

Master and servant—Manager of restaurant—Dismissal of—Length of notice—Reasonable notice.

A manager of a restaurant who is employed by the month is not entitled to a month's notice of dismissal.

In the absence of custom, or special agreement, the length of notice must only be reasonable.

In order to recover damages for dismissal without reasonable notice, a plaintiff must shew an endeavour and failure to obtain other employment.

APPEAL from the judgment of HENDERSON, Co. J.

The plaintiff was engaged at a monthly salary of $100 as manager of defendants' coffee house business in Vancouver, and entered upon his duties about 1st November, 1903. On 4th December he received a written notice from the secretary of the defendant Company notifying him that his services would not be required after 31st December, 1903, and after that date defendants refused to allow him to continue in their service. It appeared that the directors of the defendant Company were having trouble among themselves, and that after a meeting on the 18th of November, the vice-president told the plaintiff to "remain on in spite of the letter" which he had received from the secretary. The plaintiff sued for $100, "being the amount of one month's wages as compensation for the said wrongful dismissal." Judgment was given for plaintiff for $100 on the principle that he was entitled absolutely to a month's notice. No evidence was given of any attempt by plaintiff to obtain other employment.

Statement

The defendants appealed and the appeal was argued at Vancouver on the 26th of November, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Brydone Jack, for appellants.

Bowser, K.C., for respondent.

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HUNTER, C.J.: I think that the learned trial Judge proceeded on a wrong principle. He has evidently taken it for granted that the law with regard to notice in the case of domestic service applies to this case. The question in this class of case is, what is reasonable notice, having regard to the nature of the employment, and all the surrounding circumstances. And in order to shew damage it must appear that the plaintiff not only endeavoured to get similar employment elsewhere and failed, but that he acted reasonably in that behalf.

HUNTER, C.J. It may be that the learned Judge will come to the same conclusion as before, that is to say, that a month's notice was reasonable under all the circumstances, and that the plaintiff has proved his damage, but with that we are not now concerned. All we now say is that the case must go back for reconsideration.

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DUFF, J. MARTIN and DUFF, JJ., agreed that the appeal should be allowed.

Appeal allowed and new trial ordered.

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SPRUCE CREEK POWER COMPANY, LIMITED v. MUIRHEAD *ET AL.*

Water Clauses Consolidation Act—Water record and rights—Status of free miner—Mining jurisdiction of County Court—Res judicata—Trespass—Damages—Remedy of self-help—Gold Commissioner's powers—Construction of statutes.

The County Court in its mining jurisdiction has power to deal with actions respecting the disturbance of water rights appurtenant to mining property.

Observations upon the scope and object of the said Act and powers of the Gold Commissioner.

In construing the Mineral Act and its amendments the language of the particular enactment governing the question under consideration should be taken and read, in connection with the other language of the same statute, in its natural signification and effect should be given thereto notwithstanding the way in which the subject-matter has been dealt with previously by the Legislature.

Semble, no one has a status to complain about the diversion or misuse of water by the holder of a water record unless he himself holds such a record under the Water Clauses Consolidation Act which is an exclusive Code on the subject of water rights, and the right to a flow of water is vested either in the Crown or in a holder of such a record.

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ACTION respecting mining water rights tried at Atlin by DUFF, J., on 16th and 17th September, 1904.

The plaintiff is a Company incorporated under the Companies Act, 1897, and Amending Acts, and Part 4 of the Water Clauses Consolidation Act, 1897, and Amending Acts, and is the owner of a water ditch having its intake upon Spruce Creek in the Atlin Mining District at or about claim 17 below Discovery and extending along the North side of Spruce Creek to a point approximately 8,500 feet below said intake. The Company is also the owner of a water record No. 92 for 1,200 miners inches of water from Spruce Creek, which water the Company conveyed through the said ditch to its workings.

For the purpose of turning the water of Spruce Creek into the Company's ditch the Company had caused a dam to be constructed just above its intake by means of which the water was forced to that side of the Creek on which the intake was situate.

Statement

The defendants are free miners owning and operating placer claims between the intake and return of the plaintiff's ditch.

From about the 1st of August, 1904, the water in Spruce Creek became very low and by reason of the Company diverting the greater portion thereof by means of its intake the miners operating below the intake and above the return of the plaintiff's ditch, amongst them the defendants, were deprived of the quantity of water necessary to carry on their workings in a miner-like manner.

Prior to the plaintiff becoming owner of said water record the miners on Spruce Creek, including the defendants, were given 300 miners inches of water by a decision of the Gold Commissioner, which, together with two records of 100 and 200 inches, known as the Queen and Garrison records, the defendants claimed should flow down stream past the plaintiff's intake.

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Application was therefore made to the Gold Commissioner for an order directing the Company to allow 600 inches to pass its intake, and for the purpose of ascertaining the number of miners inches in Spruce Creek above and below said intake he instructed the miners to measure the quantity of water in the Company's ditch at its intake and in the Creek above and below the intake. On the 16th of August the defendants proceeded to said intake and for the purpose of measuring the water, closed down the plaintiff's gate at the intake and removed its dam, and early the next morning placed logs, rocks and gravel in front of the intake so as to prevent the flow of water into the Company's ditch.

The plaintiff brought this action on the 18th of August for an injunction restraining the defendants, their servants, agents and workmen from in any way interfering with the plaintiff's water ditch, head gates, waste gates, pipes and other plant and machinery used on and in connection with the plaintiff's hydraulic mines on Spruce Creek, Atlin Mining District, and for damages, and on the 22nd of August obtained an *interim* injunction as prayed.

Statement

On the 26th of August three of the present defendants, Andrew Brown, Chris. Nissen and W. C. Smaile brought an action in the Mining Jurisdiction of the County Court of Atlin against the present plaintiff for a mandatory order compelling it to permit 600 miners inches of water to flow down Spruce Creek past its intake on said Creek, and on the 6th of September obtained a judgment in their favour to that effect.

On the 1st day of September the present plaintiff delivered its statement of claim herein and in addition to the injunction and damages originally asked for in the indorsement on the writ claimed a declaration that it is entitled as against the defendants under and by virtue of the said water record No. 92 to the uninterrupted use of 1,200 inches of the waters of Spruce Creek through its said ditch, flumes, pipes and monitors, upon any of its mining properties.

In answer to this claim the defendants pleaded the said judgment of the County Court in their favour.

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Belyea, K.C., for the plaintiff: The County Court in its Mining Jurisdiction had no power to hear disputes arising under the provisions of the Water Clauses Consolidation Act and therefore this Court has jurisdiction to now go into the question of water rights between the plaintiff and defendants and to grant the declaration asked for. Though by the old Placer Act of 1891 the Mining Jurisdiction of the County Court provided for suits respecting water rights claimed under that Act the present Placer Act omits that provision.

Kappele, for defendants: The Act should be construed as it now stands, and if it gives the County Court jurisdiction this Court should give effect thereto when it has been exercised: see Placer Act, Sec. 133, Sub-Secs. 1 and 4, and definition of "mining property" in section 2, which sections it is submitted give the County Court jurisdiction over this subject-matter. As to the claim for damages we rely on our right to the water as found by the learned County Court Judge and on the direction of the Gold Commissioner to measure the water at the point where the trespass took place. The real issue between the parties, however, is the right to the water in question.

Argument

DUFF, J.: I have come to the conclusion in this case that the plaintiffs are entitled to damages against Muirhead, Brown and Nissen in the amount of $500. I have assessed the damages, as far as I can upon the evidence, on the basis of the actual damage suffered by the plaintiffs on account of the wrongful action of the defendants in the destruction of the plaintiff's dam, which was chiefly the cause of injury suffered by the plaintiff Company.

There is evidence from which I think I ought to infer that there was a combination in which the defendants Muirhead, Brown and Nissen were parties, for taking such steps as they considered necessary (including the destruction of this dam) for the purpose of causing a flow of 600 inches of water to pass the plaintiff's intake.

Judgment

At first I was disposed to think that, assuming these defendants had a right to the flow of the water they were entitled to exercise the remedy of self-help to the extent of destroying

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the works which prevented the flow; but, in the first place, on that question of fact, I accept Mr. Blaine's evidence, and from that evidence it appears that the destruction of the dam was not necessary for the purpose referred to.

Further, as the plaintiff Company is a Power Company, having a certificate approving its undertaking from the Lieutenant-Governor in Council under Part 4 of the Water Clauses Consolidation Act, and as these works were constructed on Crown property, the defendants could not, at all events without giving notice to the plaintiffs, exercise the remedy of self-help. In passing, I must say that I think it is a very fortunate thing indeed that the good temper of the people who were involved in this contretemps prevented the consequences being more serious than a few angry words. It seems to me rather unfortunate in view of the elaborate provisions of the Water Consolidation Act, affording as I think, the most ample protection to the individual miners—being, as it seems to me, it was intended it should be—the rock of defence both to the small proprietor and the individual miner against anything in the nature of a misuse or a monopoly of the water—considering I say, the very ample provisions of that Act for the prevention of a waste of water, and the misuse of water by people obtaining water records, and of a monopoly of water, it seems to me almost incredible that people should attempt to obtain redress by the rude and primitive method of taking the law in their own hands, when they have such ample recourse to the Gold Commissioner who has power to grant a reduction or cancellation of the existing water records, or an interim record entitling the applicant to the use of the water comprised in such existing record, or to modify the record in such a way as to enable the applicant to use water in the proper way for which a record is given; I give these men credit for thinking that they had some vague official approval of some kind for what they were doing although I am quite satisfied from what Mr. Fraser, the Gold Commissioner, has said that nothing he said to them justified any belief on their part that he approved of what they ultimately did. However, as I say, I give them credit for not wantonly, without colour or belief of any right on their part, destroying the

property of other people, and therefore I fix the damages at the actual amount which I find to be the damage suffered by the plaintiff Company; and I do not award anything in the nature of vindictive or exemplary damages.

Now, the plaintiff Company is also entitled to an injunction against Muirhead, Brown, Nissen, Smail and Lambert, restraining these defendants from in any way interfering with the intake, or with the ditch, or with the flow of the water into the intake and the ditch of the plaintiff Company.

I was at first disposed to think that the plaintiffs should not recover anything from Smail and Lambert. Lambert was called as a witness, and he denied any complicity in the combination which I have found to have existed among the miners generally, and I accept his statement on that head, but he and Smail did attempt to interfere with the flow of the water into the plaintiffs' ditch, and they were only restrained from that by the remonstrances of the plaintiffs' men, and in fact, the whole interference—that is, the physical obstruction which they placed across the mouth of the intake—was removed by the plaintiffs' own employees.

Under the circumstances, and in view of the fact that Lambert stated in the witness box that this was done in pursuance of what he considered his right, I think the plaintiff Company are entitled to an injunction against all of the defendants in the terms I have mentioned.

Judgment

As to the other branch of the claim, I have come to the conclusion that it is concluded by the decision of the County Court referred to in one of the paragraphs of the statement of defence. I do not propose now to discuss the question arising in the County Court action with regard to, or in respect of, priorities of the plaintiffs, or of the defendants beyond saying this, that I have no doubt, speaking for myself, I have no doubt whatever that in order to acquire a status to complain about the diversion of water, any subject—be he a free miner or otherwise—must acquire a water record, as the Water Consolidation Act now stands. My view is that the Water Consolidation Act constitutes an exclusive code on the subject of water rights in this Province. The right to the flow of the water is vested either in the Crown

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or in the holder of the water record—which is a thing clearly defined by the Act—not a vague or nebulous thing at all, but a thing clearly defined by the Act, a thing granted to an individual, or a definite number of individuals, and appurtenant to a distinct piece of property, fixing the place of diversion at a certain point and the place of return at a certain point, and providing for purposes for which the water is to be used. I say that no person not having such a record, in my judgment, has any status whatever in a Court to make any complaint about the misuse of water by the holder of a record. And I say this, that the rights of persons desiring records are amply protected, or I should say, the interests of such persons are amply protected by the section of the Water Consolidation Act which provides that upon an *ex parte* application to the Commissioner or Gold Commissioner, for leave to apply for a record, notwithstanding the existence of other records, leave may be given to the person making such application to apply for a record, and if the Gold Commissioner is satisfied that there is water that should properly be applied to other purposes he may entertain such an application, and may grant another record.

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It seems to me that there is nothing whatever in the Act to authorize the Gold Commissioner to make an apportionment in such a way that persons benefiting by this appropriation, or apportionment, shall have the right to come into Court and bring an action against another party, who is the holder of the existing water record, for misuse of water, where that apportionment or appropriation is not expressed in the water record. I do not wish to be misunderstood as saying the Gold Commissioner cannot impose conditions. The Act seems to give him the power to impose conditions; and it gives him power under certain conditions to direct the flow of water, and as regards Crown rights or Crown lands I have no doubt the Attorney-General, representing the Crown, would be in a position to enforce the provisions of the Act in those matters. The Act seems to be framed, and I think wisely framed, with a view of requiring a public record of water rights—analagous to records of similar character which we have, such as records of title to land, and records of title to mineral claims, and of timber rights, and it is a public

record which shall be open to anybody who wishes to acquire mining property, and wishes to ascertain his position with regard to water rights, as well as mining rights. That seems to be the object of the Act, and I must say, after consideration of it, the Act seems to have gone a long way towards the accomplishing of that result. I am not expressing an opinion on the particular rights, or rather the particular priorities of these plaintiffs or defendants, which matter was decided on by the County Court Judge, because my view is that the County Court Judge had jurisdiction in the proceeding before him to decide on that question. My reason for thinking this is based upon Part 10 of the Act, relating to County Courts (Sec. 133, Sub-Sec. 4), which deals with the Mining Jurisdiction of the County Court.

"In all actions of trespass, or in respect of mineral claims, or other mining property, or upon or in respect of lands entered or trespassed on, in searching for, mining, or working minerals (other than coal) or for any other purpose directly connected with the business of mining (other than coal mining) or in the exercise of any power or privilege given, or claimed to be given by this Act, or any other Act relating to mining (other than coal mining.)"

Now, this action, I think, is a personal action. It is an action of trespass on the case for damage for disturbance of an easement. That is, I mean to say, the action in the County Court, which is relied on, and therefore I think it comes within the scope of the sub-section which I have just read, reading the words in their usual and natural sense. A point has been raised in the course of the argument, which, at first, I was disposed to think would give rise to some difficulty. That is, that the Placer Act of 1891, in one of the sub-sections dealing with the jurisdiction I am now referring to, confers jurisdiction in suits relative to water rights claimed under this Act, or any other Act relating to mining. This is something which is entitled to some weight, but as I have said I think sub-section 1 of this section, read alone, would confer jurisdiction upon the County Court to deal with actions arising out of the disturbance of water rights; and I do not think that the particular reference to water rights, in the repealed sub-section should cut down the scope of the general words. Personally, I hold the view that some, at all events, of the subordinate maxims of statutory construction,

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involving presumptions arising from the method in which particular legislative enactments have been dealt with, by way of amendment, cannot fully be applied in a legislative jurisdiction where amendments are made without very careful consideration or supervision, as they are in this Province; and I think that particularly in dealing with the Mining Act, in view of the very large number of amendments to that Act that yearly receive the sanction of the Legislature, one's only safe course generally is to take the language of the particular enactment in force, or rather the particular enactment governing the question under consideration, and to read that language of course in connection with the other language of the same statute in its natural signification, and to give effect to that, notwithstanding the way in which the subject-matter has been previously dealt with by the Legislature. So far as that part of the claim is concerned—so far as the plaintiffs' action claims a declaration of priority of water rights, there will be no order.

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Mining law—Location of placer claim over lode claim—Essentials of a placer location—Application and declaration—Belief—Gold Commissioner—Powers of.

Appeal—Pleadings—Issue not raised in Court below.

A placer claim may be located on a lode claim.

A Gold Commissioner has no authority to change the entire location of a placer claim and an order to that effect made by him is null and void.

Where it is sought to sustain an appeal on an issue outside the record, on the ground that nevertheless it was an issue fought out in the course of the trial, it must, particularly in a charge of fraud, appear that the attention of the Court and the adversary was directed to the fact that such an issue was being raised otherwise a waiver of the necessity for a formal pleading will not be assumed.

Per MARTIN, J., at the trial: (1.) Upon a locator of a placer claim tendering to the proper officer the proper fee and documents, he is entitled to obtain a record for the claim, and the officer has no discretion in the issuance thereof, and where the record is not granted

to him in due course he shall, under the remedial provisions of section 19 of the Placer Mining Act, 1901, be deemed to have had such record issued to him at the time of his application therefor.

(2.) The validity of a placer mining record primarily depends upon the mere belief of the locator based upon indications he has observed on the claim in the existence of a deposit of placer gold therein.

Decision of MARTIN, J., affirmed.

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ACTION by the plaintiff Tanghe against E. M. Morgan, the Great Northern Mines, Limited, and Fred. Fraser, Gold Commissioner, for a declaration that the Shamrock placer claim as located by the plaintiff was a good and valid claim; that a certain order made 24th October, 1903, by the defendant Gold Commissioner was null and void and as against the defendant the Great Northern Mines, Limited, for an order restraining them from interfering with the plaintiff in the working of his claim and against them and Morgan for the value of plaintiff's placer gold and precious metals taken from plaintiff's said claim. The defence alleged that the plaintiff's record was obtained without his "having reason to believe that there was really a deposit of placer gold from the indications he observed on the claim." The action was tried at Rossland in December, 1903, before MARTIN, J., in whose judgment the facts appear.

Statement

MacNeill, K.C., for plaintiff.

W. A. Macdonald, K.C., and *Hodge*, for defendants.

2nd April, 1904.

MARTIN, J.: This is a mining case raising questions of novelty and importance.

On the 9th day of July, 1903, a lode claim called the Lucky Jack was validly located near Poplar Creek, and is owned in whole or in part by the defendant Morgan.

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Over two months thereafter, on the 7th of September, 1903, the plaintiff, acting in alleged exercise of his free miner's rights under the Placer Mining Act, located a placer claim called the Shamrock wholly within the boundaries of the existing lode claim.

It may be opportune to mention that this is something which has not infrequently occurred in this Province and is contem-

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plated by the Mineral Act and Placer Mining Act, which clearly recognize that there may be different mining rights on the same ground: see, *e.g.*, sections 11, 32, 37 and 129 of the Placer Act, and sections 12 and 26 of the Mineral Act. Several placer claims were in fact located on lode claims in the district in question. Placer and lode miners have frequently mined on the same ground without experiencing any difficulty, but the situation is one in which, unless the various owners act reasonably and considerately, ill-feeling and conflict may easily be engendered, and it therefore behoves all concerned to act circumspectly and openly.

On the 19th of September, the plaintiff, after preparing in due form the documents required by the Placer Mining Act, applied at the proper office for a record of his claim, and at the same time tendered said documents and paid the lawful fee and got a receipt from an officer of the Government then properly in charge, but by direction of the Gold Commissioner of the District, the defendant, Frederick Fraser, the receipt given was not written on the customary office blank, but was drawn up in an informal manner, being what Fraser described as a "private receipt," whatever that may mean. The plaintiff asked for a record of his claim, but the Gold Commissioner practically refused to grant

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it on the ground that, as the result of an examination he had made that morning of the claim with the plaintiff, he, the plaintiff, had not proved it to be a *bona fide* placer location, and therefore was not entitled to a record; and he stated that he would "hold the application over" and refer it to the Attorney-General's Department and communicate with the plaintiff later. In the meantime, he made and left in the recorder's office the following memorandum for that officer's guidance:

"Memo. for Mr. Lucas.

"This application is a subject of correspondence and is referred to the Attorney-General's Department, you will therefore be good enough to hold same over for final decision from Victoria.

"Yours obediently,

"Fred. Fraser,

"Gold Commissioner."

What fancied statutory authority the Gold Commissioner relied upon in support of this method of procedure it is

impossible to say, but none exists. On the contrary, the Act is clear that if the free miner makes application in due form to record his location, and furnishes the recorder with the application and affidavit in proper form as required by section 11 of the Placer Mining Amendment Act, 1901, and pays the fee as provided by section 27 of the Placer Act, he is, in the language of that Act, "entitled to record the same," and the right to the exclusive possession thereof is immediately vested in him under sections 31 and 32, subject to the observance of those requirements and other sections, such as 37, 38, 128 and 129.

It was the clear right, therefore, of the plaintiff at that time to obtain his record as soon as the clerk could record it, and it was likewise the plain duty of the Gold Commissioner not to interfere to prevent its issuance, for he had no inquisitorial powers or discretion in the matter. By this interference the plaintiff has suffered a wrong in not having had promptly granted to him that record to which he was entitled, and had there been no remedial statute he might have been placed in a very serious position by the error of the Gold Commissioner. But fortunately section 19 of the Placer Mining Act Amendment Act, 1901, was enacted to deal with just such cases, and it is as follows:

"19. No free miner shall suffer from any act of omission or commission or delays on the part of any Government official, if such can be proven."

It was argued that this Court could not give effect to this section, but, it may be asked, if this Court cannot give effect to it, what was the object in passing it, and by what tribunal, and when can it be put into operation? I have no doubt whatever that the section was enacted for the purpose of enabling this or any other Court having jurisdiction in mining cases to afford relief at the trial, or whenever proper, from the unfortunate consequences of an error of a Government official, and I do not hesitate to apply it here, the result being that the plaintiff must be regarded as being in the same position as though he had actually received at the time of his application that record which was his right.

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And in case it may be argued that the plaintiff did not properly represent his claim up to the beginning of the close season—the 1st of November—as required by section 38, he would be excused in this case from the performance of the provisions thereof by the operation of said section 19, because the Gold Commissioner by his illegal orders prevented him from doing so, as did also the defendant Morgan and his associates.

It is not necessary to express an opinion on the point as to whether or no the Gold Commissioner was right in the circumstances in requiring the plaintiff to give security (under section 12 of the Mineral Act or the same section in the Placer Act) for the object and in the manner and to the amount specified, because the demand was complied with and the point was not specifically raised nor argued.

Ultimately, and on the 24th of October, the delayed record was finally issued to the plaintiff which, as has been stated, should have been issued on the 19th of September, but it was accompanied by the following document:

"Mining Recorder's Office,
"Kaslo, B. C., October 24th, 1903.

"E. Tanghe, Esq.,
"Poplar Creek, B. C.

"*Re* Shamrock Placer Claim.

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"Dear Sir,—In confirmation of my conversation of this morning and acting under authority of section 128, sub-section G of the Placer Mining Act, I do now order the posts marking the easterly boundary line of the above claim, to be moved so as to mark out the westerly boundary line of said claim leaving the now west boundary the east line of said Shamrock placer claim.

"I might here state for your information that during the visit over this claim in company with Messrs. Morgan, Simpson and yourself, it became so apparent that, of the annoyance and interruptions that the 'Lucky Jack' M/C owners must undergo owing to the Shamrock placer claim crossing their lead and overhanging the Big Showing as must cause a constant source of danger to the mineral claim employees to such an extent that I have not the slightest hesitation in following up my powers and duties as Gold Commissioner in that protection due the quartz owner from the annoyance of the placer man under the circumstances of the present case.

"Obediently yours,
"Fred. Fraser,
"Gold Commissioner."

Now, the effect of this "order" was to change the whole of the plaintiff's location so that, as altered, it did not include one square inch of ground which had been within its former boundaries, in other words, under the guise of moving posts an entirely new location was sought to be created and bestowed upon the plaintiff in substitution for his original claim. It is sufficient to say that, as might be expected, there is nothing in the Act which confers upon a Gold Commissioner or any one else powers so extraordinary; and it is difficult to imagine how that officer, who must be presumed to be a practical mining man, was induced to believe he had such an autocratic jurisdiction. His real powers are, in my opinion, quite large enough already. The sub-section here relied upon is a useful one in some cases, particularly under section 24, whereby if a claim owner removes of his own motion one of his posts for an unlawful purpose, his claim thereby becomes forfeited, and it is very proper that when it becomes necessary in the course of surveying, mining, or other operations to remove posts that the Gold Commissioner should order it to be done. But that is something radically different from what he purported to do here; nor was his action justified by sub-section (*e.*) for that relates to extending, not curtailing, the limits of a claim; nor by sub-section (*f.*) for this is not a case of disputed boundaries; nor by the general section 130, because what he did was not in any way "necessary or expedient for the carrying out of the provisions of" the Act.

The so-called order, therefore, may be disregarded, because it was made wholly without jurisdiction, and is absolutely null and void, and the record stands freed from any limitations sought to be imposed thereby. The minute of the order indorsed upon the record and entered in the books of the Mining Recorder should be cancelled; it presumably has been recorded under section 13 of the Placer Mining Act Amendment Act of 1901.

In the statement of claim a charge of lack of good faith is brought against the Gold Commissioner (par. 7) and it is doubtless on that account that he is made a party defendant to the action, though no specific relief is prayed against him. While this defendant lent a too willing ear to the representations of the owners of the Lucky Jack, identifying himself too closely with

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their interests, and acted without due discretion and to a certain extent laid himself open to the animadversions of counsel, yet I hardly feel justified in going to the length of finding that he acted in bad faith between the parties. At the same time his course of conduct was undoubtedly such as to place the plaintiff in a very ambiguous and embarrassing position, whereby he was prejudiced and delayed in the exercise of his rights, and was almost forced to make Fraser a party to this action. In such circumstances, while the plaintiff is not successful, and the defendant Fraser is entitled to have the action dismissed against him, which is hereby ordered, yet his conduct taken as a whole has been such that I do not feel called upon to make an order for costs in his favour.

But though the plaintiff was entitled to have his location recorded as aforesaid, yet the validity thereof is attacked on the ground that in truth it is not a placer claim at all, though so styled, and that nothing was found on the claim to warrant the statement in the affidavit, par. 2:

> "That from indications I have observed on the claim applied for I have reason to believe that there is therein a deposit of placer gold."

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The first thing that strikes the inquirer into the Placer Act is the very indefinite nature of the affidavit on which a record is obtained. This is in marked contrast to the Mineral Act wherein the discovery of mineral in place must be sworn to (Form S, 6) and the locator cannot even invoke the remedial and curative section 16, sub-section (*g.*) unless he can prove that he has "actually discovered mineral in place on said location." But in placer claims, all that he is required to pledge his oath to is that "from indications I have observed on the claim applied for I have reason to believe that there is therein a deposit of placer gold." In the one case the fact of mineral in place must be established—*Manley* v. *Collom* (1901-2), 1 M.M.C. 487—but in the other the existence of "a reason to believe" however wildly erroneous is sufficient. This introduces an element of great uncertainty into the record, for the more ignorant and credulous a prospector is the more may he have "reason to believe" that he has found a placer claim. It is well nigh impossible to probe into a man's mind and arrive at a satisfactory conclusion regard-

ing his reason for belief in the "indications" he has observed in his claim; there is practically no means of weighing or determining such a vague issue; I have been unable to think of any method, nor have counsel been able to suggest one. It is urged that the defendant has established that this is not a placer claim at all because there is no placer ground in it, and that any prospector or miner of the most elementary knowledge could in a very short time satisfy himself of this fact beyond peradventure. Assuming all this to be the case, we get very little further, for it does not touch the one necessary element, *i.e.*, the belief. It is further argued that in the circumstances no sensible man could have thought that the claim was placer ground, and therefore it must be assumed that the act of the plaintiff was fraudulent, and that he had not the requisite belief, but simply aimed at appropriating some rich ground from a lode claim and blackmailing the owner thereof. But the difficulty is that the belief required is not that of a sensible or an honest man; the insane delusion of a criminal under the Placer Act is just as efficacious, and it would require very strong evidence, stronger than has been adduced here, to justify the Court in coming to the conclusion that the belief was entirely absent, even in the case of a locator who has acted in such a suspicious and dubious manner as has this plaintiff. The fact that under colour of a location which he thought he was entitled to to some extent, he intended to harrass and obstruct the defendant by setting up extravagant claims with the idea of being bought out, would not detract from the effect of his entertaining a belief that he had placer rights, however small or valueless in a mining sense they might be. That this was the case here I have little doubt.

This branch of the case is thus left in a manner far from satisfactory to my mind, but on all the facts I have decided to give the plaintiff the benefit of the doubt, and hold that the existence of the statutory belief as sworn to has not been disproved, the onus of doing which is upon the defendant, and it follows therefore, that the Shamrock placer claim must be taken to be a valid location.

I turn now to the claim of the plaintiff against the defendant Morgan, for the alleged wrongful conversion of gold from the plaintiff's claim.

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It appears that on the Lucky Jack there was at the time of the location of the Shamrock placer claim (September 7th), and within the boundaries of the Shamrock, an exposed free milling white quartz ledge, about three feet in width, of remarkable appearance, and running up the steep and rocky mountain side, called the Big Showing, and depicted on the photograph, Exhibit T, 12, and in the plan prepared by order of this Court by Henry B. Smith, P.L.S., dated December 28th, 1903. On portions of this ledge, when located, gold was exposed prominently and the ore was in places so valuable and easily detachable that it was necessary to keep a guard over it. The plaintiff does not claim any of such ore that was "in place," but when the Lucky Jack was located (July 9th, 1903), there were also at the side and within a few feet of and below the ledge, and particularly where it is badly faulted beneath the Big Showing (as shewn by the blue line on Exhibit T, 12) detached pieces of quartz containing appreciable values in gold to a greater or less degree; and a number of these pieces also lay on top of the faulted portion which widened out to about six feet; they lay, before being disturbed by man, in the position where they had been dislodged from the ledge by the course of nature, and the configuration of the ground is such that they must be deemed to have fallen from that ledge and none other.

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The plaintiff claims these loose fragments because he alleges that they are "float" and not "rock in place," and therefore not the property of the lode owner, but that of the placer owner.

In answer to this contention the defendant says: First, that as a matter of fact he had already gathered up and appropriated to his own use the said pieces of so-called "float" between the time of the location of his own claim on July 9th and the plaintiff's location on September 7th, and therefore he cannot be called upon to account to the plaintiff therefor; and further, that any detached fragments of gold bearing quartz which were lying on the portion of the claim in question when and after the Shamrock was located had been broken or blasted out of the Big Showing by the defendant, and therefore were his own property as coming from his lead.

Second, he alternatively contends that if these issues of fact be found against him his action in taking the said fragments is justifiable as being in pursuance of his legal rights as a lode owner.

It therefore becomes necessary to first determine the questions of fact, for however interesting the legal question may be, it would be unprofitable and undesirable to go into it if the facts were found to exclude its application to the present case.

Now, assuming that this float, so-called, could have been taken by the placer owner, the onus is on him the plaintiff to prove (1.) that it was at the time he located his claim within the limits thereof, and (2.) that it was the defendant who wrongfully converted it to his own use. The evidence to support such a charge should be precise and clear both as to time, place, and amount, but not only was the plaintiff most vague and loose in his statements, but was wholly unsupported by other evidence, or by any measurements whatever, though the importance of them has been repeatedly pointed out by this Court: see *Bleekir* v. *Chisholm* (1896), 1 M.M.C. 112; *Waterhouse* v. *Liftchild* (1897), *ib.* 153; and *Dunlop* v. *Haney* (1899), *ib.* 369.* In none of those cases were measurements more necessary than in the present where the plaintiff's lack of knowledge of the position of his own claim as regards the Big Showing and the place where the trespass complained of must have occurred, if at all, is so astonishing that he actually contended his location excluded all of the Big Showing, except the top corner (see his sketch in red on Exhibit T, 12), whereas the survey directed by the Court shews that it really included the whole of it. So striking an error in so important a point of the case, taken in conjunction with the way in which the plaintiff is flatly contradicted by several other witnesses, renders it impossible for me to place any reliance upon his statements, and even on his own evidence, unsupported, I should hesitate long before giving judgment in his favour for any amount, however small. But the defendant Morgan contradicts him and says that all the quartz he picked up after the 7th of September—the date of the location of the Shamrock—was what came from his own workings in breaking down and

* For original reports of these cases see 8 B.C. 148; 6 B.C. 424 and 7 B.C. 1 and 305.

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blasting out the Big Showing, in the doing of which fragments of quartz were shot out to a considerable distance from and below that point. In the face of this denial I find it impossible to hold that the defendant has taken anything the plaintiff would be entitled to even if his contention regarding the float were correct, and it therefore becomes unnecessary to discuss the legal point above mentioned, which, should it arise again, will doubtless be disposed of to better advantage than in this case, where more evidence from placer miners of experience should have been forthcoming to assist the Court in coming to a proper conclusion.

I have not overlooked the fact that the plaintiff also contends that in addition to said float there were boulders of quartz scattered about that undefined portion of the ground which is in dispute near the Big Showing, and which he claims as carrying gold and as appertaining to his claim. These, he says, the defendant took and prevented him from taking, and he asserts that it was one of these small boulders that he had broken and was breaking up when he was arrested. But the broken rock produced in Court does not answer his description, and he seeks to meet this discrepancy by alleging that the rock now produced has been fraudulently changed for that which he was taking off his claim. It is sufficient to say that this story is rejected, and it only serves to shew what little credence can be placed upon the plaintiff's veracity. In such circumstances it would be idle and profitless to consider further his right to these boulders, for there is nothing to satisfy me that they carry any gold value whatever, or are of any value to miners, placer or lode. Whatever they may be, they do not, on the evidence so far, appertain to the placer claim more than to the lode claim. If it is deemed desirable or worth while to test their ownership, some definite evidence, accompanied by the result of tests, should be offered so that the Court could have something certain to found its judgment upon, and not mere vague statements and loose and extravagant assertions which result in nothing except confusion.

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The plaintiff asks that the defendant Morgan should be restrained from interfering with or preventing his working his claim. This branch of the case is clear, and there is no doubt

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that the defendant has acted in an illegal manner and obstructed the plaintiff in the exercise of his lawful rights, in the belief that his location was an invalid one. It may be that there is no placer gold on the plaintiff's claim and that he is simply wasting his time and money in endeavouring to work it, but since he has a valid claim he is entitled to work it as he pleases, subject to the restrictions imposed by the Act. There will consequently be judgment in the plaintiff's favour on this branch and an injunction as prayed restraining the defendant Morgan, his servants or agents from interfering with the plaintiff in the lawful working of his claim.

The plaintiff on the whole case is entitled to the costs of the action against the defendant Morgan, less any extra costs which may have been incurred in defending the issue on which he has been unsuccessful, *viz.*, the wrongful conversion.

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During the trial the action was dismissed with costs as against the Great Northern Mines, Limited, no case being made out against that Company.

Finally, I draw attention to the expense and delay that have been caused by the neglect of either party to take measurements or prepare a plan; in cases of this nature that should always be done, otherwise the examination of witnesses is rendered difficult and uncertain, and additional expense and delay are incurred by undue prolongation of the trial.

The defendant Morgan appealed and the appeal was argued at Vancouver on the 9th, 10th and 11th of November, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

Argument

W. A. Macdonald, K.C., for appellant: Our contention is that the placer claim is bogus and was located in bad faith for the sole purpose of harrassing the holder of the quartz claim; the applicant for a placer claim must swear that he has reason to believe the ground contains placer gold and that he makes the application in good faith for the sole purpose of mining: see the Placer Amendment Act, 1901, Sec. 37, Sub-Secs. 2 and 7. Lack of the "reason to believe" and also the lack of good faith can be shewn from the surrounding circumstances.

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MacNeill, K.C.: Bad faith is not pleaded.

Macdonald: It was not necessary to plead it as the plaintiff had no record; he asked to have defects cured so he must shew that he has complied with all essentials.

"Reason to believe" means an honest reason and not one manufactured for the occasion: see *Howard* v. *Clark* (1888), 20 Q.B.D. 558 and *In re Walker* (1890), 59 L.J., Ch. 386. He referred to the evidence and contended that no reasonable miner would have considered it a placer claim and that the plaintiff would not think it was placer ground simply because he saw float exposed.

[HUNTER, C.J.: When plaintiff said to the Gold Commissioner "I want that float or nothing" I think he meant the ground under the float; he might have considered the float an indication of a placer claim. It seems clear to me that a quartz claim and a placer claim covering the same ground cannot be worked to advantage at the same time; there should be some provision whereby work on one of them should stand until the other is worked out.]

The plaintiff has no record and no title and there is no jurisdiction in the Court to grant it.

[*Per curiam:* On the record as it stands the appeal should be dismissed, but it appears that the issue of "bad faith" has not been tried.]

Argument

MacNeill: I will agree to treat it as if the question of "bad faith" had been raised and consider all necessary amendments made.

[*Per curiam*: You need not do that as you have a right to refer to the evidence to shew that there is no necessity for a new trial.]

Plaintiff found float or pieces of quartz on the ground to the value of $4,000 or $5,000 to which he was entitled under his location; float is the floe or flow from the lead; the floe of an iceberg and the flow of a lead are similar.

He referred to *Stevens* v. *Gill*, 1 Morr. 576; *Stevens* v. *Williams*, *ib.* 558, 561; *Tabor* v. *Dexter* (1879), 9 Morr. 614 and Lindley on Mines, 2nd Ed., 1903, Secs. 299 and 323.

HUNTER, C.J.: The appeal will be dismissed. I now feel satisfied that there would be no object to be gained in granting a new trial as even if we thought it right under the circumstances to allow an amendment to raise the defence of bad faith it would be an impracticable defence in view of the evidence already before us as it would be hopeless to expect a finding that the plaintiff did not *bona fide* claim a right to locate the float under the Placer Act. I will only add that I think this case signalizes the necessity for a change in the law, and that a placer claim should not be allowed to be located over a mineral claim without the previous written permission of the Gold Commissioner. It seldom if ever happens that placer gold is found in paying quantity on lode ground, and in the vast majority of cases the location of a placer claim over such ground is the act of either a deluded or a fraudulent mind and can only result in undue embarrassment to the owner of the mineral claim.

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IRVING, J.: The statute contemplates that there may be two sets of people working the same property; that is to say, that there may be placer miners and mineral miners working side by side, or one under ground, and the other on the surface. When this is taken into consideration, it will be seen that disputes are likely to arise between these two sets of people as to how their respective claims shall be worked. To obviate these difficulties, the Legislature has said matters of this kind shall be left to the Gold Commissioner, to whom most extensive powers have been given. I am satisfied that nearly all the matters which have been debated before us during the last day and a half are matters which should have come before and been settled by that officer.

IRVING, J.

I think on the pleadings there was only one issue open, that is the question of belief, paragraph 2. The question of *mala fides*, paragraph 7, was not raised on the pleadings, nor was it raised unequivocally during the evidence so as to put the plaintiff on his guard. I think that the judgment ought to be affirmed and the appeal dismissed.

DUFF, J.: I concur in the dismissal of this appeal. The ground on which the appeal is mainly based is an allegation that

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paragraph 7 of the plaintiff's statutory affidavit leading to the record of his claim is untrue. That is an allegation of fraud coupled with perjury; and upon it the defendant could only succeed *secundum allegata et probata*. Yet this charge finds no place in the pleadings; nor does it appear that during the trial it was specifically propounded; and still less that any issue involving such a charge was determined or investigated.

A case based upon such an allegation must, under the express provisions of the rules, be placed upon the pleadings—and that too, with exact particularity. The party's right to insist upon compliance with this rule may of course be waived; and waiver may doubtless be implied from the conduct of the parties at the trial.

But where conduct is relied upon as a waiver, it must, I think, be shewn clearly and unmistakably that the charge was propounded with sufficient distinctness to bring to the knowledge of the adversary the specific nature of it, as well as the fact that it was put forward as a ground of claim or defence, as the case might be; and that the adversary, not choosing to insist on his strict rights, accepted the challenge, either expressly or by shaping his case to meet it: see *Browne* v. *Dunn* (1893), 6 R. 67. Moreover, I do not think that the Court of Appeal ought to consider as a valid ground for interfering with the judgment of a trial Court an allegation of fraud not found in the pleadings—however seemingly well supported on the evidence—unless it appears that the tribunal was made distinctly aware of the proposal to raise such an issue at a stage of the trial sufficiently early to enable the tribunal to follow the oral evidence with an eye to the determination of that issue.

DUFF, J.

I only wish to add that I am not at all impressed with the suggestion that our decision will expose mine owners to invasion and disturbance by marauding locators under the colour of title to placer locations taken up with the sole object of exacting ransom. In such a case, on an issue properly framed, I cannot suppose that the Court would, under the existing law, fail to discover an appropriate and adequate remedy; but the issue which would be presented in such a case was not at the proper time raised here, and, therefore, has not been decided here.

Appeal dismissed.

SCOTT v. THE FERNIE LUMBER COMPANY, LIMITED.

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Master and servant—Negligence—Volenti non fit injuria—Inconclusive verdict—Course of trial—Parties bound by—Effect of section 66 of the Supreme Court Act, 1904—Practice.

In an action for damages for personal injuries sustained by a workman engaged in decking logs caused by the alleged negligence of defendants in supplying a team of horses unfit for the work, the jury found that the team was unfit; that the accident was caused by reason of such unfitness, and that plaintiff did not have a full knowledge and appreciation of the danger :—

Held, by the Full Court, affirming a judgment in plaintiff's favour that although the findings read alone did not establish any legal liability on the part of defendants, yet as the issues for the jury were limited to the questions submitted to them, and as defendants' negligence was treated by all parties as an inference arising from the defect charged, a finding of the existence of the defect involved a finding of negligence.

The provisions of section 66 of the Supreme Court Act, 1904, are applicable to an appeal in an action tried and decided before the provisions were enacted.

The said section has not wholly repealed the rule that a litigant is bound by the way in which he conducts his case.

The proviso of said section giving a party the privilege of having his right to have the issues for trial submitted to the jury enforced by appeal without any exception having been taken at the trial, does not give a right of new trial in cases where counsel settle by express stipulation the issues of fact for the jury or where the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass.

APPEAL by defendants from a judgment for $1,440 and costs recovered against them by plaintiff.

The plaintiff, who was in the employ of defendants, was injured while engaged in piling or decking logs. Plaintiff's usual work was swamping, but on the day of the accident he was assigned to help in decking logs, an operation carried out by means of a team of horses which haul the logs up skids on to the top of the pile where they are received by a workman who puts each log in position by means of a cant hook. As

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each log was carried to about the proper distance on the deck the man on top would call out "whoa" as a signal for the driver to stop the team. To this duty on top of the deck the plaintiff was assigned and while so engaged a log rolled on to his leg and so crushed it that it had to be amputated.

The contention on behalf of plaintiff at the trial was that the horses were unfit for the work and that the driver could not stop them; that of the defendants was that the horses were fit and that the plaintiff became rattled and let the log roll on to his leg, and that he had voluntarily assumed the risk fully appreciating the danger.

In the statement of claim it was alleged that the defendants' plant was defective and that defendants knew or ought to have known it and that in consequence of the defective plant plaintiff was injured; the particulars alleged the team to be wild, unmanageable and unfit.

On the day of the accident the teamster was sent to get plaintiff to assist in the decking.

The plaintiff in his evidence said he knew the team was unfit for decking and he told the teamster so before the accident, but beyond that he made no objection to doing the work; he gave instances of the team having been unmanageable and told of one incident which happened three weeks before in the presence of defendants' foreman.

Statement

The trial took place before IRVING, J., and a jury at Nelson.

The learned Judge in his charge to the jury in reference to the fourth question said (referring to the statements of plaintiff):

"'I had a very slight knowledge of that work—only a few hours—I knew about the team—I didn't refuse nor did I object—I didn't say I would not go—I made a slight objection to Thornton—I knew it was risky.' That is as to his knowledge of the risk.

"'The trouble was caused by the speed—this log came up faster than the others—with a steady team they would come up slowly—that is a dangerous occupation—I knew it before I went up there that afternoon.'

"Now then, a man may know things and yet not fully appreciate or recognize them—he may have the means of knowing and yet not fully recognize the danger. Did that man recognize the dangers of that place? Had it dawned on him what a dangerous business he was at? Then, did he appreciate it? Did he comprehend it? If he did why he would then have a full knowledge and appreciation of the danger. . . . The mere fact that a man continues in an employment with a knowledge of a defect which caused the injury is not conclusive evidence that the man voluntarily incurred the risk of the injury —it is a matter of fact in each case for you to decide."

The following were the questions put to the jury and the answers given:

(1.) Were the horses unfit for the work at which they were employed? Yes.

(2.) Did the accident take place by reason of such unfitness? Yes.

(3.) Did the plaintiff do anything which a person of ordinary care and skill would not have done under the circumstances or omit to do anything which a person of ordinary care and skill under the circumstances would have done? No.

Statement

(4.) Did the plaintiff with a full knowledge and appreciation of the extent of the danger he was incurring or likely to incur, voluntarily accept the risk of working on the deck? Do not think he had a full knowledge and appreciation of the danger.

(5.) Damages, if any? $1,440.

(6.) What sum is equivalent to the estimated earnings during the three years preceding the 2nd of February, 1903, by a person employed in the same grade as plaintiff during those years in the like employment within this Province? $2,160.

The appeal was argued at Vancouver on 22nd and 23rd April, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Joseph Martin, K.C., for appellants: The answer to the fourth question *re volens* is in the teeth of the evidence; there is a conflict of evidence as to the fitness of the horses and we must shew that plaintiff knew of the risk and that he accepted

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it; he referred to the evidence to shew that plaintiff knew all about the horses and contended that any additional knowledge and appreciation of the danger could not be imagined; the jury should have found that plaintiff appreciated the danger and voluntarily assumed it; a team is a part of the plant: *Yarmouth* v. *France* (1887), 19 Q.B.D. 647.

The action was wrongly launched; it does not purport to be brought under the Employers' Liability Act; the findings of the jury are inconclusive; there is no finding in regard to the matters set out in sub-sections 1 and 3 of section 7 of the Act and there is no finding fixing liability on defendants at common law: see *Griffiths* v. *The London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259. The Act has not affected the question of *volens*: *Woodley* v. *The Metropolitan District Railway Co.* (1877), L.R. 2 Ex. 384 and *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685.

Argument

W. A. Macdonald, K.C., for respondent: The defendants relied at the trial on the defence that plaintiff voluntarily assumed the risk and the jury having found against them they are bound by the course of the trial: *Nevill* v. *Fine Arts and General Insurance Co.* (1897), A.C. 68; *Waterland* v. *Greenwood* (1901), 8 B.C. 396 and *Patterson* v. *Victoria* (1899), A.C. 619.

The charge shews that the case went to the jury under the Employers' Liability Act. Plaintiff had no duty cast on him to report anything about the team as he ordinarily had no work to do with it.

As to the maxim of *volenti non fit injuria* each case must be looked at with reference to its particular circumstances: *Sanders* v. *Barker & Son* (1890), 6 T.L.R. 324 and *Williams* v. *Birmingham Battery and Metal Company* (1899), 2 Q.B. 338.

Failure to supply proper plant is in itself negligence: see *Greenhalgh* v. *Cwmamian Coal Co.* (1891), 8 T.L.R. 31; *Thrussell* v. *Handyside & Co.* (1888), 20 Q.B.D. 359 at p. 363 and *Osborne* v. *London and North Western Railway Co.* (1888), 21 Q.B.D. 220.

Cur. adv. vult.

On 22nd November, the judgment of the Court was delivered by

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DUFF, J.: This appeal is mainly based upon two grounds.

First, it was argued that the risks attendant on the employment in which he was engaged at the time he suffered the injury complained of, were wholly appreciated, and freely assumed, by the plaintiff.

To this proposition I do not assent. I do not stop to discuss the evidence in detail. It is sufficient to say that this issue—accurately presented by the learned trial Judge to the jury—was by them decided adversely to the defendant Company; and I am unable to agree that there was no evidence reasonably leading to their finding.

It was also urged, that the findings of the jury are inconclusive.

Reading them apart from the evidence, and disregarding the course of the trial, the findings do not, I think, establish any legal liability. The action is based upon the allegation that the injury suffered by the plaintiff was caused by a defect in the defendant Company's plant, arising from, or not discovered or remedied, owing to the negligence of the defendant Company, or of some person charged with the duty of caring for the condition of the plant; and in such an action the negligent act, or omission of the employer, or of the employer's delegate, is always a co-efficient of the employer's liability. Here the jury have found the existence of the defect complained of, as well as the necessary causal relation between the defect and the injury; and their verdict leaves the question of negligence untouched; and is, therefore, in itself formally inadequate to support the claim.

Judgment

To get a just conception of the effect of this verdict, however, one must not examine the findings *in vacuo*; one must view them through the atmosphere of the trial; it then becomes at once apparent that the issues for the jury were limited to the issues embodied in the questions submitted to them; and, in substance, the defendant's negligence was regarded, and treated by all parties, as an inference inevitably arising from the existence of the defect charged; a finding of the existence of the defect involving, therefore, a finding of negligence.

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It is, perhaps, needless to say that in these circumstances, but for the legislation hereinafter referred to, the rule long established, which holds a litigant to a position deliberately assumed by his counsel at the trial, would preclude in this Court any discussion of the sufficiency of the findings to support the judgment. The rule is no mere technicality of practice; but the particular application of a sound and all-important maxim—that litigants shall not play fast and loose with the course of litigation—finding a place one should expect, in any enlightened system of forensic procedure.

The application of this principle in the Courts of this Province has been restricted by section 66 of the Supreme Court Act, 1904, which reads as follows:

"Nothing herein, or in any Act, or in any Rules of Court, shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the Judge to the jury before whom the same shall come for trial, with a proper and complete direction to the jury upon the law and as to the evidence applicable to such issues: Provided also that the said right may be enforced by appeal, as provided by this Act or Rules of Court, without any exception having been taken at the trial: Provided further, that in the event of a new trial being granted upon the ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the Court."

Judgment

The first and second provisoes were introduced into the section after the trial of this action; but there can be no doubt, I think, that so far as they are applicable we are governed by them in determining this appeal: *Quilter* v. *Mapleson* (1882), 9 Q.B.D. 672.

The question is, does the first proviso so far abridge the rule above referred to as to make it inapplicable to the circumstances of this case?

One does not forget that, unless constrained by the most unequivocal language, one is not so to construe statutory amendments as to overturn fundamental principles of judicial procedure; and, without determining the precise limits of its scope, I have come to the conclusion that the proviso properly construed does not apply here.

It cannot, I think, reasonably be contended that the section in question gives an absolute right to a new trial in all cases in

which an issue of fact which proves to be relevant was not submitted to the jury. For example, it must be clear that, notwithstanding the amendment, counsel at the trial may finally settle by express stipulation the issues of fact for the jury. Nor can I perceive any sound distinction between the effect of such an express agreement, and the binding force of an agreement arising from conduct at the trial, leading the Court and opposing counsel to believe, and to act upon the belief, that the issues submitted are accepted on both sides as the only issues on which the jury is to be asked to pass. In neither case, it seems to me, do the terms of the amendment compel us to hold that the litigant, on whose behalf such a course has been taken, can be heard to say that there are other issues within the meaning of the section.

Judgment

The appeal is dismissed with costs.

Appeal dismissed.

COOPER v. THE YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED.

Practice—Striking out pleadings—Frivolous and oppressive action—Discretion of Judge in Chambers.

When a Judge to whom an application has been made to strike out a statement of claim, on the ground that it discloses no reasonable cause of action, has exercised a discretion and made an order refusing the application, that order ought not to be interfered with on appeal unless the Judge below decided the case upon an erroneous principle or omitted to take into consideration something which ought to have influenced his judgment.

Decision of MARTIN, J., affirmed.

APPEAL by defendants from that part of an order of MARTIN, J., dismissing an application for an order that the statement of claim be struck out on the ground that it disclosed no reasonable cause of action.

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In dealing with the summons in Chambers the learned Judge delivered judgment as follows:

"In this matter I have come to the conclusion that I should not be justified in striking out the whole statement of claim. It is clearly divisible into two branches, one relating to the shingles and scows and the other to the steamer Courser. In regard to the former, the case made out, if any, is weak, but I cannot say it is 'obviously unsustainable,' in view of the affidavits and exhibits which have been filed by both parties without objection, though had the case been argued on the statement of claim alone I might have taken a different view.

"In regard to the latter branch, however, the case is in my opinion, 'obviously unsustainable' and all portions of the statement of claim which seek to found a cause of action on the sale or purchase of the steamer by the defendant Company must be struck out.

Statement

"Each party being equally successful, the costs of this application will be in the cause."

The appeal was argued at Vancouver on the 13th of November, 1903, before HUNTER, C.J., DRAKE and IRVING, JJ.

Davis, K.C. (*Heisterman*, with him), for appellants.
Joseph Martin, K.C., for respondent.

Cur. adv. vult.

25th January, 1904.

HUNTER, C.J.: This is an appeal from the order of Mr. Justice MARTIN made in Chambers on a summons to stay the action on the ground that it was frivolous and vexatious. The learned Judge exercised his discretion by striking out portions of the statement of claim, but allowed the rest to remain, considering on the material before him that the cause of action therein alleged was not obviously unsustainable, and hence this appeal. It seems to me that where, as in this case, the discretion has been exercised *in favorem litis* before the defence has been delivered, an appeal is hopeless, unless the discretion exercised is obviously wrong.

HUNTER, C.J.

With respect to this particular class of application I may refer to the language of Lord Herschell in *Lawrance* v. *Norreys* (1890), 15 App. Cas. 210 at p. 219, where he says that the jurisdiction to dismiss an action on the ground that it is an abuse of the process (or, as Lord Watson puts it, vexatious and oppressive), ought to be very sparingly exercised, and only in very exceptional cases; and generally with regard to appeals from discretion, to the statement of Lord Davey, in *Hulbert* v. *Cathcart* (1896), A.C. 470 at p. 476, that

"If the learned Judge below has exercised his discretion it ought not to be interfered with by a Court of Appeal unless the Judge below has decided the case upon an erroneous principle, and has omitted to take into consideration something which ought to have influenced his judgment;"

and more generally still, to the speech of Lord Brougham in *Earl of Bandon* v. *Becher* (1835), 3 Cl. & F. 478 at p. 512, where he says,

"I do not mean to say that this is a case free from doubt, but my doubts upon it are not so strong as to incline me to advise your Lordships to reverse the judgment of the court below, for a Court of Appeal ought never to reverse the judgment of an inferior court unless quite confident that the judgment given in the court below is wrong."

HUNTER, C.J.

It is unnecessary for me to consider whether I should have arrived at the same conclusion; it is enough that I cannot say that the order was clearly wrong. There is, of course, nothing to prevent a second application being made at a later stage of the action, *e.g.*, after discovery, if the defendants are so advised.

I think the appeal must be dismissed.

DRAKE, J.: This appeal is against an order of Mr. Justice MARTIN refusing to dismiss the plaintiff's action as frivolous and vexatious. The plaintiff asks the Court to make an order contrary to the order of the Full Court on appeal with respect to two scow loads of shingle bolts; and secondly, that the defendants should be ordered to account for the value of two scows which were in the ownership of the plaintiffs as a collateral security for the payment of a promissory note for $700, which he had indorsed for Messrs. Fulbrook & Innes with the defendants. Messrs. Fulbrook & Innes did not pay the note when due, and judgment was obtained against the plaintiff. He thereupon

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instructed the sheriff to seize and sell the scows under a judgment he had obtained against Messrs. Fulbrook & Innes. Why he did so is not explained, as he was the registered owner of the scows, and this he did for his own protection, and Messrs. Fulbrook & Innes were only interested in the equity of redemption. But having done so, the sheriff sold as instructed and a claim was made by the defendants against the proceeds of the execution as they held a mortgage over the interest of Messrs. Fulbrook & Innes in them. The sheriff interpleaded, and an issue was ordered in which the plaintiff herein was plaintiff, and the defendants herein were defendants, and the result was that the defendants obtained judgment on the issue. This was in January, 1901. The plaintiff now claims that the only interest in the scows which was sold was Messrs. Fulbrook & Innes' equity of redemption, and that he is still the owner of the scows. Cooper being the plaintiff in the issue, he had every opportunity of putting forward his claim on the trial thereof, or if through inadvertence he had neglected to do so, he could have appealed. He now, eighteen months after the matter has been adjudicated upon, sets up this present claim. All the matters in dispute have been adjudicated and are now "*transit in rem judicatam.*" A plaintiff has no right to stand by and allow an action to go to judgment when he could have put forward a claim which might have disposed of the defendants' case and at a subsequent date set up this claim as a fresh cause of action. In my opinion the action should be dismissed with costs as frivolous and vexatious.

DRAKE, J.

IRVING, J.: The facts of this case are, when stripped of the surrounding circumstances, very simple.

Application was made by the defendants for a stay of proceedings under Order XXV., r. 4, or under the inherent jurisdiction of the Court. The learned Judge of first instance came to the conclusion as to one branch of the case, that the plaintiff's claim was frivolous and vexatious and therefore should be struck out, but in regard to the other branch of the case he thought that the plaintiff's case, though weak, was not obviously unsustainable. He therefore refused the application. The defendants appeal

IRVING, J.

from his refusal, so it is with that second branch of the case that we have now to deal.

It appears on the 17th of May, 1900, the plaintiff indorsed a note for Fulbrook & Innes, and received from them as security for his indorsement certain shingles and two scows. As a matter of fact these scows were purchased in the plaintiff's name, but he was holding them for Fulbrook & Innes as security for his indorsement.

The note was discounted by the defendants, who were aware of all the circumstances connected with the transaction, including the giving of the security.

Shortly after the note fell due, Cooper (suing for wages, or some cause of action quite unconnected with the note or scows) recovered a judgment against Fulbrook & Innes, and he thereupon caused the two scows to be taken in execution in satisfaction of his judgment. The defendants gave notice to the sheriff that they claimed the scows under a mortgage given to them by Fulbrook & Innes. An interpleader issue was ordered to be tried, the sheriff in the meantime selling the scows under the execution: (section 121 of the County Courts Act). Afterwards the proceeds of the scows were paid out, as I understand it, by order of the Court to the defendants.

I do not understand on what grounds that order was made. However, no appeal seems to have been taken at that time by Cooper as to the defendants' right to the proceeds of the scows. In my opinion, that would have been the proper time for him to have asserted his claim, but he allowed it to go by.

Cooper now, on the 29th of July, 1903, brings this action asking that defendants should be ordered to account to him for the value of two scows at the time of the sale, and he proposes now to litigate the question which, in my opinion, should have been determined when the application for payment out of Court was made.

There is another branch which I must also mention. The plaintiff defended the action brought by the Guarantee Company against him as indorser of the note (9 B. C. 270). In the result he was ordered, by the Full Court, to pay the costs of that action

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and certain appeals. He now asks that in taking the accounts between him and the defendants the costs of those proceedings should not be allowed to the defendants.

The question we have to determine is whether under these circumstances the learned Judge was right in allowing the action to proceed.

Speaking for myself, I think the action should have been struck out, and I have arrived at this conclusion, because it seems to me that it is a scandal to the administration of justice if this Court having determined certain questions, in one set of proceedings between the same parties, is to be called upon to decide those same questions in a subsequent proceeding in the nature of the old Bill of Review.

IRVING, J.

The only point upon which I have any doubt is whether in view of the fact that this jurisdiction being one which ought only to be sparingly exercised, and the learned Judge appealed from having in the exercise of his judicial discretion permitted the action to go on—whether under these circumstances we are justified in overturning his decision. On the whole I think we ought not to interfere with his decision, on the ground that the learned Judge exercised his discretion, and that the appeal should be dismissed.

Appeal dismissed, Drake, J., dissenting.

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REX v. LAI PING.

Criminal law—Appeal—Leave—Practice—Oath for Chinaman—Form of—Perjury—Confession—Threat or inducement—Voluntary—Judge's ruling as to—Whether open to review.

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Leave to appeal to the Court of Criminal Appeal should not be lightly granted, and the representative of the Crown should be served with a notice of motion setting out the grounds of appeal.

Quaere, whether the ruling of a Judge as to the admissibility of a confession is open to review by the Court of Criminal Appeal?

Held, on the facts, that before making his confession the prisoner was duly cautioned and that the confession was admissible in evidence although on an occasion previous to his making it an inducement may have been held out to him.

When a witness without objection takes an oath in the form ordinarily administered to persons of his race or belief, he is then under a legal obligation to speak the truth and cannot be heard to say that he was not sworn.

Perjury may be assigned in respect of statements given in evidence by a Chinaman who was not a Christian where the oath was administered to him by the burning of paper and an admonition to him "that he was to tell the truth, the whole truth and nothing but the truth or his soul would burn up as the paper had been burned."

MOTION for leave to appeal to the Court of Appeal.

The prisoner, Lai Ping, was convicted by HENDERSON, Co. J., in the County Judges Criminal Court for that on a certain information against one Yamasaki for murder, he committed perjury and he was sentenced to ten years' imprisonment.

On the preliminary hearing of the murder case before H. O. Alexander, a Stipendiary Magistrate, Lai Ping was a witness, and at the direction of the Magistrate a charge of perjury was laid against him.

The prisoner, who was not a Christian, before being sworn was asked how he swore, and intimated to the Magistrate that he swore through burning paper, and then he wrote his name on a piece of paper and burned the paper and was told "that he was to tell the truth, the whole truth and nothing but the truth or his soul would burn up as the paper had been burned." Statement

The prisoner was committed for trial on the perjury charge by the Police Magistrate for Vancouver and was taken to the Provincial gaol in New Westminster pending his trial.

On both preliminary hearings a Chinaman named David Lew acted as interpreter and Provincial Constable Campbell had charge of the prosecution on behalf of the Police. A Chinaman named Chin Toy was suspected of having suborned the prisoner to commit perjury, and for the purpose of getting evidence against Chin Toy, Campbell and the interpreter visited Lai Ping in gaol on 12th December, 1903. Campbell asked him if he had

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anything to say and he said if the Magistrate would come to him he would tell him all. A conversation then took place as to the nature of the charge against him and the punishment, and the interpreter swore that Campbell read from the Code the term of imprisonment for perjury, and the prisoner who was addicted to the use of opium and was depressed by reason of not having had any since his confinement stated that he was an old man and if he got a term of any length he would not come out alive; that he then asked Campbell for opium, but on being told that Campbell had no authority in the gaol he fell back in his chair and sighed, saying, "I don't know what to do." The interpreter then said to him "A man always gets on better by telling the truth." Campbell in his evidence said he did not think he read the Code to the prisoner, but he thought he told him in regard to punishment that the extreme penalty was life, the conversation taking place in Vancouver and not in the gaol.

Statement

On the 14th of December, Mr. Alexander, Constable Campbell, the interpreter David Lew and another interpreter who was taken along to act as a check interpreter and see that no misunderstanding occurred, visited Lai Ping in gaol and after duly cautioning him Mr. Alexander took his confession.

On the trial the confession was admitted in evidence and the learned Judge refused the request of prisoner's counsel to reserve a case as to the admissibility of the confession and also as to whether a charge of perjury could properly be laid in respect to the oath which was administered to the prisoner.

The motion came on at Victoria on 18th November, 1904, before HUNTER, C.J., IRVING, MARTIN and DUFF, JJ.

J. A. Russell, for the motion.

Maclean, D. A.-G., for the Crown, said he wished to be heard on the motion but as a copy of the record had only just been handed him he was not ready.

Argument

As to the practice in granting leave to appeal IRVING, J., said:

It seems to me that we should have the assistance of the Crown representative on the question of leave to appeal. It is not in the interest of justice that leave to appeal should be

lightly granted; but the matter should be fairly debated upon this application before we grant leave; otherwise we are putting hopes in the mind of the prisoner that may not be justified, and raising doubts in the mind of the public as to the certainty of the administration of the law. There ought to be ample notice from the prisoner's counsel of the application for leave to appeal stating the grounds on which he intends to proceed; that notice ought to be given to the representative of the Crown, before the application is made to this Court so that he can be in position to discuss the points raised.

MARTIN, J.: I am heartily in accord with what my learned brother IRVING has stated. I have not known any other practice. It is highly undesirable that the idea should get abroad that any one coming here can get leave to appeal lightly, and without shewing good grounds from the start on which to base his application; a contrary practice would have a lamentable effect on the administration of criminal justice.

An adjournment was then taken and the argument was continued on 19th and 21st November.

Russell, for the motion: Every oath is an appeal to the Deity; the prisoner was not a Christian and was incompetent to take an oath; the paper oath was not binding on him and the evidence shews that Chinamen generally do not consider that form of oath very seriously; he cited *Omichund* v. *Barker* (1774), Willes, 538 at p. 549, 1 Atk. 21; *Attorney-General* v. *Bradlaugh* (1885), 14 Q.B.D. 667 at pp. 696-7; *The Queen* v. *Moore* (1892), 8 T.L.R. 287 and *Nash* v. *Ali Khan* (1892), *ib.* 444. Argument

As to the confession: it was not voluntary, and should not have been admitted; to the prisoner, the Magistrate, the constable and the interpreter all of whom he had seen at the preliminary inquiries, seemed to be persons in authority; when the confession was taken the effect of the threat or inducement made by David Lew on the previous occasion had not been removed from the prisoner's mind: he cited *Rex* v. *Kingston* (1830), 4 Car. & P. 387 and *Reg.* v. *Fennell* (1881), 7 Q.B.D. 147.

Maclean, for the Crown (called on to argue as to the confession only): Only a question of law can come up on this motion; the

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question as to whether the confession was voluntary was for the Judge alone to decide and his decision on that point is not open to review. The words used by David Lew do not constitute a threat or an inducement; the confession was taken very carefully and the prisoner was cautioned by the Magistrate, so whatever took place before is of no effect: he cited *Rex* v. *Lingate* (1815), Roscoe's Cr. Ev. 12th Ed., 41; *Rex* v. *Clewes* (1830), 4 Car. & P. 221 at p. 224; *Rex* v. *Richards* (1832), 5 Car. & P. 318 and Phipson, 3rd Ed., 231.

Russell, replied.

HUNTER, C.J.: We are all convinced that nothing has been shewn why we should order a case stated on the points taken.

Speaking for myself, with respect to the first point, I think there is nothing in the objection that has been taken. When a man is called to give evidence the law requires that he must either be sworn or that he must affirm. He must take the oath unless he objects to taking it himself on conscientious grounds, or unless someone else objects that he is incompetent to take it. If either of those events happen, then the statute permits him to affirm. It seems to me that when a man without objection takes the oath in the form ordinarily administered to persons of his race or belief, as the case may be, he is then under a legal obligation to speak the truth, and cannot be heard to say that he

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was not sworn. If we were to decide otherwise we would deprive the evidence given in a Court of Justice of the most powerful and necessary sanction which it is possible to give it, namely, the risk of a prosecution for perjury.

With respect to the second point, it seems to me the question as to whether the trial Judge was right in coming to the conclusion that the confession was voluntary, is a question of law and can be reserved as such. No doubt the question as to whether or not a confession was voluntary often depends for its solution on whether or not the Judge was right in his estimate of the credibility of the witnesses, in which case it would generally happen that an appeal would be fruitless, but that makes the question none the less a question of law and capable of being reserved.

In the case at bar, if it had not been for the caution put by the magistrate before this confession was received, speaking for myself, I would have rejected it. It seems to me that the facts shew that the interpreters visited this Chinaman, who was then suffering from the effects of opium, and was in a depressed condition by reason of the withdrawal of the drug, for the purpose of extracting information about his connection with the other Chinaman who was charged with having suborned him to commit perjury. It is quite evident that such questions had the effect of involving the man and leading him to make a confession. Language was used which is susceptible of the interpretation that a threat or inducement was held out. It, however, is clearly proved that the magistrate took all the precautions possible for a magistrate to take under the circumstances. When he found that he was being requested by the prisoner to come and receive his confession, he did all that a magistrate could do, he administered the caution, and administered it in the statutory form; and took the precaution also to have two interpreters, so that no misunderstanding could occur, or any advantage be taken of the prisoner. And the only doubt I have is as to whether or not the man's mind may not have been in such a condition, from one consideration and another, that the statutory caution was a meaningless rigmarole as far as he was concerned. But I do not see how it would have been possible to do other than what was done, under the circumstances, to insure that the man was properly cautioned, and therefore we cannot say that the confession was wrongly admitted. The application must be refused

HUNTER, C.J.

IRVING, J.: I agree.

IRVING, J.

MARTIN, J.: I agree. But I would say with regard to the first point, that as I understand the expressions which fell from this Bench during the argument, the case of *Rex* v. *Ah Wooey* (1902), 9 B.C. 569, decided by myself, receives the sanction of this Court in regard to the statement therein contained as to what is the established practice in regard to the ordinary form of oath to be administered in this Court when a person of this particular race appears before it and offers himself as a witness.

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There can be no assumption of incompetency, and I quite agree with what my brother IRVING said, that the said form of oath therein referred to is the one which has been in use in this Court from legal time immemorial, and it would be simply revolutionary if we changed it now.

In regard to the second point, all I have to say is, that I think, first, there was no inducement held out, as shewn by the facts here; and, second, even if there were, it had been rendered ineffective by the magistrate's precautions.

I express no opinion, nor is it necessary to do so, seeing the view the Court takes, as to how far the powers of this Court extend, or in what way they could or should be exercised, if at all, where the magistrate refuses to state a point of law on the admission or rejection of such a confession. It is unnecessary to do so; but I am strongly of the opinion that where that point of law depends upon conflicting facts, as here, the finding of the magistrate is of the first consequence as to what facts are established by the evidence. And that is why I think in this case that the view expressed by the magistrate that he had not any doubt as to the admissibility of this evidence means that certain facts necessary to admit the confession had been established to his satisfaction. The magistrate's opinion in these matters is of considerable value to us in determining what action should be taken on a case reserved, or on a case refused to be reserved.

MARTIN, J.

DUFF, J.: I agree. I only wish to say that it seems to me impossible to lay down any general rule by which to determine whether the decision of a Judge of Assize on a preliminary question relating to the admissibility of evidence involves a question of law which may be reviewed by the Court of Criminal Appeals.

DUFF, J.

In many cases it is quite clear it would be a question of law. If the question reserved were whether or not there was any evidence upon which the trial Judge could hold that a confession was free and voluntary, that would be a question of law. On the other hand, if the decision of the preliminary question turned upon conflicting statements of fact made by witnesses, I should have thought that it was fairly clear that the correctness

of such a decision could not be raised on a question of law. I should certainly find some difficulty myself, in stating a case arising upon such a decision in the form of a question of law. Here I think we are all agreed, that a statement has been made which may have operated as an inducement to the prisoner to make a confession. On the other hand, before the confession was made, a warning was given, and apparently given with great care by Mr. Alexander, the magistrate, who took the confession. In that case the preliminary question would be, was the inducement clearly removed before the confession was made. That, I think, is a question of fact, and I am unable to state it in such a form as to make it a question of law. It follows that in the circumstances, leave to appeal should not be granted.

KING v. WILSON.

Pleading—Sale of medical practice—Covenant not to open an office—Injunction restraining from practising—Judgment not supported by pleadings.

Plaintiff brought an action alleging in the statement of claim that defendant had agreed "to refrain from practising as a physician" and that he had not ceased to practice "as he had agreed to." The relief sought was an injunction "to restrain defendant from practising." Defendant admitted that he had agreed "not to open an office nor have one for the practice of medicine."

At the trial plaintiff's evidence was directed to proving that defendant in breach of the agreement did "open and have an office," and the defendant relying on the pleadings, which had not been amended, offered no evidence.

Judgment was given restraining defendant from opening or having an office:—

Held, on appeal, that the judgment was not supported by the pleadings, and must be set aside.

APPEAL from judgment of IRVING, J., at the trial.

Statement

Both the plaintiff and defendant were physicians residing in the Village of Ladner, and in November, 1902, they entered into an agreement in writing as follows:

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"I agree not to open an office nor have one for the practice of medicine in the Delta Municipality for a term of ten years in consideration of selling to A. A. King my property in the Village of Ladner for the sum of $3,000 cash, of which has been paid $100 at this time, $2,900 still due." The agreement was signed by defendant.

Plaintiff commenced an action against defendant and by his statement of claim alleged that defendant had agreed "to refrain from practising his profession of physician and surgeon in the said municipality of Delta for a period of ten years with the exception of completing the cases which he was then attending and the privilege of being allowed to be called in for consultation by other physicians practising in the said district," and that defendant had not ceased to practise "as he had agreed to," but on the contrary continued to practise in contravention of the said agreement. The relief claimed was an injunction restraining defendant from practising in said district and an inquiry to assess damages.

The defendant in his defence set up and relied on the agreement set out above as being the only one ever entered into between him and plaintiff. This agreement was as a fact the only one entered into. The balance of the purchase money was paid and the property was conveyed to plaintiff's wife. Defendant moved with his family into a house on the opposite side of the street.

Statement

The following is in part the judgment of the learned trial Judge:

"It appears to me it is abundantly clear that Dr. Wilson did open an office and he did keep an office in the Delta Municipality. I think there was a clear breach of that agreement on his part. I think that in construing that document it should be construed strictly. It was quite open to Dr. Wilson if he had wanted other terms imposed to have stipulated for those other terms and it is not at all clear that Dr. King would have agreed to them. What Dr. Wilson said was "I will not open an office nor will I keep one open." Under those circumstances I think, there having been a clear breach, that Dr. King is entitled to damages and an injunction.

"I shall now refer to one or two things that were mentioned in the argument for the defence. So far as I can see, having regard to the size, situation and population of the municipality of Delta and the population in that place, there is nothing contrary to public policy in this arrangement. With regard to the acts of acquiescence I think it must be borne in mind that there are many things which can explain those acts of acquiescence. In the first place, Dr. Wilson was still the health officer, in which capacity he would exercise a certain amount of supervision of the municipality. I presume he was not completely bound to give up all practice, nor was he prevented from advising, having made that stipulation as I have already mentioned. Further than that, the plaintiff would I think very naturally expect to have introductions at the hands of Dr. Wilson, and beyond that again, there was a certain amount of professional courtesy which must not be overlooked. I say that I do not think that any of these acts done or permitted by Dr. King were of such a nature as would amount to acquiescence and relinquishment by him of the benefits he was to receive under this contract. It has been said that nothing can be more difficult to assess than damages in a case like this. I think it is a very great difficulty to assess damages, and I should be very uncertain how to do it myself, but the main thing is the injunction. That, I think, the plaintiff is entitled to. If the plaintiff desires to pursue his claim for damages, he can have a reference.

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"There is one point that *Sir Charles Tupper* particularly drew my attention to, and that is that the plaintiff having in his statement of claim put a wrong meaning to this instrument of the 7th of November—that is to say, having claimed it was an agreement not to practise—he cannot go on now and make a case of opening and having an office. I do not see how that can be. The object of pleadings is to bring the case to Court, and afterwards they are shaped more or less by the evidence and the facts that are adduced there."

By the judgment the defendant was restrained from opening or having an office for the practice of medicine in the municipality of Delta for ten years from 7th November, 1902.

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The appeal was argued at Vancouver on 8th and 9th November, 1904, before MARTIN, DUFF and MORRISON, JJ.

Sir C. H. Tupper, K.C., for appellant: The issues raised by the pleadings must be adhered to most strictly in an injunction case; here we met the case as alleged; we could and would have given evidence if the case alleged against us had been the one on which the judgment proceeds; the agreement not to open and have an office means not to have a regular known place for patients: he cited *Hipgrave* v. *Case* (1885), 28 Ch. D. 356 at p. 361; *Butts* v. *Matthews* (1836), 5 L.J., Ch. 134 at p. 136; Kerr on Injunctions, 4th Ed., 564-5; *Gophir Diamond Company* v. *Wood* (1902), 1 Ch. 950; *Robertson* v. *Buchanan* (1904), 73 L.J., Ch. 408 and *Apothecaries Company* v. *Jones* (1893), 1 Q.B. 89.

Argument

Davis, K.C., for respondent: The effect of the agreement was pleaded and that there was a breach of the agreement; there was only the one agreement and no other was ever mentioned; the defence knew there was no other in question and the defendant did not give evidence. What is practising and what is having an office will differ in different cases but on the facts here the two are about the same. It is shewn the defendant was doing nearly the same as before the sale and he must be held to have an office.

Cur. adv. vult.

On 22nd November, the judgment of the Court was delivered by

MARTIN, J.: While unable to say that the learned trial Judge on the evidence before him, without contradiction or explanation by the defendant, was not justified in finding that the defendant did in breach of the agreement "open and have" an office, yet that is not the case set up by the plaintiff in his statement of claim. What he therein complains of is that the defendant "continued to practise" (par. 3) in contravention of an alleged agreement to "refrain from practising," except as to incompleted cases and consultations (par. 2). But, as is admitted, there never was an agreement to "refrain from practising," and the defendant in his defence sets up and relies upon an

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agreement not to open an office as being the only one ever entered into between the parties. The plaintiff admits this, but by a strange oversight did not ask for any amendment to his pleadings, and allowed the trial to proceed and judgment to be given in his favour on the record with this manifest defect in it. The defendant takes the position that the judgment cannot be supported as the record now stands, while admitting that the plaintiff could at the trial have readily obtained the necessary amendment. But because he did not the defendant called no evidence and allowed the case to go to judgment upon a false issue, relying on the said technical omission to render it inoperative. There was nothing, I should say, in the defendant's conduct at the trial which disentitles him to take this position of adhering to the issues raised on the record, bearing in mind the fact that the question of practising or not was one of degree only, because it was admitted on the pleadings and at the trial that the defendant was entitled to practise to the certain limited extent before mentioned. Had the amendment been made the defendant's counsel would, he assures us, have called evidence to meet the real issue, *i.e.*, the question of opening and having an office.

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It is urged by the plaintiff that to refrain from so keeping an office is tantamount to refraining from practising, and therefore the pleading is broad enough to cover both expressions, but while in certain circumstances it may be, yet it is not inevitably so, and certainly the terms are not synonymous in the case at bar, and I can well understand that evidence might have been called in regard to the one expression that would be unnecessary and inapplicable to the other.

It is unfortunate that the ambiguity was not promptly cleared up at the trial by an amendment, but we have to deal with the situation as it is, and I have come to the conclusion that the proper course to adopt is for this Court now to give that leave for the necessary amendment to be made which should have been made at the trial, this to be done within one week, and if it be done, then a new trial shall be had, and the costs of this appeal must be paid by the plaintiff, and the costs of the former trial to be costs to the defendant in any event. If the amendment

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be not accepted, then this appeal will be allowed with costs and the action dismissed with costs.

The result is to be regretted, as is also the fact that these two doctors did not, when they essayed to draw up a legal instrument dealing with a situation of some nicety, procure legal advice. This is but another illustration of what unfortunately results when unskilled persons try their prentice hand upon documents which should be drawn by qualified practitioners.

Appeal allowed.

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REX v. AHO.

Criminal law—Exclusion of jury during inquiry as to admissibility of dying declaration—Comment on prisoner's failure to testify—What amounts to —61 Vict., Cap. 31, Sec. 4, Sub-Sec. 2.

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The jury should not be excluded during the preliminary inquiry as to whether certain evidence is admissible as a dying declaration.

A prisoner at his trial has the option of making a statement not under oath or of giving evidence under oath.

A direction to the jury that an accused has failed to account for a particular occurrence, when the onus has been cast upon him to do so, does not amount to a comment on his failure to testify within the meaning of section 4, sub-section 2 of Cap. 31 of the Canada Evidence Act, 1893.

MOTION for leave to appeal to the Court of Criminal Appeal.

The prisoner was charged with manslaughter. The facts were that during the evening of 22nd November, 1903, the prisoner and one Johnson and several other men were drinking and fighting in a lodging house in Michel. Prisoner and Johnson got in a scuffle and while clinched disappeared into the darkness outside.

Statement

In a few minutes prisoner went back into the house and said "It is ready, I saw him fall to the ground," and shortly after Johnson followed having blood on his nose and a bruise on his forehead which it was ascertained was crushed in and from the

effects of which he subsequently died. No explanation could be given at the trial as to what was meant by "It is ready."

At the trial the Crown sought to prove a dying declaration made by Johnson but it was ruled out. It appeared that in the cross-examination of the witness in reference to it parts of the declaration were read in the presence of the jury by counsel in cross-examining but the Judge came to the conclusion that the declaration was not admissible.

Witnesses for the Crown swore that Johnson after coming inside pointed to the accused and said "that man hit me," and that the prisoner promptly said he did not.

No evidence was given on behalf of the defence nor did the prisoner make any statement not under oath.

Counsel for the Crown in his charge to the jury said "the prisoner knows who struck the blow, there is no question about that."

In his address to the jury, MARTIN, J., said in part:

"Therefore, gentlemen, you will see that it is established that manslaughter has been committed. Then the question is, by whom? Now the Crown says that the accused is the person who must be regarded by you as having committed this offence, for the reason that he is shewn to have been with the deceased at the time this fatal injury was inflicted, and the Crown says that he has not satisfactorily accounted for his absence with the deceased in the dark and during the period when this injury was admittedly inflicted.

Statement

"You have got one man who heard 'it is ready,' and another man who heard the explanation of how it was ready 'because he saw him fall to the ground.' Now if that man saw the deceased fall to the ground the Crown asks you to believe that he was there, and if he was there and saw the man fall, it is for him to account for it."

The questions asked to be reserved and which were refused were:

Should the jury have been excluded while the application was made to introduce as evidence at the trial the so-called dying declaration? and whether comment was made to the jury on

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the failure of the accused Aho to give evidence by the learned Judge, or by the counsel for the prosecution in addressing the jury?

The motion came on for argument at Victoria on 18th November, 1904, before HUNTER, C.J., IRVING, MARTIN and DUFF, JJ.

A. E. McPhillips, K.C., for the prisoner: At the trial stress was laid on the contention that the prisoner was the only one that could give an account of the crime and the language of the charge may very well be taken as a comment on the prisoner's failure to go in the witness box and give evidence.

[HUNTER, C.J., and DUFF, J.: A prisoner can make a statement.

IRVING, J.: It is every day practice to tell an accused who is undefended that he can either give evidence or make a statement.

DUFF, J.: But the usual way is to give evidence and a jury would be more familiar with that than with making a statement.]

Argument

He cited *Reg.* v. *Corby* (1898), 1 C.C.C. 457 and *Reg.* v. *Coleman* (1898), 2 C.C.C. 523.

The jury should have been excluded during the inquiry as to the admissibility of the dying declaration; they heard certain parts of it and it may be that it had a great deal of weight with them; the preliminary proof of a dying declaration must be most exact, but here the declaration was in and then thrown out: he cited *Bank of B. C.* v. *Oppenheimer* (1900), 7 B.C. 448 and Roscoe's Cr. Evidence, 32.

Maclean, D. A.-G., for the Crown, was not called on.

HUNTER, C.J.: The Court finds it unnecessary to call upon the learned counsel for the Crown.

HUNTER, C.J.

The only point on which any stress is really laid by the learned counsel for the accused, is the question as to whether there was what amounted to a comment on the part of the learned trial Judge, on the failure of the accused to testify. For my part, I am clearly of the opinion there was not. In my opinion, to hold that a direction to the jury that the accused

has failed to account for a particular occurrence, when the onus has been cast upon him to do so, amounts to a comment on the failure to testify, would paralyze the action of the Court in the discharge of its most essential function, *viz.*: to charge the jury on all questions of law which have any relevant bearing on the case including the question as to when the onus shifts.

As to the other point, the learned counsel for the accused succeeded in shewing that the so-called dying declaration never had any existence; and as it was explicitly withdrawn from the jury there is no room for complaint on that ground.

With regard to the general question as to whether the jury should be excluded or not from a preliminary inquiry as to whether or not certain evidence tendered would be admissible, I am of the opinion that it is not incumbent on the Judge to exclude the jury during any part of a criminal trial. To my mind the jury in a criminal case, if not the most essential component of the tribunal, is just as essential as the Judge himself, and to have any evidence given in the absence of the jury might cause a mis-trial.

HUNTER, C.J.

IRVING, J.: I concur.

IRVING, J.

MARTIN, J.: I have nothing to add.

MARTIN, J.

DUFF, J.: I concur.

DUFF, J.

REX v. THERIAULT.

Criminal law—Theft—Goods exposed for sale in store—Found in possession of accused—Keys in possession of accused that would open doors of store—Negativing fact of sale—Onus of proof.

On a charge of theft of goods from a store evidence of the finding in prisoner's house of the goods and of keys fitting the store doors, and of the fact that the goods were in the store exposed for sale at the time of the alleged theft and had not been sold, is sufficient to put the onus upon the prisoner of accounting for his possession.

Under such circumstances it is not necessary for the Crown to prove that the goods had not passed from the possession of the owners by some means other than sale.

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REX v. THERIAULT

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

"The prisoner was tried at the Vernon Assizes on the 17th of October, 1904, on an indictment containing counts for shop-breaking, theft and receiving stolen goods.

"The prisoner was found guilty on the third count, which is as follows:

"(3.) And the jurors aforesaid do further present that the said Frederick Theriault, between the first day of May in the year of our Lord one thousand nine hundred and three and the fifth day of April in the year of our Lord one thousand nine hundred and four, at Kelowna aforesaid, one tobacco pouch, one Fedora hat, one black hat, one pair dark grey pants, two cans of black paint, one handle for mattock, one pair of blue overalls, two boxes of cartridges, one box of knives, one box of thread, one pair of Ames Holden shoes (leather) one razor strop, one pair of Ames Holden black leather boots, one wood rasp, one pair of black pants, five top shirts, one grey suit (youths), one pair of Arctic socks, one pair of brown canvas pants, one suit of underclothing of the goods and chattels of Lawson, Rowcliffe & Company unlawfully did steal, against the form of the statute in such case made and provided and against the peace of our said Lord the King, His Crown and dignity,"

Statement

and was sentenced to imprisonment for two years in the Penitentiary.

"It was proved that the prisoner was a shoemaker living at Kelowna, a small town on Okanagan Lake, carrying on his business in a shack having one room, variously described as of the dimensions of 10 by 10 feet and 10 by 12 feet.

"In March, 1904, certain goods were found on his premises in the course of a search by the Provincial Constable. Of these goods the following were identified as having been at one time the property of Lawson, Rowcliffe & Company, a firm carrying on the business of general merchants in Kelowna, the identification based on certain marks found upon tickets attached to the goods, which were the cost marks of the firm and were shewn to

be in the handwriting of various members of the firm: Box of penknives, box of thread, Fedora hat, one black hat, six keys, one small file and skeleton key, and numerous other articles (setting them out in detail.)

"The members of the firm stated that two of these articles, namely, exhibits 1 and 2 had not been sold to the prisoner or to anybody else. In cross-examination they admitted that this statement was based, to some extent, upon the fact that such articles were not sold by or bought from them in the original package, or packed in the way in which the exhibits appeared as they were found.

"With respect to the other articles, the members of the firm all swore positively that they had not sold any of them to the prisoner; but they were unable to say that they had not been sold to anybody else.

"There were also found in the prisoner's shack, on a bracket covered by a piece of brown paper and a piece of leather—which covering was held down by an empty can placed on one edge of the leather—the keys and the instrument, marked respectively exhibits 21, 22 and 23. It was shewn that one of these keys opened a lock on the front door in the shop occupied by this firm prior to the beginning of December, 1903, and that another of them opened the lock in a side door of the premises occupied by the firm from the last mentioned date down to the present.

Statement

"Part of the goods in question when found in the prisoner's shack were in a small packing case, loosely covered by a lid resting on top of the case, but not fastened to it, placed under a table in one corner of the shack. The remainder of the goods were found wrapped up in a parcel, placed on a shelf on one side of the shack behind a curtain.

"None of the articles in question was ever missed by the proprietors of the shop and, at the trial, the proprietors were unable to say—except from the marks before-mentioned by which the goods were identified—that any of the goods had ever been in their possession.

"It appeared that goods of the character of exhibits 1 and 2 had not been carried by them in stock prior to the beginning of

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December, 1903, and there was no evidence to shew when they were removed from their place of business.

"The prisoner's shack is about 200 yards from the prosecutors' shop and the prisoner had been living in Kelowna working as a shoemaker for about five years.

"The defence adduced no evidence and there was no explanation on the evidence of the fact that the goods were in the prisoner's shack.

"The testimony for the Crown did not expressly negative the possibility that exhibits 1 and 2 had passed from the prosecutors' possession by means other than sale—by gift, for example; nor did the evidence shew whether the shack was open to public access or was locked up when entered by the officers for the purpose of the search which resulted in the discovery of the goods, the prisoner being then in custody on another charge; nor was there any evidence to shew how long the prisoner had been absent before the search or the usual means or absence of means of access to the shack in the absence of the prisoner.

"I did not find that the goods were in the exclusive possession of the prisoner, but I told the jury that if they were satisfied on the evidence that exhibits 1 and 2 had been stolen from the pro-

Statement

secutors' shop by somebody and if they were satisfied, from the place in which the goods were found, that the goods had been placed there by the prisoner and that his personal possession of them was the only reasonable explanation of their being found there, then the onus was on the accused to account for his possession of them; and, in the absence of some reasonable explanation of his possession they might find him guilty of theft.

"I also told them that if they were not satisfied the prisoner was guilty of theft, there was nothing on the evidence to indicate these goods had been stolen by anybody else, as the only persons appearing from the evidence as having had access to the shop were the three prosecutors and the prisoner; and it would be unsafe for them, in such circumstances, to convict of receiving the goods with the knowledge of the fact that they were stolen.

"The question reserved for the consideration of the Court is:

"Was there sufficient evidence of the theft of the goods in question; and, was the prisoner's exclusive possession of the

goods sufficiently established to put upon the accused the onus of accounting for possession ?"

The question came on for argument at Victoria on the 18th of November, 1904, before HUNTER, C.J., IRVING, MARTIN and DUFF, JJ.

Maclean, D.A.-G., for the Crown: The exhibits 1 and 2 consisted of a box containing four penknives and a box of spools of thread; the jury would attach weight to the circumstance of the prisoner's having such things in such a quantity; the prosecutors did not sell them to the prisoner and they did not sell them to any one else in the way they were found, *i.e.*, done up in boxes. The prisoner had the goods and had the means of getting into the store and hence the onus was on him to explain: he cited *Rex* v. *Watson* (1817), 2 Stark. 116 at p. 139.

Argument

No one appeared for the prisoner.

The judgment of the Court was delivered as follows by

HUNTER, C.J.: I see no error whatever in the trial.

With regard to the first question, in order to make out a *prima facie* case, it was quite sufficient for the Crown to have shewn that these goods were in a place exposed for sale at the time of theft and that the owner had not sold them, and it was not necessary for the Crown to negative such hypotheses as that the owner had not given them away, or that some child might have taken them, etc.

As to the question of possession, it seems to me that my learned brother put the matter in as fair a light as possible for the accused. I would perhaps have put it differently; I would have suggested to the jury to first settle the question as to whether or not the goods had been stolen, and then to consider the question as to whether the possession of the prisoner was his exclusive possession, and if they considered that his possession was exclusive, that then there was an onus cast upon him to account for the possession. I think that the charge of the learned Judge has, if anything, put the matter in a more favourable light for the accused.

Judgment

The conviction is affirmed.

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RICHARDS v. WILLIAMS *ET AL.*

Practice—Judgment obtained by fraud—Fresh action to set aside judgment—Pleading—Fraud—What amounts to allegation of.

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Where a judgment has been obtained by fraud, the Court has jurisdiction in a subsequent action brought for that purpose, to set the judgment aside.

Plaintiff sued to set aside a judgment recovered against him and alleged in the statement of claim "the plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action as defendants well knew at the time":—

Held, dismissing an appeal from the order of DRAKE, J., dismissing the action

Per HUNTER, C.J.: Fraud was not alleged in the statement of claim.

Per MARTIN and MORRISON, JJ.: Fraud was alleged—but

Per MARTIN, J.: There was no positive averment of the recovery of judgment against plaintiff which was essential.

Decision of DRAKE, J., affirmed, MORRISON, J., dissenting.

APPEAL from an order of DRAKE, J., made 18th February, 1904, whereby the plaintiff's action against Robert T. Williams and Joseph Sears was dismissed on the ground that no cause of action was disclosed in the statement of claim.

The statement of claim was as follows:

"(2.) The defendant Robert T. Williams is a civil servant and merchant, and the defendant Joseph Sears is a painter and paper hanger, both in the Province of British Columbia.

Statement

"(3.) On or about the 27th day of May, 1893, the defendants with one other Henry Saunders indorsed for the accommodation of the plaintiff a certain promissory note for the sum of $3,000 bearing interest at the rate of 12 per cent. per annum.

"(4.) At the time of such indorsement the plaintiff gave security to the said indorsers in the event of the indorsers being called upon to pay said promissory note as aforesaid. Such security being by way of life insurance policies upon the life of the plaintiff, which said policies were assigned in writing to the

defendants and the said Henry Saunders by the plaintiff as the indorsers aforesaid.

"(5.) Shortly after the making and before maturity of the said promissory note so indorsed the plaintiff being then unable to retire said note so informed said indorsers, and requested them to realize on the then surrender value of the policies of insurance and pay the note.

"(a.) The then surrender values of said policies were nearly equal to the amount of said promissory note.

"(6.) The indorsers of said promissory note other than the defendant Robert T. Williams were agreeable to such proposal, but the said defendant Robert T. Williams by arrangement with the plaintiff agreed to take over the said policies absolutely himself at their then surrender value as an investment in his, the defendant Robert T. Williams' behalf, and to pay said note and relieve the plaintiff therein of any responsibility thereon up to the amount of such surrender value of said policies.

"(7.) The defendant Robert T. Williams did not pay the said note as agreed and subsequently became embarrassed financially and was unable to carry the said policies, and the same were disposed of by or on behalf of the defendant Robert T. Williams at a sum less than the surrender value of the same at the time of the maturity of the said note as aforesaid.

Statement

"(8.) Thereafter the defendant Robert T. Williams knowing full well that the plaintiff was embarrassed financially, absent from the Province, and unable to protect himself in the premises, falsely pretended that the plaintiff was indebted on a balance due on account of the said promissory note and together with the defendant Joseph Sears procured a judgment in that behalf in the Supreme Court of British Columbia.

"(9.) The defendants also procured the arrest of the plaintiff upon capias proceedings, which said proceedings were subsequently set aside by a Judge of the Supreme Court of British Columbia, and owing to said arrest the plaintiff suffered damage.

"(10.) The plaintiff believes and charges the fact to be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-indorser was satisfied and discharged either

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prior or subsequent to the institution of said action as defendants well knew at the time.

"The plaintiff claims:

"(1.) A declaration that the said judgment should be set aside.

"(2.) Alternatively a declaration that the said judgment has been satisfied.

"(3.) A declaration that the defendant Robert T. Williams has received for and on account of the original policies aforesaid a sum equal to the surrender value of the said policies of insurance at the time of the maturity of the said note as aforesaid.

"(4.) An account of all monies paid out or received by defendant in connection with said promissory note and insurance policies.

"(5.) Costs of this action and such further and other relief as the nature of the case may require."

The judgment referred to in the statement of claim was signed on 29th January, 1895, in default of appearance by defendant and in the affidavit of service the deputy sheriff swore that he served the writ on Richards on Monday, 21st January, 1895.

Statement

On 9th December, 1903, the plaintiff commenced an action to have the said judgment against him set aside. In the indorsement on the writ fraud on the part of defendants was not charged and before the delivery of a statement of claim that action was dismissed, on an application to HUNTER, C.J., on the ground that the relief sought was properly the subject of an application in the original action.

Plaintiff then commenced this present action, the claim indorsed on the writ being to have the judgment set aside on the ground that it was obtained by fraud.

The appeal was argued at Victoria on 11th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

W. J. Taylor, K.C. (*Twigg*, with him), for appellant: We charge fraud in the obtaining of the judgment without ever having served the writ; it is a fraud upon the Court.

[HUNTER, C.J.: Where is fraud charged in the pleadings?]

We allege writ was never served and that judgment was obtained by defendants well knowing it: *Flower* v. *Lloyd* (1877),

6 Ch.D. 297. If facts alleged constitute a fraud then fraud is alleged: see *Thom* v. *Bigland* (1853), 8 Ex. 725 and *Davy* v. *Garrett* (1878), 7 Ch.D. 473 at p. 489.

Oliver, for respondents: It does not follow from the allegations made that fraud is the gist of the action, and if facts alleged are consistent with innocence fraud will not be inferred; fraud must be set up clearly and definitely; he cited Daniell's Chancery Practice, 1,291-2; *In re Rica Gold Washing Co.* (1879), 11 Ch.D. 36; *Wallingford* v. *Mutual Society* (1880), 5 App. Cas. 685; *Cole* v. *Langford* (1898), 2 Q.B. 36; *Birch* v. *Birch* (1902), P. 130; *Baker* v. *Wadsworth* (1898), 67 L.J., Q.B. 301; *Patch* v. *Ward* (1867), 3 Chy. App. 203 and *Wyatt* v. *Palmer* (1899), 2 Q.B. 106. Argument

Taylor, in reply, referred to the judgment of Lindley, L.J., in *Wyatt* v. *Palmer*.

HUNTER, C.J.: I think the judgment is right, and that the appeal ought to be dismissed.

The statement of claim develops two complaints, according to Mr. *Taylor* (I say according to Mr. *Taylor*, because I do not see that the allegations are sufficient), that is to say, the complaint that the judgment in question was recovered by fraud, and, in the alternative, that the debt is satisfied.

As to the latter complaint, there is no doubt whatever that a full and sufficient remedy could have been given on a summary application in the original action. There is no doubt the ground could have been taken that the judgment has been satisfied, or certain transactions had in respect of the judgment that would amount to satisfaction. The only ground upon which this action can be supported is that the judgment was recovered by fraud. HUNTER, C.J.

It is a well-settled rule that allegations of fraud must be positively and distinctly stated so that there is no ambiguity or liability of misunderstanding; they must not only be precise, but the material facts upon which the plaintiff relies as constituting the fraud must be clearly set forth.

Now, the only paragraph in this statement of claim that I can see bearing on the question of fraud is paragraph 10, in which it is stated that "the plaintiff believes and charges the fact to

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be that no service of the writ of summons in the said action was ever made upon him, and that the said liability of the plaintiff to defendants and co-indorser was satisfied and discharged either prior or subsequent to the institution of said action as defendants well knew at the time." Now, that allegation as it stands is ambiguous, because it is impossible to say whether the expression "as the defendants well knew at the time" is intended to apply to the first or second statement in the paragraph, or to both. To say that the mere fact of no service of the writ of summons—or any other proceeding in the action, for that matter—is sufficient to sustain an allegation of fraud, is absurd. The cause of action is that the judgment has been recovered by fraud, and not that some particular step taken in the suit was irregular or improper or was not taken at all. It is quite consistent with the statement that there was no service of the writ, that it was served on Sunday, or that there was insufficient or irregular service, as, for instance, by leaving the document in the room where the defendant was at the time and not handing it to him personally, or something of that sort.

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And it is evident that, for anything stated in that paragraph, all irregularities, if there were any, might have been waived and that the present plaintiff might have allowed the judgment to go without objection.

A significant fact, I think, also, is, that the prayer in the statement of claim does not ask definitely and positively that there should be a declaration that the judgment was recovered by fraud. And that to my mind points to the conclusion that the allegations in paragraph 10 were not intended to go so far as to charge fraud in the recovery of the judgment but were left open to a double interpretation.

In my opinion there is no class of action in which the rules relating to allegations of fraud ought to be more rigidly enforced than in an action of this character.

MARTIN, J.

MARTIN, J.: I am of the opinion also that this appeal should be dismissed, and the judgment of the lower Court affirmed but on a somewhat different ground from that mentioned by my Lord; *viz.*, I find that the positive averment of the recovery of

judgment against the then defendant is wanting, though it is the averment upon which the whole case turns; because, unless the judgment was recovered against this particular person then the charge of fraud is at an end.

And, at first, I may say that I also took the view expressed by my Lord in regard to paragraph 10, that in any event it does not set up a charge of fraud properly because of the ambiguities suggested by the alternative statement in the latter part of the paragraph, "either prior or subsequent to the institution of said action." However, on further consideration, I am of opinion that it may be that the words "as defendants well knew at the time" apply to the former part of the paragraph as well as the latter. But I must say that I realize it is quite open to others to take a contrary view to mine on that matter for the whole pleading is slovenly.

It strikes me as being a remarkable thing that though the paragraph says, taking it at its best, that there was no service of the writ, nevertheless it does not state what always was necessary to be stated under the former practice and is under the present one when an application is made in Chambers to set aside a judgment on this ground (and I see by reference to Archbold's Practice, to which I referred this morning, that the application should be made in Chambers), *viz.*, you must not only shew that you were not served with the writ, but that it did not come to your knowledge or notice, otherwise the irregularity will be deemed to have been waived, especially after a long period has elapsed. Now there is no averment in that paragraph other than that the writ was not served, and it is quite consistent with what is alleged that even if it were not served the defendant had notice thereof, which is tantamount to the same thing in law, and therefore there would be no fraud and the judgment should stand. In my opinion, in such cases as the present, this averment must always be made for it really is the whole gist of the allegation, because if there was notice then there was also waiver of actual service, and here the judgment now attacked for the first time, was recovered some nine years ago.

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MORRISON, J.: I regret that I cannot read paragraph 10 in the way in which the majority of the Court seem to read it. I think the matter savours of fraud, and coming down to paragraph 10, that allegation it strikes me is specific. I think there is a sufficient cause of action shewn and that the appeal should be allowed with costs.

Appeal dismissed, Morrison, J., dissenting.

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JOHNSON v. APPLETON.

Commission agent—Sale of land—Special agreement as to remuneration—Findings of fact—Reversal where evidence not taken in shorthand.

Defendant commissioned plaintiff to sell his house and lot and agreed to pay five per cent. commission: plaintiff offered it to R., the tenant who paid the rent to plaintiff as agent for defendant, who did not want to buy at the time: defendant became dissatisfied at plaintiff's not being able to sell and told him he was going to put the property in other agent's hands for sale, but not withdrawing it from plaintiff's, and that his price was $3,000 net, and whoever sold it was to look for remuneration to what he could get a purchaser to pay above that sum: another agent sold to R. for $3,150, defendant realizing $3,000:—

Held, affirming HARRISON, Co.J., that plaintiff was not entitled to commission in respect of the sale.

Observations on reversing a finding of fact on a trial in which the evidence was not taken in shorthand.

APPEAL to the Full Court from the following judgment of HARRISON, Co. J., in the County Court of Victoria:

"The plaintiff who is a house and land agent sues the defendant for $157.50, being commission at five per cent. on $3,150, the sum for which defendant sold his (defendant's) house and lot. The commission claimed is the usual agent's charge or commission where such agent has effected a sale of real estate. The plaintiff did not sell the defendant's property, but claims full commission under the following circumstances:

Statement

"The plaintiff had been defendant's agent for the collection of rent for the property in question for some 11 or 12 years prior

to the defendant's selling it. The plaintiff during that time was also authorized by defendant to sell and if he effected a sale was to receive five per cent. commission on the price at which it might be sold. Though he did not effect a sale, the plaintiff claims that through his efforts the Rev'd Mr. Rowe who in 1903 became tenant of the property for a year, subsequently purchased it from the defendant at the price of $3,150.

"Mr. Rowe was called on behalf of the plaintiff, but he does not bear out the plaintiff's statement that on becoming a tenant, he, after the property had been offered for sale to him by plaintiff, told the plaintiff he would more than likely purchase it later on during the tenancy. On the contrary, Mr. Rowe swears that he had no intention on renting the place of purchasing it. His affairs were too unsettled to purchase, nor did he say anything to the plaintiff about purchasing it.

"I find that the defendant not being able to effect a sale through the plaintiff, in August, 1903, told him he was dissatisfied and that he was going to put the property in other agents' hands for sale. That his price was $3,000 net, and whoever sold it was to look for remuneration to what if anything they could get a purchaser to pay above that sum. I find the defendant did put the property in other agents' hands for sale, among them Mr. Brown, on the terms last mentioned.

"Stress was laid by the plaintiff on his version of the conversation with Mr. Rowe previous to Rowe's tenancy. He also claims that he was handling the property all along on the understanding that if it was sold he was to get five per cent. commission. But I have arrived at the conclusion that Mr. Rowe's version is correct and that the plaintiff did not in any way conduce to the sale, let alone bring it about. And I think that the plaintiff's statement that if he found a purchaser at the price of $3,000, he was to get no commission, bears out the defendant's statement that the agent who sold was to look for remuneration or commission to whatever was obtained for the defendant above $3,000. As a matter of fact, however, Mr. Rowe was not the purchaser of the property. It was purchased by Mrs. Rowe, in May, 1904, and she purchased, not through the plaintiff, but through Mr. Rowe and Mr. Brown, who each received $75—$150

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for their trouble. She paid $3,150, and the defendant when he gets the money, will receive $3,000 net.

"Under the circumstances, I do not see how the plaintiff is entitled to any commission or remuneration in respect of the sale.

"Judgment for defendant with costs."

In addition to the facts stated in the above judgment, it appeared that before Appleton placed the property in other agents' hands for sale, the plaintiff told him that he had offered it to Rowe.

On the 4th of August, 1904, Brown wrote defendant as follows:

"F. Appleton, Esq.,
"City.

"Dear Sir,— *Re* your premises, Michigan Street.

"I have been instructed by the Rev'd Rowe to make you the following offer of purchase:

"Price	$3,150
"Cash on acceptance	$ 350
"Cash Aug. 15 or Oct. 15	300
	$ 650
"Mortgage at 5 per cent	2,500
	$3,150

"Mortgage reduceable $250 per year.
"Interest payable quarterly.
"To insure against fire for $1,500

"Yours truly,
"P. R. Brown."

Statement

The appeal was argued at Victoria on 13th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Frank Higgins, for appellant, stated the facts and contended that plaintiff had introduced the purchaser and was entitled to the commission citing *Toulmin* v. *Millar* (1888), 58 L.T.N.S. 96; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139 and *Steere* v. *Smith* (1885), 2 T.L.R. 131.

Argument

The Court called on

J. H. Lawson, Jr., for respondent: The fact that the plaintiff put the property in other agents' hands for sale and told Johnson that he was going to sell to anybody so long as he got

$3,000 net disentitles plaintiff to the commission: He cited *Millar, Son, and Co.* v. *Radford* (1903), 19 T.L.R. 575 at p. 576; *Barnett* v. *Brown and Co.* (1890), 6 T.L.R. 463; *Colonial Securities Trust Company* v. *Massey* (1896), 1 Q.B. 38; *McCartin* v. *Williams* (1896), 22 V.L.R. 103 and *Oetzmann and Co.* v. *Emmott* (1887), 4 T.L.R. 10.

Higgins, in reply: The purchase price was $3,150, defendant got $3,000, and plaintiff by introducing the purchaser who bought at defendant's price became entitled to his commission. He cited *Aikins* v. *Allan* (1904), 14 Man. 549.

HUNTER, C.J.: I am of the opinion that the appeal should be dismissed. Speaking for myself, I think it is very clear that in this appeal there is no question of law involved at all, it is entirely a question of fact. The principles governing the law with respect to agents' commission with respect to land sales are well understood, and difficulty only arises in applying the law to the facts of the particular case. As far as I can see, in this case, the question is a very simple one. The owner of the property instructed the agent in August, 1903, that he wished to receive $3,000 net for his property. Some time in the spring of 1904. Mr. Rowe became a tenant. It is true that the agent had several interviews with Mr. Rowe for the purpose of leading him to become a purchaser of the property, the price named by him to Mr. Rowe being $3,150; he of course understanding perfectly well from the owner that in order to make a profit for himself he would have to secure for the owner more than the sum of $3,000. It appears that the owner got somewhat impatient at the failure of the agent to dispose of the property, and notified him that he was going to put the property in another agent's hands, at the same time not withdrawing it from his own. He clearly notified the agent, Johnson, according to the evidence, that he intended to take the $3,000 net from any person who offered it to him, and that he was going to put the property in the hands of other persons for sale. And he listed the property on the same terms with other agents, according to the evidence. Another agent, Brown, did effect a sale, with Mr. Rowe as purchaser. But Mr. Rowe testifies, and the learned Judge so finds, that all that

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Appleton received was $3,000, that anything over and above that, which he paid, he paid to the agent Brown. Now, it seems to me quite plain that Appleton has not deviated one iota from the understanding or arrangement he had with Johnson. He notified him that he intended to accept $3,000 net; and that is what he did, and, therefore, in the absence of collusion between Mr. Rowe and Mr. Appleton, of which there is no suggestion, to defeat the plaintiff of his commission, there is no cause of action. Even, however, if it were not clear, I should think that as the appeal involves only a question of fact, it is impossible to succeed having regard to the ordinary principles governing appeals to this Court. The appellant when the question is one of fact, must satisfy the Court of Appeal that the trial Judge is clearly wrong. In this case, after perusal of the memoranda of the learned County Court Judge, I fail to see in any respect in what he was wrong. I might also add that where the amount involved is small, in this case $150, and where the question is entirely one of fact, and where there has been no shorthand reporter to report the proceedings in the case below, an appeal must, in the great majority of cases, necessarily be fruitless.

MARTIN, J.: I need only add that on the special facts of this case, as found by the learned trial Judge, I find myself unable to say that the decision is wrong. I may say that I appreciate the forcible manner in which Mr. *Higgins* has presented the case for his client. But after due consideration I fail to see that the judgment should be set aside.

MORRISON, J.: I have had all through the case some misgivings as to whether the salient parts of the evidence have all been noted by the learned Judge. Of course it is quite clear that a Judge has very difficult work to follow the points of the case and at the same time take down satisfactory notes of the evidence. There are some differences between the findings of the learned Judge and the evidence as taken by him; which at first inclined me to think that there was sufficient ground for a new trial. But having regard to the smallness of the amount, and the conclusions of my learned brethren, I have no hesitation in agreeing with them.

Appeal dismissed.

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Action for declaration—Practice—Stay of proceedings—On judgment in County Court—Jurisdiction to grant.

Where no consequential relief is claimed the Court's jurisdiction to make a declaratory order will be exercised with great caution.

A declaration that the defendant is not entitled to proceed on a judgment recovered by him in another action against the plaintiff will not be granted if on a proper case being made out the proceedings could have been stayed in the original action, except in special circumstances.

A County Court Judge has jurisdiction to stay proceedings on a judgment in his Court on a proper case for a stay being made out such for instance as that the judgment has in effect been satisfied.

In such case an action in the Supreme Court to restrain the defendant from proceeding with his action in the County Court will be dismissed.

ACTION tried before MARTIN, J., at Victoria on 4th and 5th October, 1904. The facts appear in the judgment.

Harold Robertson, for plaintiff.

Prior, for defendant.

Cur. adv. vult.

14th October, 1904.

MARTIN, J.: So far as regards the judgment recovered in this Court on the 31st of October, 1900, by the defendant against the plaintiff, and in regard to which the plaintiff seeks a declaration that the present defendant is not entitled to proceed thereon, it is admitted that if an application had been made in the original action in which the said judgment had been recovered the Court had, and has, jurisdiction to stay proceedings on a proper case being made out. No consequential relief is sought in regard to the said judgment, and such being the case, the authorities cited shew that the Court will exercise "with great care and jealousy" and "with extreme caution," *Austen* v. *Collins* (1886), 54 L.T.N.S. 903; *Faber* v. *Gosworth Urban District Council* (1903), 88 L.T.N.S. 549, the power to make a binding declaration of right or title, and it will only be done where there are special circumstances. In the present case I

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have come to the conclusion that there are no special circumstances which would entitle the plaintiff to the declaration asked for, and it would be establishing an undesirable precedent if I acceded to the plaintiff's request. No case of the kind has been cited which at all approaches the present wherein there are no material facts in dispute, and wherein, despite the fact that admittedly the proceedings could have been stayed in Chambers in the original action—*Crooks* v. *Wilson* (1851), 8 U.C.Q.B. 114; *Fish* v. *Tindal* (1862), 10 W.R. 801—a subsequent action is launched which seeks a bare declaration only.

In addition to the said judgment recovered in this Court, the defendant also recovered a judgment against the plaintiff in the County Court of Victoria on the 8th of July, 1902. This judgment was recovered on one of the covenants contained in an agreement in writing between the present litigants dated 30th June, 1895, and the said Supreme Court judgment had been recovered on certain other covenants contained in the same agreement. The present plaintiff seeks (1.) a declaration that the defendant is not entitled to proceed on the County Court judgment, and (2.) prays an injunction restraining him from so doing. The only County Court proceedings complained of are alleged in par. 12 of the statement of claim to be the obtaining of an order for payment of the judgment by monthly instalments, an order which was obtained after the examination of the present plaintiff as a judgment debtor under section 193. This judgment, so far as appears from any evidence before me, has not been registered under the Judgments Act, 1899. It is submitted for the plaintiff that even assuming that there is jurisdiction in the County Court to stay proceedings on its own judgments and orders to the same extent as in this Court, yet nevertheless seeing that the County Court is an inferior Court, this Court will exercise a concurrent jurisdiction to control proceedings therein. In answer to this it is submitted that the County Court has jurisdiction to stay proceedings on its own judgments and orders, and has control over its own records, and that if it has this Court should not, as a matter of practice or procedure, exercise its jurisdiction, at least before application had been made to the County Court itself and that

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Court given an opportunity to deal with the matter; and that to adopt a contrary course would be to encourage useless expense and multiplicity of action.

It becomes necessary then to inquire into the jurisdiction of the County Court in the premises.

Turning first to the County Courts Act, section 161 gives an unusual power to "suspend or stay any judgment, order or execution" where "from sickness or other sufficient cause" the defendant is unable to pay, and as the concluding words shew, is intended to apply to cases of "temporary . . . . disability." Mere want of means is not "sufficient cause": *Attenborough* v. *Henschel* (1895), 1 Q.B. 833. This section clearly does not apply to the case at bar. Then there is section 25, as follows:

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

This section and section 26 correspond with sections 89 and 90 of the Judicature Act, 1873 (Yearly Practice 1904, p. 113), and if section 25 stood alone I should be disposed to hold that it was wide enough to cover the present point, but it has been held by the Court of Appeal in *Pryor* v. *City Offices Co.* (1883), 10 Q.B.D. 505, that the latter section explains and limits the construction of the former, and that the words "in any proceeding" mean, as Lord Justice Cotton puts it, p. 510, "'in any action or suit,' and that they do not mean 'in a motion in any action or suit.'" Lord Justice Bowen says that the error lies in "supposing the relief is the same thing as the mode of getting it." Section 25 therefore cannot be invoked. There are, however, several sections of that Act which are directly applicable to the present case; I refer to those dealing with the procedure by way of judgment summons: 189-202.

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The whole foundation of such proceedings in the County Court, which are the only proceedings complained of in the pre-

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sent action, is that the plaintiff must have "an unsatisfied judgment or order in any County Court for the payment of debt, damages or costs," and on that assumption only can an order for payment or commitment be make against the judgment debtor. By section 195 the fullest power is given the Judge to rescind or alter any order already made and make any further or other order which in the circumstances "he thinks reasonable or just." This is manifestly a very necessary provision, and in practice I have known applications to be made thereunder to meet a change of circumstances since the making of the original order. Further, it is provided by section 194 that if in the opinion of the Judge the proceedings are unnecessary or vexatious and oppressive, the Judge may even direct the judgment creditor to pay the judgment debtor "a sum of money by way of compensation for his trouble and attendance."

Now, what the plaintiff complains of here is that since the recovery of judgment the defendant has rescinded the agreement for sale of land on which he recovered that judgment and has resumed possession of and sold (on May 12th, 1903), the very property which was the subject-matter of the agreement, and that, to quote the words of his counsel, "since the agreement has been rescinded on which the judgments were founded the judgments fall with it and cannot be enforced": *Cameron* v. *Bradbury* (1862), 9 Gr. 67; *Arnold* v. *Playter* (1892), 22 Ont. 608; *Gibbons* v. *Cozens* (1898), 29 Ont. 356. That is merely another way of saying that the judgment has in effect been satisfied, and there can be no doubt if an application were made in the ordinary way, by summons, *Wilkerson* v. *City of Victoria* (1895), 3 B.C. 366, to the County Judge, and the above allegations established as a matter of law (for, as I have said, there is no dispute on any material fact), that the order for payment now complained of would be rescinded as was, it is contended, the agreement on which the judgment is founded. In such case the proceedings on judgment summons would not be merely "unnecessary" but "vexatious and oppressive" within the meaning of section 194, and would be adequately dealt with by the Judge on that basis under sections 194 and 195.

Judgment

But apart from statutory powers the case of *The Queen* v. *Bayley* (1882), 8 Q.B.D. 411, decides that a Judge of a County Court has in a proper case inherent jurisdiction to stay proceedings in his Court, even on account of proceedings taken in another Court, and there is much more necessity for the exercise of that power in the case at bar than in *The Queen* v. *Bayley*. This must be on the principle that a Court of record has inherent control over its own records and procedure to prevent abuse thereof or improper proceedings being founded thereon: *O'Neill* v. *Bass* (1844), 6 Ir. Eq. Rep. 307; and *Bodi* v. *Crow's Nest Pass Coal Co.* (1902), 9 B.C. 332; and "procedure" is a term of wide application: *Poyser* v. *Minors* (1881), 7 Q.B.D. 329. On the general power to stay the following note in the Annual County Courts Practice for 1895, p. 398, merits consideration:

> "There are strong grounds for believing that a judge might stay proceedings in his own court in any case in which, if the action were in the high court, an order to stay might be made."

It is true that the present plaintiff asks for an injunction and not a stay, but that is of no consequence, for if a stay be an adequate remedy, it is, as Lord Justice Mellish said in *Garbutt* v. *Fawcus* (1875), 1 Ch.D. 155 at p. 158, "even a stronger thing; because an injunction affected only the parties, but a stay of proceedings affects the Court itself."

Judgment

On all the above authorities, and for the above reasons I am clearly of the opinion that not only had the County Court jurisdiction to deal expeditiously and inexpensively with the proceedings complained of, but that because of their nature, being peculiar to that Court, it could utilize its special machinery more adequately than could this Court. And therefore quite apart from the general principle laid down by the Court of Appeal in *Garbutt* v. *Fawcus* in regard to applications for a stay, *viz.*: "If you wanted a stay of proceedings in any Court you must go to the Judge of that Court" (p. 156), it would be undesirable to interfere with the jurisdiction of the County Court in the case at bar.

Though, to quote the words of Lord Herschell in *Barraclough* v. *Brown* (1897), A.C. 619, "unwilling as I am to determine the

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(action) otherwise than on the merits," yet in my opinion it would be establishing a mischievous precedent to encourage the plaintiff in a suit of this nature, and I therefore direct that it be dismissed with costs.

NOTE.—On 4th November, 1904, on motion by Williams to MARTIN, J., an order was made in *Jackson v. Williams* staying proceedings in that action, but without prejudice to the right of the plaintiff to bring an action against defendant to recover damages for breach of the contract or contracts the subject-matter of the action.

MARTIN, J.
(In Chambers)
1905
Jan. 13.

ALASKA PACKERS ASSOCIATION v. SPENCER.

Practice—Order for special jury—New trial—Whether order is exhausted after first trial.

ALASKA v. SPENCER

Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered :—

Held, that the order for a special jury was not exhausted and a summons for a special jury on the new trial was unnecessary.

SUMMONS by defendant for trial with a special jury.

An order for trial with a special jury was made on 31st October, 1902, and the trial took place and a verdict was given in favour of the defendant. On appeal the verdict was set aside and a new trial ordered by the Full Court: (see 10 B.C. 473) and affirmed by the Supreme Court of Canada, 21st November, 1904.

The summons was heard on 13th January, 1905, by MARTIN, J.

Peters, K.C., for the summons.

J. H. Lawson, Jr., contra.

MARTIN, J.: The first order for trial with a special jury is not exhausted, and this application is therefore unnecessary. The summons is dismissed with costs to the opposite party in any event.

PEIRSON v. CANADA PERMANENT AND WESTERN CANADA MORTGAGE CORPORATION.

HUNTER, C.J.

1905

Feb. 8.

PEIRSON v. CANADA PERMANENT

Specific performance — Agreement for sale of land — Option to cancel on failure to pay balance—Time of essence of contract—Laches—Conveyance—Conditional execution of.

Plaintiff agreed to purchase land from defendant and to pay the balance of the purchase price on 1st July, 1904, the agreement providing that time should be of the essence of the contract, and that in case of plaintiff's failure to pay the balance at the time agreed defendants should be at liberty to treat the contract as cancelled : a deed of the property was executed in Toronto and sent to defendants' agent in Vancouver to deliver to plaintiff when he paid up : plaintiff did not pay the balance on 1st July, and on 18th July defendants notified him they treated the agreement as cancelled and that they had re-sold the land :—

Held, that defendants had exercised their option of rescinding within a reasonable time and that plaintiff was not entitled to any relief.

ACTION for specific performance of an agreement for the sale of land.

On 22nd March, 1904, plaintiff and defendants entered into an agreement whereby the plaintiff agreed to purchase from the defendants certain real estate at the price of $950, $100 of which was to be paid in cash and the balance on or before the 1st of July, 1904. The deposit was paid to defendants' agent in Vancouver. On 5th April, 1904, a deed of the property from defendant to plaintiff was executed in Toronto where the defendants' head office was, and was forwarded to the Vancouver agent to hand over to plaintiff when he paid the balance of the purchase money. Plaintiff did not pay the balance on 1st July, and on 18th July defendants notified him that they treated the sale of the property as cancelled and that they had re-sold the property.

Statement

The action was tried at Victoria on 8th February, 1905, before HUNTER, C.J.

Harold Robertson, for plaintiff.

A. E. McPhillips, K.C., for defendants.

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HUNTER, C.J.: I think this action must be dismissed. The agreement is of a very ordinary kind and the facts are not in dispute. It is dated March 22nd, 1904, and calls for payment of $100 down, and the balance, $850, on the 1st of July, 1904.

On the 1st of July, 1904, the $850 was not paid, and the Corporation, by its agent, Mr. Smellie, under the power of rescission reserved in the agreement, chose to cancel it on the 18th of July.

There is no question but that time was of the essence of the agreement. There is an express stipulation to that effect, which reads as follows:

"The above stipulations as to title, time and payment, are hereby made the essence of this contract, and if any such stipulations are not observed by me, or my representatives at the time specified, the Corporation may treat the contract as cancelled, and all payments forfeited, and may re-sell the property without notice to me, or my representatives, in such manner and for such price as they may see fit, and I agree not to demand the production for inspection, or otherwise, of any further proof of title, nor of any deeds, papers, or documents in relation to the property other than those in the Corporation's possession."

Judgment

It is argued by the learned counsel for the plaintiff that the effect of the clause requiring that interest shall be paid on the unpaid balance at the rate of eight per cent. both before and after the purchase money became due was to nullify the stipulation I have just read, but it seems to me that these two stipulations are quite consistent. In fact, they are but common stipulations, and are generally found in agreements of this kind. The time clause is a stipulation inserted for the benefit of the vendor, which he may enforce if he chooses, but if he does not choose to enforce it then the other clause provides that he shall get interest at the rate of eight per cent. from the 1st of April, 1904, both before and after the purchase money becomes due until the amount is paid.

The next question is as to whether the rescission has been exercised with reasonable promptitude, and I am under the impression that a question of this kind is to be decided having regard to the circumstances of the particular case. I apprehend

that a delay in one class of case which would be unreasonable would not be unreasonable in another class of case.

In this particular case, the vendor happens to be a Corporation with its head office in Toronto, which is a week's mail from Vancouver, and in this particular case the agent in charge, although he had a power of attorney which authorized him to cancel the contract, saw fit to ask the head office for instructions, and it is not unreasonable that he should have chosen to consult the head office even although he had the power to deal with the matter himself; in fact, I think it is quite reasonable and proper for the agent to ask the express direction of the Corporation as to what should be done in a case of this kind. As it happens, the agent did not wait for the reply but chose to exercise his own discretion in the matter fearing that the Corporation might lose the benefit of the proposed re-sale, but I do not see how that affects the matter one way or the other. The sole question so far as concerns the plaintiff is whether the rescission took place with reasonable promptitude, *i.e.*, before it, could reasonably be supposed that the right had been waived and it is not to be overlooked that a corporation whose directors are distant a week's journey from the scene of the contest cannot be expected to move as promptly in a matter of this kind as an individual on the spot.

Judgment

In the case of *Barclay* v. *Messenger* (1874), 43 L.J., Ch. 449, I find that there was a delay from the 26th of August to the 2nd of October, and that the time for the payment in that case had been extended from a prior date until the 26th of August, and that on the 2nd of October the party in whose favour the stipulation was made notified the other party that the contract was to be considered at an end. It does not seem to have been seriously contended in that case that there was an undue delay, and that is a considerably greater lapse of time than occurred in the present case. It seems to me that in this case the contention of the plaintiff virtually amounts to a complaint that he was given eighteen days grace to pay the money, and that he would have been just as swift to complain if the rescission had taken place within a day or two after the due date.

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Now with respect to the argument urged that the execution of the deed at the head office in April had the effect of merging the agreement for sale, and that the property vested at once in the plaintiff, I think that that contention is utterly untenable. The case of *Robertson* v. *Security Co., Ltd.* (1897), 1 Q.B. 111, cited in support of that contention, was the case of an application for a policy of insurance, and the policy was executed in the ordinary course by the Company. The recital was incorrect, for the policy contained a statement that the premium had been paid, while as a matter of fact it had never been paid, but the Court held that there was nothing in the circumstances of the case to shew that the policy was executed conditionally and that the Company was bound although the premium had not been paid. In the case in question here, it appears to me that all the circumstances go to shew that the deed was executed conditionally. The very fact that the agreement for sale stipulates that the Corporation shall furnish a deed to the purchaser on the payment of the purchase money on the 1st of July, 1904, points to the conclusion that it was the duty of the Corporation to have the deed in readiness in case the money should be paid on that date. It seems to me that the drawing up and execution of that agreement at the Corporation's head office was simply the carrying out of the stipulation entered into between the parties, and there can be no doubt that the deed was executed conditionally and that it was not to be delivered until the balance was paid.

Judgment

There is no doubt the case is one of hardship as from the evidence the sum of $100 has been forfeited and the plaintiff has lost the advantage of the expenditure of a considerable sum of money on the property. As to the latter, however, it seems that the Corporation was in ignorance, and the fact that the plaintiff had entered into possession was, according to the evidence, also unknown to the Corporation. If the Corporation had known that the plaintiff had entered into possession, and expended all these moneys on the property, then it would have been the duty of the Court to rigorously scrutinize the circumstances surrounding the forfeiture of the property in the hope of finding some ground of relief, but in this case it is not shewn that these facts

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were known to the Corporation and I therefore cannot grant any relief to the plaintiff. He has entered into an agreement which called for payment of the balance of the purchase money on a day certain, and the agreement having made time of the essence allowed the Corporation to rescind it if payment was not made as stipulated. That right of rescission has been exercised in my opinion without any undue delay, and I see no reason why the Corporation should not be allowed to retain the money in pursuance of the right which the agreement has given it.

Robertson, asked that the costs in the case up to the hearing should not be given against the plaintiff.

Judgment

HUNTER, C.J.: Even if I had the power to refuse costs I can see no reason why I should not give costs as the Corporation has done nothing to mislead you, but I really think the Corporation should consider the question as to whether the entire sum of $100 should be forfeited. If the pound of flesh is exacted in cases of this sort it may provoke remedial legislation.

Action dismissed.

WILES v. THE VICTORIA TIMES PRINTING AND PUBLISHING COMPANY, LIMITED LIABILITY.

IRVING, J.

1904

March 2.

FULL COURT

Nov. 25.

WILES v. THE TIMES

Libel—Newspaper article—Fair comment.

Defendants published on page 1 of their newspaper an article stating that some women from Seattle had been canvassing some time ago in Victoria for subscriptions for a bogus foundling institution and on being questioned by the police had left town: on page 8 of the same issue there was an article stating that two ladies for the past few days had been selling tickets for a recital by one Greenleaf and that the tickets were being sold "in a manner similar to those for a recital by a gentleman of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon." The manner of selling tickets was as a fact the same in both cases:—

Held, that the article on page 1 did not necessarily refer to the plaintiff and that the article on page 8 was fair comment on a matter of public interest and was true.

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APPEAL from judgment of IRVING, J., dismissing the plaintiff's action. The plaintiff who was an agent and exploiter of public entertainers and an organizer and caterer of public entertainments, brought an action against the defendants for damages for libel in respect of two articles published in the Victoria Daily Times of 25th July, 1903, one of the articles being on page 1 and the other on page 8 of the newspaper. The articles were as follows:

SIREN VOICES.

HOW THEY WORKED KINDLY DISPOSED VICTORIANS.
CHINATOWN ALSO VICTIMIZED.

"The public love to be humbugged. Sometime ago the soft-voiced members of the fair sex arrived here from Seattle and at once proceeded to canvass the town for subscriptions for a "foundling institution." They were somewhat indefinite regarding the particular institution for which they were labouring, although evidently the impression they were seeking to convey was that it was a local establishment. They succeeded in working Chinatown quite successfully during their short stay.

Detective Perdue heard of their operations and locating them on the street questioned them. They said they were canvassing for the "foundling institution." "Where?" queried the detective. The women evaded the question, but the officer insisting they finally admitted that it was in Seattle. They were told that they had no authority for their actions in this city, and that they should have seen the Mayor before commencing their canvass. They were evidently frightened, because they at once went down to the boat, boarded it and left for the Sound. They told the detective that they had collected "only about ten dollars." The chances are, however, they scooped up more than that." And (on page 8):

Statement

"Two ladies have been canvassing the city for the past few days selling tickets for a "recital by Mr. Wm. Lee Greenleaf, of Boston," to be given under the auspices of the Willard Young Women's Christian Temperance Union Mission. Tickets are being sold in a manner similar to those for a recital by a gentle-

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man of the same name nearly two years ago, which was ostensibly for the benefit of the Orphanage, but which the promoters were obliged to abandon. Mayor McCandless' name is being used in connection with the concert without his knowledge or consent, and he wishes it understood that he is not favourably disposed towards the scheme. The Johnson Street Mission, it is reported, is to receive only $50.00 from the proceeds, although the Y. M. C. A. hall is being given free of charge."

The plaintiff alleged that the said articles meant that the plaintiff along with her said lady assistant was obtaining money dishonestly by selling said tickets in a manner similar to the method employed on a former occasion in Victoria by persons who sold tickets for an entertainment "ostensibly" that is to say pretendedly but not really for the benefit of a local charity, and in such manner that said dishonest persons were obliged to abandon the continuance of their said conduct for fear of the law; and that the plaintiff was improperly in furtherance of her said dishonest design using the name of the Mayor of Victoria as a patron of the said entertainment.

Statement

The plaintiff alleged that by the publication of the said articles she was injured in her profession and in her general reputation and was prevented from continuing the sale of tickets for the said concert and thereby lost the money which she otherwise would have made thereby. She claimed $5,000 damages.

The action was tried before IRVING, J., at Victoria on 2nd March, 1904.

W. J. Taylor, K.C., and *Solomon*, for plaintiff.
Gregory, and *J. H. Lawson, Jr.*, for defendants.

At the conclusion of the trial judgment was delivered orally as follows by

IRVING, J.: In October or November, 1900, a man named Greenleaf, a reciter, was here. He made arrangements with the Protestant Orphans' Home to give a concert for the benefit of that institution, in this way, that he was to give the entertainment and the Protestant Orphans' Home was to receive the sum

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of $50; and it is to be presumed that he would have the rest after paying expenses. In connection with his proposed concert there were in town two ladies, and they went about selling tickets, or collecting subscriptions and giving tickets—collecting in the form of subscriptions, as somebody called it—with the result that there was a good deal of scandal created; and they were arrested and finally left town. The entertainment was not given, in that case. Now, these were the advance agents of a man named Greenleaf. This incident I will refer to afterwards as the Chase incident—the name of one of the women who were arrested.

Afterwards, in June, 1903, two women came here apparently interested in some home in Seattle, and began collecting subscriptions here; and conveyed, or at any rate the impression got abroad, that they were collecting for the benefit of some orphans' home here, whereas as a matter of fact they were not doing anything of the sort. They were interviewed by the detective, and after being interviewed, promised to leave, and to refund; and they went away.

In July, 1903, about a fortnight after these two "sirens" from the Sound had gone, Mrs. Wiles came. She was about to undertake a concert for the benefit of some seamen's home, but finding herself in the neighbourhood of a Mission on Johnson Street, she went in there and was introduced to a lady who entered into an arrangement with her, that the Home here should permit a concert to be given, the proceeds to be divided as follows: the Home was to get $50 in cash; they were to have the sale of tickets amounting to $52, and they were also to receive all cash that might be collected at the door on the night of the entertainment. Of the performers, the main star of the evening was to be a Mr. Greenleaf; and I infer it is the same Mr. Greenleaf that figured here in October, 1900. The balance of the money was to be paid after making these deductions for the benefit of the Home, to Mrs. Wiles and her troupe. After she had made these arrangements they began to sell the tickets, "Recital, an evening with Mr. Wm. Lee Greenleaf, of Boston, under the auspices of Willard Young Women's Christian Temperance Union Mission, 17 Johnson Street, at Young Men's Christian Association hall, Friday

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evening, 7th August, 1903, 8.15, seats $1.00." Now, the method of selling these tickets was this: there was a paper got out in the shape of a circular letter, and this was taken around (it purports to be a recital by Mr. Wm. Lee Greenleaf), to various people in town here; and in it was shewn a list of people in town—President, Mrs. P. J. Riddell; Treasurer, Mrs. Gordon Grant; Vice-president, Mrs. H. Wilson; Recording Secretary, Miss McDonald; Board of Managers, Mrs. J. W. Williams, Mrs. John Frank, Mrs. Gordon Grant, and so on; Advising Board, Mr. W. Ritchie, Mr. D. Spragg, Mr. W. Gleason, Mr. A. McCandless, Mr. Holt." And there was also, according to Mr. Forman, a statement that was written inside of this, an inside leaf, shewing the amount of money collected.

Now, two articles appeared in the Times of the 25th of July, just at this time, the first written on the first page, called "Siren Voices," which the witnesses shew does not relate in any way to the plaintiff and it could not, because in the first place it expresses the fact to be that it refers to something that happened some time ago; it does not profess to be in connection with a concert, nor is the selling of tickets mentioned, it is simply in reference to subscription to a fund of an institution abroad; further than that, what is suggested in there was that they were trying to collect money in Victoria to use somewhere else, not in the city; then it is further said that these people left. Now it is quite obvious from that, that that could have no possible connection with Mrs. Wiles, who was here at that time. I am satisfied of that from reading the article myself and comparing it. And the impression that I form that it was not intended to apply to Mrs. Wiles is confirmed by what Mr. Perdue and Mr. Nicholas (the city editor of the Times) tell me, that this was written quite without reference to Mrs. Wiles and it had nothing whatever to do with her.

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The other article appeared on the eighth page and was written partly by one officer and partly by another. It begins—"Two ladies have been canvassing the city for the past few days selling tickets for a recital by Mr. Wm. Lee Greenleaf, of Boston, to be given under the auspices of the Willard Young Women's Christian Temperance Union Mission. Tickets are being sold in

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a manner similar to those for a recital by a gentleman of the same name nearly two years ago"—which obviously has reference to the Chase incident—"which was ostensibly for the benefit of the Orphanage; but which the promoters were obliged to abandon." You will notice that it begins with "Two ladies have been canvassing;" there is no mention of who those ladies are. There is no intent to identify them with the plaintiff. There is no holding up of the plaintiff to ridicule or contempt. It is the two ladies who have been canvassing the city—two unknown persons. The article then goes on,—"Mayor McCandless' name is being used in connection with the concert without his knowledge or consent." Now, as a matter of fact, Mayor McCandless' name, as Mayor McCandless was not being used, but the words "A. McCandless" were used, which was applicable to the Mayor, whose initials were A. G. "And he wishes it understood that he is not favourably disposed towards this scheme." This statement was written after an interview by Mayor McCandless with an officer of the staff of the Times. The article then goes on,—"The Johnson Street Mission, it is reported, is to receive only $50 from the proceeds, although the Y. M. C. A. hall is being given free of charge." That last paragraph is inaccurate in two respects; the Johnson Street Mission was to receive something more than a plain $50, and the hall was not being given free of charge. But that does not cut any figure in the alleged libel, according to my idea. Now the plaintiff goes on and alleges that the meaning of this article was so and so—the innuendo. That innuendo is based upon putting together the first article which appeared on page 1, and the last article which appeared on page 8; and they are not at all connected.

IRVING, J.

Now, what is enunciated in the second paragraph? It is applicable to those two ladies who have been canvassing the city for the sale of tickets. It is said that it referred to the plaintiff, that she was obtaining money dishonestly by selling said tickets in a manner similar to the method employed on a former occasion by persons who sold tickets for an entertainment pretendedly but not really for the benefit of a local charity, and in such manner that said dishonest persons were obliged to abandon the continuance of their said conduct for fear of the

law, and that the plaintiff was improperly in furtherance of her said dishonest design using the name of the Mayor of Victoria as a patron of the said entertainment.

I should not have thought it was necessary for the plaintiff to have taken that up. This article was indefinite; it applied to two ladies who had been canvassing the town. If it does not apply to her there certainly could be no libel. If it did apply to her, what are the facts in the case? Mr. Hayward has told us what the method practised in the Chase incident was, the selling of tickets and the giving of a concert in connection with which tickets were sold and subscriptions collected, the Home to receive but a small sum.

And what is the system carried on in the present case? That the Home was to receive a small sum, they were selling tickets and collecting subscriptions in the same way. Mr. Forman said, in his recollection there was a sheet of paper in this circular, shewing names of people who had subscribed. And whether you call it collecting subscriptions or not, the evidence given by one gentleman who was asked to take three tickets for the institution, shews it was practically a subscription concert. If Mrs. Wiles was one of those persons who were present in Mr. Forman's office—there were two women present in Mr. Forman's office who represented that the whole of the proceeds were to go to the benefit of the Home, and later on he met those same people in the Mayor's office, and they told him that they had never said that the whole of the proceeds were to go to the benefit of the Home, and he then and there contradicted them—I say if Mrs. Wiles had the misfortune to be one of those, why then what is said of her is true in fact. Whether Mrs. Wiles was the woman or not I don't know as a matter of fact. But this thing was going on. And it was perfectly within the limits of newspaper freedom for them to warn the public that such and such thing was being done.

IRVING, J.

I find that the first, the "Siren Voices" article, had nothing whatever to do with the plaintiff; that it was *bona fide*, and was published without malice.

I find as to the second article, that it was published without malice towards the plaintiff, that the facts as stated are true,

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other than that small statement as to the amount the association is to receive and that the hall is to be free; and it was fair comment, made in good faith, on facts which were matters of public interest.

The action will be dismissed with costs.

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The plaintiff appealed and the appeal was argued at Vancouver on 25th November, 1904, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

Cassidy, K.C., for appellant: Plaintiff's methods are compared with the fraudulent methods employed by others who were run out of town; the article was intended to stigmatize plaintiff as selling tickets wrongfully the same as in the case of the Orphange benefit: "ostensibly for the benefit of the, etc.," shews another attempt to improperly exploit the people of Victoria.

[HUNTER, C.J., and MORRISON, J.: The point of the allusion is not that fraud was being perpetrated the same as in the former case, but that the manner of selling tickets was the same.

MARTIN, J., commented adversely on the practice of letting professionals come and take away the bulk of the proceeds of the concert in this way.]

Yes, but the plaintiff is not to blame: if the system of the people who made the arrangement had been criticized there could have been no objection.

Bodwell, K.C., for the respondent, was not called on.

HUNTER, C.J.

HUNTER, C.J.: On Mr. *Cassidy's* own shewing here, what has been stated is simply a very mild criticism of what actually was done by the plaintiff. I think, though, that I should make some allusion to the remarks which were made by the paper in answer to Mr. *Cassidy's* letter on behalf of his client. I do not think it proper that when a professional gentleman writes complaining about an alleged libel in a newspaper, he should be greeted with contumely and ridicule. I think portions of the reply went altogether too far. I think newspapers are very liable to invite more serious and troublesome libel actions when they make remarks of that sort in answer to profess-

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ional letters written by professional gentlemen, than the suit which has been made the occasion of the present appeal. I cannot help feeling that this action has been largely provoked by that letter.

I put my decision upon the ground that I cannot see any statement in that article that savours of libel other than the statement that these tickets were being sold ostensibly for the benefit of the Women's Christian Temperance Union, but that statement does not necessarily import any charge either of an immoral or criminal nature. The only effect was to point out to the public the real facts of the case—that the chief benefit of the undertaking was going to the promoter, and under such circumstances, of course a great many people who otherwise would buy would not buy.

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MARTIN and MORRISON, JJ., concurred.

Appeal dismissed.

KICKBUSH v. CAWLEY.

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Costs—Appeal to Full Court—Costs not specifically awarded—Statutory provision.

The costs of an appeal may be taxed to the successful party although not specifically awarded by the judgment.

APPEAL by plaintiff from taxation of costs by the District Registrar at Vancouver.

The plaintiff sued defendant, her tenant, for possession of the premises leased and for damages for defendant's breach of his covenant to repair and also for damages to the fences and the land.

The action was tried in the County Court at Chilliwack and

MORRISON, J. (In Chambers)

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Jan. 20.

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by the judgment the plaintiff was awarded possession of the premises and $10 damages and costs.

On appeal by defendant the judgment of the Full Court was as follows:

We are of the opinion that if there were a forfeiture the defendant in the circumstances is entitled to be relieved against it. The judgment will stand in favour of the plaintiff for $10 damages with costs on the appropriate scale, but as far as relates to possession it must be set aside. No other order is made in this appeal.

The formal judgment taken out provided

Statement

"This Court doth order and adjudge that the said appeal be and the same is hereby allowed, and that the said judgment, so far as it ordered the defendant to give up possession of the premises in question and condemned him in the costs of the action, be and the same is hereby set aside. And this Court doth further order and adjudge that the plaintiff (respondent) do recover from the defendant (appellant) the sum of $10 damages, with costs on the appropriate County Court scale."

On the taxation the Registrar allowed the defendant the costs of the appeal.

Argument

Joseph Martin, K.C., for plaintiff: The order is silent as to costs and it must be taken that none were allowed: he cited section 20, sub-section 7 of the Supreme Court Act, 1903-4.

A. D. Taylor, for defendant: By section 100 of the said Act costs follow the event: defendant succeeded and should be allowed his costs.

Judgment

MORRISON, J., dismissed the appeal.

BLAIR v. B. C. EXPRESS CO.

MARTIN, J. (In Chambers)

1904

Sept. 29.

BLAIR v. B. C. EXPRESS CO.

Costs—Counsel fees for settling—Item 230 of Tariff of costs.

On receipt of a pleading from the opposite party the fee allowed by item 230 for settling and revising refers to a party's own pleadings and not to the pleadings received from the opposite party.

APPEAL from the taxation of costs by the District Registrar at Vancouver argued before MARTIN J., on 15th September, 1904.

Griffin, for plaintiff.
Joseph Martin, K.C., for defendant.

29th September, 1904.

MARTIN, J.: It is objected that the taxing master should not have allowed to the plaintiff the fee of $10 which he did allow after the statement of defence was delivered, as follows:

"Fee to counsel advising thereon .....$10."

Item 230 of the tariff is the only one relating to such a matter, but it authorizes the allowance of fees on the pleadings and other documents mentioned to the party "settling or revising" them, and not to the opposite party to whom they are delivered. It appears that it has been the practice for some years in the Vancouver Registry to allow a fee on such pleadings to the party to whom they were delivered, but I find that in the senior Registry at Victoria, it has never been so allowed. In case, however, the defence is of such a nature that the solicitor would be warranted in consulting counsel thereon before replying then the preceding item, 229, may and has been invoked, and it authorizes a fee on such "consultation." It may be, therefore, that though the charge in its present shape cannot be supported under item 230, yet it may under 229, and so the matter is referred back to the taxing master to deal with under that item.

Judgment

The present application bears a close resemblance to *In re Cowan* (1900), 7 B.C. 353 and see *Fry* v. *Botsford* (1902), 9 B.C. 207.

In view of what was said on the argument about the point having come before my brother IRVING, I have consulted with him thereon, and our opinion is the same.

HUNTER, C.J. (In Chambers)

1904

July 11.

IN RE THE MUNICIPAL CLAUSES ACT AND *IN RE* WAH YUN & CO.

Liquor license—Person entitled to—Whether firm included in "person."

IN RE WAH YUN

Unless specially provided to the contrary the word "person" does not include a firm.

SUMMONS on behalf of Wah Yun & Co., a firm of Chinese merchants of Victoria, calling upon the Board of Licensing Commissioners for the City of Victoria to shew cause why a writ of mandamus should not issue to them to hear and entertain the said firm's application for a wholesale liquor license.

Section 171, sub-section 4 of the Municipal Clauses Act provides that

"Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licenses for the purposes following, and to levy and collect, by means of such licenses, the amounts following:

"From any person not having a retail license as above, and vending spirituous or fermented liquors by wholesale, that is to say, in quantities of not less than two gallons for each house or place, not exceeding seventy-five dollars for every six months."

Statement

When the application came before the Commissioners on 13th June, 1904, it was dismissed on the ground that the applicants were Chinese and therefore less subject to proper police supervision in the matter of liquor traffic.

The summons was argued at Victoria before HUNTER, C.J., on 11th July, 1904.

A. D. Crease, for the summons.

Bradburn, contra.

HUNTER, C.J.: This application may be disposed of on the short ground that the Act does not authorize the issue of a liquor license to a firm. English law has not yet recognized a firm as a *persona*: see per James L.J., in *Ex parte Blain* (1879), 12 Ch.D. 522 at p. 533.

Judgment

Summons dismissed.

DICKINSON v. ROBERTSON *ET AL.*

HUNTER, C.J. (In Chambers)

1905

Feb. 23.

DICKINSON v. ROBERTSON

Execution—Exemption from seizure—Option of debtor.

A seizure of goods under an execution and a notice that goods 20 miles away in the same bailiwick belonging to the same execution debtor are under seizure do not operate as a seizure of the latter goods.

Quaere, whether a debtor's right of exemption is absolute or a privilege to be exercised within two days: *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2) 257 and *In re Ley et al.* (1900), 7 B.C. 94, questioned in this regard.

Semble, goods cannot be seized by telephone.

MOTION on behalf of the defendant W. A. Robertson for an order allowing the claim to exemption in pursuance of the Homestead Act, R.S.B.C. 1897, Cap. 93, Secs. 17 and 18 made by the said defendant, and also for an order restraining the sheriff of the County of Victoria from selling the goods and chattels which the said defendant is entitled to have exempted from seizure and sale in pursuance of such claim.

On 14th February, 1905, an execution against the goods of the said defendant was issued in the County Court and on the same day the sheriff seized her goods in her house in Victoria: on a previous occasion when an execution had been issued against her son's goods she had given the sheriff a list of the goods on Moresby Island belonging to her; the same day of the seizure of the goods in Victoria the sheriff notified the defendant of the said seizure and also that the goods on Moresby Island were under seizure, but it was not until the 15th of February that the latter goods were actually taken possession of by the sheriff and the defendant became aware of it on the 16th. On the 18th defendant made a selection of $500 worth of the Moresby Island goods as being exempt from seizure.

Statement

Prior, for the motion.

Higgins, for the execution creditor and the sheriff: The exemption is a privilege which must be claimed within two days after seizure or of notice thereof: see *In re Ley et al.*

Argument

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(1900), 7 B.C. 94 and *Sehl* v. *Humphreys* (1886), 1 B.C. (Pt. 2), 257.

The seizure in Victoria together with the notice on the 14th that the goods on Moresby Island, the sheriff having a list from the defendant herself, were under seizure operated as a seizure on the 14th of the goods on Moresby Island: *Balls* v. *Thick* (1845), 9 Jur. 304.

HUNTER, C.J.: It is idle to say that there was a seizure before the 15th; you might just as well talk of a seizure by telephone.

As to the question of the debtor's right of exemption, in spite of the cases cited I strongly incline to think that it is absolute, and not a mere privilege to be asserted within the two days on peril of the loss of everything. The effect of the statute is that the debtor may select the $500 worth within the two days, but if he does not the sheriff is to leave $500 worth behind. Suppose the debtor too ill to think of exemptions, was it intended that he should be left destitute, or does the law regard life more than the debt? Or suppose he is absent and his notice goes astray, must he go home and find not even a stove to cook his food in? I need not, however, come to any final conclusion as to this as I have no doubt that the claim was put in within the time allowed. But as the sheriff contends that the goods claimed as exempt have been undervalued, the matter will stand over to allow the proper proceedings to be taken to settle that question, and to enable the debtor to answer the sheriff's affidavit on the point of waiver. As to whether the right can or cannot be waived I express no opinion now.

Judgment

NOTE.—Compare *Yorkshire* v. *Cooper* (1903), 10 B.C. 65.

REX v. KAY.

DUFF, J.

1904

Nov. 4.

REX v. KAY

Criminal law—Statements made to constable after arrest—Admissibility of.

The prisoner was arrested on a charge of stealing S's gun, and in answer to questions put to him by a constable who did not caution him, he made certain statements: he was afterwards charged with the murder of S. and on his trial the Crown sought to put in evidence his answers:—

Held, not admissible.

TRIAL of a prisoner on an indictment for murder before DUFF, J., and a jury at Vancouver, in November, 1904.

Prisoner was first arrested at Langley charged with the theft of a gun from one Spittal, and on being taken to the police office was questioned by the officers without a previous caution having been given him.

Statement

He was afterwards charged with the murder of Spittal and on that trial the Crown sought to put in as evidence the questions and answers.

Bowser, K.C., for the prisoner, objected.

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

DUFF, J.: I think the answers to the questions put by the chief constable are not admissible. The earlier cases present a puzzling conflict of authority; but the later decisions disclose a rule of exclusion (sufficient for the determination of this question) which is not difficult either to formulate or to apply.

The general principle governing the receivability of statements made by accused persons to persons in authority is stated by Mr. Justice Cave in delivering the judgment of the Court of Crown Cases Reserved in *Reg.* v. *Thompson* (1893), 17 Cox, C.C. 641 at p. 645:

Judgment

"If these principles and the reasons for them are, as it seems impossible to doubt, well founded, they afford to magistrates a simple test by which the admissibility of a confession may be decided. They have to ask, Is it proved affirmatively that the confession was free and voluntary —that is, was it preceded by any inducement held out by a person in

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authority to make a statement? If so, and the inducement has not clearly been removed before the statement was made, evidence of the statement is inadmissible."

In this case the statements were made after the arrest of the accused in answer to questions put by the chief constable. In such a case it is not, in my opinion, sufficient for the prosecution simply to shew that no inducement was put forward by way of threat or promise, express or implied. The arrest and charge are in themselves a challenge to the accused to speak; an inducement within the rule.

The accused ought therefore before speaking to have been warned of the consequences of speech; and made to understand that he was being questioned with the object of extracting admissions to be used against him. In the absence of affirmative proof by the prosecution that these conditions were fulfilled, the statements of the accused made in such circumstances cannot be heard in support of the charge against him.

Mr. Maclean relies upon *Rogers* v. *Hawken* (1898), 19 Cox, C.C. 122. But the Court there dealt with answers to questions put before any arrest had been made or charge preferred; and although the judgment of Lord Russell is silent upon the point, it is discussed by Mr. Justice Mathews who enforces the distinction between admissions procured by the interrogation of the accused before arrest and such admissions procured afterward. The same remark applies to the decision of Mr. Justice Hawkins in *Reg.* v. *Miller* (1895), 18 Cox, C.C. 54. In *Reg.* v. *Day* (1890), 20 Ont. 209, the case stated shewed that the usual caution was administered. So in *Reg.* v. *Elliott* (1899), 31 Ont. 14. In the last mentioned case the trial Judge found that the statements were voluntary and not obtained by any undue means. None of these decisions is therefore inconsistent with the rule as I have stated it.

Judgment

In *Reg.* v. *Histed* (1898), 19 Cox, C.C. 16, Mr. Justice Hawkins says:

> "In my opinion when a prisoner is once taken into custody a policeman should ask no questions at all without administering the usual caution."

In his judgment in *Reg.* v. *Male and Cooper* (1893), 17 Cox, C.C. 689, the appropriate deportment of a police officer inter-

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viewing a prisoner before trial is thus described by Mr. Justice Cave:

"It is quite right for a police constable, or any other police officer, when he takes a person into custody to charge him, and let him know what it is he is taken up for, but the prisoner should be previously cautioned, because the very fact of charging induces a prisoner to make a statement, and he should have been informed that such statement may be used against him. The law does not allow the judge or the jury to put questions in open court to prisoners; and it would be monstrous if the law permitted a police officer to go, without anyone being present to see how the matter was conducted, and put a prisoner through an examination, and then produce the effects of that examination against him. Under these circumstances, a policeman should keep his mouth shut and his ears open. He is not bound to stop a prisoner in making a statement; his duty is to listen and report, but it is quite another matter that he should put questions to prisoners."

NOTE.—Before the addresses of counsel the accused made a statement not under oath.

REX v. PRESTON.

HENDERSON, CO. J.

1905

Jan. 18.

REX v. PRESTON

Criminal law—Speedy trial—Election—Warrant of commitment—Depositions.

Where the depositions disclose an offence which could not have been disposed of by speedy trial the prisoner will not be allowed to elect for speedy trial if the Crown intends to lay the more serious charge, even though he is committed for an offence which may be disposed of by speedy trial.

Statement

THE warrant of commitment charged that the accused "did unlawfully assault with intent to carnally know;" but the recognizances by which the witnesses were bound over to appear at the trial stated that they were to give evidence on a charge of an "attempt to commit rape."

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Joseph Martin, K.C., stated that the accused desired to elect for a speedy trial.

Pottenger, for the Crown: As the charge is of attempting to commit rape a speedy trial cannot be had.

Martin: The warrant of commitment charges only an aggravated assault under section 263 of the Code and not an attempt to commit rape under section 268. If the Crown had intended to lay such a charge the offence should have been described in specific language: to describe an offence under section 268 the word "attempt" must be used.

Argument

Pottenger: The depositions may be looked at to see if they warrant the charge intended to be laid, *i.e.*, an attempt to commit rape: he referred to section 767; *Cornwall* v. *The Queen* (1872), 33 U.C.Q.B. 106 and to an unreported decision of IRVING, J. (sitting as County Court Judge), refusing (after reading the depositions) to take an election though under the warrant of commitment the prisoner would have been entitled to elect.

HENDERSON, Co. J., without deciding the point as to whether the warrant of commitment disclosed an offence of "attempt to commit rape" under section 268, said that as the counsel for the Crown intimated that he intended to lay the more serious

Judgment

charge, he would look at the depositions to see if they might support such a charge, and having looked at the depositions he said he was not prepared to say that the depositions did not shew that there was evidence to support said charge and he thought that if the Crown was willing to assume the responsibility of laying the more serious charge, he should not stand in the way.

The accused was therefore not permitted to elect for a speedy trial.

RASER v. McQUADE *ET AL.*

DRAKE, J.

1904

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April 18.

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RASER v. McQUADE

Contract—Consideration of marriage—Ante-nuptial agreement by woman to make future husband her sole heir—Will made afterwards excluding husband—Effect of—Specific performance—"Voluntarily"—Meaning of—Costs—Of executor—Whether payable out of the estate.

A woman in consideration of a man marrying her promised him that she would make him her sole heir: he married her and after marriage in acknowledgment of the ante-nuptial contract she signed a writing stating "I voluntarily promised . . . . before and after marriage that I would make him my sole heir . . . . by virtue of this contract he is my sole heir." She died having (after the acknowledgment) disposed of her estate by will to the exclusion of her husband:—

Held, that the ante-nuptial agreement was a binding contract on the part of the woman to leave by will her property to her husband and should be specifically performed; and that "voluntarily" in the acknowledgment meant "of her own free will."

Held also, on the facts, that the executor named in the will acted reasonably in defending the action and resisting the appeal, and was therefore entitled to charge the estate for his costs.

APPEAL from the judgment of DRAKE, J.

This was an action for an order declaring that the defendants held the real and personal property of Maria Raser, deceased, in trust for the plaintiff; for an order directing defendants to convey the said property to the plaintiff and for specific performance of a contract dated 7th August, 1901.

On 7th August, 1901, Maria Vigelius agreed with Louis Henry Raser that in consideration of his marrying her she would make him her sole heir and in pursuance of the said agreement he married her on 26th September, 1901. Subsequently on 14th October, 1901, Maria Raser executed an acknowledgment of her said agreement as follows: Statement

"Victoria, B. C.,

"October 14, 1901.

"I, Maria Raser wife of Louis Henry Raser, of the City of Victoria, Province of British Columbia, I volunterily promised Mr. Raser before and after marriage that I would make him my sole heir. I spent $60 in Telegrams sent to South America hunting for relatives but no trace could be

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found of any one belonging to me. I have no one but my husband L. H. Raser to give my property to, so under my former promise I agreed to give my husband all of my real estate, personal property, money in Bank, jewelry, diamonds, household goods, furnature, and all my personal effects. This promise was first made on condition that Mr. Raser would marry me; he fulfilled his part of the agreement on September 26, 1901; by virtue of this contract he is my sole heir. This agreement made and signed in the year of our Lord one thousand and nine hundred and one signed in the presence of us both at the same time.

" Witness my hand this 14th day of October, 1901. } " Maria Raser."

" Mrs. J. E. Elliott,
" Carrie Peverette."

On 4th July, 1902, Maria Raser made a will by which she devised to Esther Campbell certain of her real estate and all of her personal estate subject to the payment of a $100 legacy to her husband, and the residue of her estate she devised to the Bishop of Vancouver Island. By the will which revoked all testamentary writings Louis McQuade was appointed executor, and after Maria Raser's death on 6th August, 1902, he obtained probate of the will on 21st August, 1902.

Statement

The action was commenced by Raser who afterwards assigned his interests to one Pemberton, who further assigned to one Macdowall by whom the action was carried on. The defendants were McQuade, Esther Campbell and the Bishop of Vancouver Island, a corporation sole.

The defendants McQuade and the Bishop of Vancouver Island filed a joint defence by the same solicitor and the defendant Esther Campbell filed a separate defence by another solicitor.

The action was tried at Victoria on 25th January, 1904, before DRAKE, J.

Solomon, for plaintiff.

A. E. McPhillips, K.C., for the defendants, McQuade and the Bishop of Vancouver Island.

30th January, 1904.

DRAKE, J.

DRAKE, J.: The plaintiff claims in this action under a document, not under seal, possession of all the real and personal property of his wife under a contract, which document purports to carry out an ante-nuptial verbal agreement, and is as follows: (Setting it out.)

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The plaintiff Raser commenced his action on 11th October, 1902. Maria Raser died on the 6th of August, 1902, having made a will dated 4th July, 1902, and the same was probated in the Supreme Court of British Columbia on the 21st of August, 1902, and the defendants are the executors and Mrs. Campbell, a devisee under the will.

On the 12th of June, 1903, while the action was pending, Raser assigned his interest in this action and in the proceeds and subject-matter thereof to Charteris Pemberton; and on 24th September, Pemberton assigned to the plaintiff, D. H. Macdowall; and the plaintiff Macdowall asks for a declaration that the defendants hold the real and personal estate upon trust for the plaintiff.

It appears from the evidence that Mrs. Raser, formerly Mrs. Vigelius, was anxious to marry again, and made overtures to Raser, and promised if he would marry her she would make him her heir; and in consequence, after the marriage had taken place, she signed the document referred to. This document is not a deed or covenant to convey *in præsenti*, but by virtue of this contract Raser was made sole heir. The intention of the parties was apparently to leave Mrs. Raser in absolute possession for her life of her property, real and personal, and at her death to devise the same to L. H. Raser either by will or by some other sufficient deed.

DRAKE, J.

The defendants contend that this, not being under seal, no consideration is imported, and marriage is not in itself a consideration, and therefore it should be treated as a voluntary agreement, which is not enforceable in equity, and cited *Hooper* v. *Goodwin* (1818), 18 R.R. 125; *Antrobus* v. *Smith* (1805), 8 R.R. 278; *Hogarth* v. *Phillips* (1858), 28 L.J., Ch. 197; *Colman* v. *Sarrel* (1789), 1 Ves. 50 at p. 54. These authorities establish that marriage is not a part performance of a parol agreement made before marriage, but do not affect a written contract after marriage.

On the other hand the plaintiff contends that this document is enforceable, and there is a sufficient contract in writing to satisfy the Statute of Frauds. The case *In re Holland* (1902), 2 Ch. 360, is an authority for this proposition. Vaughan Williams, L. J., in his judgment, p. 374, deals with this question.

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He says the recital is not an agreement to settle, it is evidence of a fact, and that fact is an agreement made antecedent to the marriage. The statute does not deal with the validity of the agreement, only with the evidence to prove it. There is no difference, he says, between an agreement in consideration of marriage and any other agreement within the 4th section of the Statute of Frauds. He then discusses the authorities, and he considers *Barkworth* v. *Young* (1856), 4 Drew. 1, as still good law, in which case Kindersley, V. C., held that a memorandum though written after marriage stating an ante-nuptial oral agreement was a sufficient memorandum within the 4th section of the Statute of Frauds; but a document sufficient to satisfy the Statute of Frauds does not thereby make the contract valid so as to enable the plaintiff to enforce it.

The other point on which Mr. *McPhillips* relied was that a Court of Equity will not compel a party to complete a voluntary gift which is not complete in itself, as without some consideration expressed or implied it is a voluntary act and not enforceable in law, and equity will not interfere to carry into effect a purely voluntary intention or agreement to give or settle property against the settlor or his executors. The document is a mere parol agreement to make Raser her sole heir, but no steps were taken to convert this voluntary gift into a binding document, it is a *nudum pactum*, and the plaintiff has so treated it by making a will declaring a contrary intention. The case of *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264, is a direct authority in support of this view. In that case one Thomas Medley made a deed-poll which purported to be a transfer to the defendant of certain specified Bank shares to hold upon trust in consideration of natural love and affection for his niece; and to apply the dividends to the use of the said niece until marriage; and in case she survived the said Medley to transfer the stock to the niece for her sole benefit. But in case the said niece died in the lifetime of the settlor or married without his consent, the said stock was to be re-transferred to the settlor. No transfer was ever made to Lord, but the dividends were paid to the niece. The Bank shares stood in the settlor's name at the time of his death. The Court of Appeal held that the document was

DRAKE, J.

voluntary and could not be enforced against the settlor or his estate, the transaction having been left incomplete by there being no transfer; and Lord Justice Turner states the law to be well settled that in order to render a voluntary settlement valid the settlor must have done that which, according to the nature of the property was necessary to be done in order to transfer the property and render the settlement binding on him; and there is no equity in the Court to perfect an imperfect gift. This is, if anything, a much stronger case than the one I have to consider. Here there is a voluntary promise to make Raser the testatrix's sole heir. No step was taken to make any conveyance or assignment of the estate, neither was there any appointment of trustees to carry out the gift.

I am therefore of opinion that the alleged gift fails, and the defendants are entitled to judgment with costs.

The appeal came on for argument at Vancouver on 18th April, 1904, before IRVING, MARTIN and DUFF, JJ.

Davis, K.C., for appellant: The judgment proceeds on the ground that the promise was voluntary and that therefore there was no consideration for the agreement: "voluntary" in the agreement means of her own free will and not by compulsion: *Milroy* v. *Lord* relied on below is distinguishable as there the deed was without consideration: here the deed was not voluntary: see *Barkworth* v. *Young* (1856), 4 Drew. 1 and *In re Holland* (1902), 2 Ch. 360.

Argument

The substance of the agreement is that the wife is to leave her husband all her property on her death; he married her on that condition; it is either a declaration of his rights under the antenuptial contract or else it is a testamentary document which must stand in plaintiff's favour; a fraud is attempted against which the Court will relieve: he cited *Hammersley* v. *Baron de Biel* (1854), 12 Cl. & F. 45; *Loffus* v. *Maw* (1862), 32 L.J., Ch. 49; *Roberts* v. *Hall* (1882), 1 Ont. 388; *Coverdale* v. *Eastwood* (1872), L.R. 15 Eq. 121; *Shadwell* v. *Shadwell* (1860), 9 C.B.N.S. 159 and *England* v. *Downs* (1840), 2 Beav. 522.

A. E. McPhillips, K.C., and *Heisterman*, for respondents: To find in favour of plaintiff the Court must hold that there was a

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contract precedent to marriage; there cannot be two contracts, one before and the other after marriage; there can be no *nunc pro tunc* marriage agreement made on consideration of a marriage already performed; after marriage a contract made before marriage in consideration thereof may be reduced to writing.

The contract is a voluntary one without consideration, and Mrs. Raser was at liberty to dispose of her property as she thought fit to the exclusion of her husband, and this view is confirmed by the fact that the wife had the view she could dispose of her property otherwise, as she spent $60 in telegrams, etc., trying to find relatives; the only evidence on the point is in the document put in by the plaintiff which states that it is voluntary; we have the finding of the trial Judge in our favour: he cited *Trowell* v. *Shenton* (1878), 8 Ch.D. 318; *In re Holland* (1902), 2 Ch. 360, judgment of Cozens-Hardy, L.J.; *Warden* v. *Jones* (1857), 23 Beav. 487 at p. 494; Fry on Specific Performance, 4th Ed., Sec. 621 and *Vincent* v. *Vincent* (1887), 56 L.T.N.S. 243.

The document here is a voluntary testamentary disposition and therefore since there is a later one it is nullified and revoked by the will.

Argument

Specific performance will not be decreed where the document is testamentary in character and therefore revocable. A Court of Equity will not interfere to perfect a defective or imperfect gift; so long as anything remains to be done it can be revoked: *Hooper* v. *Goodwin* (1818), 1 Swanst. 485; *Jones* v. *Lock* (1861), 1 Chy. App. 25; *Meek* v. *Kettlewell* (1843), 1 Ph. 342, 7 Jur. 1,120; *Moore* v. *Moore* (1874), L.R. 18 Eq. 474; *Milroy* v. *Lord* (1862), 4 De G. F. & J. 264 at p. 274; nor will it lend its assistance to enforce a voluntary deed: *Fletcher* v. *Fletcher* (1844), 4 Hare, 78, 14 L.J., Ch. 66; *Consett* v. *Bell* (1842), 1 Y. & C. 569, 11 L.J., Ch. 401. The intention to do a thing is not sufficient, and there is no sufficient warrant for the Court to say that the testatrix was not entitled to dispose of her estate otherwise than in conformity with the terms of the voluntary—and incomplete document: see Halsbury, L.C., in *Scale* v. *Rawlins* (1892), A.C. 342 at p. 343; he cited also judgment of Lord Westbury in

Parker v. *Nickson* (1863), 1 De G. J. & S. 177 at p. 182 and Jarman on Wills, 5th Ed., p. 18.

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Per curiam: The agreement of 7th August, 1901, as evidenced by the instrument dated 14th October, 1901, was a binding contract on the part of Mrs. Raser to leave by will her property to her husband and should be specifically performed. The word "voluntarily" in the instrument means "of her own free will." The appeal is allowed.

The next day the question of costs was argued.

Davis: Any question about not giving costs against defendants can only apply to the executor; the others are not in the same position and costs should be awarded against them: he cited r. 751; *Page* v. *Williamson* (1902), 18 T.L.R. 770; *Twist* v. *Tye, ib.* 211 and *Turner* v. *Hancock* (1882), 20 Ch. D. 303.

[DUFF, J.: You claim under an agreement to leave property to you by will; that is you claim title through McQuade, and you must take subject to the incidents of administration including the burden of costs reasonably incurred by the administrator.]

Argument

The executor and the beneficiaries when they knew of this contract should not have contested plaintiff's claim.

McPhillips: We don't ask for costs for the Bishop; we did not put in a vexatious defence and we could not examine Raser because he was dead; the litigation was necessary.

Per curiam: We think the litigation was necessary.

McPhillips, cited *Purcell* v. *Bergin* (1894), 16 P.R. 301 at p. 303 and *Jenner* v. *Finch* (1879), 5 P.D. 106.

Cur. adv. vult.

On 29th July the Court delivered judgment holding that having regard to all the circumstances the executor acted reasonably in defending the action and resisting the appeal and was therefore entitled to charge the estate for his costs.

Note:—The operative part of the formal order of the Full Court was as follows:

This Court doth order and adjudge that the said judgment of the Honourable Mr. Justice DRAKE pronounced on the 30th day of January,

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1904, and the order entered thereon on the 8th day of February, 1904, be and the same are hereby set aside and reversed.

And this Court doth declare that the agreement made on the 7th day of August, 1901, as evidenced by the instrument dated the 14th day of October, 1901, between the late Maria Raser and Louis Henry Raser in the pleadings mentioned constitutes a contract for valuable consideration and ought to be specifically performed.

And that by virtue of said contract and said paper-writing dated the 14th of October, 1901, the plaintiff, Louis Henry Raser, was solely entitled to the real and personal property of the said late Maria Raser at her death as her sole devisee and legatee and with and subject to all the liabilities, incidents and conditions of a sole devisee and legatee and subject to all proper and legal claims thereon and thereout on the part of the said Louis McQuade as the executor of the last will and testament of the late Maria Raser and the plaintiff, Day Hort Macdowall is entitled to such real and personal property as the assignee thereof from the said C. C. Pemberton, the assignee thereof from the said plaintiff, Louis Henry Raser, and with and subject to all the incidents, conditions and liabilities of an assignee thereof from a person entitled thereto as sole devisee and legatee as aforesaid and subject to all proper and legal claims thereon and thereout on the part of the said Louis McQuade as executor of the last will and testament of the said late Maria Raser.

And that the defendants, Louis McQuade, Esther Campbell and the Bishop of Vancouver Island, a corporation sole, hold the real and personal property purported to be devised and bequeathed to them by the alleged will of the said late Maria Raser in the pleadings mentioned, upon trust for the absolute use and benefit of the plaintiff, Day Hort Macdowall, as aforesaid.

And let the defendants, Louis McQuade, Esther Campbell and the Bishop of Vancouver Island, a corporation sole, execute a conveyance in fee simple to the plaintiff, Day Hort Macdowall, of all the real property of the said late Maria Raser.

And let the defendant, Louis McQuade, render unto the plaintiff, Day Hort Macdowall, a true account of all the assets and liabilities of the estate of the said late Maria Raser, and transfer, assign and deliver unto the plaintiff, Day Hort Macdowall, all the personal property of the said late Maria Raser, remaining after the payment of her just debts, and funeral expenses and all just allowances.

And let the defendants, Louis McQuade, Esther Campbell and the Bishop of Vancouver Island, a corporation sole, be restrained from selling, encumbering or disposing of or attempting to sell, encumber or dispose of any of the real or personal property of the said late Maria Raser.

And this Court doth further order that the costs of the said Louis McQuade as well as of this action as of this appeal be taxed and paid out of the estate of the said late Maria Raser.

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And let the said costs of the said Louis McQuade be a lien and charge on the estate of the said late Maria Raser in question in this action.

And this Court doth further order that the defendant, the said Louis McQuade, so rendering a true account and transferring the personal estate as aforesaid unto the plaintiff, be thenceforth discharged of and from his office as such executor.

And it is further ordered that all other parties to this action pay their own costs thereof.

RASER v. McQUADE *ET AL.* (No. 2.)

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(In Chambers)
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Appeal—Case in Victoria Registry—Whether appeal can be heard in Vancouver without consent—Supreme Court Act as amended in 1902.

Under the Supreme Court Act as amended in 1902, an appeal in a Victoria case could be heard by the Full Court sitting in Vancouver without consent.

Per DRAKE, J.: A single Judge has jurisdiction to order a notice of appeal to the Full Court to be struck out.

SUMMONS to strike out notice of appeal.

The action was commenced in the Victoria Registry, where all the proceedings were carried on and where the trial was held. After judgment in the action, the plaintiff gave notice of appeal to the Full Court at Vancouver. Statement

The summons was argued before DRAKE, J.

Solomon, for appellant, took the preliminary objection that the application should be made to the Full Court and that a single Judge has no jurisdiction to deal with the matter.

The objection was overruled.

A. E. McPhillips, K.C., for the summons: As this is an action in the Victoria Registry, an appeal can only be heard in Vancouver by consent; legislation to that effect was passed in 1899, Cap. 20, Sec. 14, and by section 16 an appeal could be heard out- Argument

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side of the proper Registry only by consent; section 73 as amended has been repealed and another section was substituted in 1902 (section 2), but section 16 of 1899 providing for consent is still standing, and so when the Legislature left that section standing the effect of it and section 32 as amended in 1901 must be that an appeal in a Victoria case cannot be heard in Vancouver without consent.

Solomon, contra: The effect and intent of the Act as it now stands is that parties have an option as to the place at which their appeals are to be heard, subject to their bringing them on in proper time.

DRAKE, J., held that an appellant had an option and could take his appeal to the Full Court sitting either at Victoria or Vancouver as he pleased, and that section 32 only applied to the intermediate steps in bringing an action to trial and did not affect the question as to where an appeal should be heard.

Judgment

When the appeal came on for argument at Vancouver on 18th April, 1904, before IRVING, MARTIN and DUFF, JJ.,

McPhillips, for respondents, renewed his application by way of preliminary objection.

The Court overruled the objection.

YOUNG v. WEST KOOTENAY SHINGLE CO.

MORRISON, J.

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YOUNG v. WEST KOOTENAY SHINGLE CO.

Woodmen's lien—Wages—Independent contractor—Payment to contractor without production of receipted pay-rolls—Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132, Secs. 26 and 27.

Under the sections of the Mechanics' Lien Act relating to woodmen's wages, a person by requiring only the production of the pay-roll is not relieved of liability to the workmen for the amounts due them from the contractor; he must have produced to him a receipted pay-roll.

The plaintiff and a large number of other wage-earners were employed by one Farnell to get out logs from the defendants' timber limits, and deliver them at the defendants' saw mill. Farnell had a contract with the defendants for the furnishing of the logs, and was largely in their debt for advances made to enable him to carry on his contract. Part of this debt was secured by chattel mortgage on Farnell's plant. Work under the contract had been carried on for about a year, when the de- Statement
fendants entered into possession under their chattel mortgage, thereby causing all work under the contract to cease. At that time the wages sued for in this action had been earned and were unpaid. The claims for wages were all assigned to the plaintiff who brought this action to collect same. The plaintiff alleged that the defendants were the real debtors, and that in any event they were liable under sections 26 and 27 of the Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132.

The action was tried at Nelson in December, 1904, before MORRISON, J., without a jury.

R. M. Macdonald and *R. W. Hannington*, for the plaintiff.
W. A. Macdonald, K.C., and *A. M. Johnson*, for the defendants.

11th February, 1905.

MORRISON, J.: This action is brought by the plaintiff as assignee of a number of claims for wages earned while the men to whom the wages are due were working for one Farnell. At Judgment
the trial the plaintiff sought to establish the fact that the men were in reality employees of the defendants, and that Farnell in

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hiring the men was merely acting as the agent or foreman of the defendants. In the alternative the plaintiff claims that the agreement between the defendants and Farnell was colourable and a mere scheme or device, between Farnell and the defendants, to evade liability on the part of the defendants for the men's wages. I am of the opinion that the agreement in question was *bona fide* and that Farnell was not the agent of the defendants, but was acting as an independent contractor.

The plaintiff claims further in the alternative that the defendants should pay the wages under sections 26 and 27 of the Mechanics' Lien Act. Section 26 of the Act provides that every person making or entering into any contract, etc., with any other person for the purpose of furnishing . . . . logs, by which it is necessary to engage and employ workmen . . . . shall before making any payment for or on behalf of or under such contract . . . . require such person to whom payment is to be made, to produce and furnish a pay-roll or sheet of the wages and amount due and owing and of the payment thereof . . . . or if not paid, the amount of wages or pay due and owing to all the workmen . . . . at the time the said logs or timber is delivered. . . . .

By section 27 it is provided that any person making payment under such contract without requiring the production of the "pay-roll or sheet as mentioned in section 26" shall be liable at the suit of any workman for the amount due any such workman.

Judgment

I am of opinion that the words "pay-roll or sheet" in section 27 must be read in the same sense as the same words in section 26. In section 26 it is evidently meant that the production of the pay-roll or sheet is not sufficient in itself, but it must be shewn that the wages have been actually paid. This view is rendered more clear from the words which follow, requiring the person to whom payment is to be made to shew the amount due for wages, when not paid, irrespective of the pay-roll or sheet.

In section 27 the only words used are "pay-roll or sheet" as mentioned in section 26, and no mention is made of any requirement to shew a statement of the amount of wages due where not paid.

I am also of opinion that unless the person to whom payment

is to be made produces the pay-roll or sheet with evidence of the payment of the wages to the person making payment, that such last mentioned person is liable for the wages if he makes payment under the contract, and it afterwards turn out that the wages have not been paid.

In this case no such pay-rolls or sheets were produced for the months of November and December. It is true a statement of the amount of wages due was produced to the defendants, but that is not sufficient in the view I take of the Act. To say that the production of a statement of the amount of wages due irrespective of payment, is sufficient to relieve the defendants from liability under section 27, would be to defeat the plain intention of the Legislature, and would render both sections 26 and 27 meaningless.

Judgment

The defendants gave Farnell credit on their books for the value of the logs furnished during the two months in respect of which wages are due, and I think this is a payment to him under the contract. Judgment for the plaintiff with costs.

PACIFIC TOWING COMPANY v. MORRIS.

Contract—For towage of logs—"Lost or not lost"—Onus of proof—Costs—On County Court scale—Counter-claim for amount beyond County Court jurisdiction.

Under a contract to tow logs the tug is entitled to be paid only for the logs delivered and where the special term that the tug is to be paid for logs "lost or not lost" is relied on it must be proved specifically.

Where the defendant in a Supreme Court action counter-claims for an amount beyond the jurisdiction of the County Court, costs on the County Court scale only will not be awarded to a successful plaintiff, even though the action should have been brought in the County Court.

ACTION for $415 tried before HUNTER, C.J., on 11th December, 1903. The defendant counter-claimed for $1,540 for damages for non-delivery.

Higgins, for plaintiff.

Eberts, K.C., and *Harold Robertson*, for defendant.

HUNTER, C.J. 6th February, 1904.

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PACIFIC TOWING CO. v. MORRIS

HUNTER, C.J.: This is an action for towage of piles and demurrage, also for the value of a chain lent, but not returned. The total claim is for $415 of which $75 a claim for demurrage and $41.60 part of the towage, are not disputed. The evidence is also clear as to the chain, and therefore the only item left to dispose of is the balance of the claim for towage amounting to $278.40.

The piles were taken out of San Juan harbour bound for Blaine, but were for the most part lost shortly after rounding San Juan Point owing to stress of weather, and, as the plaintiffs allege, defective boomage. The issue between the parties turns on the question as to what were the terms of the contract; the plaintiffs alleging that they were to be paid at the rate of 80 cents a pile, whether lost or not lost, and the defendant alleging that he was to pay only for such as were delivered at Blaine.

Such evidence as was given on the point seems to establish that by the custom of these waters under the ordinary contract of towage, the tug is paid only for such piles or logs as she delivers, which would appear to be in consonance with the general law on the subject. Therefore, it is for the plaintiffs to make out to the satisfaction of the Court that the special term "lost or not lost" was agreed to, the arrangement being verbal.

Judgment

The plaintiffs' agent, Greer, says that he was brought into negotiation with the defendant by Oddy, who had engaged to tow the defendant's piles, but who wanted the plaintiffs to take the contract off his hands.

That contract had been reduced to writing, but I gather from the evidence that there was no formal assignment of it to the plaintiffs with the consent of the defendant, but rather that a new contract was entered into between the plaintiffs and the defendant in substitution of Oddy's contract with the consent of all parties.

This new contract being verbal, or at least part verbal and part written, I have to make out its terms as best I can from the evidence. Greer says positively that he stipulated that the booms were to contain not less than 400 piles, and that he had a discussion with the defendant about the method of booming the

piles, and stated it as his opinion that unless they were boomed by the Griffith mode they could not be safely towed out of San Juan, and that the result of this discussion was that they agreed that he should have a boom of not less than 400 piles at the rate of 80 cents per pile, payable whether the piles were lost or not.

The tug having lost the bulk of the piles put in at Oak Bay, and there Greer and the defendant had a conversation, which Greer says was mainly about the defendant's insurance policy, during which Greer asked him if he had taken in the freight as part of the value of the piles, to which he said "No;" that Morris was in doubt whether to proceed with the balance of the piles to Blaine; that he (Greer) said it was immaterial to him as he would require payment whether the tug towed the balance to Blaine or not; that Morris said he did not think he (Greer) could be so hard as that. The tug towed the balance to Blaine, with Morris on board, and Greer further says that a few days afterwards he met Morris on the street in Victoria and asked for payment of the whole, or at least part of his claim, to which Morris said he would come in and settle after he had got his insurance money.

A witness, Owen, who was a clerk in the plaintiffs' employ, corroborates Greer's story about the "lost or not lost," but I do not lay much stress on his evidence, especially as he could not remember the exact language that was used, his impression being that the words were "whether the boom will tow or not."

Judgment

The defendant, Morris, denied that there was any stipulation that there should be at least 400 piles, or that the tug should be paid whether they were lost or not; but admits that he has not a good recollection of the conversation. He also admits that the captain of the tug who had been wired to by Greer to secure a definite agreement, would not take the boom out, as he did not like the way it was put together, unless he (Morris) agreed to pay the towage in any event, but says that he would not let the boom go in that condition.

Deaville, a brother-in-law of the defendant, and interested in the undertaking, was present at the Oak Bay interview, and says that Greer claimed that the plaintiffs had earned their freight, but that Morris disputed the arrangement. Stratford, the cap-

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tain of the tug, says that when he first went to San Juan he told Morris that he would have to pay at the rate of 400 piles, and that the towage would be at his own risk, and that Morris finally consented, although complaining that Greer was taking advantage of the position; and it is not disputed that on this occasion the piles had not been properly boomed for the voyage, in fact some of them had broken loose in the harbour.

On the whole, I think, having regard to the demeanour of the witnesses, that the balance of credibility is in favour of the plaintiffs, and that the defendant had consented, grumblingly it is true, to the stipulation that the freight should be paid, lost or not lost. I think, moreover, that the fact that the tug had gone up the first time on an abortive mission and found the piles broken up in the harbour; that it would not have been worth her while to proceed from Oak Bay to Blaine with only 52 piles unless the agreement was as the plaintiffs alleged; that it is notoriously difficult to tow logs or piles in safety from West Coast ports to inner coast points and that Morris when pressed for a settlement of the claim did not repudiate the alleged agreement all point to the conclusion that he had assented to the stipulation, and therefore I think the plaintiffs are entitled to judgment for the amount claimed with costs, which I would have allowed only on the County Court scale had it not been that a counter-claim was made by the defendant beyond the jurisdiction of that Court. As to this latter, it is quite clear that it must be dismissed. Even assuming that the voyage was not undertaken with the consent of the defendant, who was on board, the evidence shews beyond doubt that the conditions of the sea and weather were not at all unusual, but were such as might be expected at any time in those waters, and that the boom could not stand the strain to which it would ordinarily be subject in being towed from San Juan. In any event, according to the captain it was impossible to turn back after he had got out into the straits without jeopardizing both tug and tow.

Judgment

The counter-claim must be dismissed with costs, and the plaintiffs will have judgment for $415 and costs.

CAMSUSA *ET AL.* v. COIGDARRIPE *ET AL.*

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1904
March 26.
FULL COURT
Nov. 15.

CAMSUSA
v.
COIGDARRIPE

Trustee—Sale of trust business to stranger with arrangement that one of trustees go into partnership in the business—Validity of—Lapse of long term before action—Adequate price.

Evidence—Entries made by an executor in private book—Whether admissible for or against co-executor—Entries by solicitor as to instructions from client.

In 1885 the trustees of a certain business sold it at an adequate price to B., who before purchasing stipulated with C., one of the trustees, that he should go into partnership with him; C. did go into partnership and in 1893 he sold out his interest at a large profit.

In 1903, certain beneficiaries commenced an action founded on an alleged breach of trust against C. and the representatives of his deceased co-executor and asked for an order declaring that the sale to B. was a sham and was really one to C.:—

Held, that considering the number of years since the sale took place and that it was for a fair price, C's account of the transaction must be accepted, notwithstanding several suspicious circumstances.

In cross-examination of a defendant it is admissible to question him as to what disposition he has made of his property since the suit was begun or in anticipation of it and a defendant so disposing of his property does an act which will be viewed with suspicion.

Per HUNTER, C.J.: Entries made by the deceased executor in a private book kept by him were not admissible in evidence either for or against the other executor, neither were the entries in the charge book of the solicitor for B. and C. as to instructions received by him from B. in regard to the drawing of certain papers carrying out the arrangement between B. and C. admissible in evidence as against C.

Decision of IRVING, J., affirmed.

APPEAL by plaintiffs from the judgment of IRVING, J.

The plaintiff, Marguerite Camsusa, was the widow of Michel Camsusa, who in his lifetime was a wine merchant in Victoria, and the other plaintiffs were the surviving children of the said Michel and Marguerite Camsusa. The defendant, Coigdarripe, was one of the trustees and executors of the will of Michel Camsusa and the defendants, Wilson, Yates and Ker, were the executors and trustees of the will of Ludwig Emil Erb, who was the co-executor and co-trustee with Coigdarripe of Michel Camsusa.

Statement

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On 1st August, 1883, Michel Camsusa entered into partnership with one Boucherat in the wholesale liquor business for a term of two years, the agreement stating that the firm's capital was to consist of $27,281, of which Boucherat contributed $19,281 and Camsusa $8,000, and stipulating that after the payment to Boucherat of interest on the excess of capital put in by him, the profits should be divided equally; towards the middle of the year 1884 Camsusa became ill and continued in a state of health which kept him unfit for active business operations until his death, which occurred in December, 1884. On account of his illness the business ran behind, and as Boucherat was not an active business man, being advanced in years and not understanding English very well, the question arose as to how the business was to be carried on, and the two executors arranged with Mrs. Camsusa that Coigdarripe should go into the store, take charge of the business and receive the $100 per month which Mrs. Camsusa would have been entitled to out of the business, and half of this $100 he was to retain for himself and the other half he agreed to pay to Mrs. Camsusa. This arrangement was carried on until 1st August, when the partnership ceased according to the original agreement.

On or about 1st August, 1885, Boucherat bought from the executors Camsusa's interest in the business for $6,000, but he would not consent to purchase unless Coigdarripe would agree that after the transaction of sale should be completed he (Coigdarripe) and one Ragazzoni would become partners with Boucherat and assist him in carrying on the business. Coigdarripe then agreed to go into partnership and put $5,000 into the business, or, as he said, assume $5,000 capital. This arrangement was pleaded by Coigdarripe in his statement of defence thus:

Statement

"The said Boucherat would not consent to become a purchaser of the said interest unless the defendant, Coigdarripe, would agree that after the transaction of sale should be completed he, the said Coigdarripe and one Ragazzoni, would become partners with the said Boucherat and assist him in carrying on the said business."

Coigdarripe induced Boucherat to purchase by telling him

that it was a business that would pay, although he (Coigdarripe) did not believe it himself, or, as he said subsequently in his evidence, he had grave doubts about it. He said he urged Boucherat to buy in order that the Camsusa estate would be benefitted.

In December, 1885, articles of partnership dated 1st August, 1885, were executed by Boucherat, Coigdarripe and Ragazzoni, the agreement stating that the firm's capital was to consist of $27,000 of which Boucherat contributed $20,000 and Coigdarripe $7,000. The agreement provided that after payment to Boucherat and Coigdarripe of interest on their capital the profits should be divided equally amongst the three members of the firm.

The action was founded on an alleged breach of trust by the executors and an order was asked for declaring that the sale to Boucherat was really one to Coigdarripe.

Mr. Eberts, a solicitor, was called and he produced his day book for 1885, containing entries as follows:

"Boucherat & Co., Dr.

"Wednesday, 2 Sept., 1885.

"To drawing assignment of interest of the late Camsusa in the firm of B & C to Jean Coigdarripe, con. $6,000.

"*Re* Boucherat and Coigdarripe.

"Instructions to draw assignment of Camsusa's interest (lately purchased from executors of C. by Boucherat) to Jean Coigdarripe $6,000. Drew assignment and two notes $3,000 due 1st August, 1887, and 1st August, 1888, a credit on one of $150. Attending and had same signed and executed.

"Thursday, 3rd Sept., 1885.

"*In re* Boucherat, Coigdarripe and Ragazzoni.

"Ins. to draw up articles of partnership attg. and got particulars.

"28 Decr. 1885.

"*Re* Boucherat & Co.

"Drafted articles of partnership 24 fos: Attg. at your office reading over, fair copy for your perusal."

Statement

Coigdarripe explained in reference to the assignment to him of the Camsusa interest that immediately after Boucherat had bought he submitted a partnership agreement in French to him

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for his signature, but he refused to agree to the terms that Boucherat had inserted in it, and that Boucherat thereupon charged him with having put up a job on him in inducing him to purchase and then refusing to go into partnership as agreed, and that he (Coigdarripe) then proposed the assignment as a mark of his good faith and that it remain in the hands of the solicitors as an escrow until the final partnership agreement was settled, and that negotiations for such settlement were continued until December, when the partnership agreement was finally signed and thereafter acted upon. The defendant, Coigdarripe, said that the Camsusa interest had not been offered for sale to anyone other than Boucherat.

When Boucherat bought for $6,000 he paid $100 cash and gave notes for the balance, and when Coigdarripe went into partnership he paid $150 cash, gave notes for $5,850 maturing at the same time as the Boucherat notes; the same extension of time for payment was made in each case and also the same increase in the amount of interest after maturity; and the notes were finally paid off at the same time in 1893 when Coigdarripe sold his interest to Max Leiser for $26,000; about three years before this Pither had taken over Boucherat's interest in the business.

Statement

On cross-examination Coigdarripe admitted that since the commencement of the action he had conveyed away and mortgaged property to the value of $23,600 and that the money he had thereby received had been used to re-pay to Boucherat's widow money borrowed from Boucherat some time since the year 1890 and to pay debts that he had in France, but the names of the persons to whom the money was paid and the nature of the debts he refused to disclose.

The trial took place at Victoria in March, 1904, before IRVING, J.

Davis, K.C., and *A. D. Crease*, for plaintiffs.
Bodwell, K.C., and *Jay*, for defendant Coigdarripe.
A. E. McPhillips, K.C., for defendants other than Coigdarripe.

At the conclusion of the trial on 26th March judgment was delivered (orally) as follows by

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IRVING, J.: On 15th December, 1884, Camsusa died leaving then surviving him a widow and three infant children, the eldest being about six or seven years old. By his will, admitted to probate on 24th December, 1885, Coigdarripe and also Erb, now deceased, were appointed the executors. Under the terms of the will the executors were to collect and get in such portions of the personal estate as should not consist of money, and to lease or sell the real estate, and to invest the moneys arising from the getting in of the personal estate and the sale of the real estate, and from time to time to vary the investments; and to pay the income arising from such investments semi-annually to his widow during her life and widowhood, and after her death to pay to his children share and share alike the whole of his property for their own use absolutely. The rest of the will I do not think is material to this case.

At the time of his death he was insured for the sum of $6,000. He owned a lot in the north end of the town which was subsequently sold and applied to the purchase of another lot in another part of the town; and he was a partner in the firm of Boucherat & Camsusa. There is no dispute in this action about the lot or the insurance money.

After paying his debts, which amounted to about $2,000, the balance coming from the insurance money was duly invested and we are not concerned about that. There is no dispute but that the interest was punctually paid, and that the moneys realized from the sale of the interest in the firm were subsequently invested; and the securities are now in Court. The sufficiency of these securities is not questioned.

IRVING, J.

The widow and children, who have now attained the age of 21 years, now, on the 13th of June, 1903, bring this action against Coigdarripe and the executors of the late Ludwig E. Erb for a breach of trust. They claim now, after all the evidence is in, the pleadings being closed and the matter is narrowed down to an issue, a declaration that the sale was made to Boucherat merely colourably, that it was in reality a sale to Coigdarripe; and they ask for an order to set aside that sale, and an account of the estate which has been sold, or alleged to have been sold, after making allowances if proper to make allowances.

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The partnership business between Boucherat and Camsusa was formed on 31st August, 1883; a term of the articles of partnership provided that in case either of the parties should die before the expiration of the term of the co-partnership—which co-partnership expired on 1st August, 1885—then the legal representatives of the person dying should continue to carry on, with the surviving partner, the business up to the end of the partnership term, that is 1st August, 1885; and immediately thereafter the surviving partner should settle and adjust with the representative of the deceased partner all the accounts, matters and things relating to the partnership.

Within a month after the death of Mr. Camsusa the executors caused a balance sheet to be prepared by Mr. Monteith, a gentleman who gives evidence that he had had experience in that line of business; and he found that the assets amounted to $39,455, that the book debts amounted to $14,459.69; that Boucherat's capital account was $19,281, and that Camsusa's capital account was $8,000; that there were certain debts due from Camsusa to the firm, and certain deductions to be made on account of loss of profits, which sums having been deducted the liability of the firm to Camsusa was $6,347.41 on 15th January, 1885, practically at the time of Mr. Camsusa's death.

Evidence has been given on both sides as to the value of this business. On the part of the plaintiffs Mr. Saunders, who has had considerable experience, and had experience in the liquor business in 1884 and 1885, and also Mr. Harrison have given evidence. But they gave evidence, if I may say so, in pretty much the way the man in the street talks about things he knows of without having any definite information to go on; their evidence is based upon the general reputation of what they saw, what every person in the place probably saw—what the man in the street car thinks, it was a good business. On the other hand, the figures of Mr. Monteith have been submitted to gentlemen quite as well qualified apparently in experience as the witnesses called for the plaintiffs, namely Mr. Lawson and Mr. Wollaston, as to the value of the property. Mr. Lawson says, on the estimation that the net assets were divisible in proportion to the capital of each partner, Camsusa's share of the business estimated

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on the selling value of the business as a going concern, he thought would be about $4,758.37; at a forced sale he thinks that that interest would only be worth about $3,575. Mr. Monteith, in estimating the value of Camsusa's interest, his system being different, deducts the estimated cost of liquidating the business, and he finds the value of the business to be $5,724.41. Mr. Wollaston, who proceeded on a third system, said if the business had been sold as a going concern Camsusa's share would be worth about $4,930; if sold at a forced sale and the business wound up, $3,686.25.

The exact amount that the trustees did receive for this business was $150 in cash and $5,850 secured by notes at two and three years, carrying interest at six per cent., with an understanding, I take it, that those notes were to be renewed for convenience of the makers for a further period, so that the money would be at their disposal for a term of six years from the giving of the notes. Now, if I add to those figures given by any one of those gentlemen the sum of $360 profit made in the succeeding six or seven months, the sum that they received is in excess of the estimates furnished by Mr. Lawson, Mr. Monteith and Mr. Wollaston. Now then how is it possible for me to say at this date, and having regard to the opinion of these gentlemen that the sum of $6,000 was not a fair valuation so far as the amount was concerned?

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As to the propriety of the sale, the executors had many things to consider. In the first place they had, as it were, two sets of clients, the widow, who was interested in increasing the annual income as much as possible for her own convenience and ease and also for the benefit of her children whom she had to support, and then they had to consider, too, the interest of the children that the body of the money should not be used up. Then they had only a small amount of ready money; the terms of their trust were that they were to sell, invest and pay this over half yearly. As the widow had, some years before this, been led to believe that her husband had some $15,000 in this business, she not unnaturally felt considerably disappointed when the true state of affairs became apparent. They had then this small amount of ready money, $3,000, this interest in the business

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which had only some seven months to run, the surviving partner a man of 70 years of age, somewhat antiquated in his ways of doing business, speaking French only, and the business, without saying it was losing money—without going so far as that—certainly it was open to this remark, the business was in a very low state. On the whole I feel that the trustees realized, so far as the amount was concerned, a very fair amount under the circumstances.

Now there are certain dates in this case which are proved by document; their proof does not depend upon the memory of any person; and I think that they are very important, and very useful as shewing what the true state of facts was; at any rate they have given me a good deal of confidence in the way I am dealing with the evidence,—the conflict of evidence between Mrs. Camsusa and Mr. Coigdarripe. When you have to deal with conflicting evidence, we are taught that the proper course is if possible to reconcile the different statements; to attribute to the witnesses an honest desire to speak the truth to the best of their ability. In these days of business sharpness people do not follow that course enough; but that is the proper course, and it is dictated by the same Christian spirit that pervades the judgment of the three Lords Justices in *In re Postlethwaite* (1889), 37 W. R. 201. When you are face to face with contradiction between two people or between sets of witnesses, then

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you have got to be guided by certain rules; and there is no rule that will be able to tell you when a man is speaking the truth or speaking an untruth, but there are certain guides laid down which assist. In the first place there must be an honest desire on the part of the witness to speak the truth; the integrity of the witness is the first point; and his ability to recall, his ability to form an impression at the time, and his ability to recall it and to tell it when in the witness box. The numbers on one side and their interests have to be considered; the consistency of their testimony with the experience of men of the world; and the way the facts that they tell dove-tail in with the facts that are admitted, with the outside facts or the facts which cannot be disputed.

Now the facts which cannot be disputed are those which

appear in these exhibits. The first one to which I wish to refer, after the death of Mr. Camsusa, is that in one of the ledgers (14th January, 1885), the sum of $50 cash was advanced by the firm; then the 15th of January is the date of Mr. Monteith's report; in the month of January, no particular date was given, Mr. Hett, a solicitor, was consulted; the 31st of July—that was just on the eve of the breaking up of the old partnership—Coigdarripe was credited with $9.10 interest under the agreement which existed with the old firm of Boucherat & Camsusa that he should receive interest at five per cent. on moneys deposited with them; on the next day the partnership expired and a new account for Coigdarripe was opened, and on which he did not draw interest; on the 31st Mr. Hett drew an assignment of the Camsusa interest to Boucherat; Boucherat gave two notes dated 1st August, 1885, that is just immediately after the old firm dissolved; then on 1st September Mr. Erb makes an entry in his book, which in my view is a most important one, "September 1st, sold Camsusa's interest in business to J. Boucherat for $6,000; received in cash $150, notes $5,850;" and on the next page under date September 1st, 1885, "to cash account of selling business $150. To one month's interest on $6,000 at six per cent. $30." That corresponds, I take it, to one month's interest on the $6,000 that we are speaking of, and that he gave Mrs. Camsusa $30 instead of the $29.25. Then "to two months' interest on mortage at eight per cent., less something, $57, total $237." He then repaid himself on the other side on the same date $7.50; paid Mr. Hett $8 the balance of his account, paid some insurance $15, paid to Mrs. Camsusa $55.10 and there is a receipt by Mrs. Camsusa for that same $55.10. That was the first payment of interest on the $6,000 that is produced; that is the first payment that was proved by outside testimony, and it was the $6,000. And the next, 13th of September, 1885, is a receipt by Mrs. Camsusa for $29.25 for the next payment of interest, namely for the month of September. Under date 2nd September, 1885, there is an entry in Mr. Eberts' book from which it appears that he on that date received instructions to draw an assignment of interest of the late Camsusa in the firm of Boucherat & Co. to Jean Coigdarripe, consideration $6,000;

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and on the same day "instructions to draw assignment of Camsusa's interest (lately purchased from executors of Camsusa by Boucherat) to Jean Coigdarripe, $6,000;" and on the same day, "drew assignment and two notes $3,000 due 1st August, 1887, and 1st August, 1888, a credit of $150 on one; attending and had same signed and executed." On 2nd September, Coigdarripe drew $150 cash, and on 3rd September Coigdarripe deposited $1,000 with the firm in Boucherat's business to his own credit; and on 3rd September instructions were given to Mr. Eberts to draw up articles of partnership between Boucherat, Ragazzoni and Coigdarripe. On 28th December Mr. Eberts was instructed to draw articles of partnership between the same people. And he accordingly drew, I infer, exhibit No. 8. It is dated the 1st of August; it recites that they enter into a partnership for the term of three years, and then occur the words "commencing from the 1st day of August, 1885," from which I infer that it was drawn as of the 1st of August, some time afterwards; I therefore infer that this, being in the handwriting of a clerk in Mr. Eberts' office, was the one that he received instructions to prepare on the 28th of December. On the 9th day of February, 1886, there are several entries of importance in the cash books. Coigdarripe was allowed $450, being $75 per month from 1st August, 1885, to 1st February, 1886; and on the same date Camsusa's account was credited with the sum of $303.54 profit made during the period between his death and the expiration of the partnership. In 1888 the house was built and certain of the money was lent to Mrs. Camsusa for that purpose, or applied for that purpose; and that accounts for certain discrepancies in the interest. On 1st August, 1889, $23 was paid for interest, that would be something less than the $29.25; but on 1st September, 1891, at the expiration of the period of six years for which the money was lent, the interest comes up to the sum of $36.60, and that is continued on during the next month and for many months afterwards.

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In 1893 Pither & Leiser bought; Mr. Pither having come in on 1st April, 1890. Some time in 1894 the dentist bill came in. In October, 1897, Mr. Erb died, and in June, 1903, this action was commenced.

Now all those dates must assist me in forming a conclusion as to the correctness of the testimony given by these two people. After the expiration of 20 years it is pretty hard to say what actually took place—20 years is a long time to remember details. It is very easy for a person casting his mind back to say, How did that happen? and then to say, Well it must have happened that way; and then it is an easy step to say it did happen that way, —Yes, that is the way it happened, now I am sure of it. The most honest people in the world could very easily deceive themselves. And people can very easily, after the expiration of 20 years, step into the witness box and give wrong statements of fact really believing that they were speaking the truth, and yet not be guilty of anything discreditable to them. And, if it is possible, that is the way I think one ought to look at a case of this kind. And another thing that one should remember is that where you have come to a conclusion on points that you have outside assistance upon, and formed the opinion that one man or one woman is speaking the truth with reference to those particular things, on other things you should be guided by the conclusions that you have arrived at in the instances where you have had this outside assistance to guide you.

Now, what is Mrs. Camsusa's story? Her first story is (as to the buying out) that in January or February, 1885, Erb came and told her about the sale of the business, he said that they had taken stock and that Coigdarripe wanted to buy at $6,000 to remain there at six per cent. "I left it to him. He advised me to sell as I would lose the $100 a month; Coigdarripe brought me the interest on $6,000, namely $29; later on I asked Coigdarripe for a higher rate of interest and he said, 'We have decided to give it to you to-day;' and thereafter I got eight per cent." She is positive that the business was sold before the month of August. She got one $50, and the next payment was $29.25 on the 1st of March, and she fixes it by the illness of one of her children. And she says that Coigdarripe did not agree with her to work shares with her and to allow her one half of the $100, which, he, as a representative of her husband would be entitled to draw; that she only received one $50, and that she received from Mr. Erb. She says the receipt for $29.25 dated

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30th September, 1885, is not the receipt for the first payment; that is true, it was not, it was the second, but it was not within months of it was the point.

Now, is her story correct? The whole of her case started on that, on what she understood from Mr. Erb at that interview. Now, did Mr. Erb tell her that? We know that at a later date, in 1894, when the dentist bill came in, Mr. Erb told her that Coigdarripe never bought into the business or never went into the business. Now, it is perfectly true that at that time Mr. Erb must have told her, or would very likely have told her about Coigdarripe going into the business, and she must have known that Coigdarripe was in a sense going into the business. It also was perfectly clear that at some time it must have been told her that the business was going to be sold for the sum of $6,000 at six per cent. to remain in the business for six years. But was the sale that they told her of to be a sale to Coigdarripe, or was it to be a sale to Boucherat? She says she is sure of it, sure the sale took place on account of the payment of interest. Now, the first interest shewn to be paid by any of the documents and the first interest that any receipt was taken for was the 1st of September, 1885, and no other receipts are produced, and the second receipt is in the following month. I have come to the conclusion that that was the first time that he paid her the interest, namely when the sale took place to Boucherat on the 30th of August.

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I have come to the conclusion that Mr. Coigdarripe is honest and upright. I have come to the conclusion, strange as it may seem in these days, that Mr. Coigdarripe told Mrs. Camsusa that he would go into the shop and work for the $50 and that he would give her the other $50, and that he did do so; and the explanation of why there are no receipts is perfectly clear having regard to the fact that it was more or less an arrangement between Mr. Coigdarripe and Mrs. Camsusa based upon the friendly relationship that existed between Camsusa in his lifetime and Coigdarripe.

The plaintiffs' case turns upon their establishing that the sale was a sale to Coigdarripe. I have arrived at the conclusion, in the way I have endeavoured to point out, that Coig-

darripe is an honest man, and that his story of what took place, where it is contradicted by Mrs. Camsusa, must be accepted. I find that the arrangement was that Boucherat bought for himself from the executors; that the intention of so selling was communicated to Mrs. Camsusa when it was resolved upon. I am not able to actually fix the time, but I think that the real time is in the month of August when the accounts were first taken up that Boucherat first offered $5,000 and ultimately increased it to $6,000, and it was closed at that figure. I think, too, that there was an understanding—there was more than an understanding, there was a promise almost by Coigdarripe that he would go in and assist Boucherat in the business, and that that was connected with the sale. But the sale was for Boucherat himself. That I think is borne out circumstantially by the trouble that there was in arranging the terms of the partnership afterwards when Boucherat asserted his proprietorship in the business.

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I think my finding with regard to the honesty of that transaction, and that Boucherat bought for himself and not for Coigdarripe, disposes of the case. But on a further ground, I think this action ought to be dismissed, having regard to the fact that I consider Coigdarripe an honest man and that this was an honest transaction and that fair value was given for the property, and having regard to the great delay that has occurred in bringing this action, and the informing of the mother, the widow, of what was being done, and also of there being no loss of the corpus.

The appeal was argued at Vancouver in November, 1904, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Davis, K.C. (*A. D. Crease,* with him), for the appellants: The question is whether the Camsusa interest was sold to Coigdarripe or Boucherat, and we submit the judge's finding on this point should be reversed: as to the rule as to reversing a decision on the facts see *Dempster* v. *Lewis* (1903), 33 S.C.R. 292; *Belcher* v. *McDonald, ib.* 321; *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A. C. 73 at p. 83.

Argument

Defendants say the sale was the best thing that could have

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been done at the time, but whether it was or not Mrs. Camsusa should have had independent advice and the law should have been carried out; the business was never offered to anyone but Boucherat; if the sale was a sham adequacy of consideration is immaterial; see *Re Postlethwaite; Postlethwaite* v. *Rickman* (1888), 59 L.T.N.S. 58 at p. 60, (1889), 60 L.T.N.S. 514 at p. 519 and Lewin on Trusts, 10th Ed., 551.

We rely on the entries in the various books and on Coigdarripe's evidence; after the action was commenced Coigdarripe mortgaged and conveyed away nearly all his property.

Bodwell: I objected to the evidence of that at the trial; it should not have been received.

Davis: In a case like this where fraud is alleged it is important in order to test the credibility and honesty of the witness.

[HUNTER, C. J.: The evidence was admissible, but not of much value.]

The inference is that Coigdarripe believed the action was well founded and so he disposed of his property.

Until Coigdarripe's attention was drawn to the assignment (which he explained was an escrow) he maintained there was no agreement other than the partnership one with Boucherat and Ragazzoni; he could not have forgotten about it; it is incredible.

Argument

Bodwell, K. C., for respondent Coigdarripe: The business had been losing for two or three years and the stock was a poor one. Erb, who was a brewer and well informed as to the value of the business, thought it was a good sale, and the entry in his book shews that it was a sale to Boucherat; the evidence fully shews that the consideration, $6,000, was adequate.

The assignment drawn by Mr. Eberts never came into operation; it was only executed to assure Boucherat that Camsusa would keep his promise, but that promise was not that he would buy Camsusa's interest.

On the facts the Court should hold that Coigdarripe has acted honestly and reasonably and should relieve him from liability for any breach of trust which may have occurred; B. C. Stat. 1900, Cap. 41.

A. E. McPhillips, K. C., for defendants other than Coigdarripe,

stated that they did not make the admission that Boucherat only consented to purchase on getting Coigdarripe's promise to go into partnership.

He was stopped.

[HUNTER, C.J.: I don't see on what principle the Eberts and Erb entries were admitted in evidence.]

Davis, in reply: The Eberts entries only refresh Mr. Eberts' memory. Coigdarripe swears there was an agreement executed in Mr. Eberts' office but his counsel suggests Coigdarripe knew nothing about its terms. Coigdarripe says the agreement was to shew his good faith. To bind him he must have signed it and therefore he must have known what it was.

HUNTER, C.J.: The appeal must be dismissed. Speaking for myself, I cannot say that the learned trial Judge was wrong in accepting the statement of Coigdarripe that as trustee he considered he was acting in the interest of the Camsusa family when he undertook to get the Camsusa interest disposed of to Boucherat, the former partner, and that after Boucherat purchased, in obedience to the pressure of Boucherat, he himself consented, in pursuance of a previous vague promise, to become a member of a new firm in partnership with Boucherat and Ragazzoni.

So far as the entries are concerned, I do not understand upon what principle they were received; and that they were received I gather from the allusions to them by the learned trial Judge in his judgment. Of course, entries of this nature are admissible when made by a deceased person in pursuance of his duty; but I think that entries of this sort if admitted in the way they apparently were in this case, might lead to serious error; and I do not think there could be any better illustration of it than is furnished in this case. The entries themselves, of course, can not be cross-examined, it is only the person who made the entries. In this particular case, the person who made the entries apparently knows nothing, except that he made them in the usual course of business, which is not to be wondered at, as they were made twenty years ago, and they were admissible only for the purpose of refreshing his memory. Any inference that we could

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draw would more likely to be wrong than right, as it is quite possible that they were made by Mr. Eberts, after an interview with Boucherat, who may have misunderstood the nature of the transaction, or may have perfectly understood it and misinstructed Mr. Eberts, or Mr. Eberts may have misunderstood what Boucherat said. Divers possibilities of error would clearly be created if those entries were to be held in any sense admissible as against Coigdarripe. On the other hand, I do not see upon what principle the entry made by Mr. Erb is admissible in favour of his co-executor. It is clearly admissible as against his own interest, but I do not see how the entry is admissible for or against Coigdarripe. Therefore, it comes down to this, whether Coigdarripe is a veracious or unveracious witness? No doubt he did all he could to damage his case by parting with his property during the pendency of the suit, because a man who so acts does damage his case in the eyes of the judge or the jury. At the same time, it is quite possible it was done under bad advice, or because he felt that the evidence had slipped away from him which would corroborate his story. It may have been done for a variety of reasons, but I do not think it is at all germane to the question of whether or not there had been a breach of trust. It does, of course, afford scope to a skilful cross-examiner to test his credibility, and for that purpose may be looked at. Still, although the answers given by him in relation

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to the disposition of his property were not wholly satisfactory I do not think, however, having regard to his evidence as a whole, that he can be said to be an unveracious witness. The explanation given by him of the transfer to Boucherat is not an unreasonable one, and the learned trial Judge, who saw him under a most severe cross-examination, taking his evidence as a whole, came to the conclusion that it was the evidence of a truthful witness. In a case of this sort, I think the Court of Appeal ought to be very careful before it comes to the conclusion that the learned trial Judge was wrong who had the advantage of observing the demeanour of the witness under such circumstances. Of course, it is open to the Court of Appeal, notwithstanding the fact that it has not had the advantage of observing the demeanour of the witnesses, to reverse the trial Judge, if it

comes to the conclusion that he was wrong; but in a case of this sort I think the Court ought to be extremely careful how it reverses the trial Judge, because not having had the advantage of observing the demeanour of the witnesses, it would be reversing his decision on less evidence than was before him. Moreover, it was admitted by the appellants that they could not impeach the adequacy of the purchase price, a fact which is not to be disregarded in coming to a conclusion as to the *bona fides* of the trustee.

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The appellants have failed to satisfy us that the learned Judge was wrong in his conclusion, and that being the case, the appeal must be dismissed.

MARTIN, J.: I concur with what my Lord has said that this Court would not be at all justified in interfering with the findings of fact by the learned trial Judge, and I say this after a careful examination, since the Court rose, of the whole of the testimony of Coigdarripe, both on direct and on cross-examination, and of Mrs. Camsusa. Further, had I approached the matter without a knowledge of any of the findings of the learned trial Judge, I should have come to the conclusion that Coigdarripe's actions, in view of all the previous circumstances, and in view of the entries on both sides which were admitted in evidence, *viz.*, particularly that one of Erb, which is strongly in his favour, and that very ambiguous one in Mr. Eberts' book, which is open to the objection which has been pointed out, should be regarded in the manner which the Court below regarded them.

MARTIN, J.

One must bear in mind that this defendant, speaking now about what my Lord has referred to in regard to the disposition of his property, was placed in a very unusual position, *viz.*, that he was after a lapse of nearly twenty years called upon to explain matters coming upon him like a "bolt from the blue," and that he should in such circumstances have acted in a way that shews he was more or less in a state of panic and apprehension and so, ill advisedly, sought to protect himself from the demands made upon him by a woman who he thought was acting at least in an ungrateful manner, is very probably true. That he

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went too far in the suspicious measures he took in that state of alarm may be very well the case, but all I can say is that it is not unnatural under the exceptional circumstances and does not destroy or seriously detract from the weight to be attached to his testimony. I have nothing more to add.

MORRISON, J.: I concur.

Appeal dismissed.

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CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND MINERS UNION, No. 38, WESTERN FEDERATION OF MINERS, *ET AL.*

Solicitor—Obtaining transfer of property to himself pending litigation—Fraudulent preference—Summary jurisdiction of Court.

Before the trial of an action for damages for tort the defendants' solicitors wrote to one of the defendants warning him of a possible judgment against him and advising him to make disposition of his property in anticipation of it. After verdict against defendants and pending argument on the motion for judgment counsel (who was also one of the solicitors) for defendants, obtained a transfer to himself of certain property belonging to the defendant Union which he credited with $500 on account of costs; subsequently judgment was entered for plaintiffs for $12,500 and costs and plaintiffs obtained the appointment of a receiver and issued executions but nothing was realized:—

Held, that the solicitor in obtaining the transfer to himself of the property was guilty of a fraud on plaintiffs and that he should restore it or pay its value into Court under penalty of attachment.

Per MARTIN, J. (dissenting): The evidence is not sufficient to warrant the Court in making a summary order against the solicitor and there should be a trial of an issue to determine the questions in dispute.

Decision of IRVING, J., reversed, MARTIN, J., dissenting.

APPEAL from that part of an order of IRVING, J., dismissing plaintiffs' application that the defendants' solicitors, S. S. Taylor

and James O'Shea, do deliver up to the sheriff of the County of South Kootenay, or to such other officer or person as this Court shall direct, all printing press, type and other materials comprising the plant of the Evening World newspaper at Rossland, or the proceeds thereof if sold.

The action was one for damages for conspiracy in unlawfully procuring a strike of plaintiffs' employees. The trial took place at Victoria and on the 16th of July, 1904, the jury returned a verdict fixing the damages suffered by plaintiffs at $12,500; a motion was thereupon made by counsel for plaintiffs for judgment but (as stated in the affidavit of A. C. Galt, solicitor and counsel for the plaintiffs) in view of the fact that the verdict was rendered late Saturday afternoon and that counsel for the defendants announced that his argument against the said motion would occupy considerable time, it was arranged that written arguments should be filed on behalf of all parties concerned at certain specified dates expiring on or about the 11th of August.

On 17th August, judgment was given in favour of the plaintiffs against the defendants for $12,500 and costs, and on 19th August plaintiffs obtained the appointment of a receiver; they also took some garnishee proceedings and issued execution, but nothing was realized. They then examined the defendant, Peter R. McDonald, the financial secretary of the defendant Union, and ascertained that at a meeting of the Union on 6th July, 1904, authority was given to issue a cheque "for $970 to H. G. Seaman *re* law suit" and the cheque was issued according to McDonald's evidence to defray the expenses of the Centre Star law suit.

Statement

During the trial of the action the following letter from Taylor & O'Shea to Constantine, one of the defendants, was produced and although not used in evidence was marked for identification:

"Alexander Constantine, Esq.,

"Rossland.

"*Re* Centre Star v. Rossland Miners Union and others.

"Dear Sir:—You are defendant in this action with many others, and notice of trial has been given by the plaintiffs for the Court at Victoria, on the first of March, to which it would be well that you would go to give evidence if possible, and we should like to know at once whether you will be able to go.

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"We tried our best to force a trial at Nelson or Rossland and obtained an order for trial at Nelson, but the Court of Appeal upset this order, and we are now forced to go to trial at Victoria. Plaintiffs are claiming against all defendants $50,000 damages.

"While we hope to win the action, still, with the jury at Victoria, where such strong prejudice has prevailed against the Western Federation of Miners, we feel afraid that a verdict might be given against you; therefore it is very necessary if you have any property in your name to make disposition of it at once. It is very dangerous to convey to your wife, because the law is that a voluntary conveyance, on the eve of a trial of law suit against you, is no good.

"We think it is our duty to fully advise you in time, however, as we would feel very sorry to have you lose the property that you have worked so hard for.

"We hope to hear from you at once with regard to whether you can attend as witness on your own behalf at the trial.

"You remember that the day of trial is for Tuesday, the first day of March next.

"Yours truly,

"Taylor & O'Shea."

The plaintiffs' solicitor, A. C. Galt, deposed in an affidavit used in support of the summons that the defendant, Peter R. McDonald, transferred in February, 1904, certain real estate in Rossland, owned by him, to a relative; that the defendant, Preston, had transferred real estate in Rossland, owned by him, and that the other individual defendants against whom judgment was recovered possessed no property in Rossland out of which anything could be realized; that on 30th September he called at the building where the Evening World used to be published, until it discontinued publication during the trial of this action; a man came forward who said his name was Collis and that he and one Fletcher formerly owned the Evening World plant subject to a chattel mortgage for $1,300 advanced by the defendant Miners Union for the purchase of said plant; also that the plant was worth fully $1,000 and that it had recently been sold by said Union to Mr. Taylor, the defendants' solicitor, and that a deal was pending for a re-sale of said plant for a sum exceeding $500.

Statement

In answer to the summons the affidavit of S. S. Taylor was filed and the paragraphs in it referring to that part of the summons which is the subject of this report were as follows:

"(4.) With regard to the second paragraph of the said summons no judgment has been given in the action and no receivership order or injunction granted prior to the disposition of the $970 referred to in the second paragraph and the said $970 has not as yet been paid to our firm for costs, and we have made a demand from the Western Federation of Miners' general office (through whom the said moneys should pass, as I am informed by James Baker, the Executive Officer of the said general office of the Western Federation of Miners) for the said moneys because the defendants in this action owed us a very much larger amount than said moneys amount to, over and above all sums which have been received up to date.

"(5.) With regard to the third paragraph of the said summons I proceeded to Rossland immediately after the trial of this action at Victoria, B. C., and a considerable time before the judgment given in the same and before any receivership order was made or injunction granted, and demanded some security for at least a reasonable portion of our costs; the result was that I visited the World plant, upon which the Union had a chattel mortgage, and arranged for them to pay $100 to clear the claim of Messrs. Fletcher & Collis, and to hand over to me the plant at $500, which I then believed to be its full value. I have held the said plant since that time until about a week or ten days ago and have attempted to sell it to several persons in the printing business, with the result that I have not been able to get an offer from any person except A. T. Collis & Co., of Rossland, the former owners, and after incurring considerable expense in attempting to make this sale, with the loss of considerable time, I have only been able to sell it for $575, $100 having been paid down and the balance extends over two years without any other security than the lien agreement on the plant. This property is old and dilapidated excepting one printing press which is really the only part of the plant which is actually of commercial value. The acquiring of this property by me from the Rossland Miners Union is absolutely *bona fide* in every respect; it was not in any way done to defeat, delay or hinder the plaintiffs in any judgment that they might at that time or afterwards obtain in this action. It was solely for the purpose of getting some solid

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security for the large amount of money that these defendants owed me on account of costs, and at the time that the said property was received by me there was no judgment and very strong arguments were being urged why judgment should not be entered against the defendants in this action. In addition I have been instructed to appeal this action and have ordered the notes of evidence, which when received, notice of appeal will be prepared and served upon the plaintiffs' solicitors. I absolutely deny that the acquiring by me of the World plant was a part of or in any way connected with any scheme or plan to defeat the plaintiffs in recovering any part of any verdict that they might receive. It is true, of course, that at the time I got the property the jury had rendered their verdict, but the motion for non-suit and the motion for judgment had not been disposed of and I verily believe that we have good grounds for succeeding upon these motions on appeal. The World plant was turned over to me as the result of my request; I found that they were attempting to sell or dispose of it, and I believe because the newspaper had ceased publication that the property had come back into their hands quite irrespective of this action and I determined that it was time that they should make further payments to me on account of costs and hence the putting through of that transaction.

Statement

"(6.) With regard to the sixth paragraph of the said summons I have been informed by the officers of the Rossland Miners Union, including Peter R. McDonald, and the present secretary, J. C. Scott, that the members of the Union would not pay their usual dues if they knew that such moneys were to go to the Centre Star, and I therefore advised them, rather than to sacrifice the interests of the Union, to reduce the dues to ten cents, then the members would have no objection to having at least that amount paid to the receiver, and which might ultimately pass to the Centre Star. I verily believe that they have a perfect right to control matters of their constitution and to either raise or reduce their monthly dues as they see fit, hence the reason for my advice as above stated."

(7.) In answer to Mr. Galt's statement as to his conversation with Collis, he produced a letter from Collis in which he stated,

"Now Mr. Galt has construed my conversation to suit himself. He asked what the plant was worth; I told him that $500 was a good price the way the plant stood to-day, as outside the press it was junk. He said he understood that it included the plant now operated by Collis & Co., which I quickly informed him was not the case.

"He then said: 'Now if anyone wanted to start a paper would it not be worth $1,000?' Here is my answer, and what the honourable gentleman construes to suit himself and further his own ends: 'If the plant had to be duplicated it would cost that amount, probably more, but you must remember that you would have all new material.'"

The summons was argued before IRVING, J., who on 27th October, 1904, delivered the following judgment:

"I am unable to find any authority shewing that I have jurisdiction, or if jurisdiction there is, that I ought at the instance of the plaintiffs to deal summarily in this action, with the defendants' solicitor.

"In the absence of some direct authority I think it would be mischievous for me to create a precedent of this kind, when the usual method of attacking an alleged fraudulent assignment is open to the plaintiffs.

"The plaintiffs must pay the solicitors the costs of this portion of the summons."

Statement

The grounds of appeal as set out in the notice of appeal were:

"(1.) The plaintiffs submit that defendants' solicitors, being officers of this Court, and one of them, namely, Sidney Stockton Taylor, having been present in Court as counsel for defendants when a verdict was rendered in favour of the plaintiffs, and the learned trial judge directed both parties to file written arguments on their motions for judgment at the conclusion of the trial it was not competent for the said solicitors to obtain for their own benefit the goods and chattels in question to the prejudice of the plaintiffs.

"(2.) The said solicitors were well aware that the defendants possessed very little property and they knew that whatever goods or property the defendants possessed would be wholly insufficient to answer the amount of the verdict, to wit the sum

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of $12,500, in case the learned trial judge gave judgment in favour of the plaintiffs, as he subsequently did.

"(3.) The materials used upon this application established the fact that the defendants' solicitors prior to the trial had advised one or more of the defendants to dispose of their property in anticipation of the plaintiffs recovering damages at the trial, as they subsequently did, so that whether the transaction complained of was intended to benefit the defendants' solicitors, or merely to place the property in question beyond the reach of the plaintiffs' execution the transaction ought not to be allowed to stand."

The appeal was argued at Victoria on 10th and 11th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

Galt, for appellants: The Court has jurisdiction to deal summarily with the solicitors and the facts shew that they should be so dealt with; to attempt to evade a likely judgment is a fraud under 13 Eliz., Cap. 5; there was collusion and the transfer to Mr. Taylor should be set aside: he cited *Marsh* v. *Joseph* (1897), 1 Ch. 213 at pp. 244-5; *In re Dangar's Trusts* (1889), 41 Ch. D. 178, where the cases are reviewed; *Re Ward* (1862), 31 Beav. 1; *Re Spencer* (1869), 18 W. R. 240; *Batten* v. *Wedgwood Coal and Iron Co.* (1886), 31 Ch. D. 346; *Slater* v. *Slater* (1888), 58 L. T. N. S. 149; *Crossley* v. *Elworthy* (1871), L. R. 12 Eq. 158; *Cameron* v. *Cusack* (1890), 17 A. R. 489; *Ex parte Chaplin; In re Sinclair* (1884), 26 Ch. D. 319 at pp. 336-8 and *Holten* v. *Vandall* (1900), 7 B. C. 331.

Davis, K. C., for respondents: This is not the proper or permissible proceeding to obtain an order for payment of the $500; Mr. Taylor has a right to have his case tried in the ordinary way by action; every man has a right to have a case of fraud against him tried by a jury and that right will not be taken away because he is a barrister or solicitor; to give the Court jurisdiction the act complained of must be done by the solicitor in the ordinary course of his business as a solicitor: see *Re Richard Blanchard* (1861), 4 L. T. N. S. 426 and *Re Cutts, an Attorney, Ex parte Ibbetson* (1867), 16 L. T. N. S. 715.

The Court in its discretion will not put the solicitor in a

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worse position than an ordinary creditor; if any doubt at all he should get the benefit of it; it was not an act *qua* solicitor but *qua* creditor; the transfer cannot be set aside if made under pressure; all these facts should be inquired into on a trial.

There was a demand and that constitutes pressure; see *Stephens* v. *McArthur* (1891), 19 S. C. R. 446.

Under the Fraudulent Preference Act plaintiffs would have to shew the Union was insolvent and also that it was "a person;" the statute cannot be held to apply to the Union as it is not a person or a corporation; plaintiffs' claim was not for a debt but for damages for an alleged tort. The sum of $100 was paid and the conveyance was not void, but voidable and according to the decision in *Cascaden* v. *McIntosh* (1892), 2 B. C. 268 could not be attacked at all.

Argument

Galt, in reply: *Reg.* v. *Cox and Railton* (1884), 14 Q.B.D. 153 shews the letter to Constantine was not privileged. The Court administers a different rule in the case of its officers: see *Ex parte James*; *In re Condon* (1874), 9 Chy. App. 609 at p. 614; *Ex parte Simmonds*; *In re Carnac* (1885), 16 Q.B.D. 308; *In re Brown*; *Dixon* v. *Brown* (1886), 32 Ch. D. 597 and *In re Opera, Limited* (1891), 2 Ch. 154.

As to the duty of solicitor when buying himself from his client see *Spencer* v. *Topham* (1856), 22 Beav. 573.

There was no *bona fide* pressure but rather a scheme to hinder or delay plaintiffs.

HUNTER, C.J.

HUNTER, C.J.: Speaking for myself, I intend to deliver judgment now. With regard to the difficulty felt by the learned Judge below about creating a precedent, I may say that I feel no such embarrassment, because, when the Court encounters new phases of fraud then it is time to make new decisions and new precedents. And the material upon this appeal to my mind presents a very clear case where the solicitor has been guilty of misconduct in the defense of the suit from beginning to end. There is a statement in the letter to one of the litigants to the effect that the solicitor fears that a verdict will be given against him, and "therefore that it is very necessary

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if you have any property in your name to make disposition of it at once. It is very dangerous to convey to your wife, because the law is that a voluntary conveyance on the eve of a trial of law suit against you is no good." Now, that letter was evidently not written by inadvertence, as it was apparently a circular letter written to all the clients for whom he was acting. I think a solicitor who can write a letter of that sort has a very poor notion of the dictates of professional honour; and not only that, but that he is floundering in a quagmire of ignorance and moral obliquity. He evidently does not know that it is an offence at common law, that it is an offence under the statute of Elizabeth, that it is a crime under the Criminal Code of this country for anyone to transfer his property with the intention of defrauding a creditor. And of course, if that is so, then it must be a crime for anyone, and especially a solicitor, to counsel the commission of such an act. I have not the smallest doubt that the solicitor who wrote that letter was guilty of an indictable offence, and that he also committed a gross contempt of the Court. As, however, no one has seen fit to bring the matter before the Court in a formal way, I do not think it is necessary on this occasion to take any further notice of it than to mark our sense of the misconduct revealed by the material before us.

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Now, it has been suggested by the learned counsel for the solicitor that the transfer can be attacked, if at all, only under the Fraudulent Preference Act. In my opinion, this transaction is illegal at common law; it is illegal under the statute of Elizabeth, as that statute strikes at the case of a debtor who makes a preference with a view to reserving a benefit for himself, and I can conceive of no clearer case of a debtor reserving a benefit for himself than where he transfers to his solicitor the assets which ought to go to pay his creditors. But even assuming that the transaction could be impeached only under the Preference Act, it is idle to talk of *bona fide* pressure in this case, as the taking of this property by the solicitor was the last chapter in a series of acts designed to defraud the plaintiffs of the fruits of any judgment which they could recover. Justice would indeed be both halt and blind if a counsel were allowed under the circumstances that have been disclosed to us, to use the opportunity

afforded by an adjournment granted after verdict, to snatch away property pending the judgment for the benefit either of his client or himself, which ought to go to pay his client's just debts. IRVING, J. 1904 Oct. 27.

I think that the counsel for the Company has been very moderate in his demand indeed, and that the judgment of the Court ought to order this property to be restored within ten days to the sheriff, or in default, that the sum of $575, being the value accepted by Mr. *Galt*, be paid into Court by the solicitor, under penalty of attachment. FULL COURT 1905 Jan. 11. CENTRE STAR v. ROSSLAND MINERS UNION

The occasion is a very suitable one for recalling the words of Sir Alexander Cockburn, Lord Chief Justice of England, that an advocate ought to uphold the interests of his client *per fas*, not *per nefas*; that the arms which he wields he ought to use as a warrior, not as an assassin.

MARTIN, J.: So far as I am concerned, I would prefer to examine the authorities which have been cited before I come to any conclusion in this matter. I should prefer that judgment should be reserved until I have an opportunity to fully examine them. But since my learned brothers have such clear ideas on the point, of course the judgment of the Court will have to be given as it has been given by them. I only at present wish it understood, that as now appears, I think the course which was taken by the solicitor here was one which was undesirable for him to have taken. But that is not the point on which the solicitor's counsel asks this Court to pass; the questions are, first, has he acted in his capacity of solicitor and not that of creditor? and second, was there pressure brought to bear which would take the case out of the statute? I prefer to consider these questions more fully, as this is a serious matter; and I shall hand down a written judgment which will embody my views thereon. MARTIN, J.

MORRISON, J.: I concur with the conclusion of my Lord. MORRISON, J.

Subsequently, on 20th February, the following written judgment was filed by

MARTIN, J.: It was with much regret that I was unable to concur with the view expressed by my learned brothers at the conclusion of the argument that the questions raised on this MARTIN, J.

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appeal were so clear that judgment should not be reserved. And now, after full consideration, I also regret that I am unable to agree with them that the order appealed from should be wholly reversed, and I think that particularly in a case of this nature a Court of Appeal should be slow to take a step which the Judge who originally heard the matter refused to take, for much might well be left to his discretion in an application for the exercise of the summary jurisdiction of this Court against one of its officers.

I turn then to the facts which should be clearly borne in mind. It appears that the solicitors in question were acting for the defendants in a suit brought against them by the plaintiff Company for damages as the result of an alleged conspiracy to injure its business by unlawful means, which action was tried in Victoria on the 5th, 6th, 7th, 8th, 11th, 12th, 13th, 14th, 15th and 16th days of July, 1904, and on the last mentioned day the jury returned a verdict against the defendants for $12,500, upon which a motion for judgment was made by the plaintiff and opposed by the defendants' counsel, Mr. *Taylor*, who made a cross-motion for judgment in their favour. Whereupon, as the notice of appeal states, "the learned trial judge directed both parties to file written arguments on their motions for judgment," which was done, and a month later, on August 17th, judgment was delivered in favour of the plaintiff. In the interval, and very shortly after the verdict of the jury, Mr. *Taylor* went to Rossland and made a demand upon one of the defendants, the Rossland Miners Union, No. 38, Western Federation of Miners, for some security for at least a reasonable portion of a large sum admittedly due to his firm for costs, and in answer to that demand obtained, after payment of $100 to free a prior charge, possession of a newspaper plant, on which the said defendant Union had a mortgage, at an agreed value of $500, for which sum he gave credit to the defendant Union on his bill of costs against it. This transaction is set out in the following resolution of July 26th, 1904:

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"Moved by R. Morrison, seconded by D. R. Smith: That we sell and assign to S. S. Taylor of Nelson, B. C., all our right, title and interest in and to the chattel mortgage from Messrs. Fletcher & Collis to the Union, covering the printing press and plant used in the 'Evening World' and

fully described in a chattel mortgage, for the sum of $500 upon the understanding that the Rossland Miners' Union gets credit on account of costs for the sum of $500.

"(Signed) P. R. McDonald,
"Sec. *Pro tem.*"

I am unable to say on all the evidence that the amount agreed upon and credited by the solicitor was not a fair value for the printing plant; and the transfer was for valuable consideration. With the exception of this plant the defendants do not, on the material before us, appear to have had any other substantial asset.

The notice of appeal sets out what is complained of as follows: (Setting it out as in statement.)

The advice to one of the defendants referred to in paragraph 3 is contained in an ill-advised and unwarrantable letter written by the said solicitors to Alexander Constantine more than six months before judgment was delivered, and in regard to another matter, *i.e.*, the conveyance of Constantine's own property, but legally, and as a matter of proof it should not be brought into the present controversy because it has nothing to do with it, and consequently the objection entered by the counsel for the solicitors against its admissibility should be sustained.

Much stress was laid on the fact that before the impeached transaction the jury had returned a verdict against the defendants, but undue importance should not be attached to that because it is the usual practice of this Court, to avoid expense, to let the damages be assessed by the jury and reserve for further consideration on motion the question of liability on the jury's findings and the judgment to be entered thereon; a recent instance where I adopted this course is *Hosking* v. *Le Roi No. 2, Limited* (1903), 9 B.C. 551, and see also *Wood* v. *Canadian Pacific Railway Co.* (1899), 6 B. C. 561, in both of which cases damages were assessed by the jury against the defendants but judgment given by the Court against the plaintiffs. Therefore I see nothing improbable in the statement of the solicitors that they believed judgment would be given in favour of their client despite the finding of the jury.

On behalf of the solicitors it was objected that even assuming all the allegations to be true, yet what he did was done in his

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capacity as a creditor and not as a solicitor, and the case of *Re Cutts* (1867), 16 L.T.N.S. 715, is relied upon to shew that unless the solicitor has acted in that capacity the Court will not interfere. In that case, which came before Blackburn and Lush, JJ., it was laid down that

"Any gross misconduct on the part of attorneys, acting as attorneys, the Court will visit summarily, but the misconduct imputed to Cutts is not of such a description as to give us any jurisdiction."

And again

"It may be very bad of him, both as a man and a gentleman, to have acted thus, but it does not affect him as an attorney. We do not sit to punish personal but professional misconduct."

But it is stated, nevertheless, that

"Another ground on which the Court will exercise its summary jurisdiction is where, in any matter, an attorney has committed some crime, not necessarily an indictable crime, but still of such a character as to render him unfit to continue an attorney at all."

This decision, as well as being partly self-contradictory, appears to be too restricted and is at variance with other prior and later cases of more weight, and strangely enough not a single authority is cited in it. The proper jurisdiction of and course for the Court to adopt was laid down the following year in *Re Hill* (1868), L.R. 3 Q.B. 543, wherein the Court was composed of Cockburn, C.J., and Blackburn, Mellor and Lush, JJ., and followed the leading case of *In re Blake* (1860), 3 El. & El. 34, wherein the Lord Chief Justice said:

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"I am of opinion that Blake is amenable to the summary jurisdiction of this Court, although the misconduct of which he has been guilty did not arise in a matter strictly between attorney and client, but out of a simple loan transaction. I proceed on the general ground that, where an attorney is shewn to have been guilty of gross fraud, although the fraud is neither such as renders him liable to an indictment, nor was committed by him while the relation of attorney and client was subsisting between him and the person defrauded, or in his character as an attorney, this Court will not allow suitors to be exposed to gross fraud and dishonesty at the hands of one of its officers. Upon this principle the present attorney, Blake, must be held responsible, under the circumstances, of gross fraud, which have been proved against him."

And in *Re Hill* the same learned Judge said:

"In dealing with the case, I am perfectly prepared to abide by what I said in *Re Blake*. When an attorney does that which involves dishonesty it is for the interest of the suitors that the Court should interpose and pre-

vent a man guilty of such misconduct from acting as attorney of the Court. In this case, if the delinquent had been proceeded against criminally upon the facts admitted by him, it is plain that he would have been convicted of embezzlement; and upon that conviction being brought before us, we should have been bound to act. If there had been a conflict of evidence upon the affidavits, that might be a very sufficient reason why the Court should not interfere until the conviction had taken place; but here we have the person against whom this application is made admitting the facts."

And Mr. Justice Blackburn said:

"I am of the same opinion. I think when we are called upon, in exercise of our equitable jurisdiction, to order an attorney to perform a contract, to pay money, or to fulfil an undertaking, there we have jurisdiction only if the undertaking or the contract is made in his character of attorney, or so connected with his character of attorney as to bring it within the power of the Court to require that their officer should behave well as an officer. But where there is a matter which would subject the person in question to a criminal proceeding, in my opinion, a different principle must be applied. We are to see that the officers of the Court are proper persons to be trusted by the Court with regard to the interests of suitors, and we are to look to the character and position of the persons, and judge of the acts committed by them, upon the same principle as if we were considering whether or not a person is fit to become an attorney. If he has previously misconducted himself we should consider whether the circumstances were such as to prevent his being admitted, or whether he had condoned his offence by his subsequent good conduct. The principle on which the Court acts being to see that the suitors are not exposed to improper officers of the Court."

And the other learned judges concurred. And see to the same effect *Re Aitkin* (1820), 4 B. & Ald. 47; *De Woolfe* v. ——— (1822), 2 Chit. 69; *The King* v. *Whitehead* (1827), Tay. 476; *In re O'Reilly* (1841), 2 P.R. 198; *In re Morse* (1868), 7 N.S. 388; *Re Titus* (1884), 5 Ont. 87; *In re Thibeaudeau* (1877), Man. (temp. Wood) 149; *In re Osler* (1878), *ib.* 205; *Re J. B., an Attorney* (1889), 6 Man. L.R. 19 and *In re Wallace* (1866), L.R. 1 P.C. 283 at p. 295, wherein Lord Westbury said, in delivering the judgment of the Privy Council: MARTIN, J.

"It must not, however, be supposed that a Court of Justice has not the power to remove the officers of the Court if unfit to be entrusted with a professional status and character. If an advocate, for example, were found guilty of crime, there is no doubt that the Court would suspend him. If an attorney be found guilty of moral delinquency in his private character, there is no doubt that he may be struck off the Roll."

Other cases are collected in White on Solicitors (1894), pp.

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87-101; Poley on Solicitors (1897), pp. 116, 124 *et seq*; and Cordery on Solicitors (1899), pp. 150, 167, 176, 182; Archbold's Q.B. Prac. (1885), 176 *et seq.*

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The circumstances of this case are very unusual and the appellants' counsel has been unable to cite one at all resembling it, though he has referred us to several English decisions. I have in addition examined carefully all the English cases at all bearing on the question as well as those in the Canadian and Irish reports, and find that the one which comes nearest to it is *In re Attorney* (1876), 39 U.C.Q.B. 171, wherein it was laid down by Harrison, C.J., Morrison and Wilson, JJ., concurring, after reviewing many cases, that even the attempt, though unsuccessful, of an attorney, acting for an assignee in insolvency, to obtain for himself as creditor a preference from the insolvent firm is strongly censurable, the learned Judge saying:

"But, although I do not clearly see my way to proceed further against the attorney at the instance of the applicant on the present application, I cannot shut my eyes to the fact that his conduct while acting as solicitor for the assignee, in attempting to secure a preference to himself, is anything but creditable to him. Had he succeeded, his conduct, if his intention as to the $2,000 be at all well grounded, would have been a fraud on the general body of creditors represented by the assignee, whose legal adviser he was."

And speaking of an attorney who, apart from professional services, lends money to trading clients, he says, p. 186:

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"An attorney who not only advises his clients as to matters of law, but when these clients are traders, and, to use his own language, 'always hard up for money,' gives them accommodation paper, and thereby gives them a fictitious credit, is not to be surprised if some day affairs take such a turn as to leave him in the lurch. And when that day arrives, instead of endeavouring to secure an undue advantage over other creditors, he should have the manliness to suffer, and the honesty to share like other creditors in the distribution of whatever property is available for creditors generally."

In that case it will be noted that the fraudulent attempt was clearly proved by the attorney's own letter, and there were other creditors at the time, and the attorney was a creditor for money lent, and not for costs, all of which circumstances have weight in estimating the degree of impropriety on the part of the officer. But the serious charge of a fraudulent attempt to obtain a preference is flatly denied in the case at bar, and it is impossible on the limited material before us to satisfactorily

answer that complex question which is always one of the most difficult to decide in a regular trial, even when the witnesses are before the Court. In the determination of that issue the question of pressure is of the first consequence (*Adams and Burns* v. *Bank of Montreal* (1899), 8 B. C. 314, (1901), 32 S.C.R. 719; *McClary* v. *Howland* (1903), 9 B.C. 479), and it is very desirable to have all the evidence that can be procured to throw light on the actions of the parties concerned. A perusal of the appeal book satisfies me that much more evidence would be forthcoming at a trial in the regular way than there is now before us. I can find no decision where the Court has exercised its summary jurisdiction in a case of the present complicated and difficult legal nature, and all I now feel called upon to say is that if I were forced to decide the question of preference on the present insufficient material I should hesitate long before holding that the transaction should be set aside. And there is this further important element that at the time the transfer was made the plaintiff was not a creditor of the defendants or any of them, but was merely in the position of a litigant seeking to obtain damages for a tort pure and simple arising out of a conspiracy, nor does it appear that then or now there were or are any other creditors of the defendants or any of them, and taking these facts into consideration with the other circumstances, I do not at present, at least, see that there is much strength in the plaintiff's case: see *Cameron* v. *Cusack* (1890), 17 A. R. 489; *Gurofski* v. *Harris* (1896), 27 Ont. 201, 23 A.R. 717 and *Christie* v. *Fraser* (1904), 10 B.C. 291 at p. 294.

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To test the principle of the matter, let a case be supposed where litigation has long been pending and the solicitor has incurred heavy expense on behalf of his client and being unable without security to incur further expense, say for counsel fees, and thereupon and after *bona fide* pressure obtains from his client a mortgage upon certain lands to partially secure his advances, should that mortgage be set aside where there are no other creditors if judgment goes against the client and his assets are insufficient to meet it? Mr. *Galt* says it should, because an officer of the Court should not come between his client and his client's adverse litigant, but he cited no authority in support of

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such a contention, and it certainly seems an extreme case, for the solicitor in such circumstances is more a creditor than the opposing plaintiff, and from a strictly legal point of view I do not see why the doctrine of pressure should not extend to him as well as to other creditors. The reason why no case like this can be found in England is, of course, because the two branches of the profession are there divided and no man can be at once counsel and solicitor, and therefore I do not attach undue weight to the fact that the solicitor was the counsel present in Court, as set out in said paragraph 1 of the notice of appeal and as urged upon us as an element to be considered against him; why, I confess I hardly appreciate, because he was properly there and it was not suggested that he asked that the argument on the findings should be deferred. Indeed the notice of appeal states, as has been seen, that the learned trial judge required arguments to be filed, but that direction did not throw upon either counsel the obligation to forego any rights which he had in his capacity as solicitor, nor can he in fairness be taken to have impliedly waived the enforcement of them in such circumstances; this is one of the many unexpected results of the fusion of the two branches of the profession.

I do not wish it to be understood that if it was clearly established that during the pendency of an action a solicitor had obtained possession of the property of his client with the fraudulent intention of defeating and delaying other creditors, that the Court had not and would not exercise summary jurisdiction over him and call him to account; on the contrary, it could and should do so, even of its own motion in a proper case, for as Chancellor Spragge said *In re Toms* (1871), 3 Ch. Ch. 204 at p. 215:

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> "I entertain no doubt as to the propriety, and indeed the duty of the Court to call upon the solicitor whose conduct appears to the Court to have been improper to answer in respect of that which, is *prima facie* at least, misconduct, although the parties to the suit may make no application against the solicitor."

And see to the same effect *Goodwin* v. *Gosnell* (1846), 2 Coll. 260; *Wheatley* v. *Bastow—In re Collins* (1855), 7 De G.M. & G. 261, 558, 562 and *Re Solicitor* (1879), 27 Gr. 77.

In regard to the opinion expressed that what was done here

amounts to a criminal offence both under the statute of Elizabeth and at Common Law, with every respect I cannot agree to it, but even if it did the proper course to adopt where the charge is denied and the facts are at all complicated is to direct a reference to some officer of the Court and have his report thereon before the Court takes action—*Re R. A., an Attorney* (1890), 6 Man. L.R. 601, where the later cases are collected; and see *In re Attorney* (1876), 39 U.C.Q.B. 171 at p. 184.

Applying the foregoing principles and authorities to the case at bar, I am unable to take the view, with the greatest respect to contrary opinions, having regard to the very unusual circumstances of the present case, the incomplete way in which the evidence is now before us, and the impossibility of satisfactorily trying the charge of this complicated nature on conflicting affidavits, that the conduct of the solicitors concerned should be condemned or passed upon till after the truth of the charge be determined in the proper manner, *viz.:* by a trial. The usual and generally adequate course of directing a reference would not do justice between the parties in this very special case, for the reasons mentioned, and in a charge of this grave and complicated character every proper opportunity should be given to the accused to exhibit the legality and propriety of his actions, for if the charge against him is to be taken as established in its entirety the offence is certainly one that can hardly be deemed to be adequately dealt with by the order which my learned brothers have made.

MARTIN, J.

The proper course that should have been adopted before the learned Judge appealed from is, when the solicitors filed their affidavits in reply to the charge, proceedings should have been stayed pending the result of a trial, but instead of this the plaintiff chose to appeal and in my opinion the appeal must fail in the main and should be dismissed, but without costs, for while on the one hand the appellant should not obtain the order asked for, yet on the other the solicitors were not entitled to have the application against them dismissed, but stayed as aforesaid; and therefore the order appealed from should be varied by directing either that the application should stand for further consideration and disposition till after the trial, or that

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it be referred to the trial judge to be dealt with, which probably would be the better course to adopt, for he would be in the best position to dispose of it after having had all the parties and their witnesses before him.

Appeal allowed, Martin J., dissenting.

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MURRAY v. ROYAL INSURANCE COMPANY.

Trial—Damages—Measure of—What jury should take into account—Directions to jury—Failure of counsel to take objection or ask for direction—Costs.

The defendant Company instead of paying to the plaintiff the amount of damages sustained by a fire in her bakery, undertook to repair the damage, and for the faulty manner in which the work was carried out plaintiff sued for the amount of the damage caused by the fire, and also for damages in respect of loss occasioned by reason of being unable to carry on the business. The plaintiff's chief witness stated that the injury to the business was $3,000, and the jury returned a verdict for her for that amount. On appeal the Full Court being of opinion that the amount of the damages was excessive, with plaintiff's consent, reduced it to $1,000.

Precise directions should have been given to the jury as to what they should have taken into account in estimating the damages, and as the case had been allowed to go to the jury without such directions without objection by defendants' counsel and without contradiction of the statement as to the damage being $3,000, no costs of the appeal were allowed.

APPEAL from judgment of IRVING, J., entered on the findings of the jury in an action tried at Vancouver in March, 1904.

The plaintiff carried on a bakery business in Vancouver, and on 15th February, 1903, a fire occurred in the building in which the business was carried on; the building including the ovens was insured against loss or damage by fire with the defendant Company for $1,000, the policy providing that the Company instead of making payment might repair, rebuild or replace within a reasonable time the property damaged or lost.

Statement

Under the privilege contained in this provision, the Company undertook to repair the building and ovens, but the plaintiff was dissatisfied with the time taken in carrying out the work, and also with the character of the work done and sued for $968.75, being the amount of damages caused by the fire, and also for $3,000 for damages in respect of injury and loss sustained by her by reason of her being unable to carry on her business.

The plaintiff's husband gave evidence in which he stated that the repairs could have been made in ten or twelve days, that the profits of the business for the month preceding the fire were $240; that after the repairs were made, on account of the defective ovens, the bread baked in them was unsaleable, and that he estimated the damages at $3,000.

In his charge to the jury his Lordship said:

"Then, assuming you come to the conclusion that there was negligence, make her a reasonable allowance for damages. First of all, she will have to get the property restored to the condition in which it ought to be restored. Then it will be for you to make her fair and reasonable compensation for the delay that has been occasioned to her. In considering that you want to deal reasonably; you want to bear in mind that it is she who owns the property—it is not Mr. Murray who is the owner of the property—it is the loss that would reasonably be occasioned to her by it being kept out of repair."

Statement

The trial took place at Vancouver on 8th March, 1904, before IRVING, J., with a special jury, who returned the following verdict:

"The verdict is, the repairs were made within a reasonable time, that the repairs were not properly made, and that the plaintiff be paid $3,000 damages."

Judgment was entered for the plaintiff and the Company appealed and asked for a new trial to assess the damages which it claimed were excessive.

The appeal was argued at Vancouver on the 28th of November, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ.

Davis, K.C., for appellants.
Macdonell, for respondent.

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On 2nd December, judgment was delivered orally as follows:

HUNTER, C.J.: In this case the Court considers that the damages have been assessed at too high a figure, and is unanimously of the opinion that upon the plaintiff consenting to the verdict being reduced to $1,000, the appeal should be dismissed without costs and a new trial refused.

We may say that we have been influenced to some extent in our conclusion as to the costs of the appeal by the fact that although the plaintiff's husband stated in his evidence that the injury done to the business aggregated some $3,000, that statement was allowed to go to the jury without cross-examination. It also appears that the various matters which they should take into account in estimating the damages were not pointed out to the jury; but the appellants' counsel omitted for some reason or other to direct the learned Judge's attention to the fact, and, for that matter, neither counsel made any reference to it. That being the state of affairs, the case went to the jury upon the uncontradicted evidence that the plaintiff had suffered damage to the extent of some $3,000 by reason of the injury to the business, which seems to us altogether unreasonable. We think it should be clearly understood that in actions of this sort the jury should be given precise directions as to what they should take into account, and neglect on the part of counsel to call the Judge's attention to any omission in this respect will have considerable effect on the question of costs.

HUNTER, C.J.

MARTIN and DUFF, JJ., concurred.

PECK v. SUN LIFE ASSURANCE COMPANY OF CANADA.

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Lis pendens—Contract for sale of land—Registration of—Interest of vendor pending payment—Subsequent registration of lis pendens—Payment of instalments—Notice—Land Registry Act, Secs. 23, 24, 37, 85-88—Action relating to title to land—Costs.

In 1894, a husband conveyed certain lands to his wife and from her by agreement in October, 1896 (registered in March, 1897), plaintiff contracted to purchase one parcel of the land; the agreement provided that the purchase money should be paid by instalments, which were paid until November, 1898, when the wife conveyed to the plaintiff and took his note in payment of the balance. In August, 1897, defendant Company commenced an action against the wife to set aside the conveyance to her from her husband as a fraud on his creditors and registered a *lis pendens* on 24th September, 1897, and by the final judgment in that action the wife was directed to do all acts necessary to make the lands comprised in the impeached conveyance available to satisfy the claims on her husband's estate. Plaintiff on applying to register his title first learned of the action and the *lis pendens*.

Plaintiff sued to have the registration of the *lis pendens* cancelled:—

Held, (1.) The estate acquired by the conveyance to plaintiff from the wife remained subject to the rights of the Company as they should be determined by the result of its action against the wife.

(2.) The plaintiff in order to get a title should not be compelled to pay again that portion of the purchase money which he has paid since the registration of the *lis pendens*.

(3.) Notice of the Company's adverse claim was not imputed to plaintiff by reason of the registration of the *lis pendens*.

(4.) Sections 85-88 of the Land Registry Act providing for the cancellation of a *lis pendens* are not available in practice where, as in this case, the nature and extent of the interest affected by the *lis pendens* are not ascertained.

(5.) The plaintiff was entitled to a declaration of right only and the Court declared that he was within his rights in making the payments before notice of the adverse claim; that the *lis pendens* did not affect the interest acquired by the plaintiff under his contract and that the defendant Company has a charge on the lands for the amount of purchase money unpaid.

So long as there remains anything to be done to work out the judgment in an action the action is pending.

Upon a contract for the sale of land the purchase price of which is payable

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by instalments the vendor retains an interest in the land proportional to the amount of purchase money unpaid which interest is capable of being affected by *lis pendens*.

Semble, generally a cause of action imperfect at the issue of the writ is not perfected, either at law or in equity, by subsequent events.

THIS was an appeal from the judgment of IRVING, J., in an action tried before him at New Westminster on 17th February, 1904. The facts are stated in the judgments.

Reid and *Howay*, for plaintiff.

Wilson, K.C., A.-G., and *Bloomfield*, for defendants.

At the conclusion of the trial, judgment was delivered as follows by

IRVING, J.: This is a case where the plaintiff agreed to purchase this property from Mrs. Elliott, the agreement stipulating for payments of $30 per month, carrying interest. In February, 1897, Mr. Peck applied for registration of this agreement and on the 9th of March the agreement was registered. The effect of the registration of that agreement was that it gave notice to every person who might thereafter deal with this property of the estate or interest of Mr. Peck therein, but it did not give notice of the contents.

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It was admitted that Mrs. Elliott at that time was the owner in fee simple free from encumbrances. On the 25th of August, 1897, the defendants herein having commenced an action against Mrs. Elliott to set aside her title on behalf of the creditors of Mr. Elliott, deceased, filed a *lis pendens*. At that time there was still due and payable some $2,250 under the agreement to purchase.

The defendants contend that they are entitled to recover from Mr. Peck this sum of $2,250 that has been paid by him since that date. Now, the Land Registry Act is designed to protect *bona fide* purchasers without notice, the object of it is to shew the condition of the title to real estate, not the condition of the state of accounts between the persons dealing. The theory of the Act is to give protection to *bona fide* purchasers by giving notice to persons of their interest. Now, if Mr. Peck registered his agree-

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ment he did all that was possible for him to do; Mrs. Elliott could not recall that deed, the property practically passed to him, although the title did not pass to him, he was the owner of the property and he was not bound to do anything more. In dealing with Mrs. Elliott any subsequent mortgagee or encumbrancer would have to go and search the books in the registry office and anything they did would be subject to the charge of which he had given notice, I do not think he was bound to search or do anything further. When he made his payments from time to time his title was registered and it was not necessary for him to search the registry each time he paid $30; if it was necessary for him to search the registry each time it would be necessary for him to give notice every time he made a payment; his dealing with the land was finished when he entered into the agreement; it was afterwards a matter of accounts between himself and Mrs. Elliott. I think what I have said disposes of Mr. *Bloomfield's* argument; I think when the plaintiff put his document on file that he had done all that could be expected of him. There will be a decree for a declaration that the defendants have no title to this property and that the *lis pendens* must be cancelled and that the plaintiff recover his costs of the suit.

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The defendant Company appealed and the argument on the appeal took place at Vancouver on the 25th and 28th of November, 1904, before HUNTER, C.J., MARTIN and DUFF, JJ. The arguments sufficiently appear in the judgment.

Bloomfield, for appellants.
Reid, for respondent.

(On the argument the following authorities were referred to:

By counsel for appellant. *Bank of Montreal* v. *Condon* (1896), 11 Man. L.R. 366; *Re Bobier and Ontario Investment Association* (1888), 16 Ont. 259 and *Bevilockway* v. *Schneider* (1893), 3 B.C. 90.

Argument

By counsel for respondent. *Seton* v. *Slade* (1802), 7 Ves. 264 at p. 273; *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321; *Parke* v. *Riley* (1866), 3 E. & A. 215; *Dynes* v. *Bales* (1878), 25 Gr. 593; *Shaw* v. *Ledyard* (1866), 12 Gr. 383; *Ontario Industrial, &c.*,

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Co. v. *Lindsey* (1883), 3 Ont. 66 and *Townend* v. *Graham* (1899), 6 B.C. 539.)

Cur. adv. vult.

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On 15th April, the judgment of the Court was delivered by

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DUFF, J.: The defendant Company is the creditor of Henry Elliott, deceased.

In 1894, Henry Elliott conveyed certain lands to Ellen Elliott, his wife, and from her, by agreement dated 28th October, 1896, and registered 7th March, 1897, the plaintiff contracted to purchase one parcel of this land. The agreement provided that the purchase money, $3,000, should be paid in instalments; $500 at once, and the balance in monthly payments of $30 each. The purchase money was paid in accordance with these terms until November, 1898. In that month, the plaintiff, having under a fresh arrangement paid a sufficient sum to reduce the unpaid balance of the purchase money to $1,000, Ellen Elliott accepted his promissory note for that balance, and executed a deed conveying to him the parcel sold.

On applying to register his title, the plaintiff for the first time discovered that subsequent to the registration of his contract of purchase (on the 25th of August, 1897) the defendant Company had commenced an action against Mrs. Elliott claiming a judicial nullification of the conveyance to her from her late husband as a fraud on his creditors. This action was registered as a *lis pendens* on the 24th of September, 1897; it reached its final conclusion in a judgment of the Supreme Court of Canada, pronounced on the 27th of June, 1901, by which the relief prayed was granted, and Mrs. Elliott was directed to do all acts necessary to make the lands comprised in the impeached conveyance (including the plaintiff's land) available to satisfy the claim of her husband's estate.

Judgment

In the present action, which was begun in November, 1903, the plaintiff complains of the registration of the defendant Company's action as a *lis pendens* (which is noted as an encumbrance on his certificate of title), and claims to have the registration vacated. At the trial before IRVING, J., judgment was given

for the plaintiff in accordance with his claim, and the defendant Company now appeals from that judgment.

Before discussing the substantial question which the appeal presents for determination, it will be convenient first to deal with the claim as put forward on the pleadings.

On the argument, the plaintiff's counsel sought to support the action on two grounds. First, he argued that the defendant Company's action having been pursued to final judgment, there is no *lis* which can affect the land sold to the plaintiff. To this the somewhat obvious answer is that the direction, to which I have referred, requiring Mrs. Elliott to bring the property affected by the judgment into the administration of her husband's estate has not yet been complied with; and so long as there remains anything to be done to work out the judgment pronounced in the action, the action is pending. True, alienations of the subject-matter of an action made after final judgment do not fall within the doctrine of *lis pendens* for obvious reasons; but in this case the only alienations with which we are concerned were made prior to final judgment, and the plaintiff's contention in effect is, that by recovering judgment in its action against Mrs. Elliott, the defendant Company lost its right (which subsisted so long as the action was undetermined) to hold the subject-matter of the action *in medio*. This contention seems to answer itself. No case of laches is made on the pleadings, or was urged before us or in the Court below.

Judgment

It was further contended, that by contracting to sell to the plaintiff, Mrs. Elliott divested herself of all interest in the land in question; that thereafter she had, in respect of the land itself, only a lien upon it as security for the payment of the purchase money; that when the action was registered as a *lis pendens* Mrs. Elliott's interest had not the quality of real estate, and could not be affected by that registration; and it was not unreasonably said that in such circumstances the registration of the action was a challenge of the plaintiff's title of such publicity, and of such effectiveness to embarrass the plaintiff in the exercise of his rights of ownership as to constitute a cloud upon that title, and to justify this action.

That Mrs. Elliott retained, after the registration of this con-

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tract of sale, and so long as any part of the purchase money remained unpaid, an interest in the property, the subject of the contract, capable of being affected by *lis pendens*, seems to me too clear for discussion; but in deference to the very earnest argument addressed to us on behalf of the plaintiff, I proceed to state my reasons for this opinion.

I shall for the present assume that, except in so far as he is (by the operation of the doctrine of *lis pendens*) bound by the judgment in the defendant Company's action, the conveyance from Henry Elliott to his wife is to be taken as valid in favour of the plaintiff.

And first, apart from statute. It is true that upon a contract for the sale of land the interest of the vendor is for some purposes regarded as personal property. On the death of the vendor the purchase money is for fiscal purposes so treated; is recoverable by the executor *virtute officii*; in case of intestacy passes to the next of kin, and not to the heir at law. In Manitoba it has been held that a vendor's lien is not an interest in land within the meaning of the statute in force there relating to the recovery of judgment debts; the Manitoba Court, in this case, following a notable dissenting judgment of Mowat, V.C., in *Parke* v. *Riley* (1866), 3 E. & A. 215.

But, I cannot agree that even in this restricted view of the vendor's rights his interest is free from the operation of the doctrine of *lis pendens*. A leasehold or a mortgage of real estate passes to the executor, or in case of intestacy to the next of kin; generally for the purposes of administration both species of property are treated as personal estate; the former is exigible under process against goods; and the latter is not exigible as an interest in lands. Yet leaseholds have always, for the purpose of determining priorities, been treated as land; so, for more than a century have mortgages of real estates: *Taylor* v. *London and County Banking Company* (1901), 2 Ch. 231 at p. 254. Moreover, the doctrine of *lis pendens* has always been held to apply to leaseholds, and I cannot find that it has been doubted that it applies to such mortgages.

Judgment

So while for some purposes, and in some relations, a vendor's interest in his real estate after sale, and before completion, may

be treated as personal estate, this description of it can only be accepted in a much qualified sense. The legal nature of that interest where the purchase money is payable by instalments, is best described in the oft quoted speeches of Lord Westbury, and Lord Cranworth in *Rose* v. *Watson* (1864), 10 H.L. Cas. 672. To quote Lord Westbury at p. 678:

> "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate."

Thus, the vendor retaining the legal estate has as between himself and his purchaser a beneficial interest in the property sold "personal and substantial" as Lord Cairns puts it; proportional to the amount of the purchase moneys unpaid as Lord Westbury puts it; unquestionably an interest in land, and therefore subject to *lis pendens*.

Thus, apart from the Land Registry Act. That Act provides (Sec. 23) that the registered owner of an absolute fee shall be deemed to be the *prima facie* owner of the land described or referred to in the register for such an estate of freehold as he *legally* possesses therein; by section 24, that persons claiming any equitable interest in real estate may register such an interest as a charge; by section 37, "Any person who shall have commenced an action in respect of any real estate may register a *lis pendens* against the same by means of a charge."

Judgment

Here, Mrs. Elliott had in September, 1897, the absolute fee, and the plaintiff had a charge registered as an equitable interest under section 24; even assuming that the word "legally" in section 23 is not used in a restricted sense as opposed to equitably, I am unable to comprehend the reasoning which leads to the conclusion that the absolute fee referred to in section 23 is not, and that the charge referred to in section 23 is real estate within the meaning of section 37.

The action was therefore rightly registered as a *lis pendens*

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in September, 1897; but a further question arises, did the plaintiff by virtue of the arrangement in November, 1898, and the conveyance of the land to him acquire the right to have the registration vacated? In considering this question, one must bear in mind some elementary principles. The doctrine of *lis pendens* is merely an application of the maxim of forensic policy *interest rei publicae sit finis litium.* A litigant party is not permitted by alienation pending the suit to defeat the rights, or delay the proceedings of his adversary; for if so, the litigation by successive assignments might be rendered interminable: *Bellamy* v. *Sabine* (1857), 1 De G. & J. 566 at pp. 578, 580 and 584.

"Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings":

So Lord Cranworth in *Bellamy* v. *Sabine*, *supra*, at p. 578.

From the statement of the rule, and the ground on which it rests, it is sufficiently obvious that it cannot be applied to persons who have acquired interests before the commencement of litigation, so as to affect such interests (see *Manson* v. *Howison* (1896), 4 B.C. 404 at p. 406, *per* McCreight, J.); for such persons can once for all be ascertained, and if necessary made parties to the action. But while this limitation is obviously involved in the very nature and object of the rule, it must be equally obvious that the rule does apply to such persons in respect of interests acquired after the commencement of litigation. In respect of the rights in the lands in question, acquired by the plaintiff through the execution of his agreement with Mrs. Elliott, he was not bound by the result of her litigation with the defendant Company; but any interest acquired by him after action and not merely in consummation of his rights under the agreement he took subject to the event of the action.

Judgment

Now, as we have seen at the time of the execution of the conveyance, in November, 1898, Mrs. Elliott had according to the paper title, not only the legal estate but a substantial beneficial interest in the property proportionate to the amount of the

purchase money unpaid; on payment of this balance of purchase money this beneficial interest would have passed by force of the agreement. The purchase money was not paid, and no interest passed by force of the agreement; but by a fresh alienation—the deed referred to—made pending the defendant Company's action, the legal estate was transferred to the plaintiff. Can there be any doubt that the estate so acquired remained subject to the rights of the defendant Company as they should be determined by the result of its action? The learned trial judge has treated this conveyance as a mere incident in the settlement of accounts. But call it by any name, it was a fresh transaction affecting the title to real estate then in litigation. The law does not permit such a transaction to impair the rights of the actor in that litigation against his will.

These considerations dispose of the plaintiff's claim as disclosed by the pleadings. The substantial question involved is not discoverable by a perusal of the pleadings. It arises out of a contention of the defendant Company that the registration of the *lis pendens* established a charge upon the lands in question for the amount of the purchase money unpaid at the date of the registration; and that the plaintiff is entitled to relief only on the terms of paying off this charge. As to the part of the purchase money still unpaid, it is not disputed that the plaintiff has always been willing to account for that to the estate of Henry Elliott; so that the whole controversy in substance relates to the question whether the plaintiff should be compelled in order to get a title to pay again that portion of the purchase money which he has paid since the registration of the *lis pendens*.

Judgment

As I have said, the pleadings are silent on this question, but it is not disputed that the controversy on it gave rise to and is the real subject-matter of the litigation. It was, as Mr. *Bloomfield* with great candour admitted, the real ground of dispute at the trial; it is the principal topic of discussion in the judgment of IRVING, J.; with it the appellants' argument before us was wholly concerned; in a word, the parties have accepted and presented it as the substantive issue in the action.

This issue must, I think, be decided in favour of the plaintiff.

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Judgment

Two questions arise: First, does the evidence establish as against the plaintiff that the conveyance to Mrs. Elliott was fraudulent; second, if so, was the plaintiff affected by such notice of the fraud before making the payments in question as to involve him in the consequences of that fraud?

That the conveyance was fraudulent is established as against Mrs. Elliott by the judgment in the defendant Company's action, and by that judgment the plaintiff is bound, as I have pointed out, in respect of the interest transferred to him by the conveyance after the commencement of that action. But as against the plaintiff, nothing relevant to this issue with which we are now dealing is established by that judgment; *res inter alios*—it is not in this issue evidence against the plaintiff: *The Natal Land, &c., Company* v. *Good* (1868), L.R. 2 P.C. 121 at p. 123. Now, the plaintiff purchased from the holder of a registered title; his *bona fides* and want of actual notice were found by the learned trial Judge as a fact, and before us that finding was not impugned; he was the owner of a registered charge before the commencement of the Company's action and the registration of the *lis pendens*, and might have been made a party to that action. In these circumstances I think the onus was on the defendant Company in this issue to maintain its title to the moneys in dispute by proving affirmatively against the plaintiff the fraud of the Elliotts; and against the plaintiff as a *bona fide* purchaser for value failure in strict proof is generally fatal: *Sorrell* v. *Carpenter* (1728), 2 P. Wms. 482; and Sugden on Vendor and Purchaser, 9th Ed., 283. In the absence, therefore, of any evidence of this fraud, legally admissible against the plaintiff, this issue should be determined in his favour.

However, the plaintiff does not depend upon this view of the burden of proof for success in this issue. Assuming Mrs. Elliott's title to be vitiated by the fraud of herself and her husband, the plaintiff's rights under the agreement are not, I think, for reasons which I shall presently state, affected by that fraud.

The case was dealt with on the pleadings and argued before us as if the plaintiff as a purchaser of a registered title *bona fide* and for value was protected by the provisions of the Land

Registry Act. I cannot agree with this view. I cannot find anything in that Act which protects the plaintiff from attack under 13 Elizabeth, Cap. 5. The Land Registry Act provides in section 43, sub-section 4, that

"Every unregistered title, interest, or disposition, affecting registered real estate, or any registered interest in real estate, shall as against a purchaser for valuable consideration of such real estate or interest be utterly void and of no effect unless the person holding or claiming such unregistered title or interest, or taking or claiming under or by virtue of such unregistered disposition, shall obtain from the owner and hold in respect of such real estate or interest a certificate of registered estate;"

and in section 43, sub-section 7:

"Save as in this section aforesaid, no purchaser for valuable consideration of any registered real estate, or registered interest in real estate, shall be affected by any notice, expressed, implied, or constructive, of any unregistered title, interest or disposition affecting such real estate, other than a leasehold interest in possession for a term not exceeding three years, any rule of law or equity notwithstanding."

Neither of these provisions has any application here. The creditors of Henry Elliott had a statutory right to invoke by appropriate proceedings a judicial declaration of the facts, which by reason of the provisions of 13 Elizabeth, Cap. 5, made void *ab initio* the conveyance from Henry Elliott to his wife. This statutory right was neither an unregistered title, nor an unregistered interest, nor an unregistered disposition. Indeed, as the protection of these enactments extends to all purchasers for valuable consideration without regard to good faith or bad faith, it seems improbable that the authors of them conceived the likelihood that they would be set up as a shield for the kind of fraud struck at by 13 Elizabeth, Cap. 5.

Judgment

The plaintiff must therefore rely upon the protection (if any), afforded by the saving clause, section 5, commonly known as section 6, of the last mentioned statute. Does the benefit of that section extend to the plaintiff? I think it does. It reads as follows:

"VI. Provided also, and be it enacted by the Authority aforesaid, that this Act, or any Thing therein contained, shall not extend to any Estate, or Interest in Lands, Tenements, Hereditaments, Leases, Rents, Commons, Profits, Goods or Chattels, had, made, conveyed or assured, or hereafter to be had, made, conveyed or assured, which Estate or Interest is or shall be upon good Consideration and bona fide lawfully conveyed or assured to any

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Person or Persons, or Bodies Politick or Corporate, not having at the Time of such Conveyance or Assurance to them made, any Manner of Notice or Knowledge of such Covin, Fraud or Collusion as is aforesaid; any Thing before mentioned to the contrary hereof notwithstanding."

That the plaintiff's contract with Mrs. Elliott was an assurance within this language is established by *Halifax Joint Stock Banking Company* v. *Gledhill* (1891), 1 Ch. 31, which decided that an equitable, as well as a legal interest is within its protection.

It is settled law that the protection afforded a *bona fide* purchaser for value is available in favour of a purchaser who (having bought without notice) becomes aware of an adverse claim before the whole of the purchase money has been paid, only to the extent of payments made prior to his knowledge of such adverse claim: *Forth* v. *Duke of Norfolk* (1820), 4 Madd. 503; *Rayne* v. *Baker* (1859), 1 Giff. 241; Bigelow on Fraud, pp. 474 and 475.

The plaintiff here had in fact no notice or knowledge of the adverse claim of the creditors of Henry Elliott until after the execution of the conveyance of November, 1898. His liability to account for the sum claimed by the defendant Company therefore depends upon the answer to this question: Is notice of this adverse claim to be imputed to him by reason of the registration of the *lis pendens?*

Judgment

By section 37 of the Land Registry Act, it is provided that any person who has commenced an action in respect of any real estate may register a *lis pendens* against the same by means of a charge. By section 40, it is provided that "The registration of a charge shall give notice to every person dealing with the real estate against which such charge has been registered of the estate or interest in respect of which such charge has been registered but not of the contents of such instrument." I do not regard the payment by the plaintiff of purchase money pursuant to his contract as a dealing with land within the meaning of this section.

Otherwise, consider the purchaser's position. The vendor might have charged his interest (as in *Rayne* v. *Baker*, *supra*) and if the charge should be registered, the purchaser having imputed notice by reason of this last registration, would be liable to account to the chargee for all payments thereafter made to

the vendor. No such payments could be safely made except at the Land Registry Office after search for intervening registrations. A mortgagor paying off his mortgage would find himself in a like position. Unless the language be intractable, a construction leading to such consequences should not be adopted; and while I see no difficulty in placing a workable construction on section 40 when read alone, its meaning becomes more apparent when read with section 41, the words of which are as follows:

"41. When two or more charges appear entered on the register affecting the same land, the charges shall, as between themselves, have priority according to the dates at which the applications respectively were made, and not according to the dates of the creation of the estates or interests."

It is obviously impossible to contend in the face of this provision that the rights acquired under a registered charge can be impaired by the subsequent registration of another charge affecting the same lands. Full effect is given to both sections by holding that section 40 does not affect with notice the owner of a prior charge in respect of any rights secured to him by the instrument creating that charge. This view is consistent with the decisions upon the parallel provisions of the Ontario Registry Act: *Pierce* v. *Canada Permanent Loan Co.* (1894), 25 Ont. 671 at p. 679; *Gilleland* v. *Wadsworth* (1877), 1 A.R. 82 at p. 91.

There remains the question whether there is any form of relief to which the plaintiff is entitled. The plaintiff has offered to pay the unpaid purchase money as the Court shall direct; and it is regrettable that we cannot at once direct that on payment of that sum the registration of the *lis pendens* shall be vacated; but as at the commencement of the action he was not entitled to judgment vacating the *lis pendens*, he cannot now agreeably to established rules have any relief of that character, conditional or otherwise. Except in cases where the doctrine of relation back comes into play (as a grant of probate to a plaintiff executor after the commencement of the action), the rule that a cause of action, imperfect at the issue of the writ, is not perfected by subsequent events seems to be as inflexible in equity as at law: *Evans* v. *Bagshaw* (1870), 5 Chy. App. 340; *Pilkington* v. *Wignall* (1817), 2 Madd. 240 at p. 244; Story's Equity Pleadings, section 342; and see the authorities collected in the reporter's note in 33 Beav.

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285. If he be entitled to any remedy therefore, it must be by way of declaration of right alone without consequential relief.

As MARTIN, J., has pointed out in a recent judgment (*Williams* v. *Jackson* (1904), 11 B.C. 133), the jurisdiction conferred by Order XXV., r. 5, should be exercised cautiously; and (in the absence of special circumstances), not at all where the law provides a summary procedure by which the plaintiff's rights could have been ascertained, and on the argument I was disposed to think that the plaintiff had such a summary remedy under sections 85 and 88, Land Registry Act. But a careful examination of these sections convinces me that in practice the procedure there provided is not available where the nature and extent of the interest affected by the *lis pendens* are not ascertained at the time of the application to vacate its registration; and more especially where, as in this case, the controversy between the parties relates almost entirely to the nature and extent of that interest. The enactment provides no means by which such a controversy can be determined, and so long as it remains in dispute it is difficult to understand from what source the judge hearing the application is to be furnished with a basis for the judicial ascertainment of the amount of security to be required.

I have come to the conclusion that in this case the power conferred by Order XXV., r. 5, may be beneficially exercised. The real controversy between the parties has been litigated; the plaintiff, as a *bona fide* purchaser for value, is entitled to the benefit of the most liberal view of all rules of procedure; and we ought, I think, formally to determine the issue, which we have decided in substance, by declaring that the plaintiff was within his rights in making the payments of purchase money to Mrs. Elliott before notice of the adverse claim of the defendant Company; that the *lis pendens* does not affect the interest acquired by the plaintiff under his contract; and that the defendant Company has a charge on the lands for the amount of purchase money unpaid. Such a declaration would, I think, in the language of Jelf, J., in *Attorney-General* v. *Scott* (1904), 20 T.L.R. 630 at p. 633, be both "definite and useful."

Judgment

The action in form at all events relates to the title to land; and the Legislature has therefore left us a discretion as to the

disposition of costs. These costs have been liberally swelled by the misconceptions of both parties; and as I cannot strike a balance between them, each party should, I think, bear his own, both here and below.

The judgment of IRVING, J., will be varied in accordance with this opinion.

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TARRY v. WEST KOOTENAY POWER AND LIGHT COMPANY.

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Conveyance—Of right of way for pole line with exclusive possession—Grantor's right of cultivation—Rectification of deed—Mistake.

A conveyance of a right of way to a power and light company for a pole line and any other purpose which it may use it for and the sole and absolute possession of the right of way does not divest the grantor of his right to cultivate the right of way in such a manner as will not interfere with the company's poles or pole line.

ACTION tried before MORRISON, J., at Nelson on the 8th and 9th of December, 1904.

The plaintiff had executed in favour of the defendants a deed of a strip of land upon which the defendants' pole line was. The words of the grant were as follows:

"The party of the first part doth hereby give and grant unto the said party of the second part, its successors and assigns forever, the right of way as the same is laid out on the sketch 'A' hereto annexed, three hundred feet wide by a length of eighty chains or thereabouts over and upon the said in part described lands . . . . for a pole line and any other purpose which the said party of the second part, its successors or assigns may use the same for and the sole and exclusive and absolute possession of the said right of way three hundred feet wide by a length of eighty chains or thereabouts over and upon the said described land."

Statement

The plaintiff now sought to have this deed rectified, claiming that it was in effect a conveyance of the fee simple, whereas it was only intended to confer a right or licence to occupy the land

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for the specific purpose of maintaining a pole line thereon. The plaintiff also claimed damages for trespass.

S. S. Taylor, K.C., for plaintiff.

A. H. MacNeill, K.C., for defendants.

11th February, 1905.

MORRISON, J.: In one branch of this case the plaintiff seeks rectification of his deed to the defendant granting a right of way 300 feet wide for a pole line across the plaintiff's lands. It is urged by the plaintiff that the words in the deed giving to the defendants "the sole and exclusive and absolute possession of the said right of way" are comprehensive enough to deprive him of any right to enter upon the 300 foot strip for the purpose of cultivating it. He further urges that he did not intend to exclude himself from the possession for agricultural purposes, and that he entered into the agreement by mistake. The evidence to warrant rectification must be of the strongest possible nature. If the mistake were clearly made out by admissible and satisfactory evidence or were admitted, the instrument would be rectified: Snell on Equity, 13th Ed., p. 461. Here, the mistake, if any, was not proved. The existence of a right of way is quite consistent with a right of cultivation, and I am of the opinion that the deed grants only the right of way, leaving to the plaintiff such right of cultivation as may be consistent with the grant, and such as will not interfere with the defendants' poles or pole line.

Judgment

The other branch of the case is laid in trespass. I find that the defendants are not trespassers. The plaintiff cannot get compensation for the lands in this action. His remedy, if any, is by arbitration under the Company's special Act. The action is dismissed with costs.

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CENTRE STAR v. ROSSLAND-KOOTENAY MINING CO.

Mining law—Trespass—Wrongful abstraction of ore by trespass workings—Conversion—Injury to adjoining mine by accumulation of water—Nuisance—Injunction—Liability of company for trespass of predecessor in title.

A mining company which purchases the assets of an old company whose debts and liabilities it agrees to pay and satisfy is not liable to a stranger to the contract for a tort committed by the old company.

Defendants purchased a mineral claim having ore on the dump which had been wrongfully taken from plaintiffs' claim; they let the ore remain where it was at plaintiffs' disposal:—

Held, there had been no conversion of the ore by defendants.

Defendants' predecessors in title ran trespass workings from their mineral claim the Nickel Plate through the Ore-or-no-Go mineral claim, in which they had a right to mine, but of which the plaintiffs were the owners in fee, into plaintiffs' mineral claim the Centre Star, which adjoined the Ore-or-no-Go claim; to stop the flow of water from the Nickel Plate through the trespass workings to the Centre Star claim defendants built bulkheads on the boundary between the Centre Star and Ore-or-no-Go claims and at this point a large body of water accumulated:—

Held (reversing MARTIN, J., in this respect), that the accumulation of water was a menace to plaintiffs and amounted to a nuisance and that the bulkheads should have been built at the Nickel Plate boundary so as to keep the water from flowing from the Nickel Plate into the trespass workings.

APPEAL by plaintiffs from judgment of MARTIN, J., in an action tried by him in Rossland in December, 1903, in which the plaintiffs sought to recover damages from defendants for trespassing upon and abstracting ore from the Centre Star mineral claim by means of trespass workings extending from the Nickel Plate claim, owned by defendants, through the Ore-or-no-Go claim of which the plaintiffs were the owners in fee subject to the defendants' right to mine, to the Centre Star claim, and also for injury caused by an alleged accumulation of large quantities of water in the trespass workings.

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The trespass had been committed by the defendant Company's predecessors in title, the Rossland Great Western Mines, Limited, which latter Company, on 2nd May, 1902, entered into an agreement with one W. B. Mitchell, providing that the Company should sell all its assets and undertakings to a new company to be formed under the name of the Rossland-Kootenay Mining Company, Limited, on certain terms and conditions, one of them being that the new company should pay and satisfy the debts and liabilities of the old company of whatsoever nature and should indemnify the old company therefrom; it was also agreed that the new company should take over and perform the unperformed and uncompleted contracts and engagements of the old company and indemnify it from all liability thereon.

Subsequently, on 28th May, 1902, the said Rossland Great Western Mines, Limited, the said Mitchell and the defendant Company entered into an agreement under which the agreement of 2nd May, 1902, was adopted by the defendant Company and declared to be binding on the Rossland Great Western Mines, Limited, and the defendant Company in the same manner as if the defendant Company had been a party thereto instead of the said Company.

Under the Companies Act, 1897, a license (to an extra-provincial company) was issued in August, 1902, to the defendant Company and in it clause (a) of the objects for which the Company was established was as follows:

Statement

"(a) To adopt, enter into and carry into effect, with or without modifications, two agreements, one dated the 2nd day of May, 1902, and made between the Rossland Great Western Mines, Limited (a Company registered under the Companies Acts 1862 to 1898, hereinafter called the 'Rossland Company') of the one part, and William Blayney Mitchell, as Trustee for this Company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Rossland Company, the other, dated the 2nd day of May, 1902, and made between the Kootenay Mining Company, Limited (a Company registered under the Companies Acts 1862 to 1898, hereinafter called the 'Kootenay Company'), of the one part, and William

Blayney Mitchell, as Trustee for this Company, of the other part, for the acquisition of the assets and undertaking (subject to the liabilities) of the Kootenay Company, and to develop, work, turn to account, or deal with the property comprised in the said two agreements, and to exercise any of the hereinafter mentioned powers and objects of this Company, which powers and objects may be exercised independently of the primary objects stated in this clause, and this clause shall not minimize or derogate in any way from the Company's powers of acquiring other mines, either in addition to or in substitution for the property referred to in the said two agreements, etc., etc., etc."

The remaining facts are stated in the judgment.

Galt, for plaintiffs.

Hamilton, for defendants.

13th April, 1904.

MARTIN, J.: It is alleged in the statement of claim, first, that the defendant Company, the owner of the Nickel Plate and Ore-or-no-Go mineral claims, trespassed upon the Centre Star mineral claim, the property of the plaintiff Company, and took certain ore therefrom, or, alternatively, that if the defendant Company did not do so, its predecessor in title (The Rossland Great Western Mines, Limited) did. The evidence shews that it was the latter company and not the defendant that took the ore, but it is sought to make the defendant liable for the trespass on the ground that the effect of the agreement made between said latter company and Mitchell, dated 2nd May, 1902, before the defendant was in existence, and the confirmatory agreement between it and Mitchell of the one part, and the defendant on the other part, dated 28th May, 1902, is to create a partnership between these two companies under the name of the defendant; and the licence issued to the defendant on the 2nd of August, 1902, is relied on in support of this view. On this point it is sufficient to say that after considering the additional authorities cited by leave, I see no reason to alter my opinion formed at the trial, which is, that the licence being permissive in its nature cannot be regarded in the same light as an Act of Parliament expressly creating a statutory obligation, and that there is no

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privity of contract between the plaintiff and defendant Companies, nor can they be regarded as partners in the proper sense of that term. It is to be observed that clause 1 of the agreement of the 28th of May says in effect that the prior agreement of 2nd May is to be read as though the defendant Company had been a party thereto instead of Mitchell. Now, even if that agreement had originally been so entered into between these two companies it is apparent, to me at least, that the present plaintiff would have no cause of action against the defendant for torts committed by the Rossland Great Western Mines, Limited. The case of the *Natal Land, &c., Company* v. *Pauline Colliery Syndicate* (1904), A.C. 120, supports in general the foregoing views.

Secondly, it is alleged that in any event the defendant is liable for conversion of the ore, estimated at 2,011 tons, now lying on its property on the Nickel Plate dump, which was admittedly wrongfully taken by its said predecessor from the Centre Star claim.

For the present consideration of the point, I shall momentarily accede to the contention of plaintiff's counsel that when the defendant on the 16th of August, 1902, took possession of the Nickel Plate and Ore-or-no-Go claims it became affected with notice of the fact that this ore had secretly come from the Centre Star mine, and was the property of the plaintiff, and that it did not convey that information to the plaintiff till the middle of March, 1903, which was the first knowledge the plaintiff had thereof; since that time the plaintiff has been at liberty to remove the said ore from said dump without any interference by the defendant, but it has not seen fit to do so. It cannot, properly speaking, be said that the defendant wrongfully, if at all, took possession of the property because it had been where it was long before the defendant began to exist in British Columbia on the 2nd of August (the date it received its licence) nor, as Thompson says, did it begin to do business till the 16th of that month when it took possession of the claims and plant aforesaid. It did not in any way attempt to deal or interfere with the ore or exercise over it any rights whatever, but simply left it lying where it was. It is, I think, fair to say in the circumstances,

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that the defendant may be considered to be in a state of innocence, as regards this ore till the last mentioned date at least.

Despite these facts the plaintiff contends that the defendant should be held accountable therefor to the same extent as the original trespasser, but cites no authority in support of such an extreme view. I quite agree that one who trespasses upon another's mining ground and clandestinely abstracts ore therefrom should be held strictly accountable for his fraudulent acts, and everything in doubt should be presumed against him as the result of his dishonest conduct, but I fail to see that the defendant can in any way be regarded as occupying that position. The situation is similar to a case where a man buys a field from A, knowing that A has left on it some sacks of potatoes which are the property of B, though unknown to B, and simply says and does nothing but lets them lie there till they rot away. In such circumstances is the purchaser liable to B, and if so, for what, and on what principle? In my opinion, he is clearly not liable at all, though it would have been a neighbourly and friendly act to have notified B. And the principle does not differ because the chattels happen to be imperishable, like ore, instead of perishable, like potatoes. To my mind there is no element of conversion in such a state of affairs, because to constitute this injury there must be some act of the defendant repudiating the owner's right or some exercise of dominion inconsistent with it, while here there was nothing of the kind, nor was even formal possession ever attempted to be taken. Mere passivity is all that the defendant can be accused of, but there must be more than that before conversion can be established. As was said by Mr. Baron Parke in *Simmons* v. *Lillystone* (1853), 8 Ex. 431 at p. 442:

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> "In order to constitute a conversion, there must be an intention of the defendant to take to himself the property in the goods, or to deprive the plaintiff of it."

And see also *Lethbridge* v. *Phillips* (1819), 2 Stark. 544; *Thorogood* v. *Robinson* (1845), 6 Q.B. 769; *Foulds* v. *Willoughby* (1841), 8 M. & W. 540 and *Hollins* v. *Fowler* (1875), L.R. 7 H.L. 757; wherein it is also shewn that even where there is possession, if of lawful origin, there must be a demand and refusal before an action for conversion will lie, and there has been no demand

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here. The result of the cases is concisely summed up in Addison on Torts, 7th Ed. 504, as follows:

"A man cannot be made a bailee of goods against his will; and, therefore, if things are left at his house, or upon his land, without any consent or agreement on his part to take charge of them, he is not thereby made a bailee of them; and if the goods are demanded of him, and he says he will have nothing whatever to do with the goods, such a declaration, in answer to a demand of the goods, is no evidence of a conversion of them."

In arriving at the foregoing conclusion I have also assumed that the property alleged to have been converted is of any commercial or market value, for if it is not, the defendant's case is not only greatly strengthened as to the conversion itself, but there would be no damages in such circumstances as exist here.

Now, the proper measure of damages, if any, is the amount of pecuniary loss the plaintiff has sustained by the conversion of the chattel, *i.e.*, what it was worth at the time of the conversion, and if he does not receive it back he is entitled to its full market value. The question then arises what is the fair market value of the ore in dispute. According to Thompson, it was simply waste material on the dump, and taken on the average would not run more than $3 to the ton, total value. James Cram, a witness for the plaintiff Company, places it at $3.60 to $4.60, but though the onus is on the plaintiff to establish the market value no evidence at all is adduced to shew that ore of so low a grade has any market value whatever; it certainly is not shipping ore.

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Simply because there is a certain amount of precious metal in ore that does not mean that it has any market value, because, for example, ore which carries $5 worth of gold per ton, but requires an expenditure of $6 to extract it, is worth just $1 less than nothing, and is not only useless to its owners, but an encumbrance about their mine.

On the evidence, which is all I am entitled to consider, I am forced to the conclusion that since the time the plaintiff became aware that the ore was lying as waste on the Nickel Plate dump it knew it was valueless to it or anyone else in that position, and therefore has suffered no damage by any act of the defendant in regard thereto.

In the third place, it is alleged that the defendant Company unlawfully permitted and permits a large body of water to accu-

mulate in its mine whereby is caused an undue flow of water into the plaintiff's mine.

This raises a difficult question of fact which must be determined before the cases cited can properly be considered. The difficulty in arriving at a satisfactory conclusion is, however, lessened by the view already expressed that the defendant cannot be held responsible for the trespass workings as such, nor has it ever made any use of them. The onus of proving that the maintenance of a column of water in the defendant's shaft caused an increased flow into the plaintiff's mine is upon the plaintiff, but though this should be clearly established, I feel bound to say that generally speaking, the evidence in support of the allegation is not of that precise and definite nature which would be expected, and while it is often plausible and theoretical it is likewise often far from convincing. The evidence of Davis and Jenkins does establish the fact that there was within the dates mentioned an increased flow of water into the Centre Star mine, but they must go further than that and shew that this increased flow came from the defendant's workings.

In the face of much that is vague and theoretical regarding real and supposed natural seams and channels, there is this clearly established and striking fact that when the water had ceased flowing into the Centre Star mine on the 24th of June, it was perhaps ten, but not more than 20 feet below the Nickel Plate 200 foot level, and some 180 feet above the highest point of the trespass workings from which it is alleged the water escaped into the Centre Star mine, chiefly at its 400 foot level, which is on a slightly higher plane than the Nickel Plate corresponding level. On this peculiar fact the defendant's counsel not unnaturally enlarges and contends that unless water can be proved to flow up hill, his client is clearly not responsible for its presence in the Centre Star, and that it must have got into that mine through theretofore unsuspected natural seams and fissures from undiscovered sources. This is undoubtedly the salient fact in the case, and it must be grappled with and satisfactorily explained, for, in the face of it, it is not sufficient to rely on the mere coincidence, singular though it is, that the Centre Star, theretofore a dry mine, did not become wet till

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after the Nickel Plate shaft was allowed to fill up. The plaintiff's counsel on the argument at the trial was unable to solve the problem, nor have I been able to do so after a further close consideration of the evidence. Such being the case, I can only find that the basic fact on which this branch of the action must stand or fall has not been established.

In case it may be thought material, should the matter go further, and as a matter of precaution, I find that the bulkheads were in every way well and properly constructed to perform the function expected of them. And in regard to the water in the trespass workings, I think it proper to say that I place most reliance on the evidence of Thompson, who has a better knowledge and experience thereof than any other witness. The action must be dismissed with costs.

The appeal was argued at Vancouver on 15th and 16th November, 1904, before HUNTER, C.J., DUFF and MORRISON, JJ.

Argument

Galt, for appellants: The effect of the two agreements and the defendants' licence is to make defendants liable for the trespass committed by the Great Western Mines, Limited, for the licence is tantamount to a statutory obligation to assume all liability of the old company; the agreements are recited in the memorandum of association and are a part of the Company's charter and the Company must get its licence subject to its charter and remain so subject: he cited *Ecclesiastical Commissioners for England* v. *North Eastern Railway Co.* (1877), 4 Ch. D. 845 at p. 857; *Bulli Coal Mining Company* v. *Osborne* (1899), A.C. 351, 364; the Companies Act, Secs. 123, 124, 127, 128, 139; Palmer's Company Precedents, 8th Ed., 1,845 and *Rolfe and the Bank of Australia* v. *Flower, Salting & Co.* (1865), L.R. 1 P.C. 27.

Defendants are also liable for the ore converted; they have in effect adopted the tort of their predecessors: see *Hall* v. *Duke of Norfolk* (1900), 2 Ch. 493; *Pretty* v. *Bickmore* (1873), L.R. 8 C.P. 401; *Gwinnell* v. *Eamer* (1875), L.R. 10 C.P. 658; *Todd* v. *Flight* (1860), 9 C.B.N.S. 377 and *Gandy* v. *Jubber* (1864), 5 B. & S. 78.

As to the accumulation and drainage of water; the accumula-

tion of a large body of water is a constant menace to plaintiffs and keeps them from going on with their work as by doing so they might let it loose and thus cause great damage and probably also loss of life; it constitutes a nuisance: he cited Pollock on Torts; *Attorney-General* v. *Colney Hatch Lunatic Asylum* (1868), 4 Chy. App. 146; *Humphries* v. *Cousins* (1877), 2 C.P.D. 239; *Broder* v. *Saillard* (1876), 2 Ch. D. 692; Kerr on Injunctions, 4th Ed., 196; Lindley on Mines, 2nd Ed., section 807; Garrett on Nuisances, 6; Broom's Legal Maxims, 281; *Reg.* v. *Belford* (1863), 3 B. & S. 662; *Tipping* v. *St. Helen's Smelting Co.* (1863), 4 B. & S. 608; *Harrison* v. *Great Northern Railway Co.* (1864), 3 H. & C. 231; *Attorney-General* v. *Council of Borough of Birmingham* (1858), 4 K. & J. 528; *Rylands* v. *Fletcher* (1866), L.R. 1 Ex. 265 at p. 274, (1868), L.R. 3 H.L. 330; *Westminster Brymbo Coal and Coke Co.* v. *Clayton* (1867), 36 L.J., Ch. 476; *Phillips* v. *Homfray* (1871), 6 Chy. App. 770; *Hurdman* v. *North Eastern Railway Co.* (1878), 3 C.P.D. 168; *Holmes* v. *Wilson* (1839), 10 A. & E 503; *Hudson* v. *Nicholson* (1839), 5 M. & W. 437; Seton on Decrees, 6th Ed., 574 and *Ross* v. *Hunter* (1881), 7 S.C.R. 289.

Davis, K.C. (*Hamilton*, with him), for respondents: All the trespasses complained of were by the defendants' predecessors in title; if any ore belonging to plaintiffs was on the ground when defendants took it over they knew nothing about it.

Argument

[HUNTER, C.J.: You had the same general manager as your predecessors and his knowledge would be your knowledge.]

The question is, was there conversion by the new company? The new company did not receive under the purchase any ore which was on the ground and which came out of another mine; they had no knowledge of any ore there not belonging to old company; there was never a demand for that ore and therefore there was no conversion; at any rate the ore said to have been converted was valueless.

[*Per curiam*: You need not argue the question of devolution of liability.]

Under the terms of the agreement defendants are to pay and satisfy the liabilities of the old company; that refers only to a money demand.

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As to the so-called nuisance he cited *Wilson* v. *Waddell* (1876), 2 App. Cas. 95; *Hurdman* v. *North Eastern Railway Co.* (1878), 3 C.P.D. 168 at p. 174; *Smith* v. *Kenrick* (1849), 7 C.B. 515; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127 at p. 144 and *Clegg* v. *Dearden* (1848), 12 Q.B. 576.

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Cur. adv. vult.

CENTRE STAR v. ROSSLAND-KOOTENAY MINING CO.

On 15th April, 1905, the judgment of the Court was delivered as follows by

HUNTER, C.J.: The facts appear in the judgment of the learned trial judge.

So far as concerns the questions which were the subject of the main argument for the appellant, I agree with the decision of the learned trial judge. I see no ground on which the defendants can be made liable for the tort of their predecessors. The transfer between them stipulates, it is true, that the former's liabilities are to be assumed by the latter, but the idea that C, being a stranger to a contract between A and B which provides that B should settle A's liability to C, has a right of action against B, unless the transaction was such as to make B his trustee, was finally exploded in *Re Empress Engineering Co.* (1880), 16 Ch. D. 125. The case of *Ecclesiastical Commissioners for England* v. *N. E. Ry. Co.* (1877), 4 Ch. D. 845, referred to by Mr. *Galt*, was that of a company being amalgamated by statute with another company, the first company being dissolved and its property and contracts transferred to, and its debts, liabilities and obligations being imposed upon the other company, and it was held that there was thus a statutory liability available to the party injured by the first company's trespasses.

Judgment

With regard to the question of the conversion of the ore, it was not proved that there was any conversion by the defendant company, but on the contrary it was always at the plaintiffs' disposal so far as they were concerned.

As to the injury and expense caused by the invasion of water, if it could be clearly shewn that the water came in through the trespass workings from the defendants' workings, there can be no doubt that the defendants would be liable on the ground that

they were maintaining a nuisance which was created by their predecessors in title. It was, however, candidly enough admitted by Mr. Kirby that it was impossible to state the source of the water, that is to say, it might have seeped into the trespass workings and thence into the plaintiffs' mine from the Nickel Plate, in which case the defendants would be liable, or it may have come in from the plaintiffs' own property, or from the Ore-or-no-Go, in which case the defendants would not be liable, whether it came in through the trespass workings or not, or it may have come in from the Nickel Plate by natural drainage and not through the trespass workings, in which case also the defendants would not be liable. It being impossible to trace how much, if any, of the water came in from the Nickel Plate through the trespass workings, the defendants cannot be made liable on this branch of the case.

There is, however, a ground on which in my opinion the defendants are liable, which is that they have maintained a nuisance by allowing water to get into the trespass workings from the Nickel Plate. It was not sufficient for them to have bulkheaded the workings at the Centre Star boundary—in fact they would have no business in these workings at all without the plaintiffs' consent, as the latter are the owners in fee of the Ore-or-no-Go subject to the right to mine vested in the defendants—but they should have bulkheaded the workings at their own boundary. There can be no doubt that to allow water to get into these workings from the Nickel Plate from which they became no doubt in large part filled up, was to render the nuisance a highly dangerous one, as great damage must necessarily have ensued to the plaintiffs, and probably loss of life, if they in the exercise of their right to mine their own ground had broken into the workings in ignorance of their existence. As it is, knowing of their existence they are, of course, precluded from mining the ore in their vicinity without going to the expense that will be necessary to prevent any damage or danger.

Judgment

I think that the plaintiffs were and are entitled to have the trespass workings kept protected against water coming in from the Nickel Plate, and that there ought to be an injunction restraining the defendants from permitting these workings to

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remain open at the Nickel Plate boundary and from permitting any water to flow from the Nickel Plate through these workings into the plaintiffs' mine.

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As to the damage arising from the legal injury to the plaintiffs' rights and so constituting a menace for the time being to the lawful use and enjoyment of the plaintiffs' property, caused by Nickel Plate water being allowed to get into these workings, it has not been shewn that the defendants have sustained any actual damage, and therefore there can be judgment for nominal damages only, which I am content to place at $10. Had the defendants failed to inform the plaintiffs of the existence of these workings before they allowed them to fill up with water from their mine, the question might have arisen as to whether the Court should not award exemplary damages, inasmuch as the defendants' general manager was the general manager of their predecessors in title by whose direction the tortious excavations were made, and of course his knowledge was their knowledge, but as it is, that question does not arise now.

The plaintiffs are entitled to the costs of the action less the costs of those issues on which they failed, together with the costs of this appeal.

Note:—The formal judgment of the Full Court was as follows:

Judgment

(1.) This Court doth order and adjudge that the judgment of the Honourable Mr. Justice MARTIN, dismissing this action with costs, be and the same is hereby set aside.

(2.) And this Court doth further order and adjudge that the defendants, their servants, workmen and agents be and they are hereby perpetually restrained from permitting water from the said Nickel Plate mineral claim to flow into the Centre Star mineral claim through the artificial openings at the Nickel Plate boundaries in question in this action or any of them.

(3.) And this Court doth further order and adjudge that the defendants do pay to the plaintiffs the sum of ten dollars damages.

(4.) And this Court doth further order that the defendants do pay to the plaintiffs the costs of this action and the costs of this appeal forthwith after taxation thereof, and that the plaintiffs do pay to the defendants the costs of those issues upon which the plaintiffs have failed.

(5.) And this Court doth further order that the injunction hereby granted be suspended for the period of six months to enable the defendants to consider and adopt the most convenient means available to them in order to comply with the said injunction.

BROWN *ET AL.* v. SPRUCE CREEK POWER COMPANY, LIMITED.*

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Water rights—Placer mining—Grant of water record and joint application for—Status to attack—Mining jurisdiction of County Court—Concurrent jurisdiction—Gold Commissioner and powers of to reduce or modify water record—Appeal—Mine owner and layman—Placer Mining Act, Part X.

The County Court has jurisdiction over water rights appurtenant to placer claims.

Though such jurisdiction is concurrent with that of the Supreme Court, it is not ousted by the mere fact that an action was begun in the Supreme Court by the same parties respecting the same subject-matter before it was begun in the County Court, and if no objection is taken it will continue to exercise its jurisdiction.

If objection is taken, the proper course is to apply to stay one of the actions, and it depends upon the circumstances which one will be stayed.

It is too late to object to the jurisdiction after judgment.

A layman is a lease holder, and may apply for a water record; which is appurtenant to the mine and not to the miner.

No one has a status to attack a water record who is not the holder of one himself, or the equivalent to one under the Act: a right to water under section 29 confers such a status.

Individual miners working on the same creek who have statutory rights in the same water may join in an application for a record, or to reduce or modify an existing record which is being misused to their disadvantage, and on such application the Gold Commissioner may make such adjudication as seems to him just; and unless those interested who participated in or properly had notice of the proceedings appeal from his decision in the summary way provided by section 36, they are bound by it.

If the action taken by the Gold Commissioner was the proper one, it is not invalidated because he gave wrong reasons or relied on one section instead of another which authorized his action.

Decision of HENDERSON, Co. J., affirmed.

APPEAL by defendant Company from a judgment of the County Court of Vancouver, Mining Jurisdiction, directing the Company to allow 600 miner's inches of water to pass its intake

Statement

*Also reported in 2 M. M. C. 254.

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for the benefit of other placer miners in working their claims.

The action was tried at Atlin in September, 1904, before HENDERSON, Co. J.

The plaintiffs were three of many individual placer miners working claims on Spruce Creek, Atlin Mining Division, and using its water in close succession for that purpose. All the water in the creek was recorded and under section 29 of the Water Clauses Consolidation Act, as amended in 1904, Cap. 56, Sec. 2, said placer miners were entitled to a continuous flow of 90 inches through their claims. The defendant Company was the assignee of the water record of one Banon, No. 92, dated 26th August, 1903, for "1,200 inches of water out of the unrecorded and unused water in Spruce Creek, if and when there is any." There were prior to this record certain other valid records, one No. 15, in favour of Martin, for 300 inches; another, No. 83, in favour of Queen, for 100 inches; another, No. 37, in favour of Crumback, for 600 inches; and another, No. 73, in favour of Sageman, for 300 inches. Before the grant to Banon, on the joint application of one Storey and many of the said individual miners, said records, Nos. 37 and 73 had been reduced by the Gold Commissioner by written decision duly recorded, dated 10th August, 1903, by 200 and 100 inches respectively, in all 300 inches, in favour of the individual miners as a class, without apportionment. At the foot of Storey's application the Gold Commissioner made and initialled this note:

Statement

> "Granted the use of 300 miner's inches from records 37 and 73 thus—from No. 37, 200 inches; from No. 73, 100 inches—until individual claims, both creek and bench, are either worked out or abandoned. They pay therefor the sum of $6.33, which they may pay to the Mining Recorder for application upon the rentals of Nos. 37 and 73. The said 300 inches to revert to the said records unless otherwise apportioned by the Gold Commissioner."

On the 24th of August, 1904, the defendant Company received written notice from the Gold Commissioner ordering it to allow sufficient water, estimated at 600 inches, to pass its intake to provide for prior interests, but it refused to do so, hence this action.

The other material facts will be found in the judgment.

Woods and Kappele, for plaintiffs.
Belyea, K. C., for defendants.

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At the opening of the trial, counsel for the defendants objected to the jurisdiction of the County Court to try the action, and in overruling the objection the learned judge gave the following reasons:

"As to that, the view I take of this is that the Placer Mining Act confers a certain jurisdiction and an enlarged jurisdiction upon the County Court, and by reading section 137 you will see the force of my reasoning.

Now, that statute means, although it does not say so in express terms, that it is to a large extent a summary jurisdiction. Now, if that is so, it seems to me that the object of the Act was to enable litigants to have their disputes terminated in the shortest possible manner, and in a summary manner, and also in a sense to leave with the courts the discretion largely as to how that dispute should be heard, because in another section—section 138—it says: "In all mining actions or suits the Court may decide the question at issue upon the ground in dispute, and such decision shall be rendered as in ordinary cases and shall have the same effect as rendered in an ordinary court." If that means anything, it means that the Court has the power conferred upon it of visiting the ground and settling the dispute, quite apart from the question of pleadings at all.

HENDERSON, CO. J.

It seems to me it was intended by the Legislature that the Court, in settling mining disputes, shall first to the best of its endeavours make an effort to settle that dispute in the shortest possible manner—on the ground if necessary. So my view of the points raised is that technical objections will not prevail if I am convinced that there is a good ground for dispute, and for that reason I am disinclined to give effect to your technical objections unless I see that some grievous harm has been caused, or some injury done to the party who is raising those objections.

Now, I have not the slightest doubt that, laying aside for a moment Mr. *Belyea's* objection as to the plaint not disclosing a cause of action, this Court has jurisdiction in a case of this kind. Take into consideration the interpretation of the term "mining

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property." The term (section 2), after explaining what placer claims mean, the section goes on to say, "and in the term 'mining property' shall be included every placer claim, ditch or water right used for placer mining purposes, and all other things used in connection therewith or in the working thereof." That is intended to be very wide and include every possible form or phase of mining property, and clearly it seems to me that this Court would have jurisdiction in the case under consideration."

At the conclusion of the trial judgment was given as follows (orally) by

HENDERSON, CO. J.: I may say now I have come to the conclusion that my judgment must be in favour of the plaintiffs, but the injunction should be drawn so as to avoid the complications suggested by Mr. *Belyea*—that is, that the defendant Company should not be prevented from using the water in case of abandonment by the plaintiffs, or other cause, entitling the defendants to the use of the water in the absence of an injunction in this matter.

HENDERSON, CO. J.

I award no damages, but the plaintiffs will have the costs of the action, and as there will in all probability be an appeal from my judgment in this case, I intend to give my reasons* later on, but it will be, of course, at as early a date as possible. I deliver judgment now, as I understand that both parties are very anxious for a decision, and I think it is advisable in cases of this kind to give the decision at the very earliest date; but in any event the conclusion I have reached represents my most careful consideration of the facts and of all that has been urged on both sides.

The costs will be on the Supreme Court scale (section 140, Placer Mining Act.)

The appeal was argued at Victoria on 11th, 12th and 13th January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

Belyea, K.C., for appellants: The County Court has no jurisdiction in an action respecting water rights under the Water Clauses Consolidation Act; the County Court's former jurisdic-

* None were given.

tion respecting rights under sections 54 and 56 to 78 of Part IV. of the then existing Placer Act of 1891 is abolished by section 154 (*b.*) of the Water Clauses Consolidation Act and the present Placer Act, Part X., Sec. 133, does not contain section 156 (9) of the Act of 1891; the present Act is a complete Code respecting water rights and it is clear that the intention of the Legislature was to abolish the jurisdiction of the County Court.

Further, an action between the same parties on the same issues was begun in the Supreme Court before this action, and that has the effect of ousting the jurisdiction of the County Court, for the Court which was first seized of it retains it to the exclusion of all others: Encyclopædia of Pleading and Practice (1898), Vol. 12, pp. 151-2.

A. D. Taylor: This objection was not taken at the trial; it is too late now.

Belyea: The record should shew it for the point was raised, and I put the Supreme Court proceedings in evidence for that purpose.

[*Per curiam:* An objection to jurisdiction must be taken clearly and so far as we can see this objection was never taken. HUNTER, C.J., referred to *Ex parte Pratt* (1884), 12 Q.B.D. 334, judgment of Bowen, L.J.]

Argument

The plaintiffs have no status to attack our record; they have no record and the Queen and Garrison records are not available to them; the intention of the Act is to confine water records to the owners of the claims: he cited *Spruce Creek Power Company, Limited* v. *Muirhead et al.* (1904), 11 B.C. 68.

The application of Storey and others was not authorized by the Act as it was a joint application by different owners of different claims; the application was a nullity and posting up alone is not sufficient: see *Centre Star* v. *B. C. Southern* (1901), 8 B. C. 214 at p. 218 [MARTIN, J.: That case is distinguishable] and *War Eagle* v. *B. C. Southern Railway Co.* (1901), 8 B. C. 374 at p. 379. The alleged Storey record is not a record in accordance with the Act.

[HUNTER, C.J.: You got an order under section 18 and now you are virtually attacking it before us although it was open

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to you to appeal to a Supreme Court Judge or the County Court Judge.]

Our application was long before Storey's; no Storey record was ever issued; the making of the memorandum was the only thing done.

[HUNTER, C.J.: The Commissioner evidently intended to grant an interim record and if you objected you should have appealed.]

But no record was granted and nothing to appeal from.

[HUNTER, C.J.: The memorandum contains all anyone wants to know and even if it didn't there is nothing in the statute compelling us to declare it bad.]

It cannot be an interim record: see sub-section 3 of section 18.

In any event the evidence shews that there was ample water available for the plaintiffs.

Argument

A. D. Taylor, for respondents (not heard on the question of jurisdiction): Banon's record under which defendants claim is on its face subject to the rights of prior record holders; we have a statutory status equivalent to a record under section 19 and so can attack any conflicting record. In the circumstances it was proper for all individual miners to join in the application to protect their rights, and the Gold Commissioner acted lawfully in imposing new conditions on existing records to meet the case. His order for 600 inches, in view of prior records, was the only one that could have been made, for the evidence shews that was the least quantity that would be sufficient, and there was no appeal from his decision and therefore it must stand—when the decision was given Banon was present or saw it the same day.

Cur. adv. vult.

On 27th February, the judgment of the Court was delivered by

Judgment

MARTIN, J.: As regards the first point respecting the jusisdiction of the County Court I see no reason to reverse his Honour Judge HENDERSON or to depart from the recent judgment of Mr. Justice DUFF delivered September 17th, 1904, in *Spruce Creek Power Co.* v. *Muirhead*, 11 B.C. 68, 2 M. M. C. 158;

wherein he held that the County Court has jurisdiction in actions of this kind under section 133, sub-section 4, and also under sub-section 1 of the Placer Mining Act.

It is also contended that even if the County Court has concurrent jurisdiction with the Supreme Court in this action under said section 133, and also section 143, yet because an action was begun on the same issues in the Supreme Court between the present defendant as plaintiff and the present plaintiffs and others as defendants, eight days before the present action was brought in the County Court, therefore the jurisdiction of the latter Court is ousted; and counsel cites the following extract from the Encyclopædia of Pleading and Practice (1898), Vol. 12, pp. 151-2:

"It is a settled rule that when two courts have concurrent jurisdiction over a particular subject-matter the one which first takes cognizance of a cause falling thereunder will retain the jurisdiction throughout, to the exclusion of the other, and until final determination . . . . This rule rests upon comity and the necessity of avoiding conflict in the execution of judgments by independent courts, either of distinct or concurrent jurisdiction. Any other rule would unavoidably lead to perpetual collision and be productive of most calamitous results."

Now, in the first place, the parties in the two actions are not the same because there were nine defendants in the Supreme Court action instead of the three now before us, and the American authority relied on, at p. 152, shews that in order to apply it "the suits should be between the same parties, seeking the same remedy, and apply to the same question." But further than this, our practice is different, and it is that though the jurisdiction exists yet the proper course is to apply to stay one of the actions. In the Encyclopædia of the Laws of England, article "Stay of Proceedings," Vol. XI. p. 724, it is stated that:

Judgment

"If concurrent actions are pending, say, in the High Court and the County Court, or any other Court in this country, raising the same issues, the maxim *Nemo bis vexari debet in eadem causa* applies, and the Court will, as a rule, allow the action which was commenced first to proceed, and stay the other (but see *Thomson* v. *S.-E. Rwy. Co.* (1882), 46 L. T. 513); unless, indeed, a decree has already been made in either action, in which case that decree will stand, but the conduct of the proceedings will be given to the plaintiff who first issued his writ . . . . "

And in addition to the authorities cited see *Wedderburn* v. *Wedderburn* (1840), 2 Beav. 208. In *Thomson* v. *S.-E. Rwy. Co.*

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it was held by the Court of Appeal that there was no hard and fast rule as to which action would be stayed and that the Court would exercise its discretion on the facts before it. Other authorities will be found collected in the Annual Prac. 1905, Vol. 2, p. 429; and Yearly Prac. 1905, pp. 38-9.

Speaking generally it would seem to be clear that either of two courts having jurisdiction will continue to exercise it till objected to.

As between conflicting County Courts in this Province where the property is in different jurisdictions section 136 provides that the Court "before which the dispute is first brought shall decide it."

By means of the special and simple procedure of its Mining Jurisdiction the County Court is enabled to try mining disputes much more speedily than the Supreme Court. Section 137 provides that:

> "The hearing of any summons, plaint, or other process in any County Court shall not be deferred beyond the shortest reasonable time necessary, in the interests of all parties concerned, and it shall be lawful for the Registrar to make summonses or other proceedings returnable forthwith, or at any other time."

And sometimes it is of the first consequence to the litigants to get judgment as soon as possible, otherwise heavy loss would follow, of which this very case is an instance in point, and this feature would have much weight in an application to stay.

Judgment

But the defendant at the trial herein instead of objecting to the celerity of the proceedings, objected to any delay therein and pressed the learned Judge for an early decision. In such circumstances it is too late to complain of a want of jurisdiction on this head: *Gelinas* v. *Clark* (1901), 8 B. C. 42, 1 M.M.C. 428; and see *Ex parte Pratt* (1884), 12 Q. B. D. 334, *per* Bowen, L. J., at p. 341.

In this question of jurisdiction the recent decision of Mr. Justice DUFF in *Muirhead* v. *Spruce Creek Power Company, Ltd.*, delivered on September 13th, 1904, 11 B.C. 1, 2 M.M.C. 150, should be considered; it is to the effect that a mining action in the County Court may under section 34 of the County Courts Act be stayed pending trial in the Supreme Court.

Then as to the second point, that no one has a status to attack

a water record unless he holds a water record himself. This is the view of the learned judge as expressed in the case cited, thus:

"In order to acquire a status to complain about the diversion of water any subject—be he free miner or otherwise—must acquire a water record as the Water Clauses Consolidation Act now stands. My view is that the act constitutes an exclusive code on the subject of water rights in this Province . . . . No person not having such a record in my judgment has any status whatever in a Court to make any complaint about the misuse of water by the holder of a record."

Subject to what follows I see no reason, at present at least, to differ from his Lordship, interpreting his language in the sense that one who seeks to attack a record under that Act must also have a status thereunder. Such a status is specially given to placer miners in certain circumstances by section 29 of the Water Clauses Consolidation Act as amended in 1904, Cap. 56, Sec. 2, as follows:

"29. In any case where all the water in any stream has been recorded for mining purposes and placer mines, either before or after the date of such record, are located and *bona fide* worked either above or below the point of diversion, the owner or owners of such placer mines shall be entitled to the continuous flow in said stream past, or to divert into or upon or through, such mine or mines sixty inches if two hundred or less be diverted by such record, and ninety inches if three hundred inches be diverted by such record, but no more; and such owner or owners shall be entitled to the full use of such water for such distance above or below such mine or mines as shall be necessary for the continuous and economical workings of said mine or mines and the carrying away of tailings and debris arising therefrom: Provided, however, that such owner or owners may divert a greater quantity than above specified upon paying to the holder of said record compensation for the damage he may thereby sustain; and in computing such damage the cost of the ditch shall be considered."

Judgment

It is admitted that the plaintiffs are free miners working on the creek in question and entitled to invoke this section, and their counsel contends that its effect is to confer upon them a statutory record for the specified number of inches, in this case 90, without the necessity of any application, and that consequently they have a statutory status to attack the holder of any record who is misusing the water granted to him or failing to comply with the conditions of his record to their disadvantage. I am clearly of the opinion that this is the case (see sections 7, 18, 28, 140 and definition of "Unrecorded Water"), and that section 29,

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where it applies, is intended to prevent the necessity of a multitude of applications being made for small amounts of water, and that any one who is entitled to invoke the section is in the same position as if he held the customary written record for the amount of water allowed him by the section. And I agree with my brother DUFF that the whole Act is intended to be "the rock of defence both to the small proprietor and the individual miner against anything in the nature of a misuse or a monopoly of the water."

The third objection is that the application of Storey and other individual miners on that creek should not have been even entertained by the Gold Commissioner, and reliance is placed on the language of Mr. Justice DRAKE in an appeal from a decision of my own under this Act in the matter of the *Centre Star* v. *B.C. Southern* (1901), 1 M.M.C. 460, 8 B.C. 214, wherein the Full Court upheld my view that a joint application could be made by two distinct companies being the owners of two different lode mines which were not adjoining. On the actual point at issue the case when properly understood is really an authority against the appellant who now invokes it, because the judgment of the Full Court says that:

> "If more persons join in an application than the law contemplates, or if some of the uses for which the water is to be put are not in his opinion correct, he (the Commissioner) has power to make the record, omitting those matters which are in his opinion incorrect, just as much as he has power to limit the amount of water to be used, etc., etc."

Judgment

It is true the learned judge goes on to say (p. 464) that:

> "The intention of the Act it appears, from a general view of its provisions, is that any mine owner or number of mine owners interested in one claim may apply, or owners of a group of mines under control of one company or partnership, may join in an application, but not several owners of separate and distinct mines with no proprietary connections; if such a course was allowed very great difficulty might arise. Without enumerating such difficulties, it is sufficient to say that in my view such a proceeding was not in contemplation of the framers of the Act, which was to enable the waters of the Province to be separated for the use of all miners and not to be absorbed for scattered miners under one application."

But it must be remembered that he is speaking only of applications relating to lode claims, and that considerations of a very different sort apply to this case where there are a number of individual placer miners on the same creek who not only have

peculiar rights under said section 29, but have one paramount interest in common, *viz.*: to secure a continuous supply of water which they are using in close succession one after the other during the short season in which their claims can be worked. Miners so operating do not come within the proper meaning of the term "scattered miners" as employed by my brother DRAKE, and indeed in one sense they have a common "proprietary connection" of a special and vital kind in the water of the stream under and by virtue of said section 29. Though from one point of view their claims may be "separate and distinct mines," yet their common interest and the operation of the section may serve to connect them in such a way that it will often be found impossible to "disconnect" them when considering the best means to practically apply the statute; it all depends on the varying circumstances which the Gold Commissioner will have to deal with on the spot.

I am of the opinion therefore that the Gold Commissioner acted properly in the circumstances in entertaining the joint application of Storey and the other individual miners concerned, who, in fact, made their application in that manner at the suggestion of the Gold Commissioner. I do not see how he could have acted otherwise, for, as has been seen, these men were already in effect holders of statutory records and entitled to attack existing records and have them cancelled, reduced or imposed with new conditions, under sections 18 and 28 if they shewed good cause therefor. Indeed, it facilitated matters and gave the Gold Commissioner a freer hand to have them all before him in the one interest. And it was also proper to hear the three conflicting applications of Banon, Smaill and Storey *et al.* at the same time, for section 18 requires him to "hear all parties in interest and their witnesses," and make his "adjudication" thereon. He did hear all the parties and the course he adopted in provisionally reducing Record No. 37 by 200 inches and Record No. 73 by 100 inches, a total of 300 inches, in favour of the individual miners as a body until their claims were worked out or abandoned seems to have been the only practical way of dealing with the matter. It is objected that this does not constitute a grant of a record in their favour, but, as has

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been seen, they were already in the position of record holders by statute, and all that it was necessary to do in such case to guard their rights was to amend or modify the existing records by attaching new conditions thereto. An interim record could not have been granted under sub-section 3 for that only applies to records "obtained under any Act heretofore passed," and all the records in question had been granted under the existing Act. The reduction was made, and either section 18 or 28 would justify the step taken, and the Gold Commissioner took the precaution of immediately sending copies of his adjudication to the Mining Recorder, to the Chief Commissioner of Lands and Works and to each of the parties, so that all concerned had express notice thereof. Nothing more is required to be done even in the case of a new grant: see section 15, sub-section 3.

It was perhaps, strictly speaking, incorrect for the Gold Commissioner to say in his decision that "the said 300 inches shall be considered as *granted* in response to the said application of Thomas Storey and others in *lieu of a record* and as appurtenant to the individual claims above designated," yet if the action taken was the proper one on the ground that the individual miners already had statutory grants it will not be invalidated because the official used inapt language or erred in thinking he had power to make a grant "in lieu of record," which is something the statute does not authorize. The point is, that what he did in reducing the two records was lawful though apparently, and very excusably, he did not appreciate the exact rights or status of the individual free miners in the circumstances.

Judgment

In addition to the said 300 inches there was also another record, No 15, Martin's, for 300 inches which was admittedly prior to Banon's, and this made in all 600 inches which the plaintiff Company must allow to pass its intake, and on the 24th of August, 1904, with the apparent intention of implementing his adjudication of August 10th, 1903, as amended on August 25th of the same year, the Gold Commissioner ordered the defendant to allow that amount to pass its intake, which it refused to do and hence this action. This order is not in the appeal book as it should be, though it is referred to in the plaint in para. 8, and was twice referred to at the trial and was cross-

examined on and discussed by plaintiff's counsel and the measurements directed to be made under it also discussed. Mr. *Belyea* says it was in the form of a letter but that he cannot recollect its terms. However, there is no dispute about its general effect as above stated, though we are in the dark regarding the circumstances which led up to its being made. But it is not necessary to consider it further for it does not carry the case beyond the original adjudication and is only supplementary. Having given, then, his formal adjudication and placed it on record, it was open to anyone who felt aggrieved thereby to take that appeal "in a summary manner" to a judge of the County Court or of this Court that section 36 provides, *i. e.*, by filing a petition "within one month after the day such decision is recorded." It is difficult to understand why the defendant Company, or its predecessor in title, did not adopt this course if it was not satisfied with the decision, but since it has not seen fit to do so it is bound by it.

On the facts it is clear from even the defendant's own witnesses that 600 inches is not too much to allow to pass the intake for the use of the various prior interests concerned and the decision of the trial judge should be affirmed on that ground also. If less than that amount had been allowed the individual miners would not get their 300 inches, for, in addition to the prior Martin record for 300 inches, one Queen also had an admittedly valid prior one, No. 83, for 100 inches, which he was using.

Judgment

It was argued by Mr. *Belyea* that the holder of a lay on a claim could not apply for or obtain a water record and that only a recorded owner of land or a mine could do so. Section 10 declares that "Every owner of a mine may secure the right to divert unrecorded water from any stream or lake for any mining purpose . . . . " Section 18 declares that "Any owner of land or owner of a mine who would be entitled to apply for a record of the water in any stream or lake if the same were unrecorded" may get leave from the Gold Commissioner to apply therefor "notwithstanding the existence of such prior records . . . . " The term "owner of a mine" is thus defined:

"'Mine' shall include 'claim' and 'mineral claim,' and shall mean any land held or occupied under the provisions of the mining laws of the

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Province, for the purpose of winning and getting therefrom minerals, whether precious or base, and whether held in fee simple or by virtue of a record or lease, and 'owner of a mine' shall mean owner of a mine as above defined."

Now, a "layman" is really a leaseholder and an occupant of a claim within the meaning of that definition, the peculiar feature of his tenure being that the amount of the rent he pays is contingent since it depends upon the clean-up, and he is bound to work the claim continuously in a miner-like manner during the mining season. The claim cannot be worked without water and therefore after getting his lay his first duty to his lessor as well as to himself must be to get a water record, if one is not already appurtenant to the claim by statute or otherwise. For this purpose, he must, from the very nature of a lay, be deemed, in the absence of evidence to the contrary, to represent the owner as well as himself, and therefore is entitled without further authority to apply for a record to the claim, if it be necessary to do so. There is nothing restricting the right to recorded owners merely, and it would be surprising to find such a restriction for the record is not made appurtenant to the applicant but to the mine according to section 19:

"19. Every record obtained by the owner of land or the owner of a mine shall be deemed as appurtenant to the land or mine in respect of which such record is obtained.

"(2). All assignments, transfers or conveyances permitted by law of any mine or of any pre-emption rights, and all conveyances of land in fee, whether such assignments, transfers or conveyances were or shall be made before or after the passing of this Act, shall be construed to have conveyed and transferred, and to convey and transfer, any and all recorded water privileges appurtenant to the premises assigned, transferred or conveyed, and shall pass with any of the premises aforesaid upon devise or descent."

Judgment

And by section 20, the record exists only so long as the mine does:

"20. Whenever a mine shall have been worked out or abandoned or a pre-emption cancelled or abandoned, or whenever the occasion for the use of the water upon the mine or pre-emption shall have permanently ceased, all records appurtenant thereto shall be at an end and determined."

In section 29 the expression "owner of such placer mines" is clearly intended to include a layman; to seriously contend otherwise, bearing in mind the way placer mining operations are carried on, seems to me to be impossible.

Some discussion arose on the proper form of a water record, and it is strange that one is not given in the Act, which gives rise to some uncertainty on the point for, while the interpretation section says that "Record" shall "mean an entry on some official book kept for that purpose," yet section 15 contemplates something more formal, for it provides that:

"The record granted upon such application shall be forthwith entered by the Commissioner, or Gold Commissioner, in the Book of Record of Water Rights, and shall contain the particulars required to be contained in the notice of application as confirmed by or modified upon the adjudication and any other particulars directed to be inserted therein by Regulations in that behalf, with such additions and variations as circumstances may require."

But from the course the appeal has taken it is unnecessary to decide the point here, and I merely draw attention to it so that it may receive consideration in the proper quarter. It is true that a printed form has been adopted in practice, but we are informed it is not authorized by rule of the Lieutenant-Governor in Council under section 142, for none has been made.

Judgment

On the whole case I am unable to discover any good reason why the judgment of the learned trial judge should be disturbed, and therefore the appeal must be dismissed with costs.

Appeal dismissed with costs.

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THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. LUDGATE AND THE ATTORNEY-GENERAL OF CANADA.

DEADMAN'S ISLAND CASE.

Military reserve—Deadman's Island—Recitals in Private Acts—Whether binding on the Crown—Reserve—What constitutes—Colony of Vancouver Island—British Columbia—Powers of Governor, Sir James Douglas—British North America Act—Litigation by the Crown in different rights.

Held, on the facts, reversing MARTIN, J. (HUNTER, C.J., dissenting), that it was shewn that Deadman's Island was a military reserve, called into existence by properly constituted authority, and therefore, that it belongs to the Dominion and not to the Province.

Litigation between the Dominion and a Province respecting the right to administer certain public property should not be conducted in the same way as a suit between subjects, but should rather be regarded as a public inquiry, in which it is incumbent on all the Crown officers to come forward with all the evidence in their possession, and any properly authenticated documents bearing on the issues should be admitted in evidence.

APPEAL to the Full Court from the decision of MARTIN, J., reported in (1901), 8 B.C. 242.

The appeal was argued at Victoria on the 15th, 16th, 17th, 22nd, 23rd, 27th, 28th, 29th and 30th of June, and the 4th of July, 1904, before HUNTER, C.J., DRAKE and IRVING, JJ.

Peters, K.C., *Howay* and *Duncan*, for appellant.

A. E. McPhillips, K.C., *Cassidy, K.C.*, and *Harold Robertson*, for respondent.

8th September, 1904.

HUNTER, C.J.: This is a dispute as to which of two sets of Crown officers have the right to administer the property known as "Deadman's Island" in Vancouver harbour, and dispose of the revenue therefrom.

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Ordinarily speaking, a contest of this nature should not be conducted as though it were a suit between subjects, but should rather be regarded as a public inquiry, in which it is incumbent

on all the officers of the Crown to come forward with all the evidence in their possession, in order that the interests of the State may not suffer by an erroneous decision founded on imperfect knowledge of the facts. To a large extent, the case of the Dominion was in the hands of its adversary, resting as it does on documentary evidence, now in possession of the latter, and on other documents which, it is alleged, were once in its possession, but are not now to be found. Some evidence tendered by the Dominion was rejected at the trial, which should have been received, subject, of course, to all just exceptions, on account of the age of the witnesses, and therefore we thought that this evidence should be preserved, and for that reason allowed these witnesses to be recalled, but, in my opinion, the evidence so elicited has thrown little, if any, additional light upon the question to be solved.

Two principles bearing on this controversy are now firmly settled as part of the jurisprudence of the Canadian Constitution; the first being that the British North America Act has transferred to the Dominion only those proprietary rights expressly mentioned, the residuum remaining in the Provinces: see *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46, and *Attorney-General for the Dominion of Canada* v. *Attorneys-General for the Provinces of Ontario, Quebec and Nova Scotia* (*Fisheries Case*) (1898), A.C. 700; and the second being that the Crown cannot be bound by alleged acts on the part of departmental officers which are not brought home to, or authorized by, the proper executive or administrative organs of the Government and are not manifested by any Order in Council or other authentic testimony: see *Ontario Mining Co.* v. *Seybold* (1899), 31 Ont. 386, at p. 393; (1903), A.C. 73, at p. 84. If we bear these principles in mind, then any question that may arise between the two Governments respecting the beneficial ownership of the public domain will, generally speaking, be easy to solve, nor do I think the present case any exception.

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In November, 1857, James Douglas, afterwards Sir James Douglas, was appointed Governor of Vancouver Island; in September, 1858, he became Governor of British Columbia, and

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remained in that office until 1864. His Commission as Governor of British Columbia conferred the most extensive powers, or, as Sir E. B. Lytton in his despatch to the Governor dated September 2nd, 1858, says, of "very serious and unusual extent."

The Commission states that the Governor is appointed in pursuance of Chapter 99 of the Imperial Acts of 1858, and empowers him, *inter alia*, to constitute and appoint Judges, Justices of the Peace, Sheriffs and other necessary officers and ministers, for the due and impartial administration of justice and putting the laws in execution; by proclamations issued from time to time under the public seal of the Province, to make, ordain and establish all such laws, institutions and ordinances as may be necessary for the peace, order and good government of the Colony, not repugnant to the laws of the United Kingdom, but subject to the Royal approbation or disallowance; to expend public money; to establish cities, towns, counties, etc.; to defend the country; to suspend officers acting under Imperial authority, and to grant pardons and remit fines and forfeitures. The Royal instructions accompanying the Commission, dealing with the law-making powers entrusted to him, direct that he is "not to make any law" in respect of a number of specified matters, not here material to mention. It will thus be seen that Governor Douglas was in reality a Viceroy, with practically unlimited powers, except as to certain specified topics. In a letter to Colonel Moody, who was chosen by the Imperial Government to act as Chief Commissioner of Crown lands, under date of August 23rd, 1858, Sir E. B. Lytton is careful to impress this fact upon him in order to avoid any possible conflict of authority. He says (Ex. 6, p. 65):

> "It is to be distinctly understood—First, that the Governor is the supreme authority in the Colony. That you will concert with him and take his orders as to the spots in the Colony to which your attention as to surveys, etc., should be immediately and principally directed. That you will advise and render him all the assistance in your power in the difficult situation in which it is probable that he will be placed for some time.
>
> "2. The Governor will be instructed to regard your duties as special, and that they are not on any account to be interfered with, except under circumstances of the gravest necessity, so that all possible conflict of duties may be avoided."

And he concludes by directing him to send in his reports through the Governor.

In a letter of October 29th, 1858, a copy of which was sent to the Governor, Sir E. B. Lytton thus instructs Colonel Moody:

"On this subject, I am bound, in justice to both parties, to guard against any risk of misapprehension as to your respective duties and powers. Whilst I feel assured that the Governor will receive with all attention the counsel or suggestions which your military and scientific experience so well fit you to offer, I would be distinctly understood when I say that he is, not merely in a civil point of view, the first magistrate in the State, but that I feel it to be essential for the public interests that all powers and responsibilities should centre in him exclusively. Nothing could be more prejudicial to the prosperity of the Colony than a conflict between the principal officers of Government."

And in a letter dated March 21st, 1859, to the Governor, he says:

"I take this opportunity to notice an inaccuracy into which you have fallen in this despatch in designating Colonel Moody the Lieutenant-Governor. You will observe that it is of importance to bear this in mind, as his functions in that capacity will commence only in the event of the death or absence of the Governor."

It is thus abundantly clear that Governor Douglas was constituted the sole executive and legislative authority for the Colony, and that no exercise of the Royal prerogative, or valid disposition of the Crown lands, could take place within the Colony, except by the instrumentality of Governor Douglas himself. In fact, it is clear that no person in the Colony had any power before February 14th, 1859, to effectually set apart any Crown lands, not even the Governor himself, as he had no power to make any law, except by way of Proclamation; but, on that date, he issued a Proclamation, the third section of which enacts as follows:

"It shall also be competent to the Executive, at any time, to reserve such portions of the unoccupied Crown lands, and for such purposes, as the Executive shall deem advisable."

This section remained in force until April 11th, 1865, when it was re-enacted in the Ordinance of that date, in substantially the same terms, save that the word "Governor" is substituted for the word "Executive." Therefore, it follows, if this so-called reserve was made before February 14th, 1859, that it was made without authority; but if afterwards, in 1859, as Howse seems to think, or in 1860 or 1861, as Turner thinks, it was equally made without authority unless made by Governor Douglas, or by

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Moody acting under his instructions, or at any rate ratified by the Governor if made without his authority.

Now, it is admitted by Mr. *Peters*, that he is unable to produce any proof that Governor Douglas either himself set apart the island for military purposes, or that he conferred any authority on Moody to do so by any instructions, either general or special, or, for that matter, that he ever applied his mind to the subject at all.

But, notwithstanding the absence of any such proof, Mr. *Peters* contends that there is a sufficient body of evidence of general reputation, to lead us necessarily to conclude that an executive act did in fact take place whereby the island was competently set apart for military purposes. I think not.

The first circumstance relied upon by him is, that Corporal Turner's field notes, made in 1863, shew the peninsula, now known as "Stanley Park," marked "military reserve," and the island marked "reserve," and that it is reasonable to infer by reason of the proximity of the island to the park that it was reserved for the same purposes, and that the park is referred to and recognized in the Vancouver Incorporating Acts as a military reserve.

Assuming for the purpose of the argument that the evidence is sufficiently conclusive in the case of Stanley Park, which it is not now necessary to decide, it does not follow that the mere
HUNTER, C.J. proximity of the island (it being some 390 feet distant from the park) is a fact which leads, necessarily, to the inference that it was set apart for the same purposes. There was no evidence given by any person competent to speak on military matters as to the necessity or advisability, either then or now, of including the island in a reserve of the park for military purposes; and it is not unreasonable to suppose that the island, if set apart for any purpose, was set apart on account of the coal it may have been supposed to contain, or as a suitable place for Government stores. All that can be said about it is that, while no doubt it is a reasonable inference that it was set apart for military purposes, or as necessary for the proper use of the park for such purposes, it is not the only reasonable inference.

Reliance was next placed on the testimony of Howse to the

effect that there was a plan of the reserve, signed by Colonel Moody in his official capacity, and sealed with the official seal of his department, which plan is not now to be found, but of which Exhibit 4 is an unsigned duplicate; that this plan shewed (as does Exhibit 4) military reserves outlined in red, naval reserves in blue, and Indian reserves in brown; that the park and the island were both marked in red, and that it was the uniform practice of the Department to use these colours to respectively indicate these different classes of reserves.

But this contention seems weakened by the fact that on this same Exhibit 4 the townsite of New Westminster appears coloured red, and there seems to be no reason why this colour was used to shew the townsite, rather than yellow or green. The plan also shews other parcels marked off with red outlines, which afterwards disappear as reserves (one of which is marked "cancelled," apparently in Moody's handwriting); nor is there anything to shew either their origin or how they came to be cancelled. In fact, it is fairly evident, from this very plan, that these so-called reserves were merely temporary withdrawals from pre-emption or sale of the areas outlined, on account of their potential usefulness for various purposes, including military and naval purposes, or in order to make the surveys before occupation. For instance: about midway between False Creek and New Westminster two blocks are outlined in red, but the military value of these parcels is certainly not obvious. Having regard to the fact that on another map, of apparently about the same date, marked "obsolete" and "No. 2," in the lower right hand corner, which seems not to have been used at the trial, but is among the bundle of maps filed in this Court, these blocks are marked "reserve," without shewing for what purpose, while other reserves are marked "Indian" and "cemetery" reserves, the inference is certainly not a necessary one that these blocks, although outlined in red, were set apart for military purposes. In fact, it is not at all unlikely that the primary motive in making many of these reserves was to secure coal for Imperial purposes, as it was commonly supposed at this time that there were coal-beds in this section of the country. Meade's map (Exhibit 24D) shews the park and the other portion of the old

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reserve marked "coal-beds," and Richards' chart shewed the whole peninsula marked "Coal Peninsula," and the harbour "Coal Harbour," and generally, on the subject of the meaning of the term "reserve" as used by the Land Office officials, I agree with the remarks of the learned trial judge, and consider that in the great majority of instances the expression means nothing more than withdrawal from pre-emption or sale.

So far as concerns the use of the separate colour, blue, to indicate naval reserves, this may be satisfactorily accounted for by the fact that Moody was specifically directed by Governor Douglas to reserve these parcels in compliance with the request of Rear-Admiral Baynes, pending the decision of the Imperial Government, and I think the most reasonable conclusion to draw in connection with this question of colour is that blue was used to indicate those parcels proposed to be devoted to naval purposes, brown such as were proposed to be set apart for Indian reserves, and red to indicate such as were for the time being withrawn from pre-emption or sale for any one of a variety of reasons. It is at any rate fairly evident that this plan (Exhibit 4) was not intended to shew that any of these parcels were finally and definitely set apart for public purposes, because it would, in such event, most probably have been certified in the usual way by Colonel Moody, and because a number of the parcels soon after disappeared into the general public domain; in fact, one of them, as already stated, was marked "cancelled" apparently in Moody's own handwriting.

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The next circumstance relied on was that there was a return of Government Reserves made to the Legislature of the Province by the then Chief Commissioner of Lands and Works on the 14th of January, 1873, and that this return shews an area described as "South of first narrows, Burrard Inlet," which is stated to be a military reserve and to contain 950 acres, and that as the park and the island together contain about 880 acres, this amounts to an admission by the Crown in right of the Province that the island was duly reserved for military purposes. Apart from the difficulty that no date is assigned in the return for the creation of the reserve (*i.e.*, it may have been subsequent to the entry of the Province into the Union), the acreage is evidently

given in round numbers, and the island may not have been intended to be included in the description at all. Moreover, the evidence shews that this return was compiled by a clerk in the office, and while it may have received the *imprimatur* of the Chief Commissioner of Lands and Works, and may even have been carefully considered by him, it would be impossible to hold that the Province was estopped from contesting the claim of the Dominion by any admission which might be implied on his part from this return that the Province had become dispossessed of a portion of the public domain which is not identified in the return beyond reasonable doubt.

Feebler still is the contention based on the "Schedule of Reserved Lands of B. C., proposed to be surrendered to the Dominion Government," by the Imperial Government.

In the first place, none of the lands mentioned in this schedule ever became vested in any Imperial authority, except such as were duly reserved by competent Colonial authority for naval purposes and taken over by the Imperial Government for such purposes; and it has never even been suggested that the island was reserved for naval as well as for military purposes. Such lands, if any, as were reserved for military purposes, before the establishment of the Civil list, remained vested in the Colony, for the simple reason that the Imperial Government withdrew at that time from any further control over the military affairs of the Colony; in fact, considerably before this time the Colonial Secretary gave Governor Douglas distinctly to understand that the Home Government expected the Colony to become self-governing and self-sustaining as soon as possible.

Accordingly, it was not competent for the Imperial Government to assume to hand over to the Dominion any lands embraced in the schedule which had been reserved by the old Colony for military purposes, and the only effect that can be ascribed to the so-called surrender as regards such lands, is that as the Imperial Government does not deal directly with the Provincial Governments, it saw fit to formally announce to the Governor-General, for the benefit of whom it might concern, that it did not set up any claim to the lands in question.

There is, moreover, the same difficulty in the case of the

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return of 1873, as to the identity of the island with any land purporting to be embraced in the schedule.

Finally, it is suggested that, although the power to set apart portions of the public domain was reserved and remained reserved to the Governor, it does not follow that this power was not exercised by Colonel Moody as the instrument of the Governor, just as several of his powers must have been exercised through the agency of others, such as the power to establish cities and towns, to defend the country, etc. But, as already shewn, there is no satisfactory evidence to shew that the island was ever set apart by Col. Moody for military purposes; and, even if there was, the power to make reserves was one which could have been personally exercised by the Governor himself, and there is no evidence to shew that the Governor had chosen to exercise this power through Col. Moody, or that he conferred any authority at all upon Col. Moody in respect to the matter, to shew its extent; or that he had ever ratified the setting apart of the island if it was done without authority. In fact, as already stated, there is no evidence to shew that he ever applied his mind to the matter at all, or that he knew that it had ever been withdrawn from the operation of the pre-emption laws. Not only so, but what evidence there is points the other way. The correspondence between the Governor and Colonel Moody shews that at that time, at any rate, the Governor was almost wholly

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ignorant of what Moody had purported to do in the matter of reserving public lands, and it is also evident that the latter was in the habit, not so much of assuming to finally set apart any of the public domain for public purposes, as of withdrawing undefined portions from pre-emption, from time to time, from various motives, and again throwing them open for settlement. For instance, the original reserve, so-called, of which the park is only a remnant, was withdrawn from settlement by Moody himself, and it is evident that the Governor had not finally set it apart for public purposes, as Crown grants issued for a large portion of it to squatters by Moody's direction.

On the question of fact, then, it seems to me that the learned counsel for the Dominion has not succeeded in removing the matter from the region of suggestion and surmise into that of

reasonable proof, and has accordingly failed to satisfy the onus resting on his client.

It therefore becomes unnecessary for me to discuss at length the other questions raised in the case, but I will content myself with adding that, in my opinion, if it had been satisfactorily established that the island had been set apart by or under the authority of Governor Douglas, as a military reserve, the right to the control and beneficial user thereof became vested in the Colony on the establishment of the Civil List, and any of the subsequent Colonial Governments could have cancelled the reserve, as I do not understand by what process of consecration it was irrevocably dedicated to Imperial uses; and failing such cancellation, that it would have passed to the Dominion by virtue of item 10 of the third schedule of section 108 of the British North America Act.

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For these reasons, I think the judgment of the learned trial judge was right, and should be affirmed.

DRAKE, J.: This case is in the nature of an inquiry as to the relative rights of the Crown as represented by the Dominion, and the rights of the Crown as represented by the Province, to a piece of land at Coal Harbour, being a small island of some eight acres in extent lying within some 200 yards of Stanley Park, Vancouver, and in the shallow water of an arm of the inlet running along the eastern shore of Stanley Park. At extreme low tide the island is connected with Stanley Park, and Turner says his notes shew that the island was chained when surveyed, thus shewing that access to it was gained over dry land.

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The Colony of British Columbia was established in 1858, and Mr. Douglas, afterwards Sir James Douglas, was the first Governor, with very exceptional powers. He ruled the Colony autocratically, and made the laws by Proclamation only. At the time he was then acting, *viz.*, in July, 1858, Colonel Moody and a party of Royal Engineers were sent out. Their duties were defined to survey lands for settlement and public purposes, and it was stated the force was sent for scientific and practical purposes, and not solely for military objects. In pursuance

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of these duties, Colonel Moody advised the removal of the capital from Langley to its present site, and the grounds for such removal were its greater military advantages; and in order to protect the future town certain naval and military reserves were placed on Burrard Inlet. When these were made is not clearly defined, but in 1859, according to Mr. Howse's evidence, what is now known as Stanley Park was marked as a reserve on a chart prepared by the naval authorities and used in Colonel Moody's office.

In 1862, Mr. Turner, a corporal of the Royal Engineers, in obedience to instructions from his commanding officer, ran a contour line around the land in question, and his field notes shew that at that time the land now in question, known as Deadman's Island, including Stanley Park, was a military reserve. These field notes have ever since been used as a basis for subsequent plans affecting property included within the notes. I make these remarks as it was held by the learned trial judge that these field notes and instructions were inadmissible as evidence. This is not an issue between subject and subject, but an inquiry as to whether the Crown in right of the Province is entitled to this land as against the Crown in right of the Dominion; and any properly authenticated document bearing on this question should be examined and admitted. We therefore called both Mr. Turner and Mr. Howse before us, and have had the advantage of their *viva voce* testimony.

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The original records of the Land Office are imperfect, and some plans which might assist us are not forthcoming. This doubtless arises from the numerous changes in the departmental offices which have arisen in the last forty years. But the evidence we have I think clearly indicates that this was a reserve for military purposes, certainly as far back as 1862, if not some years before, and ever since that time has been so held, although in some maps it is merely marked as "G. R." or "Reserve," and no one was ever allowed to take up any portion of these lands for settlement, and various other lands on Burrard Inlet were marked as reserved for military and naval purposes. Some of these reserves were subsequently removed by Colonel Moody and the lands thrown open to settlement.

It does not appear from the evidence that reserves were notified to the public in any way, there was no official Gazette in existence until 1863, and there was no order in council, because there was no Executive Council. The mode by which reserves were made was partly by the Governor himself (*vide* the Vancouver Island Reserves) and partly by Colonel Moody as Chief Commissioner of Lands and Works. The latter were apparently communicated to the Governor. Many of the reserves were only temporary, and the only information that the public could obtain as to reserves was by an inquiry at the Land Office. I am of opinion, as a matter of fact, that Stanley Park, including the island in question, was and is a military reserve.

On 27th July, 1883, the War Office gave a list of the reserves, Exhibit 15, which they proposed to surrender to the Dominion Government, including reserves 8 and 9 on south shore of Burrard Inlet and south shore of First Narrows. These reserves are in fact Stanley Park. The acreage given is sufficient to include the island now in question. From this letter it is reasonably clear that the War Office had in their possession maps or plans shewing the reserves, although the evidence before us does not shew what the plans were, or when they were sent to that office.

Counsel for the Province bases on the use of the term surrender in this letter, and in the letter, Exhibit 25, of 27th March, 1884, from Lord Derby to the Marquis of Lansdowne, an argument that as soon as the military authorities surrendered this land it fell at once to the Provincial Government as land surrendered and not required for the uses for which it had been retained, and in support of this contention he cites the case of *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46. This case deals with Indian lands which never were the property of Canada under the B. N. A. Act, but over which the Dominion had merely administrative powers, and it was there held that these lands when no longer required for the Indians reverted to the Provinces. This argument does not deal with the Imperial rights anterior to the B. N. A. Act, although there is language used in Lord Watson's judgment which might indicate that the reserves here in question might under section 109 become subject to the administration of the Provincial

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Legislature. He says that the section in question is sufficient to give to each Province the entire beneficial interest of the Crown in all lands within its boundaries which at the time of the Union were vested in the Crown. In construing this language the special circumstances connected with this reserve must be borne in mind. This reserve had been transferred to the War Office before the B. N. A. Act, together with many others, and some had been transferred to the Admiralty as naval reserves. All these reserves were in fact vested in the Crown, but they had been appropriated to distinct branches of the Imperial service, and as such would come within the last clause of section 109—"Subject to any interest other than that of the Province in the same"—and the Imperial Government have always considered those reserves were valid and became effectual without confirmation by the Secretary of State: see Lord Derby's letter, 27th March, 1884, Exhibit 15. It is to be remarked that this letter was written long after Confederation, and it is to be presumed that the advice tendered to Lord Derby, to which he refers, was from the law officers of the Crown, and was not tendered without sufficient knowledge of the facts.

Lord Watson says in the *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1889), 14 App. Cas. 295, at p. 301, "The title to the public lands in British Columbia has all along been, and still is, vested in the Crown; but the right to administer and to dispose of these lands to settlers, together with all royal and territorial revenues arising therefrom had been transferred to the Province before its admission into the Federal Union." This language refers to public lands of British Columbia and not to lands which were impressed with a special trust or object. Public lands are those lands of which no sale or other disposition or transfer has been made by the Crown or Province. In my opinion, the land in question was segregated from the public lands when it was made a military reserve and handed over to the Imperial authorities. Unfortunately we are not in possession of the documents by which this was accomplished. There is no official record beyond the fact of the reserve having been made, and the letter of Lord Derby.

DRAKE, J.

Lord Watson in *St. Catherine's Milling and Lumber Company*

v. *The Queen*, at p. 57, in discussing section 109 of the B. N. A. Act, says:

"The enactments of Sect. 109 are, in the opinion of their Lordships, sufficient to give to each Province, subject to the administration and control of its own Legislature, the entire beneficial interest of the Crown in all lands within its boundaries, which at the time of the Union were vested in the Crown, with the exception of such lands as the Dominion acquired right to under section 108, or might assume for the purposes specified in section 117."

Section 109 is subject to any trusts existing in respect thereof and to any interest other than that of the Province in the same. The effect of this section is that the Province is owner of all lands subject to any trust or interest that may be existing. Lands set apart for military purposes are lands subject to a trust. This being so, where the trust is merely for a temporary purpose, the freehold remains in the Province.

Under section 91, sub-section 7, the Dominion Government has the right to legislate on the subject of militia, military and naval service and defence. Lands set apart for military purposes are lands set apart for defence, and the Province has no power to deal with any such lands.

It was argued by Mr. *Peters* on behalf of the Dominion that the land now in question never was land which passed to the Dominion under the B. N. A. Act, it was not land reserved for general public purposes, but for a special object, and has to be dealt with quite apart from that Act. In this view I think he is right, and this view was held by the Imperial Government when they proposed to transfer this with other lands to the Dominion Government, but it is contended that if the Dominion Government took this land over it could not use it for any other purpose than that indicated by the reserve. The Dominion Government are not supposed to deal with lands of this character with the object of making a profit out of them. If they are not prepared to utilize the lands for military purposes, they should not use them for any other purposes in the meantime. I do not accede to this view; the lands may not be wanted at present for military purposes, but at some future time they may be required for defence or protection, and I see no reason why the Dominion Government should not use them in the meantime or let them to others.

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Mr. *Cassidy* contended, arguing by analogy, that these lands were governed by the same principles as those governing Indian lands which came under section 91 of the B. N. A. Act, that is, under the exclusive legislative authority of the Dominion, and not under section 108, whereby public works and property of each Province became the property of Canada. The terms used in this section indicate that the Dominion has absolute power over the property which passes to them thereby.

Mr. *Cassidy's* further contention was that the transfer by the War Office authorities to the Crown acted as a surrender of the reserves, and therefore they fell within the same category as lands held in trust for the Indians. As I have already pointed out, these reserves were made anterior to the establishment of legislative authority within the Colony of British Columbia, and are not subject to the B. N. A. Act. He places his reliance on the B. N. A. Act, but even then his argument fails, because there is a clear distinction between lands held in trust for Indians and other lands reserved for general public purposes; the latter become the absolute property of the Dominion, the former do not. These lands were contained in the return made to the Legislative Assembly on 14th January, 1873, and are there stated to be military reserves commanding the entrance to Burrard Inlet, and it is reasonable to suppose that this return was made from documents at that time in his office, and are stated to be made from official maps. It was shewn that certain maps were not produced. These maps were stated to be maps of lands in New Westminster District. Whether they ever existed is a matter of deduction, but the returns before mentioned must have been taken from some official maps.

DRAKE, J.

The other point, to which I have already alluded, is whether the island is included in the before-mentioned reserves. It is marked as a reserve in Mr. Turner's field notes, and an examination of the plan marked "Reserves" shews the island as a military reserve, *i.e.*, coloured red; independently of which the acreage set down in the return to the House is sufficient to include the eight acres this island contains, and its situation is such that at low tides the land between the island and Stanley Park is visible.

It was contended that, admitting Stanley Park was a reserve for military purposes, it did not of necessity include this island. The evidence of Howse and Turner both concur in stating that at extreme low tide one could go on foot from the shore of Stanley Park to the island, and the island was chained from the shore when the survey was made. Such being the case, the island was part of Stanley Park : see *Embleton* v. *Brown* (1860), 3 El. & El. 234, where it is laid down that the shore between high and low water is part of the adjoining country. The island was originally marked as a reserve, when the contour before spoken of was run, and Turner says he had no authority to mark a reserve if it was not one originally; and it is open to this further observation, that a piece of land so closely adjoining a military reserve as this does would, *ex necessitate rei*, be required to make a military post complete.

In my opinion, I think the island formed part of the original reserve, and that the judgment in this case should be reversed and entered for the defendants.

This is not a case for costs.

IRVING, J.: At the trial a great many maps were produced from the Lands and Works Department. The greater portion of them do not touch the particular piece of land in question in this action, but a study of them all is necessary to understand those that do.

I have endeavoured to arrange these maps on some sort of system, and although there are discrepancies, on the whole they fit in very well and explain one another very satisfactorily if arranged chronologically—so far as it is possible to arrange them in that way.

The earliest, January, 1860, shews the four naval reserves on Burrard Inlet selected by Admiral Baynes—23D and 32D. There is no conflict about these reserves. They were established with the full approval of Governor Douglas at the request of the naval authorities.

Another exhibit, dated in 1860, is an Admiralty chart shewing these four naval reserves and shewing also the space between Deadman's Island and the park as dry at low water.

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The next in point of time is a map, 22D, dated November, 1862. It is only useful in this case for purposes of comparison with other maps.

Then follows a map, 20D, dated December, 1862, signed by Colonel Moody, but marked "incomplete."

Then come a series of plans dated August, 1863.

Then a series of four maps dated October, 1863, signed by Colonel Moody and sealed with the seal of the Lands and Works Department.

From a comparison of these two series I am led to believe that the plans of August, 1863, were used as the drafts of the October series: see lot 161.

In addition to the above mentioned, which are officially authenticated maps, there were also produced a series of maps, six in number, marked "Diagram of Lines," also a map marked "obsolete." These, however, are all undated and afford but little information.

Few of these maps shew any land to the north of Burrard Inlet. It is apparent from the sheet numbers that many parts of the series are missing. As a rule the maps produced shew on their face that they are drawn for particular purposes, that is to say, one series of maps professes to deal only with "country lands," another series with "suburbs" of New Westminster; another series is simply a diagram of lines. None of these maps

IRVING, J.

which I have mentioned as official, professes to shew the character or nature of the reserve, that is, whether it is a naval, military, townsite or Indian reserve.

That there were established in the early sixties reserves for these different objects can hardly be disputed.

I now come to a most important document. It is a sheet unsigned, undated; marked across the head of it with the word "reserves," produced by the Lands and Works Department. It states on its face that it was "drawn by J. B. Launders, R.E.;" therefore, presumably before October, 1863. This map, Exhibit 4, professes to shew what none of the other plans do, *viz.*, the reserves and their character. Perhaps I had better state it more fully. This map does not profess to be a general map. It shews certain isolated plots of land; these plots are marked as

to the margins thereof in different colours, *viz.*, red, blue and brown. The plots as to shape, size and position agree in the main with the shape, size and situation of the lands marked or shewn on the official series as reserves. I infer from this that Exhibit map 4 was designed to shew the reserves and their character or object for which they were reserved, and that the key to the reading of the map is the right understanding of these coloured margins.

That this was the object of the map is made obvious by the fact that some person has crossed out certain lines in some places and in others has written the word "cancelled."

I shall not now attempt to go through this map of "reserves" in detail, but before dealing with the verbal testimony given at the trial, and before us in the Court of Appeal, I will endeavour to shew by references to the officially recognized maps that a blue margin indicates a naval reserve; a red margin, a military reserve; and a brown margin, an Indian reserve. And in my opinion, it is of some weight that Launders, who prepared a large wall map, Exhibit 19, embracing the whole lower Fraser River country, employed that system of marking margins in colours for other purposes; and it is also worthy of mention that Launders in his wall map does not shew as "reserves" those plots which were marked "cancelled" on Exhibit 4.

Returning now to the consideration of the map of reserves, Exhibit No. 4, six plots are marked with blue margins—two of these are cancelled, the remaining four are the four plots selected by Admiral Baynes in 1860. IRVING, J.

Of the two reserves marked with a brown margin, I find in the signed and sealed series of maps dated October, 1863, Exhibit 20B, one of them bounded with brown and marked in words "Indian reserve." Again, in Launders' wall map I find that he has indicated the boundaries of a large reserve marked "I. R." by a brown margin. This indicating of the character of the reserve is an exception from the rule observed by Launders in the preparation of his wall map. The reserves on it are, except in this one instance, shewn by the word "reserve" or "res."

Now, as to those coloured on Exhibit 4 in the margin with red: Stanley Park and Deadman's Island are so marked on the

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map of reserves. The park is marked as a "military reserve" by Corporal Turner in his field notes, dated March, 1863. The island is marked simply as "reserve."

So far I am only dealing with the maps produced from the custody of the Provincial Government, and in particular I am comparing an unsigned map with a number of official maps, and I have shewn that certain plots marked thereon in blue coincide with the recognized naval reserves; that others marked in brown are stated under the seal of the Lands and Works Department to be Indian reserves; and that one of those marked in red is called a military reserve in the field notes of the Royal Engineer selected by the Chief Commissioner to make a survey of the coast line around the Coal Peninsula in 1863.

I now turn to the correspondence in order to see if from it any information can be obtained as to the reserves shewn on the maps produced, in particular as to the military reserves.

Colonel Moody, writing from on board H. M. S. Plumper on 28th January, 1859, in pointing out the advantages of the site afterwards established at New Westminster for the capital of the Colony, calls attention to certain localities, one of which was the Coal Peninsula, as being peculiarly adapted for defensive purposes. These are all shewn on one or more maps as military reserves.

IRVING, J.

In October, 1867, there was some correspondence between the Colonial Secretary and Mr. Trutch, the Chief Commissioner of Lands and Works, in the course of which the Colonial Secretary writes as follows:

"The reserves on Burrard Inlet would appear to His Excellency to be as follows:

"1. The Naval reserves, 3 in number.
"2. The Fort reserves, 3 in number.
"3. Township (?) site, reserves, 2 in number."

And Mr. Trutch writes, on 13th December, 1867:

"I have already . . . . communicated to Captain Stamp that he was to have the timber on the Military reserve on the south shore of the First Narrows."

From this it would seem that in 1867 the Executive was fully aware of the fact that Stanley Park was a military reserve.

I pass by the Parliamentary returns of 1872 and 1880, as the

persons who compiled them were endeavouring, like ourselves, by searching the records of the Provincial Government to find out what had been reserved. It is satisfactory to note that in the main I have reached the same conclusions.

To sum up: Colonel Moody in January, 1859, writes of the Coal Peninsula as a suitable place upon which fortifications could be erected.

All the official plans in 1863 shew that Stanley Park was reserved. Some shew that it was reserved for military purposes. The official correspondence of 1867 recognizes it as a military reserve.

Exhibit 4 (map of reserves) shews that the island was marked with a red margin similar to the margin of Stanley Park. Then one must not forget in considering whether the island would or would not be included in the military reserve, which it is clear covered Stanley Park, the proximity of the island, some 390 feet only, which was dry at low water; and most material that the reserve on the Coal Peninsula as originally established embraced the whole peninsula beginning somewhere about lot 181, or even further east than that. Is it reasonable to suppose that the island would be excepted from the reserve thus established?

I now turn to the evidence given by two members of the Royal Engineer Corps, *viz.*, Corporal Turner, who was detailed to make a survey of the coast line of Burrard Inlet and False Creek, beginning at the Hastings townsite around Stanley Park to the head of False Creek, and who when engaged on this duty was instructed to carve out of the reserve lot 185, which lot certain settlers had been permitted to acquire; and Corporal Howse, who was employed in the Lands and Works Department.

Turner tells us that the whole of the Coal Peninsula east of lot 181 was originally reserved. An examination of his field notes shews that a reserve was in existence prior to the marking out of the lot now known as lot 185. He says that he surveyed the island as part and parcel of Stanley Park.

Howse tells us that when he came out to the Colony in December, 1859, the property known as Stanley Park and Deadman's Island was considered a reserve. That when he was the Clerk of Records from 1859 to 1878, he had custody of all the

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maps in the Department of Lands and Works. That there was in existence when he arrived here a chart of reserves shewing a military reserve on Stanley Park and Deadman's Island; that later in October, 1863, there was prepared and signed by Colonel Moody, in addition to the four maps of October, 1863, series now produced, an index map upon which Stanley Park and Deadman's Island were marked as military reserves. That according to his recollection the system adopted in the Department prior to Confederation—July, 1871—was to colour naval reserves, blue; military reserves, red; Indian and other reserves, brown; that Stanley Park and Deadman's Island were marked in red. He believes that this map was in the Department when he left it in 1878. Richards, who entered the Lands and Works Department in 1870-71, and who during Howse's absence acted as Clerk of Records and Writs, says that he remembers an index map, describing it very much as Howse describes it, although he does not agree with him as to details in the matter of colours used. He remembers that the island was marked as a military reserve on the index map referred to.

Now, if Howse's evidence be believed, we have it established that prior to December, 1859, the reserve on Deadman's Island was constituted, and that in 1863 there was a map in the Lands and Works Department bearing the seal of the Department and signed by the Chief Commissioner of Lands and Works, Colonel Moody, when leaving his office and the Colony upon the expiration of his term, and therefore presumably putting on record the exact state of affairs at that date, a statement to the effect that Stanley Park and Deadman's Island were both reserved for military purposes.

IRVING, J.

Now, why should Howse not be believed? It is true that the learned trial judge placed no confidence in his recollection, but as we have had him before us the Province loses any benefit from the conclusion arrived at by the learned trial judge. Opportunity having been given to us, we must decide as to his credibility upon our own observation, paying of course due regard to the view entertained by the judge of first instance.

It is to be remembered that at the time he was examined at the trial, none of the four maps signed by Colonel Moody upon

leaving the Colony were produced to him. The only map that he saw was Exhibit 4. When he was examined before us he shewed what appeared to me to be an extraordinary memory with regard to the maps and work of the office.

Now, what does he say that does not entitle him to be believed in other matters? He says that when he arrived here there was already established a reserve on the whole of Coal Peninsula. (Turner's field notes shew that such was the case.) He states how Colonel Moody signed four or five maps just before leaving, and also an index map shewing reserves. Four of the maps signed and sealed have been produced. All of these shew that there were reserves—none indicate the nature or character of the reserve. What could be more reasonable than that there should be such a map? He describes the system of marking reserves in the Department in days prior to Confederation, and maps drawn by Launders and produced from the Lands and Works Department, lend support to this theory. Who is there so well able to speak of the maps as the custodian of them for so many years? Then he is supported by the testimony of Richards. It is true Richards is not able to remember the particular colours used to designate particular reserves; Howse having been in the office when this system of colouring was being used is naturally able to state what that system was. A comparison of the various maps shews that his recollection is correct. And who is there that contradicts him as to the existence of that map? A number of gentlemen who went into the Department after 1873, and who at best are only able to say they never saw such a map. Apart from the fact that their testimony is only negative testimony, while the testimony of Howse and Richards is positive testimony, it is to be remembered that none of these gentlemen had committed to him the custody of the maps, whereas it was the duty of Howse and Richards to keep the records of the Department.

I think Howse's testimony is to be relied on, and confirmed as it is by Richards' statement and Turner's field notes, and by the other maps and correspondence, there is abundant evidence to shew that prior to 1863 Stanley Park and Deadman's Island were included in one and the same military reserve. I would

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find as a fact that there was a map signed and sealed by Colonel Moody, in October, 1863, shewing Deadman's Island marked as a military reserve.

The fallacy involved in the case for the Province lies in a want of recognition of the force of a combination of facts, all pointing in the same direction, each one of which, standing alone, might admit of a plausible explanation, not inconsistent with that case.

The island, in my opinion, passed to the Dominion under section 108, schedule 3, (10).

Appeal allowed, Hunter, C.J., dissenting.

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ALASKA PACKERS' ASSOCIATION v. SPENCER.

Practice—Order for special jury—New trial—Whether order for jury is exhausted after first trial—Issues requiring scientific investigation—Rules 332 and 683.

Pursuant to an order therefor a trial was had with a special jury; on appeal a new trial was ordered:—

Held (*per* IRVING and MORRISON, JJ., HUNTER, C.J., dissenting), that the order for a special jury was not exhausted by the abortive trial and that as there had been no amendment of the pleadings or change in the circumstances the order was not provisional in its nature.

Per HUNTER, C.J., dissenting: Any purely procedure order which does not touch the merits of the case, or the rights of the parties, can be disregarded or vacated if the circumstances have changed or the ends of justice require it, although it has not been appealed against; and as there were issues involving scientific investigation, the trial should be had without a jury.

Observations as to meaning of r. 683.

Statement

APPEAL from an order of MARTIN, J., made on a summons on behalf of plaintiffs for an order setting aside an order made in October, 1902, for a trial with a special jury, and for an order that the action be tried by a judge without a jury, or, in the alternative, that, notwithstanding the order for trial with a

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special jury, it be directed that the action be tried without a jury, on the ground that the issues require scientific investigation which cannot conveniently be made by a jury.

The action was for damages caused to a sailing ship by reason of a tug belonging to the defendant letting the ship run on the rocks from the vicinity of which she was endeavouring to tow her. For reports of the case see (1904), 10 B.C. 473; 35 S.C.R. 362.

On 13th January, 1905, the defendant applied in Chambers for an order for trial with a special jury, but the summons was dismissed, MARTIN, J., holding that the first order for trial with a special jury had not been exhausted by the abortive trial: see (1905), 11 B.C. 138.

The summons was argued before MARTIN, J., at Victoria, on 1st March, 1905.

Bodwell, K.C., for the summons.
Peters, K.C., contra.

10th March, 1905.

MARTIN, J.: On 31st October, 1902, an order was made by my brother IRVING, presumably under rule 333, for the trial of this action by a jury. This order was made after hearing both parties, and was not appealed from, and is, despite the abortive trial, not yet exhausted. On the hearing of that application it must be presumed that both parties brought to the attention of the learned judge everything it was proper to bring so as to enable him to rightly exercise the discretion conferred upon him under rule 332, and it is clear that there was jurisdiction to make the order he did make. Nevertheless, it is now asked that an order be made under rule 332, for trial without a jury, notwithstanding the said existing order, on the ground that the case "cannot in (my) opinion conveniently be (tried) with a jury."

MARTIN, J.

To this the objection is first taken that while the prior order of a judge of equal and general jurisdiction stands, I have no jurisdiction to directly overrule it, or even indirectly, by ignoring it, or in any way assume to review the discretion which was exercised by him on the original application.

This point has come up before in this Court in the cases of *Brigman* v. *McKenzie* (1897), 6 B.C. 56; *In re Kootenay Brew-*

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ing Co. (1898), 7 B.C. 131 and *King* v. *Boultbee* (1900), 7 B.C. 318; and it is clear from them that while the last case raises some doubt as to the proper course to be taken in the case of an order of a judge having statutory jurisdiction, yet in that of a judge of a court of general and original jurisdiction, the only way under our practice to get rid of an order made after hearing both parties is by appeal. I note we have nothing in our Supreme Court Act or Rules corresponding to section 50 of the English Judicature Act of 1873 (Y.P., 1905, p. 94). It is therefore my duty to abide by the prior order so made as aforesaid, because though the Full Court may by virtue of rule 683 disregard an interlocutory order in a proper case, it is not open to me to do so.

The summons will, consequently, be dismissed with costs to defendant in any event.

The plaintiffs appealed and the appeal was argued at Victoria on 28th June and 3rd July, 1905, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Bodwell, K.C., for the appeal: The former order is exhausted and for a new trial new machinery must be set in operation; this case comes within that line of cases in which there should not be a jury trial and by virtue of r. 683 the Full Court may now disregard the first order and order a trial without a jury: he cited *White* v. *Witt* (1877), 5 Ch. D. 589; *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154 at p. 208 and *Edison* v. *Edmonds* (1896), 4 B.C. 354 at pp. 379-80. This is a case in which there never should have been an order for a jury: see rr. 332 and 333; the questions involve a scientific investigation: he cited *Iron Mask* v. *Centre Star* (1898), 6 B.C. 355; *Swyny* v. *The North-eastern Railway Co.* (1896), 74 L.T.N.S. 88, in which the application of the facts to the law was much the same as in this case.

Peters, K.C., for respondent: The first order was not appealed from, although an appeal lay, and the plaintiffs should not be allowed to get around it in the manner they now adopt: see *In re Padstow Total Loss and Collision Assurance Association* (1882), 51 L.J., Ch. 344 at p. 348; the order stands unappealed and it was not exhausted by first trial; after going to trial with a jury without objection and taking their chance of getting a

large verdict, the plaintiffs are now estopped from objecting to a jury.

On the facts there is no good reason that the trial should not be had with a jury; the English cases must be read with reference to the English rule which provides for assessors, who are not allowed here; there are questions of fact for trial: he cited *Ruston* v. *Tobin* (1879), 10 Ch. D. 558; *Burgoine* v. *Moordaff* (1883), 8 P.D. 205; *Ormerod* v. *Todmorden Mill Co.* (1882), 8 Q.B.D. 664 and *Hamilton* v. *The Merchants' Marine Insurance Co.* (1889), 58 L.J., Q.B. 544.

The first order for a jury is not exhausted: see *Swindell* v. *Birmingham Syndicate* (1876), 3 Ch. D. 130 and *Fan* v. *Fan* (1885), 1 B.C. (Pt. 2), 172.

Argument

Rule 683 does not go to the extent that counsel contends it goes; it only means that when a case comes up on final appeal the Court can deal with it, notwithstanding some interlocutory order: *Laird* v. *Briggs* (1881), 16 Ch. D. 663 and *Beynon* v. *Godden* (1878), 4 Ex. D. 247.

Bodwell, in reply: Where the merits of a case are not dealt with by an interlocutory order, the Full Court is free to deal with the matter unhampered by the interlocutory order.

HUNTER, C.J.: In my opinion the appeal should be allowed.

Unlike those cases where the cause was only partly tried, or where the jury disagreed, I think the order for a jury had become spent when the jury found a verdict. It has performed its office—the case has been tried by a jury; therefore, as the normal mode of trial is without a jury, the action would now, in the ordinary course, be re-tried without a jury, unless either party by the appropriate step again secured a jury.

HUNTER, C.J.

Assuming, however, that this view is wrong, I am of the opinion that, at any rate, the order was provisional in its nature and that the learned judge's discretion to discharge it and make an order under rule 332, if the circumstances had changed or the ends of justice required, was not fettered by the fact that it had not been appealed against. Certainly the circumstances had changed as the experiment of a jury trial had been had, with the

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result that the parties were put to the expense of two appeals and an abortive trial, and the case has yet to be tried.

I know of no case in which any criterion is laid down as to when or not an interlocutory order is to be regarded as provisional in its nature, but I should say that any purely procedure order which does not touch the merits of the case, or the rights of the parties, can be disregarded or vacated if the circumstances have changed or the ends of justice require, although it has not been appealed against. Suppose in this case, after discovery it had been found that no facts were in dispute, can it be seriously contended that a judge would not have had power even in the face of objection of one of the parties to vacate the order? Or if the record is amended so as to set up an issue involving scientific investigation, could not an order for a jury be discharged? Instances of orders provisional in their nature will be found in *Shallcross* v. *Garesche* (1897), 5 B.C. 320, where a plaintiff who was struck out on the application of one of the parties, was, on the same party's application restored; and in *McLeod* v. *Crow's Nest* (1903), 10 B.C. 103, an action which had been selected by the plaintiff's counsel in mistake as a test action, was displaced by another action in spite of the opposition of the defendants. I therefore think that the order for the jury did not stand in the way of the learned judge, and the only question is whether the matter should be remitted to him to exercise his discretion. As,

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however, it is plain whichever way he decided it that there would be an appeal, I think we ought to decide the matter now, and so save unnecessary expense.

Then, as to whether or not the action should be tried without a jury. I adhere to what I said on the former occasion in the Full Court as to the suitability of the case for a jury. I think it should be borne in mind that modern actions for negligence are not always the comparatively simple actions that they were fifty or sixty years ago. In fact, in these days of steam and electrical machinery, they are frequently of the most complex and intricate character, and involve scientific investigation which entails several days of highly technical inquiry. Accordingly the action of the Court ought to suit the changed conditions.

It is not always easy for a judge aided by his notes and, if

necessary, by a transcript of the evidence, to follow the conflicting testimony of a contending host of expert witnesses, who may be dealing with a subject of which he knows little or nothing, but I venture to think that such a tribunal, with all its drawbacks, is much more likely to do justice than a jury of persons who are altogether unskilled in weighing expert evidence, who have nothing to assist them in recollecting the evidence given in the course of a trial lasting several days, and who cannot have as clear a notion of the issues involved as the judge, no matter how carefully he may instruct them. It is not seriously disputed that this case involves a scientific investigation, and on the former occasion the trial lasted some ten days. I think it is obvious that such an investigation cannot be conveniently had with a jury, and that under rule 332 the trial should be had without a jury.

I might add that the scope of this rule was considered in *Askew* v. *Syme* (1892), 18 V.L.R. 583. Mr. Justice A'Beckett says at p. 584, in setting aside an order which he had made for trial by jury:

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"It is said that the case requires scientific and local investigation, which cannot be conveniently made with a jury. I have no doubt that the case would be more conveniently and expeditiously tried by a judge without a jury, and with less chance of miscarriage, but I doubt whether the rule contemplated an action of this kind involving as to scientific investigation only the ordinary difficulties of any case in which a jury has to decide upon expert evidence. Observations as to the cases to which the rule applies are made in *Jenkins* v. *Bushby* (1891), 1 Ch. 484, in which Lord Justice Lindley says that it merely preserves the old practice of the common law courts. If the matter were *res integra* in our Court, I should hold that the rule did not apply, but I find that other judges have held similar cases to fall within the rule, and it is undesirable to have varying interpretations. The more beneficial interpretation is to exclude such cases. . . . . I set aside my former order, and direct that the case be tried by a judge without a jury."

IRVING, J.: In this matter some two years ago I made an order for the trial of the action to be by a jury at the instance of the defendant. No appeal was taken from that decision; and I have no recollection of there being any strenuous opposition offered to the order applied for. The trial took place before me with a jury and there was an appeal to this Court, when the

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majority of this Court came to the conclusion there had been mis-direction and non-direction, and ordered a new trial: (1904), 10 B.C. 473. In that judgment my Lord expressed the opinion that the Court as constituted was not a suitable tribunal for the trial of the action, and suggested there should be a trial before a judge with assessors. We have not that system in force in this Province, so that suggestion cannot be carried out.

My brother DRAKE, who thought that on the trial before me the jury was properly and sufficiently instructed, expressed no opinion on the point, but from the fact that he was in favour of dismissing the appeal, I conclude that he arrived at the conclusion that it was a proper case for a jury.

My brother MARTIN, on the other hand, said that it was decidedly a case for a jury.

The case then went to the Supreme Court of Canada (1904), 35 S.C.R. 362, and the judges of that Court were all in favour of a new trial, except one, Sir Louis H. Davies. An expression in Mr. Justice Nesbitt's judgment (p. 373), seems to point to the fact that he had no doubt whatever that the next trial would take place before a jury.

In these circumstances, Mr. *Bodwell* took out a summons to get rid of this jury that I had ordered. The summons came before my brother MARTIN, who dismissed it on the ground that he had no jurisdiction, holding that my decision was binding upon him, whatever his opinion might be; but he offered no opinion whatever. That decision comes on appeal before us.

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Now, I agree with my brother MARTIN in this, that the order made two years ago is not yet exhausted. In *Loo Chu Fan* v. *Loo Chock Fan*, decided in 1884 by the Full Court, on appeal from Sir Matthew Begbie, C.J. (1 B.C., Pt. 2, 172), a jury had been ordered, the trial took place, and the jury disagreed; then there was an effort made in that case to get rid of the jury, and Sir Matthew said that the second trial should take place without a jury; but on appeal to the Full Court, consisting of Crease, McCreight, Walkem and Drake, JJ., the conclusion was that the order was not exhausted, that a competent tribunal had ordered that the action should be tried by jury, that what had taken

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place had not exhausted the order, and therefore the matter must be tried out before a jury.

I am unable to see any difference between that case and this. In *Fan* v. *Fan* the jury were discharged because they could not agree; in this case the verdict of the jury was set aside because they had not the case put before them properly by the judge who took the trial. In both cases the situation is identical, there was no proper trial, no valid conclusion, and therefore no exhausting of the order that had been made.

It seems to me highly desirable that there should be one method of practice. Here is a decision which has been in force since 1884; I should think we ought to follow it to-day.

With reference to this order being a provisional order. An order for a jury trial may be provisional in a particular case. In this case, for instance, if there had been any amendment of the pleadings, or any change of the circumstances, it could have been set aside; but here there has been no amendment, no amendment is now suggested, nor has there been any change of circumstances. Everything that has taken place must have been in the minds of everyone at the time the application for a jury was first made. This order, which is an order as to the method of trial, had to be determined upon the pleadings.

As to rule 683, I do not agree with my brother MARTIN, who seems to think that this Court had jurisdiction under that rule to vary the order. Now, rule 683 is a very beneficial rule, but I do not think that it was ever intended by rule 683 to abolish the limit imposed by the Legislature with reference to the time within which appeals must be brought. I do not think that rule 683 authorizes an appeal to be heard after the expiration of two years, to determine the very question itself, and nothing more. The point that we are determining is not raised incidentally in connection with any other point. The true function of rule 683 is to get rid of any obstacle that incidentally arises in connection with an appeal. For these reasons, I am unable to agree with the judgment of the learned Chief Justice.

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MORRISON, J.: I agree with my brother IRVING as to the points referred to by him. And as to the question of this being

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a case which should be properly and conveniently tried by jury, I am very strongly of the opinion, from my knowledge of the facts gleaned from the counsel, and from the report before I had heard counsel, that this is a proper case for a jury. I cannot see where there is any great question of scientific investigation involved. Take the salient points emphasized by the learned counsel for the respondent himself. One strong point urged before the jury was whether the hawser was on the port or starboard bow. I do not think that would involve a scientific question, or require scientific investigation; another was as to the equipment and power of the tug. I cannot see where there is any question of scientific investigation involved in that. Then coming down to the question of the anchor being hauled short, and as to the effect that had upon the accident, I fail to see why an intelligent jury, gathered from a sea-port town, cannot decide that without being embarrassed in any way. Of course all these questions

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are susceptible of being made intricate by one counsel or the other, or one party or the other may call a cloud of expert witnesses and throw an atmosphere of mystery and difficulty about a question. But having regard to the prominent points which apparently the jury should have been called upon to consider, I am very strongly of the opinion that this case does not come within the line of cases cited by Mr. *Bodwell*.

I therefore concur with my brother IRVING that the appeal should be dismissed.

Appeal dismissed.

THE ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA *EX REL.* THE CITY OF VANCOUVER v. THE CANADIAN PACIFIC RAILWAY COMPANY.

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Constitutional law—Foreshore of Vancouver harbour—Occupation of by Canadian Pacific Railway terminals—Powers of Dominion Parliament—Terms of Union—Public's right of way—44 Vict., Cap. 1 (Dominion).

Held, in an action by the Attorney-General of British Columbia *ex rel.* the City of Vancouver against the Canadian Pacific Railway, for a declaration that the public has a right of access to the waters of Vancouver harbour through certain streets, that the streets at the time of the construction of the Canadian Pacific Railway were public highways extending to low water mark and that the public right of passage over said highways existed at the time of the admission of British Columbia into Canada, but that these public rights have been extinguished or suspended by reason of the construction of the said railway.

The foreshore of Vancouver harbour is under the jurisdiction of the Parliament of Canada, either as having formed part of the harbour at the time of the union of British Columbia with the Dominion, or by reason of the jurisdiction of the Dominion attaching at the Union.

The Parliament of Canada has power to appropriate Provincial public lands for the purposes of a railway connecting two or more Provinces.

The Act respecting the Canadian Pacific Railway, 44 Vict., Cap. 1, should not be construed in the same way as an ordinary Act of incorporation of an ordinary railway, but it should be interpreted in a broad spirit, and bearing in mind the objects sought to be accomplished.

Per HUNTER, C.J.: The British North America Act assigns public harbours to the Dominion, not so much *qua* property or land as *qua* harbours; the jurisdiction of the Dominion is latent and attaches to any inlet or harbour so soon as it becomes a public harbour, and is not confined to such harbours as existed at the time of Union.

APPEAL from judgment of DUFF, J., in an action tried at Vancouver on the 27th, 28th, 29th and 30th of June, and 1st of July, 1904. Statement

The facts are set out in the judgment.

Wilson, K.C., A.-G. (*Bloomfield*, with him), for plaintiffs.

Davis, K.C. (*C. B. Macneill*, with him), for defendants.

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DUFF, J.: This is an action by the Attorney-General of British Columbia claiming a declaration that the public has a right of access to the waters of Vancouver harbour through certain streets in the City of Vancouver. The line of the defendants' railway runs along the foreshore on the south side of the harbour, and the defendant Company is at the ends of these streets constructing yards and wharves on the foreshore and bed of the harbour for use in the operation of its railway and the accommodation of its shipping. The first question is, was the foreshore at the time of the construction of the railway subject to a public right of passage to and from the waters of the harbour at the ends of the streets referred to. I have come to the conclusion that these streets were at that time public highways extending to low water mark, and moreover that the public right of passage over these highways to and from the waters of the harbour existed at the time of the admission of British Columbia into Canada.

Have these public rights been extinguished or suspended by reason of the construction of the works of the defendant Company? I find, as a fact, that the works constituting the obstruction complained of are necessary to meet the reasonable requirements of the Company in respect of terminal facilities; and that the exercise of the public rights of passage at the places in question is incompatible with the effective user of the railway and other works at these places for the purposes for which they are required. In my opinion the Company's Act of incorporation authorizes the construction and user of the works for the purposes of the railway and as such user requires the exclusive occupation of the *locus* in which they are placed, I think the public rights referred to, if not extinguished, have become suspended during the period of user for such purposes. The Attorney-General relied upon section 15 of the Railway Act of 1879. Assuming that enactment to apply in the circumstances of this case, I do not agree that it would support the claim made in this action. The claim is to establish the public right of access to the waters of the harbour and obviously the defendant Company's right to maintain that portion of its works constructed in the bed of the

harbour at and below low water mark is not affected by that section.

But I think that section 18, sub-section (a), and the allied provisions of the defendant Company's Incorporation Act must be taken exclusively to regulate the determination of any conflict between the Company's rights over the foreshore and bed of a navigable water, and any claim based upon a right of access thereto, public or private; and, in the circumstances of this case, I cannot doubt that these provisions, assuming their exclusive application, confer upon the Company paramount rights. I regard the qualifying clause "in so far as the same shall be vested in the Crown" as importing a territorial limitation only.

Thus far I have assumed the legislative competence of the Dominion Parliament to authorize the appropriation of the foreshore and bed of Vancouver harbour at the places referred to for the purposes of the defendants' railway.

In dealing with that question there is no occasion in my view of the facts to consider whether the Dominion Parliament has power to authorize the appropriation of Provincial Crown lands for the purpose of a railway connecting two or more provinces.

Had the case required a decision of the last mentioned question I should have thought it necessary to consider whether the Terms of Union (which under section 146 of the B.N.A. Act have the force of an Act of the Imperial Parliament) did not, in imposing on the Dominion the duty of constructing a railway connecting the Pacific seaboard with the existing railway system of Canada, confer by implication on the Canadian Parliament the power to take or authorize the appropriation of the lands required for the purposes of its construction and operation, even though such lands should be the public property of a province.

I am, however, of the opinion that the lands in question here passed to the Dominion under section 108 of the B.N.A. Act. I find, as a fact, that at the time of the admission of British Columbia into Canada, that part of Burrard Inlet between the First and Second Narrows was a public harbour, and that the parts of the foreshore subject to the public rights of passage referred to were in use as, and were in fact part of the harbour;

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as was the whole of the foreshore adjoining the townsite of Granville.

Moreover, if formal Provincial assent were necessary I must give effect to the presumption arising from long, notorious occupation with the knowledge and acquiescence of the Provincial Government; these circumstances, cogent in any case, become conclusive in the absence of any evidence indicating the non-existence of such assent.

I may add that as no evidence was given of any proclamation under the British Columbia Harbours Act in force at the time of the admission of British Columbia into Canada, I have assumed the non-existence of such proclamations. Had it appeared that proclamations had been issued under that Act, a question of some importance might have arisen; namely, whether in applying the second paragraph of the Third Schedule to the B.N.A. Act to British Columbia the term public harbour should be confined to localities embraced within such proclamations.

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The action is dismissed with costs, to be paid by the relators.

The appeal was argued at Victoria on the 16th and 17th of January, 1905, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Wilson, K.C., A.-G. (*Bloomfield,* with him), for appellant: The learned judge is wrong in holding that the public's right of passage is inconsistent with the effective user of the railway which could be bridged over, or a road could be put under it; there were originally trestles, but now a solid embankment shuts public out from getting to water; public had the right and used it. It does not follow that because the foreshore is Crown property it necessarily forms part of the harbour; the question is, was it a part of harbour at Confederation? And burden of proof is on those who say it passed from the Province to the Dominion.

Argument

As to acquiescence: The doctrine of acquiescence cannot be invoked against the Attorney-General: see *MacAllister* v. *Bishop of Rochester* (1880), 5 C.P.D. 194; *Humphrey* v. *The Queen* (1891), 2 Ex. C.R. 386, affirmed (1892), 20 S.C.R. 591; *Attorney-General* v. *Company of Proprietors of the Bradford Canal* (1866), 15 L.T.N.S. 9. Anyhow it was not pleaded; there

was no Act in force relating to harbours of British Columbia, Cap. 92 of 1867 and in force in 1870 when dedication made; it applies to regulation of harbours and section 19 says to what it applies; then Executive could declare any particular spot a harbour, when regulations would apply; the learned judge finds, as we didn't prove any proclamation, none existed; not on us to prove that Act was made applicable to Burrard Inlet, it was on other side to shew it; plans shew defendants are not going to use the property for harbour purposes only, but rather for sidings, etc.—all private purposes.

The Dominion has no power to expropriate Provincial Crown lands; the power given by section 92, sub-section 10 of the B. N. A. Act is the power to incorporate only; the section only gives power to make laws in regard to those subjects, but not to take land to build. Nothing in Railway Act about expropriating Crown lands by railway; it deals with fixing damages suffered by private individuals.

Bloomfield, on same side: The maps of the Company shew these as public streets; they are estopped from saying these streets were not dedicated; they have admitted they were streets. He cited *Mayor of Jersey City* v. *Morris Canal and Banking Co.* (1859), 12 N.J. Eq. 547; *City of Vancouver* v. *Canadian Pacific Railway Company* (1893), 23 S.C.R. 1; the *Gore Avenue Case*.

Argument

Davis, K.C., for respondents: If the streets ran through to the water's edge, the place could not be used as a yard; it would be dangerous and of no use; we don't abandon any defences but we lay stress on two, *viz.*: the effect of section 18 (*a.*) of the Act of 1881 and the effect of the exemption by-law; most of our work is below low water mark; the plans shewed the parts defendants required and which were granted to them and after the grant all other rights were extinguished.

Secondly, in 1898, on condition of defendants building certain wharves, depots and completing certain other works on the water front, they were exempted from taxation, etc.; the necessary result of doing these works was the closing of the streets; the city had power to close; the plan itself shews streets closed; it shewed the work we were bound to do, and therefore it was in

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fact nothing more or less than a by-law closing the street; a statute can by necessary implication extinguish a public right and the by-law must be construed as having the same effect as a statute.

As to suggestion as to overhead bridge: A substituted way such as that could not be granted by the Court: see *Corporation of Yarmouth* v. *Simmons* (1878), 10 Ch. D. 518. If the learned trial judge was correct in finding this was used as a harbour before Confederation, then what is in contest here passed to the Dominion. If a harbour becomes such subsequent to Confederation, it then comes under Federal control, but we proved it was a harbour at the time of the Union; Dominion Parliament has power to interfere with public lands in any matter of legislation over which Dominion Parliament (section 92) has exclusive control; here stronger, because by section 11 of Terms of Union bound to build railway; Parliament can override everything: *Smith* v. *Merchants' Bank* (1881), 28 Gr. 629 at p. 638; *Booth* v. *McIntyre* (1880), 31 U.C.C.P. 183 at p. 193; Clement 270 and Lefroy 583. Evidence was given by several old-timers and general effect of it was that from 1860 down that portion of Burrard Inlet was used as a harbour.

Acquiescence may not be applied against Crown but principles of evidence apply—here defendants have been in possession for a long time and approval, etc., is presumed: *Sandon Water Works and Light Co.* v. *Byron N. White Co.* (1904), 35 S.C.R. 309, judgment of Killam J., on that point.

Argument

[HUNTER, C.J.: See also *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699].

Canadian Pacific Railway is in a different position from an ordinary railway governed by general Act, as its charter is the controlling thing, and so section 15 of the Railway Act not applicable as our section 18 (*a.*) overrides and covers all that; the general Railway Act is subordinate. As to defence of 18 (*a.*) see *Canadian Pacific Railway Co.* v. *Major* (1886), 13 S.C.R. 233. But plaintiffs are not claiming anything about the crossing of a street, but they want to go over our works which are below low water mark.

As to estoppel *re* plan: We had to put the plan in as it was

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and we did; after street changed by filling, etc., public's right to go over is gone, and secondly, yards do away with possibility for streets to co-exist with the works of the Company. He referred to sections 19 and 26 of the defendants' charter and clause 10 of the contract: *City of Vancouver* v. *Canadian Pacific Railway Company* (1894), 23 S.C.R. 1 and the proceedings before the Judicial Committee of the Privy Council on the application for leave to appeal.

C. B. Macneill, on the same side, referred to the evidence as to the use of the parts in question for harbour purposes.

Wilson, in reply: At the time of the Union the people could pass and re-pass to the sea; the Crown could not give this right and Parliament only gave the right the Crown had: see *City of Vancouver* v. *Canadian Pacific Railway Company*, remarks of Lord Watson, pp. 21 and 22 of proceedings on application for leave to appeal; *Credit Valley R. W. Co.* v. *Great Western R. W. Co.* (1878), 25 Gr. 507; *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas. 46. Statutes give no right to the Dominion Parliament to expropriate Provincial Crown lands, except for fortifications, etc. (sections 103 and and 108); if Dominion can, then they can subsidize a railway company with Provincial Crown lands: *The Queen* v. *Moss* (1896), 26 S.C.R. 322.

Argument

Attorney-General of the Dominion is not proper party to enforce a public right; it is Provincial Attorney-General: *The Attorney-General* v. *Niagara Falls Bridge Co.* (1873), 20 Gr. 34.

As to by-law and agreement: Arrangement between Canadian Pacific Railway and city is no answer to action to enforce public right; the by-law was passed under Cap. 65 of 1898 for special purposes of exemption; corporation and electors never thought of street closing. Undoubtedly the corporation has power to stop up streets by a by-law, but it must clearly appear that it is a street closing by-law and the streets intended to be closed must be named; they have turned a public harbour into a private one.

Cur. adv. vult.

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HUNTER, C.J.: I agree with the judgment of the learned trial judge.

He has found as a fact that the *locus in quo* formed part of the harbour at the time of Union, a finding which, in my opinion, it is impossible to disturb. But even if it did not form part of the harbour until after the Union, and even if Vancouver harbour did not exist as such until after the Union, I have no doubt that the jurisdiction of the Dominion attached as soon as it did exist.

In my opinion, the B. N. A. Act assigns public harbours to the Dominion, not so much *qua* property or land as *qua* harbours, *i.e.*, it was rather a transfer of jurisdiction than of property. The public works forming part of a public harbour as well as the bed of a harbour are, and always have been vested in the Crown, and it was no doubt considered advisable, if not actually necessary, to transfer the jurisdiction, executive and legislative, over public harbours to the Dominion as ancillary to the proper exercise of its powers relating to shipping and navigation. The jurisdiction in my opinion is latent, and attaches to any inlet or harbour as soon as it becomes a public harbour, and is not confined to such public harbours as existed at the time of Union. At the same time I would not be understood as holding that the subsoil of a public harbour is or becomes vested in the Dominion *usque ad centrum*; it is vested only so far as it is necessary for the proper management of the harbour much after the same mode in which streets are commonly vested in municipalities. For example, I think that the beneficial interest in a copper mine underlying a public harbour would belong to the Province or its grantee subject to the right of the Dominion to dredge or otherwise improve the harbour.

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Assuming, however, that these views are not sound, and that the learned trial judge was in error in finding the *locus in quo* formed part of the harbour, I am of opinion as at present advised, and the recent decision of the Privy Council in *Toronto Corporation* v. *Bell Telephone Company of Canada* (1905), A.C. 52, points to the conclusion, that the Dominion could, in the exercise of its powers to make laws relating to railways, authorize such

railway to cross any public lands, whether Imperial, Federal or Provincial. Provincial rights were created by the same power which conferred exclusive jurisdiction on the Dominion Parliament in relation to certain classes of railways, and the latter was, in my opinion, given *plenum dominium* to provide for the expropriation of all estates, rights or interests, whether Imperial, Federal or Provincial, public or private, in any lands whatever, so far as may be necessary to the proper exercise of its jurisdiction in relation to railways. I say necessary, because, for example, I would not be understood as assenting to the suggestion that the Dominion could under colour of its power to legislate regarding railways deprive the Province of its beneficial interest in the public lands.

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On the other hand, it has never been doubted, so far as I am aware, that Parliament, in the exercise of its railway jurisdiction, may provide for the expropriation of such private interests in land as may be required for railway purposes. If the interest of one man may thus be taken, then why may not Parliament do the same in the case of lands the beneficial ownership of which is in the inhabitants of a Province collectively, *i.e.*, Crown lands?—and if expropriated, why not taken without compensation?—which latter, however, would be a question only of policy and not of jurisdiction. So far as I can see, the constitution confides the power of legislating as to these matters, not to the people in their Provincial capacity, but to the people in their Federal capacity, for to say that a Dominion railway, although authorized so to do, could not traverse public lands vested in the Provinces without their consent, would be to paralyze the power of Parliament, and I feel unable to hold that one of the most important powers possessed by Parliament can be exercised only with the sufferance or consent of the Legislatures or the Provincial executives, when I find nothing in the Act compelling me to such a conclusion. If that is the position, then the Dominion could not build a telegraph line across our northern wilderness if a single Province chose to object to the post holes, and the Union would be little better than a rope of sand.

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But independently of these grounds, I think the learned Attorney-General must fail in any event on the ground that by

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the Terms of Union the Government of Canada were obligated to secure the construction of the railway to the seaboard of the Province, and by virtue of the Imperial Order in Council admitting the Colony into the Union, this obligation became part of the organic law of the land. It could not legally have been nullified even by the joint consent of Canada and the Province without the sanction of the Imperial Parliament, and for the Province, or anyone purporting to represent the Province, to have hindered or resisted the construction would have been to have set at naught the mandate of the Imperial Parliament, and to have violated the constitution of the country. Nor does it help the learned Attorney-General to contend that because the grant made by the Province to the Dominion Government in pursuance of the Terms of Union did not extend west of Port Moody, the terminus originally selected, the railway could not be built west of that point on Provincial lands without the concurrence of the Province. The mandate was to build to the seaboard and not to any particular point on the seaboard, and it seems too clear for controversy that the Government of Canada had the power to select any point on the seaboard, and that the power was not exhausted merely because a point was reached on the seaboard before the final completion of the railway.

It is not, however, necessary to enter into any of these larger questions *in extenso*, as in my opinion, the present case does not require their decision. The suggestion of the learned Attorney-General that even if the Dominion had power to authorize the Company to build on the foreshore, Parliament could not at any rate extinguish public rights of way, cannot be maintained, the short answer being that the public is just as much represented in Parliament as it is in the Legislature, and that either body may extinguish any rights, public or private, in the proper exercise of the law-making powers entrusted to it.

HUNTER, C.J.

In my opinion, there are numerous obstacles in the path of the learned Attorney-General in this action, any one of which is insurmountable, although I grant if there is a grievance there is a remedy—not in this Court, but at Ottawa: *ubi jus ibi remedium*, not *ubi damnum*.

The appeal should be dismissed.

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MARTIN, J.: Though I see no reason to disturb the finding of the learned trial judge that the harbour in question was a public one at the time of the Union of this Province with Canada, yet since we are informed that it is the intention to carry this case to the Judicial Committee of the Privy Council, it seems desirable, in the event of another view being taken of the facts, to consider the more important question raised before us, *i.e.*, was it competent for the Federal Parliament to permit the use of the foreshore in question by the defendant Company for railway purposes if such foreshore belonged to the Crown in the right of British Columbia?

And first, it should be noted that attention has already been called by the Supreme Court of Canada to the exceptional nature of the defendants' charter; I refer, *e.g.*, to the remarks of Mr. Justice Gwynne in *The City of Vancouver* v. *The Canadian Pacific Railway Co.* (1894), 23 S.C.R. 1 at p. 12:

"The object of this section (18a.) plainly was, as it appears to me, to give to the company incorporated for the construction of this great public national work extending over the continent, and which for nine-tenths of the length of the proposed work was as yet wholly unsettled, much greater powers and privileges than were given to the railway companies of purely commercial character constructed under the provisions of the Railway Act of 1879, which, enlarged as it was by the provisions of 44 Vic., Ch. 1, was made applicable to the Canadian Pacific Railway."

And the learned Chief Justice (Begbie) of this Court likewise expressed himself in the same case, (1892), 2 B.C. 306 at p. 318:

"And it is necessary to consider that this railway, though in one sense it is merely a dividend earning adventure of private interest to the Company's shareholders, is yet, at the same time, a great national undertaking —I had almost said an Imperial undertaking—that it is as yet only in its infancy; that it may at no distant period become expedient, as commerce extends, to have sidings, duplicate lines of rails, and wharves and warehouses in connection with the present line, upon this very foreshore; which indeed, seems to be distinctly contemplated by the clause in the Company's charter already quoted (sec. 18a.) And in the exercise of their powers under that clause they would find themselves extremely embarrassed if it were now to be held that the Corporation had any such rights as are now claimed by them."

It seems to me in construing an Act relating to a railway of such an unusual character and to be constructed for such special purposes and reasons, that it cannot be done in quite the same hard and fast way as an ordinary Act of incorporation of an ordinary

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railway, but that it should, whenever legally possible, be interpreted in the same broad spirit as that in which the great enterprise itself was dealt with by Parliament, and bearing in mind the objects sought to be accomplished.

Now, the Imperial Parliament by means of Part VI. of the B. N. A. Act, entitled "Distribution of Legislative Powers" (which Act is the constitution of Canada, *City of Fredericton* v. *The Queen* (1880), 3 S.C.R. 505 at. p. 563; *Attorney-General of Ontario* v. *Mercer* (1883), 8 App. Cas. 767 at p. 773; *St. Catherine's Milling and Lumber Company* v. *The Queen* (1888), 14 App. Cas. 46 at p. 55; *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia* (*Fisheries Case*) (1898), A.C. 700 at p. 709); delegated to and distributed among the Federal Parliament and the Provincial Legislatures the various powers and rights therein mentioned. By virtue of section 91, sub-section 29, and section 92, sub-section 10, the "exclusive legislative authority of the Parliament of Canada extends to 'lines of railways' connecting the Province with any other or others of the Provinces, or extending beyond the limits of the Province."

Hence it was laid down in the *Fisheries Case, supra*, p. 715, that

> "In any view the enactment is express that laws in relation to matters falling within any of the classes enumerated in s. 91 are within the 'exclusive' legislative authority of the Dominion Parliament. Whenever, therefore, a matter is within one of these specified classes, legislation in relation to it by a Provincial Legislature is in their Lordships' opinion incompetent."

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And in *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367, it is said, p. 371, that

> "It is not matter of dispute that, by virtue of these enactments, the Parliament of Canada had and have the sole right of legislating with reference to the matter of the appellants' railway."

And in explaining the application of certain sections of the Quebec Municipal Code to the cleaning of the railway ditch then in question, their Lordships say, p. 372:

> "The British North America Act, whilst it gives the legislative control of the appellants' railway *qua* railway to the Parliament of the Dominion, does not declare that the railway shall cease to be part of the Provinces in

which it is situated, or that it shall, in other respects, be exempted from the jurisdiction of the Provincial Legislatures. Accordingly, the Parliament of Canada has, in the opinion of their Lordships, exclusive right to prescribe regulations for the construction, repair, and alteration of the railway, and for its management, and to dictate the constitution and powers of the company; but it is, *inter alia*, reserved to the Provincial Parliament to impose direct taxation upon those portions of it which are within the Province, in order to the raising of a revenue for Provincial purposes. It was obviously in the contemplation of the Act of 1867 that the 'railway legislation' strictly so called, applicable to those lines which were placed under its charge should belong to the Dominion Parliament."

Then comes the question, has a Parliament with such large and exclusive powers the right to appropriate Provincial public lands for the purposes of a railway when the case is such that unless said lands are taken for that object the railway cannot be constructed?

We are informed by counsel for both parties that there is no decision on the point, but that it was thus discussed by Mr. Justice Osler in delivering the judgment of the Ontario Court of Appeal in *Booth* v. *McIntyre* (1880), 31 U.C.C.P. 183 at p. 193:

"In the view I take of the rights of the parties, this case does not necessarily involve a decision as to the power of the Dominion Parliament to confer upon those railway companies which are within its exclusive jurisdiction, the right of constructing their lines through the waste lands of the Crown in the several Provinces through which they may run, without obtaining the permission of the Lieutenant-Governor in Council under R.S.O. ch. 165, sec. 9, sub-sec. 3. When that question is presented for decision it may be found difficult to reconcile the existence of any effectual exclusive right of legislation by the Dominion with the existence of any right of the Provincial Legislature to say that such right shall only be exercised *sub modo*, subject to such checks or restrictions as the latter choose to impose. Concede the right of Provincial interference in any particular, and it will not be easy to stop short of the conclusion that charters must be obtained from both Legislatures, a result hardly consistent with the existence of an exclusive right in either: *Valin* v. *Langlois*, 3 Supreme Court R. pp. 15, 16, 18 and 23-53, and per Gwynne, J., p. 89."

Remarking on this case, in *Attorney-General* v. *Ryan* (1887), 5 Man. L.R. 81 at p. 91, Mr. Justice Killam says, referring to the Red River Valley Railway Act:

"That Act appears, however, sufficiently wide to authorize the expropriation for the purposes of the railway of ungranted Dominion lands, and a serious question at once arises of the authority of the Provincial Legislature to confer such a power. In *Booth* v. *McIntyre*, 31 U.C.C.P. 183,

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Osler, J., suggested that the Dominion Government might have the power to confer upon a railway company authority to take, without permission of the officers of the Crown for Ontario, public lands of that Province. If Parliament has that power, it would seem difficult to deny to the Legislature of Manitoba a similar power in respect of Dominion lands. As in this instance the defendants do not appear to be able to take advantage of such provisions of the Red River Valley Railway Act, even if *intra vires* of the Legislature, I shall not now discuss that question."

The same learned Judge subsequently held in *Canadian Pacific Railway Co.* v. *Northern Pacific and Manitoba Railway Co.* (1888), 5 Man. L.R. 301, that the Federal Parliament had power to prevent a Provincial railway from crossing a Federal railway without the sanction of the Railway Committee. At p. 313 he says:

"With reference to the argument that such powers are very great, and that the committee may, under cover of them, nullify any railway Act of either the Dominion or a Provincial Legislature where the line was to cross a Dominion line, Mr. Ewart has, it appears to me, presented the unanswerable reply that such power must reside somewhere. The great powers given to courts and judges may be used arbitrarily, but they are given with the expectation that they will not be. This railway committee may be considered by some not to be a satisfactory tribunal. If Parliament should so determine, probably another will be substituted, but in the meantime it is the one which must determine such questions, so far as the Dominion Parliament could bestow the jurisdiction."

And see also the other cases cited in Clement's Canadian Constitution, 2nd ed., pp. 269-70, particularly in *In re Canadian Pacific Railway Co. and County and Township of York* (1898), 25 A.R. 65, wherein at p. 70, the Chief Justice of Ontario says:

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"The railway in question is one of the subjects placed under the exclusive jurisdiction of the Parliament of the Dominion, and it follows that in all matters affecting its construction, operation and management, including the expropriation of the lands required, everything in fact necessary to its full and efficient working, the legislation of the Dominion is of paramount authority even though it interferes with property and civil rights and trenches upon matters assigned to the Provincial Legislature by section 92 of the British North America Act. To hold otherwise would be to render nugatory very many of the powers specially assigned to the Dominion Parliament, and so far as the legislation of that body is necessarily incidental to the exercise of the powers conferred upon the railway, and to the extent necessary to accomplish the objects for which it was incorporated, I agree that full effect should be given to it."

And at p. 72 Mr. Justice Osler says, referring to the section of the Railway Act in question:

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"Its provisions.....cannot be held to be invalid merely because, in the mode in which Parliament has declared they shall be carried out, they to some extent affect property and civil rights."

And at pp. 79-80, Mr. Justice Meredith says:

"Complete legislative power admittedly exists somewhere. Nothing turns upon the wisdom or unwisdom, or the reasonableness or unreasonableness of the thing, or whether it is precedented or unprecedented; those are matters for legislative, not judicial, consideration.

"Then, exclusive power to make laws, in relation to such works and undertakings as the line of railway in question, is assigned to the Parliament of Canada: B.N.A. Act, 1867, sec. 91, sub-sec. 29, and sec. 92, sub-sec. 10a. So that really the one debatable question, on this branch of the case, is, whether the enactment in question is legislation in relation to works and undertakings of lines of railway, or is legislation relating to property and civil rights only, and so within the power of provincial legislation exclusively: *ib.* sec. 92, sub-sec. 13.....

"That Parliament has power to authorize the expropriation of lands for the purposes of a railway such as this, and to compel the land owners interested to contribute towards the erection and maintenance of railway fences upon their lands, was admitted on all hands, during the argument; and, that being so I am yet unable to understand why the virtual owners of the public road in question, cannot equally be required to maintain fences and gates, or a gate only, across that road, for the double purpose of safeguarding the public travelling across the railway upon the road, and the public travelling across the road upon the railway."

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A case which well illustrates the paramount authority of the Federal Government in railway matters is the *Grand Trunk R. W. Co.* v. *City of Toronto* (1900), 32 Ont. 120, wherein it was held that though the defendant corporation had power under Provincial legislation to open and make a street, yet seeing that it would cross a Federal railway the power was subject to Federal restrictions under the Railway Act, and to such an extent that the railway had to bear part of the expense of the subway directed to be constructed by order of the Railway Committee, even though it derived no advantage therefrom. The learned Judge says, p. 128:

"Public interests, and public safety, require that the right to carry a new street across such a railway shall be withheld until the proper safeguards for those lawfully using such highways, are provided. The Legislative Assembly seems to have thought that those seeking the new way should be at the whole expense of it, but Parliament has provided that part of it may be imposed upon the railways, which take the burden without, generally speaking, getting any advantage."

By the late case of the *Toronto Corporation* v. *Bell Telephone*

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Company of Canada (1905), A.C. 52, the matter is put in a still clearer and stronger light, for their Lordships of the Privy Council, after referring to the exclusive powers of Parliament, declare that said company by virtue of its Federal charter, could enter upon the streets and highways of the City of Toronto, and, without its consent, erect poles thereon or construct conduits and lay cables thereunder despite the fact that the Legislature of Ontario had declared by a special Act that such consent was a condition precedent to the right of so doing. It will be observed that this case goes to the length of declaring that in order to properly and fully exercise its powers a Federal company may take and use without compensation so much of the lands of a municipality as are necessary for its purposes, because in the erection of poles for wires above the surface and the construction of conduits for cables below it, there is an appropriation and occupation of so much of the soil as is used for that purpose, just as in the case of a sewer through lands: *Arnold* v. *Vancouver* (1904), 10 B.C. 198. Nevertheless, their Lordships say (p. 57) that:

> "It would seem to follow that the Bell Telephone Company acquired from the legislature of Canada all that was necessary to enable it to carry on its business in every Province of the Dominion, and that no Provincial Legislature was or is competent to interfere with its operations, as authorized by the Parliament of Canada."

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Such being the far reaching powers of Parliament, it is difficult to see what limitation this Court can be asked to put upon them when exercised so as to make lawful undertakings fully effective. The mere fact that they are very great, or might possibly be oppressively exercised, even, as was suggested by the Attorney-General, to the extent of taking valuable Provincial lands without compensation, or subsidizing a Federal railway out of Provincial lands under guise of an unduly wide allowance for right of way, cannot affect the question, for as their Lordships said in the *Fisheries Case*, p. 713:

> "The suggestion that the power might be abused so as to amount to a practical confiscation of property does not warrant the imposition by the Courts of any limit upon the absolute power of legislation conferred. The supreme legislative power in relation to any subject-matter is always capable of abuse, but it is not to be assumed that it will be improperly used; if it is, the only remedy is an appeal to those by whom the Legislature is elected."

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Attention was in that case drawn (p. 709) to the fact "that there is a broad distinction between proprietary rights and legislative jurisdiction," which indeed had already been pointed out by the same tribunal in the *St. Catherine's Milling and Lumber Company Case, supra,* at p. 59, where it is said:

"There can be no *a priori* probability that the British Legislature, in a branch of the statute which professes to deal only with the distribution of legislative power, intended to deprive the Provinces of rights which are expressly given to them in that branch of it which relates to the distribution of revenues and assets. The fact that the power of legislating for Indians, and for lands which are reserved for their use, has been entrusted to the Parliament of the Dominion is not in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue whenever the estate of the Crown is disencumbered of the Indian title."

And in the *Fisheries Case,* p. 713, it is said:

"If, however, the Legislature purports to confer upon others proprietary rights where it possesses none itself, that, in their Lordships' opinion, is not an exercise of the legislative jurisdiction conferred by s. 91. If the contrary were held, it would follow that the Dominion might practically transfer to itself property which has, by the British North America Act, been left to the Provinces and not vested in it."

But it is also stated (p. 712):

"At the same time, it must be remembered that the power to legislate in relation to fisheries does necessarily to a certain extent enable the Legislature so empowered to affect proprietary rights....."

So far as the proprietary rights of the Provinces in public lands under section 109 are concerned, it was said in the *St. Catherine's Case,* p. 56, that:

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"In construing these enactments, it must always be kept in view that, wherever public land with its incidents is described as 'the property of' or as 'belonging to' the Dominion or a Province, these expressions merely import that the right to its beneficial use, or to its proceeds, has been appropriated to the Dominion or the Province, as the case may be, and is subject to the control of the legislature, the land itself being vested in the Crown."

By section 109 it is declared that, *inter alia,* "all lands, etc., shall belong to the several Provinces . . . . subject to any trusts existing in respect thereof, and to any interest other than that of the Province in the same," and the Indian title to certain lands, in the last mentioned case, (at pp. 54-5, 58) "though only a personal and usufructuary right, dependent upon the good will of the Sovereign," was held, nevertheless, to be "an interest"

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therein, to which the beneficial interest of the Province of Ontario in said lands was subject. Why may not the Federal Parliament in apt circumstances have "an interest" in Provincial lands arising out of the powers conferred upon it by section 91, as well as otherwise?

It is to be further observed that one of these two cases was a decision on fisheries, and the remarks cited are made in relation to that subject only (p. 712) and the other on the Indian title, and on the principle laid down in *Quinn* v. *Leathem* (1901), A.C. 495, they must be read as applicable to the particular facts and as authorities only for what they actually decide. Unless that is done, it is, in my opinion, impossible to reconcile all those expressions with what has been above cited from the latest decision of the same tribunal in *Toronto Corporation* v. *Bell Telephone Company*, because if it is in the power of the Province to stop a Federal railway at its boundary where it seeks to cross its public lands, even when offering fair compensation therefor, then that railway unquestionably did not "acquire from the Legislature of Canada all that was necessary to enable it to carry on its business in every Province of Canada," though the Privy Council declares the contrary. Nor can due effect be given to the decision in *C. P. R.* v. *Bonsecours*, also delivered after the *Fisheries Case*, wherein it was held that the Federal Parliament had exclusive right to prescribe regulations for the "construction" of the railway; and that decision is of special value as regards the present appeal, for it was a railway case. To my mind it does not at all follow, because in the *St. Catherine's Case* (p. 59) there was no "necessary implication" that the Federal right of exclusive legislation carried with it the patrimonial interest of the Crown in the Indian lands, that therefore in different circumstances and in relation to an entirely distinct subject-matter the Crown might not have, as a necessary consequence of its exclusive jurisdiction, "an interest," in Provincial lands. And, to apply that case further, I cannot see that it is "in the least degree inconsistent with the right of the Provinces to a beneficial interest in these lands, available to them as a source of revenue" that the Federal Parliament should have the right to construct a railway through them, for, as the *Bonse-*

cours Case shews, the railway does not "cease to be a part of the provinces in which it is situated," and is "not in other respects exempted from the jurisdiction of the Provincial legislatures," *e.g.*, in the matter of direct taxation for revenue purposes. And the same remarks apply to the *Fisheries Case* to even a greater extent.

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Turning to section 91, it will at once be seen that wholly dissimilar subject-matters are therein specified, ranging from copyrights and lighthouses to marriage and divorce, and very different considerations inevitably apply to the case of a railway than to that of the great majority, if not all indeed, of the 29 subject-matters enumerated. Legislative jurisdiction over railways is peculiar and far-reaching, and necessarily must be greater than that which is to be exercised over any of the other matters, because a railway undertaking is not only essentially constructive in its nature, but also necessarily possessive, for its road-bed must permanently occupy the surface at least of the soil on which it rests. And more than this, the line of route of a railway is frequently restricted by the natural formation of the country through which it seeks to pass, and it is not simply a question of the most convenient out of a hundred, or even a thousand available sites, such as *e.g.*, in the case of a post office, or a penitentiary, but of one route only in a vast region, of which there is no lack of illustration in this mountainous Province. The fact that recently it has been found necessary to establish a "Board of Railway Commissioners for Canada" (the Railway Act, 1903, Part IV.) is perhaps the best evidence of the exercise of the far-reaching and special powers of Parliament in railway matters. Turning again to the said 29 items, only five of them, in addition to that in question, can fairly be said to necessarily contemplate constructive work in any appreciable degree, and probably those most imperative would be the seventh, militia and defence; the ninth, beacons, buoys and lighthouses; and the eleventh, quarantine, etc. But even these do not partake to any appreciable degree of the special nature of railway construction, for the reasons already pointed out, and for others equally obvious. As to the seventh, that is specially dealt with by section 117; and as to the ninth, if it became

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necessary for the protection of life and shipping in a dangerous locality to erect a lighthouse on a particular rock, it would be a curious and startling curtailment of the powers of Parliament if the Provincial Legislature could prevent that work of public necessity from being carried out because said rock formed part of its public lands which it refused to part with on any terms. In such circumstances Parliament would surely be entitled to count on the co-operation of the Crown Provincial, and if it were withheld, to exercise its powers without it, otherwise chaos would result. Illustrations of equally unexpected consequences might be multiplied in regard to these and other subject-matters, but the foregoing are sufficient to illustrate my opinion that no hard and fast rule can be laid down, and that each subject-matter must be considered by itself in order to determine what is the extent of Federal jurisdiction therein. Nor does it in any way follow, because Federal powers are manifestly and necessarily limited in relation to one subject-matter, that they are so in relation to another and wholly dissimilar one. The same inflexible rule cannot, *e.g.*, be applied to powers which necessarily involve great constructive works as to those which do not partake of construction at all, or only in a minor and varying degree. As regards railways, while, as has been said their construction necessarily includes the occupation of lands, yet it is true it does not inevitably involve the occupation of public lands, though

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probably it did in the great majority of cases at the time the B.N.A. Act was passed. But nevertheless that statute is one of a very unusual character, the first of its kind in the history of our race, and both in its preamble and section 146 it anticipated and provided for the future, and, indeed, as in the carrying out of section 145 the Intercolonial Railway would have to cross public lands, so it is fair to assume it was contemplated by section 146 that when the North-West Territory (properly so-called and distinguished from Rupert's Land which was the property of the Hudson's Bay Company) and the Colony of British Columbia were admitted to the Union, railways crossing and connecting them would necessarily do so. It is clear from this great Act itself that the Fathers of Confederation looked forward to, and sought to provide for the unique necessities of a political

consolidation of half a continent which, stretching from one great ocean to the greatest of oceans, should become the home of a new nation within the Nation, and it is therefore impossible to view or interpret such a piece of legislation in the light of an every day Act of Parliament. That this was their intention is clear not only from the Act itself but from the fact that at the first session of the newly created Parliament a joint address was presented to Her Majesty in December, 1867 (see Can. Stats. of 1872, p. lxvii), declaring that "it would promote the prosperity of the Canadian people, and conduce to the advantage of the whole Empire, if the Dominion of Canada, constituted under the provisions of the 'British North America Act, 1867,' were extended westward to the shores of the Pacific Ocean." Indeed, the Earl of Carnarvon had, on the second reading of the Bill in the House of Lords, on February 19th, 1867, already stated . . . . "When once this Bill becomes law, it will be the duty of Her Majesty's Government not to lose one day unnecessarily in dealing with this great subject."

Taking it as established then, that the nature of the subject-matter must be considered in determining the full extent of the control over it that is contemplated by the Act, it follows that in dealing with transcontinental railways, which assume national importance, the control must necessarily be commensurately great to become effective. Suppose, to take a concrete case, the Federal Parliament in the exercise of its acknowledged powers itself undertook the construction of a transcontinental railway, (and it did in fact, as has been noted, construct portions of the line of the present defendant Company) and in coming through the only available pass in the mountains it became necessary to cross public lands in this Province. Can it be possible that the Attorney-General of British Columbia, as the proper officer to assert public rights, could stop the construction of the railway by refusing permission to cross such lands even if full compensation were offered for the same? Surely not. If he could, he could stop it at the Provincial boundary just as it touched any waste lands of the Province. Or, likewise, if in order to reach tide-water and obtain access to a new and the only available harbour, it became necessary to cross Provincial lands surrounding that

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harbour, could the Province refuse permission to cross them and by preventing the railway from reaching tidewater frustrate the primary object of the whole undertaking and render nugatory the powers of Parliament? To answer this question in the affirmative would be, it seems to me, to deny the existence of that paramount power which admittedly exists and place Parliament in the humiliating position of not being able to effectuate those laws which it has power to pass; in other words, to confer upon it powers on paper, but not in substance.

Having regard to the foregoing, it would, I think, strain the constitution to say, as a general proposition, that simply because a Province has obtained the property in public land under section 109 (which is subject to the restrictions therein mentioned) therefore even national undertakings the construction of which is assumed by Parliament itself can be thwarted. If so, one very unexpected result of the *Toronto Corporation* v. *Bell Telephone Case* is that if a municipality or a private person (for the rights are the same—*re Canadian Pacific and York, supra*, p. 73) should buy public land from the Province, that land becomes immediately subject to appropriation or user by Parliament under section 91 without compensation, but so long as the land is undisposed of by the Province it is freed from that obligation. Why the Crown Provincial in a matter undertaken by the Crown Federal for the public benefit should be in a better

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position than its own grantee is difficult to comprehend, bearing in mind that the apparent object of the Act in its distribution of legislative authority and assets is to harmonize and render mutually effective the powers of the Crown in its two capacities, however represented, and not antagonize or nullify them.

The question, I fully admit, is a difficult one on which there is much to be said from both points of view, and I should have liked the assistance of a fuller argument, but according to the best consideration I have been able to give it, I should, as it now presents itself to me, be forced to the conclusion, if the case had to be decided on this point only, that Parliament had power to enact the section in controversy—18a.

In reaching this conclusion, I may mention as a matter of precaution that I have not overlooked section 117 of the B.N.A.

Act, but in my opinion it does not affect the present question because it states itself that it only relates to "public property not otherwise disposed of in this Act." Now public lands, which alone I have been considering have already been specially "otherwise disposed of" to the several Provinces by section 109. This disposition, by whatever name it may have been called by the Privy Council in the cases hereinbefore cited—"apportionment," "distribution," "allotment," "reservation" or "appropriation"—of all legislative powers and assets brought into the new and general scheme of governmental and territorial union had to be made between the respective Provinces in their new capacity because a new form of government was being adopted which superseded all prior political institutions in Canada: *Attorney-General* v. *Mercer, supra*, p. 774. The section (117) is therefore, in my opinion, merely a precautionary general saving clause which cannot have been passed with the object of confirming to the Provinces by general language that property which had already by a prior section been specifically distributed between them and the Dominion, and in *Attorney-General of Ontario* v. *Mercer, supra*, p. 776, their Lordships stated that they did not regard it as very material other than to illustrate section 109, which they say "distinctly reserved to the Provinces" the assets therein mentioned; on the prior page it is termed an "appropriation of public property" to the Provinces. And that case also clearly shews that while the word "lands" evidently means "lands, etc., which were at the time of the Union, in some sense and to some extent *publici juris*," yet it is not restricted solely to lands, or interests therein, which were in existence at the time of the Union but extends to interests of the Crown which sprang into existence subsequently, in that case an escheat, four years later.

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But even if this is not the true construction, and seeing that at the most the Provinces have only the right to the beneficial use, or proceeds, of the Crown lands within their boundaries (*St. Catherine's Milling and Lumber Co.* v. *The Queen, supra*, p. 56) and if my views already expressed are otherwise sound, then the said beneficial use of said lands by the Provinces must be held to be subject to the rights flowing from the exclusive

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powers of Parliament derived under section 91, which, under the reservation in section 109 must be deemed to be tantamount to an "interest other than that of the Province in the same," just as the beneficial interest of the Province of Ontario was, in the case last cited, held to be subject under section 109, to the Indian title.

If said section 18a is *intra vires*, we must adopt the construction that has already been placed upon it by the Supreme Court in *The City of Vancouver* v. *The Canadian Pacific Railway Co.*, *supra*, and by the Privy Council on July 14th, 1903, in refusing leave to appeal from that judgment. We have had the benefit of reading the proceedings on that application, from which, as well as from the judgment of the Supreme Court, it appears that the public, by the operation of that section, is wholly excluded, pending lawful user by the Company, from the locality in question if the requirements of the Company for terminal purposes are such that the *jus publicum* and the Company's proper business needs cannot co-exist. On this point the finding of the learned trial Judge is the only one open on the evidence, and it is that "the works constituting the obstruction complained of are necessary to meet the reasonable requirements of the Company in respect of terminal facilities, and the exercise of the public right of passage at the places in question is incompatible with the effective user of" such works for railway purposes.

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Much was said at the bar regarding the meaning of the words "vested in the Crown" in that section, but while in some cases it may be necessary to determine whether public property is held by the Crown in right of the Province or in right of the Dominion (as, in my opinion, had to be done in the *Attorney-General* v. *E. & N. Ry. Co.* (1900), 7 B.C. 221 at pp. 239-40), yet consequent upon the views I have expressed that point does not arise in this relation, and it is as unnecessary to consider it as it was in the *Fisheries Case*, p. 709, for as their Lordships there said, the rights of the public in respect of the ownership sought to be asserted "except in so far as they may be modified by legislation are precisely the same," however the Crown may be represented. If the Federal Parliament had the paramount

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power to authorize the Company to use the Crown foreshore for railway purposes, it is unnecessary to consider the various senses in which the word "Crown" might be employed in other circumstances.

Though, so far, I have considered the constitutional question solely from the point of view of what the Federal powers are under the B.N.A. Act, yet this case does not depend on that Act alone, but it has a special feature which must be considered. This is, that since Canada undertook to build this railway to the Pacific Ocean not only as a great national work but also at the urgent request of British Columbia, and as one of the Terms of the Union therewith, it would be more than strange if British Columbia or any other Province could be allowed to prevent that railway from reaching that ocean. I do not think it could be even plausibly contended that any one of the Provinces could have prevented the construction of the Intercolonial Railway provided for by section 145 of the B.N.A. Act. My reference above was to the eleventh of the Terms and Conditions of Union, approved by Imperial Order in Council of May 16th, 1871, under and by virtue of section 146 of the B.N.A. Act which declares that the provisions of such Order "shall have effect as if they had been enacted by the Parliament of the United Kingdom of Great Britain and Ireland." And by the tenth Term the original Act was, with special exceptions, made applicable to the new Province "as if the Colony of British Columbia had been one of the Provinces originally united by the said Act." The effect of this is to make the Terms a legislative bargain sanctioned by the Imperial Parliament. The said eleventh Term is, in part, as follows:

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"The Government of the Dominion undertake to secure the commencement simultaneously, within two years from the date of the Union, of the construction of a railway from the Pacific towards the Rocky Mountains, and from such point as may be selected, east of the Rocky Mountains, towards the Pacific, to connect the seaboard of British Columbia with the railway system of Canada; and further, to secure the completion of such railway within ten years from the date of the Union" . . . . (Here follows the agreement of British Columbia to convey a twenty-mile belt of land on each side of the railway line, to aid the undertaking.)

This obligation was referred to by Parliament in the pre-

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amble to the Act of Incorporation of the Company, Cap. 1, of 1881, thus:

"Whereas by the terms and conditions of the admission of British Columbia into Union with the Dominion of Canada, the Government of the Dominion has assumed the obligation of causing a railway to be constructed, connecting the seaboard of British Columbia with the railway system of Canada . . . .

"And whereas certain sections of the said railway have been constructed by the Government, and others are in course of construction, but the greater portion of the main line thereof has not yet been commenced or placed under contract, and it is necessary for the development of the North-West Territory and for the preservation of the good faith of the Government in the performance of its obligations, that immediate steps should be taken to complete and operate the whole of the said railway."

The undertaking to so build was one of the chief inducements of the Union, as is abundantly proved by the subsequent bitter controversy which arose between the Province and the Dominion because of the delay to carry out this obligation, full particulars of which will be found in the State Papers dealing with the subject, and it is here unnecessary to more than refer to the resolution of the Legislature in the session of 1874, which requested the Lieutenant-Governor to

"protest on behalf of the Legislature and people of this Province against the infraction of this most important clause of the Terms of Union, and to impress upon the present Administration in Canada the absolute necessity of commencing the actual construction of the railway from the seaboard of British Columbia early in the present year."

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At that time the passes through the Rocky Mountains suitable for railway purposes were very imperfectly known (even to-day there is a great deal to learn about them) and it seems to me impossible to hold that it was not contemplated by the Terms of Union that the railway should have proper terminal facilities on the Pacific at whatever point should be decided by its engineers as being the most suitable for that purpose. Indeed the Chief Justice of Canada in *Canadian Pacific Railway Co.* v. *Major* (1886), 13 S.C.R. 233 at p. 239, has already held that the road was to be constructed "for the purpose of effectually connecting the waters of British Columbia with the railway system of Canada." It was, therefore, *inter alia*, essential to make ample provision for connection at tidewater with sea-going vessels so that the trade of the Pacific, coasting and trans-oceanic, might be

handled to the best advantage, and this was done by said section 18 and section 26 of the Act of Incorporation as follows:

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"26. The Company shall have power and authority to erect and maintain docks, dockyards, wharves, slips and piers at any point on or in connection with the said Canadian Pacific Railway, and at all the termini thereof on navigable water, for the convenience and accommodation of vessels and elevators; and also to acquire and work elevators, and to acquire, own, hold, charter, work and run steam and other vessels for cargo and passengers upon any navigable water, which the Canadian Pacific Railway may reach or connect with."

To hold otherwise would mean that it was in the power of British Columbia, after inducing the Federal Government to expend a vast sum on a great enterprise, to render it almost entirely useless by refusing to allow the railway to make use of that locality then considered and decided to be, in the manner directed by statute, the most suitable for the purpose of its Pacific terminus. But, in my opinion, it is perfectly clear that the Province could not at any time, as a matter of equity, and particularly cannot now after the lapse of many years of notorious occupation and user by the Company, be allowed to take a position so strikingly inconsistent with the spirit of the Terms of Union which must be construed in the same broad manner as would a treaty, which it is in its true sense, though made between colonies and not independent states. In case it might be sought to draw a distinction between the railway as built to Port Moody, the terminus as originally contemplated, and the present terminus at Vancouver, I draw attention to the following extract from the judgment of the Chief Justice of Canada in *Canadian Pacific Railway Co.* v. *Major, supra,* wherein he says, p. 239:

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"No doubt, under the contract provided for by the Act of 1881, the Canadian Pacific Railway Company obligated themselves to build only to Port Moody, but I can discover nothing in the Act to indicate that Port Moody was to be the actual and final termination of the Canadian Pacific Railway; in other words, was to be a fixed terminus, with no powers of extension under the legislation of 1881. On the contrary, the 15th section indicates, in my opinion, directly the contrary, and shows, I think, conclusively that the terminus of the Canadian Pacific Railway was not to be fixed at Port Moody, but was to be extended by branches and extensions to be constructed or acquired, if required by the exigency of the road or deemed by the Company necessary for the purpose of effectually connect-

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ing the waters of British Columbia with the railway system of Canada; and when so constructed by the Canadian Pacific Railway the road, not to Port Moody, but the road, with such branches and extensions when constructed or acquired, was to constitute the Canadian Pacific Railway, and the construction of which branches and extensions was contemplated by, and provided for in, the Act of 1881 and the schedules thereto annexed."

For all the above reasons I am of the opinion that the appeal should be dismissed with costs.

MORRISON, J., concurred with MARTIN, J.

Appeal dismissed.

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MORGAN v. THE BRITISH YUKON NAVIGATION COMPANY, LIMITED.

Master and servant—Injury to servant—Negligence—Ship—Bursting of capstan—Defect—Notice—Defective system—Superintendent—Competence of—Common law liability—Aggravation of injuries by subsequent conduct—Master of ship—Scope of authority—Delay in transport.

The mate of a steamer was injured by the bursting of the capstan and brought a common law action against the owners for damages for his injuries, and also for aggravation of his injuries owing to his unauthorized detention on the steamer after the accident:—

Held, that in the absence of evidence of a defective system, the defendants were not liable for the negligence, if any, of a competent engineer who was a fellow servant of plaintiff and not the representative of defendants.

If there was any negligence on the part of the captain in keeping the plaintiff on the steamer, the defendants were not liable for it, as such interference was not within the scope of his employment.

Statement

THIS was an appeal from the verdict and judgment for $12,000 recovered by the plaintiff against the defendants at the trial of an action for damages for personal injuries.

The trial took place before DRAKE, J., and a common jury at Victoria, in May, 1904.

On the day of the accident the superintendent of the Company at White Horse, in reply to the purser's telegram asking for instructions, sent him the following telegram:

"Take doctor on Victorian attend Morgan. Victorian help Bonanza King off bar then help Yukoner. Send Morgan to hospital Dawson or White Horse whichever doctor thinks best do everything for him possible regardless delay to boats."

The trial judge submitted to the jury the following questions:

"(1.) Was the capstan reasonably fitted for the work it had to do?

"(2.) Was it in good order at the time the work commenced which resulted in the accident?

"(3.) Was ordinary care used in the management of the capstan; if not, who was in default?

"(4.) What caused the capstan to burst?

"(5.) Were the defendants negligent in the course they adopted towards the plaintiff after the accident, and in what respect if the case?"

Statement

but the jury returned a general verdict as follows:

"The jury find the defendants guilty of negligence and award the plaintiff $12,000."

The remaining facts are fully stated in the judgment.

The appeal was argued at Vancouver on 22nd, 23rd and 24th of November, 1904, before HUNTER, C.J., IRVING and DUFF, JJ.

Cassidy, K.C., for appellants: The case should have been withdrawn from the jury; as to the branch of the case in which plaintiff seeks to recover damages for ill-treatment after the accident it is clear he cannot recover: see *Hedley* v. *Pinkney & Sons Steamship Company* (1894), A.C. 222; *Couch* v. *Steel* (1854), 3 El. & Bl. 402; *Wilson* v. *Hume* (1880), 30 U.C.C.P. 542.

Argument

As to the action for damages for injuries caused by the breaking of the capstan: the plaintiff must allege and prove defendants knew of defects, and in this he has failed: he cited *Griffiths* v. *London and St. Katharine Docks Co.* (1884), 13 Q.B.D. 259; *Rajotte* v. *Canadian Pacific Railway Co.* (1889), 5 Man. L.R. 365; *Rudd* v *Bell* (1887), 13 Ont. 47; *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326, 19 L.T.N.S. 30 and *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S.C.R. 110.

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W. J. Taylor, K.C. (*R. T. Elliott*, with him), for respondent: Defendants must shew that they kept the plant in good order; Sproat, the superintending engineer did not make an examination before this particular trip; it was his duty to do so and the Company is liable because they negligently discharged that duty: he cited Labatt on Master and Servant, 312; *Smith* v. *South Eastern Railway Co.* (1896), 1 Q.B. 178 at p. 184; *Clarke* v. *Holmes* (1862), 7 H. & N. 937; *Thomas* v. *Quartermaine* (1887), 18 Q.B.D. 685 at p. 690; *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 362; and *Williams* v. *Birmingham Battery and Metal Co.* (1899), 68 L.J., Q.B. 920.

The capstan was defective; the onus was on defendants to shew clearly that it was set up properly; it must not be assumed that proper appliances were supplied as we have shewn facts from which it could be inferred that proper appliances were not supplied: *Baxter* v. *Jones* (1903), 6 O.L.R. 360.

Argument

As to ill-treatment branch of case: the employees on the other ship were not fellow servants of plaintiff: see *The Petrel* (1893), P. 320.

Cassidy, in reply, cited *Howells* v. *Landore Steel Co.* (1874), L.R. 10 Q.B. 62; *Fairweather* v. *Owen Sound Quarry Co.* (1895), 26 Ont. 604, and Labatt, 2,203.

As to fellow servant: we were engaged in taking our injured servant to a place at which he could be treated; it was a common enterprise and all were engaged in it and were fellow servants with plaintiff.

Cur. adv. vult.

On the 15th April, 1905, the judgment of the Court was delivered by

HUNTER, C.J.: This was an action for personal injuries received by the plaintiff while acting as mate on the steamer Yukoner, owned by the defendant Company, the jury finding a general verdict for the plaintiff for $12,000 damages.

Judgment

The claim was two-fold. First, for the injuries caused by the bursting of the steam capstan; and second, for aggravation of the injuries owing to the unauthorized detention of the plaintiff on board the Yukoner which, after some delay caused by stranding, arrived at White Horse some days after the accident, the

plaintiff alleging that the defendants had undertaken to remove him to Dawson, and then that he had changed his mind and desired to go to White Horse.

After the Yukoner had stranded, and while the plaintiff and others were engaged in trying to get her off with the aid of the capstan, the capstan burst and injured the plaintiff's leg. Whether the jury considered that it burst by reason of some inherent defect, or by reason of its not having been set firmly on the deck, or because it was too roughly handled by jerking it, or because too much steam was turned on, or from some other cause, can only be conjectured, as they found a general verdict for the plaintiff, and declined to answer the special questions submitted. On the previous trip it had been used to assist the Mary Graff in getting off a bar, and had sprung a little from the deck but settled back in place. The capstan was then examined by the second engineer, who was in charge, and as a result of the examination he considered that nothing was required to be done. Shortly after the accident, the plaintiff was put on board a skiff and taken to the Bonanza King, another vessel belonging to the defendants, bound to Dawson, in pursuance of a request by the plaintiff to be sent to Dawson. The Bonanza King also grounded about a quarter of a mile below the Yukoner. The purser of the Yukoner then went on towards Selkirk to get a surgeon, and came across him on the Victorian, bound up-stream, and that vessel returned to Selkirk to procure the necessary instruments and reached the Bonanza King about nine hours after the accident. The plaintiff was transferred to the Victorian, which after getting off the Bonanza King went on up and released the Yukoner, to which the plaintiff was returned, and by her taken to White Horse because, as the Company alleged, he changed his mind and preferred to be taken to White Horse rather than Dawson, as he would be able to get outside more quickly if he desired. The plaintiff alleged on the other hand that he did not consent to go to White Horse, but always wished to go to Dawson, and that he was given opiates on board the Bonanza King and taken back without his consent to the Yukoner. Between the delays caused by the journey to White Horse and the plaintiff's refusal to have the leg amputated

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before he got to White Horse, the surgeon having informed him as soon as he examined it that such operation was necessary, his injuries were much aggravated, and in the end he was compelled to sustain a more serious operation than he otherwise would have been, while it is possible that if he had been taken to Dawson no operation would have been necessary as some surgeon there might have saved the limb.

Being a common law action, in order to succeed on the first branch of the claim, the plaintiff had, among other things, to prove that the Company was guilty of negligence in failing to keep the capstan in a good state of repair, as it would be impossible on the evidence to sustain a finding that it was originally insufficient, the capstan being of a well-known make and having been used two or three seasons without mishap until the Mary Graff incident, which took place on the second last trip of that season.

In order to make out a case of negligence by the Company it must appear either that the Company had a defective system which did not bring home notice of the defect to some person authorized to see to its proper repair, or if the system did provide for notice to such person, that he was notified and failed to have the defect remedied, and that he was not a co-employee but the representative of the Company.

Judgment

In my opinion, a finding that the system was defective could not be maintained, as it was sworn and not contradicted that engineers' logs were kept in which anything in the way of an accident or any useful information was entered and used in the form of trip reports to Sproat, the superintending engineer of the Company at White Horse; indeed it is obvious that the Company's steamers could not be managed without such a system, as a sound capstan is just as necessary as a rudder to vessels on the Yukon. In fact, no attempt was made by the plaintiff's counsel to challenge the sufficiency of the system. In any event, the second engineer, Vey, who was the engineer then in charge, testified, as already stated, that immediately after the Mary Graff incident he inspected the capstan and considered that everything was all right. But even assuming that this evidence was not to be believed, and that he did report the mat-

ter to Sproat, and that Sproat was negligent, I think it is quite clear that his negligence, if any, was not that of the Company, as he was not the representative of the Company, but an employee, and subject to orders equally with the captains and mates. And if Sproat was negligent, there was nothing to shew that he was incompetent to the knowledge of the Company; on the contrary, what evidence there was went to shew that he was competent, as he held an English Board of Trade certificate and had about fourteen years' experience with stern wheel steamers, and it is well settled that the master is not liable for the negligence of a competent servant at common law.

As to the second branch of the case, *i.e.*, the complaint based on the aggravation of his injuries, I think the plaintiff is again out of Court.

In his statement of claim the plaintiff says that after the accident the Company by the master undertook to carry him to Dawson, but not having done so it is liable in damages for the breach. The evidence in support of this allegation was that of the plaintiff himself. He said in answer to the captain's inquiry as to what was best to be done that he answered to get him to Dawson as quickly as he could and not to take him up-stream, and that the captain replied that was the best. I do not think on a fair construction of this evidence, assuming that it was an accurate statement of what took place, that the captain ever intended that he should obligate either himself or the Company to get the plaintiff to Dawson, or that any reasonable person could infer that he so intended; but rather that it was the expression of a natural desire on the part of a humane man to do all in his power to aid an injured member of his crew. If in such circumstances a Court or jury were to spell out a contractual obligation binding on either the captain or the Company, those in command would soon learn to be silent and inert in the presence of suffering. But even assuming that any jury could reasonably find that the captain had so expressed himself as to lead the plaintiff to believe that the Company was assuming responsibility for his carriage to Dawson, and to act on the belief, I think it is clear that for the captain to give such an undertaking would not be within the scope of his authority. There is

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no legal obligation on the owners of an inland vessel to provide medical assistance for the crew or to carry or forward a disabled seaman to any port which he may indicate, and for the captain to engage to do so on behalf of the owners is clearly to do something which is not within the ordinary course of his employment. If, however, the captain wilfully or wrongfully prevents the disabled seaman from getting medical assistance at such place as he desires he would no doubt be personally liable. But little stress, however, was laid by the learned counsel for the respondent on this alleged undertaking, and in my opinion, the plaintiff's case on this head amounts at most to a complaint that there was an unauthorized interference with his person on the part of the captain. For that, however, the Company is not liable, as such an act would be clearly outside the scope of the former's employment, and it cannot be contended that the telegram of Scharschmidt (assuming that he was the representative of the Company) amounted to a direction to the captain to take possession of the plaintiff's person against his will. If, however, this branch of the plaintiff's case can in any sense be regarded as grounded on any negligence on the part of the captain, then it is clear on the authority of *Hedley* v. *Pinkney & Sons Steamship Co.* (1892), 1 Q.B. 58, (1894), A.C. 222, that the Company is not liable.

Judgment

Finally, if we are to be guided by the principles underlying the common law doctrine of common employment, the complaint as to the injuries being aggravated by the delay in transport must fail as that was one of the risks incident to the service, the plaintiff being still an employee of the Company.

The plaintiff has no doubt, without any fault of his own, sustained grievous injuries through a series of untoward events, but not by reason of any person's act or default for which the Company is liable at common law.

The appeal should be allowed with costs here and below.

Appeal allowed.

LEE v. THE CROW'S NEST PASS COAL COMPANY, LIMITED.

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June 7.

LEE v. CROW'S NEST

Workmen's Compensation Act, B. C. Stat. 1902, Cap. 74, Schedule II., Clauses 2 and 4—Arbitrator appointed by Supreme Court Judge—Appeal.

No appeal lies from the decision of an arbitrator appointed by a Supreme Court Judge under clause 2 of the second schedule to the Workmen's Compensation Act, 1902.

APPEAL by the employers from the award of an arbitrator appointed by a Judge of the Supreme Court under clause 2 of the second schedule to the Workmen's Compensation Act, 1902. The arbitrator heard the case and made an award of $1,500 in favour of the applicant. Statement

The appeal came on for argument at Vancouver on 7th June, 1905, before IRVING, MARTIN and MORRISON, JJ., when

J. A. Macdonald, K.C., for the applicant, took the preliminary objection that no appeal lay, citing *Gibson* v. *Wormald & Jackson, Limited* (1904), 2 K.B. 40; Workmen's Compensation Cases, Vol. 6, p. 155. Argument

Davis, K.C., for the employers (appellants), *contra*.

Per curiam: No appeal lies, and the appeal is dismissed with costs. Judgment

DUFF, J.

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June 5.

RE SEA

RE ESTATE SARAH ELIZABETH SEA, DECEASED, INTESTATE.

Husband and wife—Estate of deceased wife—Liability of for funeral expenses—Duty of husband—Indemnity—Married Woman's Property Acts.

Held, that the husband is liable for the funeral expenses of his wife and cannot claim to be indemnified therefor out of her separate estate. *Constantinides* v. *Walsh* (1888), 15 N.E. 631, not followed.

Statement

SUMMARY application, by consent, for the opinion of the Court upon the question whether the husband or the estate of Sarah Elizabeth Sea, deceased, should bear the funeral expenses of the deceased. Argued before DUFF, J., at Victoria, on the 5th of June, 1905.

Argument

Gregory, for the estate, cited *Willeter* v. *Dobie* (1856), 2 K. & J. 647; *Bertie* v. *Lord Chesterfield* (1722), 9 Mod. 31; *Gregory* v. *Lockyer* (1821), 6 Madd. 90; *Jenkins* v. *Tucker* (1788), 1 H. Bl. 90.

Moresby, for the husband, cited *In re M'Myn* (1886), 33 Ch. D. 575; *Sharp* v. *Lush* (1879), 10 Ch. D. 468 at p. 472; Lush on Husband and Wife, 386.

Judgment

DUFF, J.: The husband's duty to bury his dead wife at his own charge is neither based upon nor incidental to his marital proprietary right. It is founded in the marriage relation itself. Its true correlative is his right to nominate the place of his wife's burial and to prescribe the manner of her obsequies.

The Married Woman's Property Acts do not expressly or by necessary implication deal with this obligation; nor do they affect the marriage status. I am therefore unable to agree with the view tentatively advanced by Mr. Lush in his book on "Husband and Wife" (which is also the view held by so distinguished a jurist as Mr. Justice Holmes respecting the effect of the parallel legislation of the State of Massachusetts), that the reduction of the *jus mariti* effected by these acts involves the

relief of the husband from the burden of this last act of piety and charity. Such an interpretation would, in my judgment, be legislative in its character. With respect to the weighty authority of Mr. Justice Holmes' opinion—one may observe that eminent American judges, in the application of legislative enactments, do permit themselves a latitude of interpretation which a Canadian Court would not feel itself free to exercise.

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Judgment

It is equally clear that there is no right of indemnity out of the wife's estate. Of course, where the wife's property, being under settlement, is in course of administration in a Court of Equity, for the benefit of her creditors, a creditor resorting to that Court to enforce his demand may be put upon terms to act fairly; and this, doubtless, is the explanation of the decision in *In re M'Myn* (1886), 33 Ch. D. 575.

The husband fails, and must pay the costs.

McLAGAN v. McLAGAN.

DUFF, J.
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McLAGAN v. McLAGAN

Probate—Affidavit verifying indorsement on writ—Citation—Service of—Curative powers of Order LXX., r. 1—Application of—Practice—Costs.

Where, in an action brought for the purpose of revoking a probate, the rule requiring the filing of an affidavit verifying the indorsement on the writ has not been complied with, the proceeding should not be invalidated, but the curative provisions of Order LXX., r. 1 ought to be applied.

Where the rule requiring the issue of a citation calling on the defendant to produce the probate has not been complied with, proceedings will be stayed until this has been done.

APPLICATION for an order setting aside the writ of summons in an action brought for the purpose of revoking the will of J. C. McLagan, deceased, argued at Vancouver, before DUFF, J., on June 15th, 1905.

Statement

Macdonell, for plaintiff.
Griffin, for defendant.

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MCLAGAN v. MCLAGAN

DUFF, J.: This is an application for an order setting aside the writ of summons on two grounds: First, that the rule requiring (in probate actions) the filing of an affidavit verifying the indorsement on the writ of summons has not been complied with; and secondly, that the plaintiff has not complied with the rule of practice which requires that either prior to or simultaneously with the issue of the writ in an action brought for the purpose of revoking a probate, a citation shall be issued calling upon the person who has the probate to bring it in.

With regard to the first ground, I intimated during the argument that, assuming the affidavit in this case to be insufficient, in my judgment it is not a case in which the proceeding should be invalidated by the order of the Court, but that the curative provisions of Order LXX., r. 1, ought to be applied.

Judgment

With regard to the other objection, I have come to the conclusion that the rule of practice invoked is still in force here. I think that the rule was established to serve a public purpose. I am not able to see that it is in any way required for the protection of the defendant. The enforcement of it prevents any improper use being made of the letters of administration or the probate by the person in possession of them while an action claiming revocation is pending; and that I should think is the object of the rule. However, I am satisfied that non-compliance has not in this case caused any inconvenience, and I do not think the writ should be set aside; but the action should not be proceeded with until the rule has been complied with by the issue of a citation calling on the defendant to produce the probate in question. There will be an order staying the proceedings until that has been done, and the plaintiff must pay the costs.

MELLOR v. MELLOR.

MARTIN, J.

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July 31.

MELLOR v. MELLOR

Husband and wife—Interim alimony—Jurisdiction of Court to grant—Order LXXI., r. 1—Validity of—Supreme Court Rules, 1890—Statutory Validation of.

The Court has jurisdiction to grant interim alimony pending an action for divorce.

APPLICATION for alimony by the wife, who is living apart from her husband and supporting a family of three children, argued before MARTIN, J., at Victoria, on 31st July, 1905. Statement

A. E. McPhillips, K.C., in support of the application, stated that in accordance with the practice, it was not necessary in an application for interim alimony to enter upon the merits, the marriage being admitted.

Eberts, K.C., for the husband, took the preliminary objection that there was no jurisdiction in the Court to decree alimony, save ancillary to proceedings for divorce, but that the action now brought was for alimony simply. That no such jurisdiction was exercised in England, and our law was the same as that of England. Whilst it is true that Order LXXI. of the Supreme Court Rules, 1890, refers to the granting of alimony, the rule is *ultra vires* as proposing a substantive enactment. The statutory confirmation of the Supreme Court Rules, 1890, was not a confirmation of other than Rules regulating procedure and practice, and that if they are in excess of procedure and practice then to the extent they are they are inoperative.

Argument

McPhillips, in reply, cited *Worthington* v. *Kenworthy* (July 18, 1902), unreported, where DRAKE, J., held that probate duty was collectable only by reason of the statutory validation of the Rules. That it is generally acted upon and might be said to be admitted that the Supreme Court Rules, 1890, have the force of statute law, and no question could now be raised in view of their validation by statute, even if previously they contained any *ultra vires* provisions. The very rule itself demonstrates the

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plain intention to create an additional remedy in British Columbia, the words being, "1. Independently of any of the provisions of Order LXVIII. (Divorce and Matrimonial Causes) alimony may be recovered in an action brought and prosecuted in the ordinary manner," etc. That the framers of the Rules had undoubtedly taken the law from the Province of Ontario, as Order LXXI., r. 1, is in the same terms as the Ontario Rule. He also cited *Severn* v. *Severn* (1852), 3 Gr. 431.

MARTIN, J.: In view of section 109, which validates the Rules of 1890, I do not think, after all these years, that I should declare against the jurisdiction. The language of the special part relating to alimony is very clear and plain, and I think the legislation of 1904 must be held to affirm and give affect to it, and I leave it to the Full Court, if necessary, to take a contrary view. The objection must, therefore, be overruled. The matter is important, and it would be better for a court of appeal to disturb the existing practice, if it is to be disturbed.

Judgment

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WALLACE v. FLEWIN.

Statute—Construction of—Water Clauses Consolidation Act, R S.B.C. 1897, Cap. 190, Sec. 36—Appeal from Gold Commissioner—Proper Registry—Change of venue—Supreme Court Act, 1904, Cap. 15, Sec. 35—Practice.

Held, the right of appeal given by section 36 of the Water Clauses Consolidation Act is in effect a right to a re-trial before a judge of the County Court or a judge of the Supreme Court; and the appropriate method of dealing with questions of fact on that appeal is by examination and cross-examination of witnesses *viva voce*.

Ross v. *Thompson* (1903), 10 B.C. 177, followed.

APPEAL from the decision of the Gold Commissioner at Port Simpson, argued before DUFF, J., at Victoria in June, 1905.

Statement

Flewin, as Gold Commissioner, issued a water record to Keith and Hamilton, and under section 36 of the Water Clauses Con-

solidation Act, Wallace applied to cancel this record. The petition was filed in the Vancouver Registry, but before the petition was set down for hearing, he applied, *ex parte*, to the Chief Justice in Victoria for a change of venue from Vancouver to Victoria. The Chief Justice made the order.

On the day set for the hearing

Bowser, K. C., for Keith and Hamilton, moved to set aside the *ex parte* order on the following grounds: that under sub-section (*d.*) of section 36, as the petition had been originally filed in the Vancouver Registry, the hearing must take place in that county, and that there was no jurisdiction in the Court, or the Chief Justice, to change the venue; but for section 36 there was no jurisdiction in the Supreme Court at all, and that that section laid down the procedure; that it was an exhaustive code so far as the hearing of the appeal was concerned, and that the statute was explicit that the hearing must take place in the county in which such petition is filed; that under section 35 of the Supreme Court Act, 1904 (Cap. 15), the *ex parte* application to change the venue should have been made at Vancouver and the order made thereon entered there.

Bodwell, K. C. (*Oliver*, with him), for Wallace: So far as the application was *ex parte*, there was no reason that it should not be, because at that time none of the respondents were properly before the Court. Flewin had not answered at all; the proper Keith had not then been served, and Hamilton had not appeared, having filed his answer at Vancouver, whereas he ought to have served it at the place for service mentioned in the indorsement, and if he appeared at all, he appeared a day late. In any event, under sub-section (*e.*) there was a right to apply *ex parte* whether the respondents appeared or not. Balance of convenience in our favour, even supposing Hamilton had to be considered. The power of changing venue is a part of the Court's inherent procedure. *Itchin Bridge Co.* v. *Local Board of Health of Southampton* (1857), 27 L.J., Q.B. 128. That the procedure in case of appeal provided by section 36 was incomplete, and that, in so far as it was incomplete the inherent procedure of the Court governed.

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DUFF, J.: In giving judgment on this application I am expressing the views of both the Chief Justice and myself.

The decision in *Ross* v. *Thompson* (1903), 10 B.C. 177, settles this; namely, that the right of appeal given by section 36 of the Water Clauses Consolidation Act, is in effect a right to have the question disposed of by the officer appealed from re-tried before a judge of the County Court or before a judge of the Supreme Court; and further, that the appropriate method of dealing with questions of fact on that appeal is by the examination and cross-examination of witnesses *viva voce.*

Now, the provisions of that section must be read in the light of that decision.

The contention made by Mr. *Bowser* is that the section referred to provides an exhaustive code of procedure. I am unable to agree. One sees at once, if one examines the section, that such a construction would lead to situations which one cannot suppose the Legislature contemplated. For example, there is a power conferred upon the Gold Commissioner to summon and examine witnesses *viva voce;* but under section 36 no such power is given to the Court of Appeal. But, as in accordance with the decision I have mentioned, the appropriate method by which before the Court of Appeal questions of fact are to be dealt with is the examination and cross-examination of witnesses *viva voce*, it obviously follows that unless the Court have some power of summoning witnesses the section would be entirely nugatory insofar as it professes to give an appeal on questions of fact.

Judgment

One need not refer to all the difficulties arising on the construction proposed, but one more may be mentioned. Subsection (*b.*) provides that "the petition shall be intituled in the matter of this Act and of the particular decision appealed from, and shall name as respondents persons who, before the Commissioner, or Gold Commissioner were adverse in point of interest to appellant, and the Commissioner, or Gold Commissioner, and shall along with the affidavit verifying the same, be filed in the proper registry within the one calendar month aforesaid." This is an ambiguous provision. For the moment

I am not prepared to say what the phrase "proper registry" means. But on any admissible interpretation of that phrase the construction contended for by the respondent here would go far to defeat the plain object of the section. Given that "proper registry" means the registry of the County, or the Judicial District in which is situate the office of the Gold Commissioner from whose decision the appeal is taken—and it then occurs to one at once that (unless there be some power in the Court to change the place of hearing), the petitioner having filed his petition in that registry, might in many cases have to wait for a very long period indeed before the appeal could be heard; in other words, it would lead in many cases to that delay of justice which is so often a denial of justice. On the other hand, assume that "proper registry" means the registry in which the petition ought to be filed, in accordance with the rules of the Supreme Court for the time being with regard to the commencement of actions—the effect of the construction I am considering would be, that the petitioner would be entitled to file his notice in any registry in the Province; then if the Court were not competent to change the place of hearing, the petitioner would have it in his power to drag respondents from one end of the Province to the other, and over that course of conduct the Court would have no control.

I conclude that the narrow construction contended for by Mr. *Bowser* is not the true construction. I think that the reasonable view to take of the section is that—the Supreme Court having once become seised of the matter—all the powers of the Supreme Court, at all events all the inherent powers of the Supreme Court, which may be necessary to attain the object of the petition, namely, the bringing of the appeal to an effectual hearing and disposition, may be exercised. The language of James, L.J., read by Mr. *Bodwell* from his judgment in *Dale's Case* (1881), 6 Q.B.D. 376 at p. 450, seems to be exactly applicable. "It was strongly urged that this was a new jurisdiction and a new procedure. According to my view of the case, that is not material, because if a new jurisdiction is given to an existing Court—that is to say, a jurisdiction to deal with some new matters in a different mode and with a different procedure—if

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that jurisdiction be so given to a well-known court, with well-known modes of procedure, with well-known modes of enforcing its orders, it must, unless the contrary be expressly or plainly implied, be given to that court to be exercised according to its general inherent powers of dealing with the matters which are within its cognizance."

The case cited, *The Itchin Bridge Co.* v. *The Local Board of Health of Southampton* (1857), 27 L.J., Q.B. 128, is authority, if authority be needed, that the control of the time and place of the trial or hearing of actions or proceedings pending before the court is one of the inherent powers of the court.

Now, with respect to the further point raised by Mr. *Bowser*—that the petition having been filed in Vancouver, the order of the Chief Justice ought to be set aside because the application could only be made there. It has been held that a summons must be heard at the place where the registry is situated in which the action or proceeding is domiciled; that is based on section 35 of the Supreme Court Act, which provides that "a writ of summons for the commencement of an action in the Court shall be issued by a District Registrar when thereunto required, and in such action and in any cause or matter pending in his registry all such proceedings as may and ought to be taken by the respective parties thereto, and as are authorized to be taken in any action, cause, or matter of a like nature by Rules of Court, shall be taken and recorded in the registry out of which the writ of summons may have been issued."

Judgment

I am not prepared to say that, if the matter were *res integra*, I should agree with the view that the hearing of a summons in Chambers is a proceeding in a registry. But assuming that to be so, it certainly cannot be said, in my judgment, that the hearing of an application to this Court is a proceeding in a registry. In the case of *Raser* v. *McQuade* (1904), 11 B.C. 169, the contention was advanced that the action having been commenced, and the trial having taken place in Victoria, and notice of appeal having been given for a sitting of the Full Court at Victoria, the Full Court sitting at Vancouver had no jurisdiction to hear the appeal (the suggestion being that the hearing of an appeal by

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the Full Court was a proceeding in a registry within the meaning of section 35, *supra*). That was, of course, the *reductio ad absurdum* of the proposition that a hearing before the court is a proceeding in a registry; and it was held not to be so. In this respect I see no distinction in principle between the hearing of an appeal before the Full Court and the hearing of a motion to the court constituted by a single judge.

The application is dismissed.

Application dismissed.

CAPITAL CITY CANNING AND PACKING COMPANY, LIMITED v. ANGLO-BRITISH COLUMBIA PACKING COMPANY, LIMITED.

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Territorial waters—Jurisdiction of Province over—Bed of the sea below low water mark—Right of property in—Foreshore leases for fishing purposes—Authority of Chief Commissioner of Lands and Works to grant—Land Act Amendment Act, 1901, Cap. 30, Sec. 41—Scope of—"Crown lands"—Meaning of—British Columbia Fisheries Act, 1901—Injunction.

Held, that the provisions of section 41 of the Land Act, as enacted in 1901, do not confer on the Chief Commissioner of Lands and Works authority to grant leases of the bed of the sea in territorial waters.

APPLICATION by plaintiffs for an injunction pending the trial of the action, argued at Victoria on the 4th of August, 1905, before DUFF, J.

Plaintiffs and defendants are both the holders of certain trap fishing leases granted by the Province, and fishing licenses granted by the Dominion, entitling them to erect and operate traps for the purpose of taking salmon in and upon those parcels or tracts of land in the district of Renfrew, and more particularly described as those parts of the foreshore and tidal lands fronting on sections 78 and 79, Renfrew District, together with the terri-

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torial waters of the Province of British Columbia appurtenant to the said described parcels or tracts of land.

The plaintiffs' claim is set out in the indorsement on the writ, which follows:

The plaintiffs' claim is against the defendant:

1. For a declaration that the plaintiff has vested in it and is entitled to a sole and exclusive salmon fishery and a sole and exclusive right to take salmon in traps in and upon that certain parcel or tract of land and appurtenant territorial water of the Province of British Columbia situate, lying and being in the District of Renfrew, in the Province of British Columbia, demised by Foreshore Lease No. 90 and more particularly known and described as that part of the foreshore and tidal lands fronting on section 79, Renfrew District, aforesaid, Strait of San Juan de Fuca and comprised within said Foreshore Lease No. 90, together with the territorial waters of the Province of British Columbia appurtenant to the said described parcel or tract of land:

2. For $50,000 damages for breaking and entering the plaintiff's said sole and exclusive fishery and erecting, maintaining and operating a fish trap therein and fishing therein and chasing, disturbing and destroying salmon of the fishery:

3. For a declaration that all salmon caught and taken by the defendant in the fish trap of the defendant erected in the said sole and exclusive fishery of the plaintiff were and are the property of the plaintiff, and were wrongfully caught and taken by the defendant, and that the plaintiff is entitled to a return thereof or to the payment therefor by the defendant to the plaintiff of the value thereof:

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4. For an account of the number and value of all salmon caught and taken by the defendant in the fish trap of the defendant erected in the said sole and exclusive fishery of the plaintiff and for the return of the said salmon or payment by the defendant of the value thereof:

5. For a mandatory injunction ordering and directing the defendant to pull down, take away and remove all the fish trap of the defendant erected in the said sole and exclusive fishery of the plaintiff and to pull down, take away and remove all erections and materials in connection with the said fish trap: and

6. For an injunction.

R. T. Elliott, for plaintiffs: As to the territorial extent of the Province of British Columbia to the centre line of the Strait of Juan de Fuca: Imperial statute 29 & 30 Vict., Cap. 67, Secs. 7 and 8; Treaty of Washington, 1871, Article 34, from Statutes of Canada, 1871, p. cxxi. As to the lease from the Chief Commissioner of Lands and Works, and possession thereunder, constituting a title good against a trespasser: *Glenwood Lumber*

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Company v. *Phillips* (1904), A.C. 405. As to the right of action in respect of trespass on a right of fishery: *Holford* v. *Bailey* (1849), 13 Jur. 278. As to the right to an injunction; and as to the jurisdiction of the Court over territorial waters included within the limits of a Province by an Imperial statute: *Direct United States Cable Company* v. *Anglo-American Telegraph Company* (1877), 2 App. Cas. 394. And on the further argument: As to the power of the Chief Commissioner to grant lease: Land Act Amendment Act, 1901. As to the right to erect traps or fixed engines: Encyclopædia of the Laws of England, Vol. V., p. 361; Moore's Foreshore, 3rd Ed., pp. 725 (note u.); 726 (note z.); 734 and 742-3.

As to the rights of the owner of a right of fishery in respect of the fish: Moore on Fisheries, 168; *Whelan* v. *Hewson* (1871), Ir. R. 6 C.L. 283; *Fitzgerald* v. *Fairbank* (1897), 2 Ch. 96; Coulson and Forbes, 2nd Ed., pp. 360, 361-2 and *Neill* v. *Duke of Devonshire* (1882), 8 App. Cas. 135.

[DUFF, J., referred to *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475 and to *Kellogg* v. *Ingersoll* (1806), 2 Mass. 96 at p. 101, where Parsons, C.J., says: "If the public town-road, described by the plaintiff in his assignment, is no legal encumbrance of the land sold, the breach is not well assigned. But the Court are well satisfied that the road, as there described, is an encumbrance of the land sold. It is legal obstruction to the purchaser to exercise that dominion over the land, to which the lawful owner is entitled."]

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Luxton, K.C., for defendants: The Land Act, including amendments of 1899 and 1901, does not authorize the Chief Commissioner of Lands and Works to lease any foreshore rights. The Act speaks of land. Fishery rights (as distinguished from land) are not within the scope of the Land Act—the Act contemplates dealings with land which can be entered upon, surveyed in the ordinary way, and occupied.

But if the Chief Commissioner of Lands and Works has such power, and the lease confers any fishing rights, it is a lease only of rights of fishing within the limits of the land granted.

The plaintiffs' lease is, at most, of the foreshore only, and not of any fishing rights outside the foreshore.

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Even if the plaintiffs have any right under the Land Act, such Act contemplates lines drawn astronomically north and south, which would place the defendants' traps outside any limits the plaintiffs can reasonably claim.

To draw the boundary lines of a lease, as plaintiffs suggest, is contrary to the idea of the Land Act, not being north and south, and would moreover frustrate the whole scheme of fishery leases, for the lines might run almost parallel with the coast, and claim other sites as appurtenant to section 79.

If the lease confers any right of fishing, it does not give exclusive right: *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475 and *Centre Star* v. *Rossland* (1903), 9 B.C. 403. Lands which may be leased under the Land Act are lands of the Province held by the Crown without incumbrance. Incumbrance here includes the right of the public to fish; it is difficult to see what "incumbrance" means, unless it was intended to refer to rights of that nature. Grant of foreshore does not give right of fishery over it. "Such rights" of fishing as the Crown has mentioned in the lease, means right in common with public, *i.e.*, the right to plaintiffs in common with public to fish in *locus in quo*. The public have right of fishing in the sea. The public right cannot now (since Magna Charta) be excluded by any lease or grant. A grantee from Crown takes subject to public right. Grants by the Crown are construed favourably to grantor.

Argument

The law of Scotland as to salmon fishing in sea, and case of *Gammell* v. *Commissioners of Woods and Forests, &c.* (1859), 3 Macq. H.L. 419, have no application. It is expressly stated there in the House of Lords and by the judges in Scotland to whom referred below, that the case was to be decided according to the laws of Scotland; and *Lord Advocate* v. *Lord Lovat* (1880), 5 App. Cas. 273, shews same law in Scotland applies to inland rivers.

As to *Glenwood Lumber Company* v. *Phillips* (1904), A.C. 405, mentioned by plaintiffs' counsel, the defendant was a wrongdoer without claim of title—we claim title under lease from Province of the foreshore of 78, and licence from the Dominion.

In the Irish case referred to by plaintiffs' counsel, *Whelan* v. *Hewson* (1871), Ir. R. 6 C.L. 283, the defendant had no licence or right to fish, he did not comply with the Act or regulations.

In any event, this is not a case for an interlocutory injunction, because the right is not clear, and if it is, the breach is doubtful, and the defendants are in actual possession of the trap complained of: Kerr on Injunctions, p. 70 and cases there cited.

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DUFF, J.: The plaintiff's ability to establish either an exclusive fishery in the waters in which the defendant is fishing or an exclusive right to maintain salmon traps on the *situs* where the erection complained of is placed, is a condition of its success on this application: *Duke of Sutherland* v. *Heathcote* (1892), 1 Ch. 475. Exclusive fishery there is plainly none, and the alternative claim fails also in my opinion.

This claim is based upon a grant made by the Chief Commissioner of Lands and Works, in the name of the Crown, which contains the following language material here: "His Majesty, under and by virtue of all powers Him thereunto enabling, doth hereby demise unto the said J. E. Kinsman, his executors, administrators and assigns, all the estate, right, title and interest of His Majesty the King, in the right of the Province of British Columbia in and to that piece of land situate, lying and being in Renfrew District, and being composed of that part of the foreshore and tidal land fronting on section 79, Strait of Juan de Fuca, which said foreshore follows the sinuosities of the coast, and which is marked at each end by a post numbered —, which demised premises are more particularly indicated on the plan hereto annexed and thereon coloured red, together with such rights to take salmon in traps in the territorial waters appurtenant thereto as may be vested in His Majesty in the right of the Province of British Columbia as aforesaid."

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I will assume that this language (to use a theologian's phrase) is patient of a construction supporting the plaintiff's claim to an exclusive licence to erect fish traps within an area embracing the site of the defendant's trap. I conceive that it is at least as easily read as granting a non-exclusive licence only. As an ambiguous grant from the Crown, therefore, it should be construed in the sense least favourable to the grantee, unless the relevant circumstances are coercive against such a construction.

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The circumstances here favour the narrow rather than the liberal construction.

Further, the construction proposed by the plaintiff is, I think, to be rejected on the ground that no authority is vested in the Chief Commissioner of Lands and Works empowering him to grant for the purpose of trap fishing any exclusive right of occupation or user of the bed of the sea below low water mark. It is not disputed that the source of this authority must be found (if it exist) in some legislative enactment; but it is contended that the Legislature has in section 41 of the Land Act (as amended in 1901) conferred upon the Chief Commissioner of Lands and Works the power to dispose for such purposes of that part of the public domain.

The section in question is as follows:

"41. (1) Leases (containing such covenants and conditions as may be thought advisable) of Crown lands may be granted by the Chief Commissioner of Lands and Works for the following purposes:

"(a) For the purpose of cutting hay thereon for a term of not exceeding ten years;

"(b) For any purpose whatsoever, except cutting hay as aforesaid, for a term not exceeding twenty-one years."

Read alone, apart from the general body of legislation affecting the public lands, this section seems to confer powers ranging over every part of the territorial possessions of the Province; and moreover, it places no restriction upon the Chief Commissioner of Lands and Works respecting the conditions to be exacted from lessees, either as to the terms of holding, or the mode of user of the subjects of the leases granted under it.

DUFF, J.

But it is not to be supposed that effect is given to the legislative purpose by treating this section as displacing the elaborate statutory provisions specially relating to the acquisition of title to coal, timber and the base metals; and for a similar reason I think one should not conclude that when enacting this section the Legislature was addressing itself to the subject of fisheries. In 1901, in the same session in which this section I am now discussing was enacted, the Legislature passed an Act (the British Columbia Fisheries Act, 1901), dealing fully with the subject of the fisheries, and authorizing the Lieutenant-Governor in Council to establish a Board of Fishery Commissioners, with

power to grant leases for fishing purposes of Crown lands covered by water. That Act, it is true, provided that it should come into force only after proclamation to that effect by the Lieutenant-Governor in Council. But such a proclamation could not affect the construction of section 41 of the Land Act. Nor if that section confers on the Chief Commissioner of Lands and Works the authority here contended for, could such a proclamation deprive him of that authority. I do not think it was the intention of the Legislature that such powers should co-exist with the special powers conferred by the British Columbia Fisheries Act, 1901, on the Board of Fishery Commissioners.

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Moreover, in my opinion, the bed of the sea below low water mark is not within the scope of the Land Act. Not only its general tenor, but many special provisions of the Act also, support this view; these I do not discuss in detail, because I think that the definition of Crown lands furnished by the interpretation clause is conclusive.

By that clause it is enacted that, "'Crown lands' shall mean all lands of this Province held by the Crown without incumbrance." The site of the defendant's trap is not, in my opinion, within this definition. It was not disputed, and I assume for the purpose of this application, that this site is *intra fauces terræ*. The bed of the sea in such places is part of the territorial possessions of the Crown; and—except in the case of public harbours, within the disposition of the Provincial Legislature—is comprehended within the terms of the description, "lands of this Province held by the Crown." But this ownership of the soil, is subject to the servitudes arising from the public rights of navigation and fishing and the rights concomitant with and subsidiary to them; and I apprehend that property held under a title so weighted, cannot (in the ordinary meaning of the words or within any signification fairly to be imputed to them as they stand in the clause I am discussing) be said to fall within the qualification expressed by the phrase, "held without incumbrance."

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For my present purpose it is sufficient to consider the public right of navigation. "The bed of all navigable rivers where the tide flows and reflows, and of all estuaries or arms of the sea, is

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by law vested in the Crown. But this ownership of the Crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subjects of the realm. The right to anchor is a necessary part of the right of navigation, because it is essential for the full enjoyment of that right. If the Crown therefore grants part of the bed or soil of an estuary or navigable river, the grantee takes subject to the public right, and he cannot in respect of his ownership of the soil make any claim or demand, even if it be expressly granted to him, which in any way interferes with the enjoyment of the public right": *Gann* v. *Free Fishers of Whitstable* (1865), 11 H.L. Cas. 192 at pp. 207-8; *per* Lord Westbury.

DUFF, J.

This public right is subject to the control of the Parliament of Canada only. It constitutes a burden on the title of the Crown or the Crown's grantee which it is not in the power of the Crown itself or of the Legislature of the Province to remove or lessen. It is, therefore, in my judgment, an incumbrance on that title; and it follows that the *locus* in question in this action is not subject to disposition under the Land Act.

Application dismissed.

THE CORPORATION OF THE CITY OF VICTORIA v. MESTON.

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Municipal by-law—Alteration of effect of by Council—Local improvement—Assessment—Extension of time, by resolution, for payment—Interest on overdue instalment—"Cost" defined.

A by-law is not an agreement, but a law binding on all persons to whom it applies, whether they care to be bound by it or not.

A resolution can no more alter a by-law than it can alter a statute.

Decision of HUNTER, C.J., reversed.

APPEAL from the judgment of HUNTER, C.J., in an action tried before him at Victoria on the 15th of July, 1903.

In 1892, the Municipal Council of the City of Victoria, under the provisions of the Municipal Act, 1892, passed certain by-laws for the extension of Broad Street, and assessed the adjacent property with the cost of the proposed improvements. The total sum required, including the amount necessary to form a sinking fund and interest, was $18,000, and in respect of this the proportionate share assessed against the defendant's property was $1,040, to be paid in ten annual instalments of $104.

In 1899, the Municipal Act was amended so as to permit the City to contribute one-third of this cost, and subsequently, in 1902, by a further amendment, this authority was increased to a contribution of two-thirds of the cost of this particular improvement. By the terms of the Broad Street Assessment Relief By-law, it was provided that "all persons in class D (of whom defendant was one) who should on or before the 10th of November, pay to the City such sum as would, with the amounts already paid, make up one-half of the total assessment, as provided by the original by-law . . . ," should be excused from making any further payment. According to the computation made under this arrangement, the balance due by defendant to the City was $540. He neglected to avail himself of this opportunity, and therefore the City claimed the benefit of a clause in the said last mentioned by-law which made payment of

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the reduced amount by the 10th of November of the essence of the by-law, otherwise the total assessment remained in force. Defendant contended that the time of payment was extended, by virtue of two certain resolutions of the Council, from the 10th of November to the 1st of December, on which last mentioned date he tendered the sum of $540 to the City Treasurer, who refused it.

The rest of the facts are stated in the reasons for judgment.

W. J. Taylor, K.C. (*Bradburn*, with him), for the plaintiff Corporation.

Bodwell, K.C., and *Helmcken, K.C.*, for defendant.

29th July, 1903.

HUNTER, C.J.: I think there is no doubt that had the defendant tendered the $540 on or before the 10th of November, 1902, the City Treasurer could not have objected to the tender as insufficient, and that he would have had no right to exact any interest. Possibly this was not the intention of the by-law but that such is its meaning is, I think, not open to doubt.

A difficulty arises, however, from the fact that the tender was not made until the first day of December. A report of the Streets, Bridges and Sewers Committee on November 5th, that the time of payment be extended till November 28th, was received and adopted by the City Council, and on November 24th another report of the Committee that the owners "be required to pay the amounts now due on or before the first day of December next," was received and adopted by the Council, and it is contended that this was a competent extension of time for payment especially as several overdue payments from the owners were accepted by the City Treasurer after November 10th.

HUNTER, C.J.

It was not denied that the intention of the Committee and of the Council was to extend the time, and although the language is not very apt or explicit I think it may be taken to be sufficient for the purpose.

The question then is had the Council power to extend the time by resolution? This depends on the question as to whether or not the fixing of the time was an essential part of the by-

law. Now all that the enabling enactment (1899, Cap. 53, Sec. 23, amended by 1902, Cap. 52, Sec. 63) requires to be done by by-law is the act of contribution by the Corporation and the fixing of the amount, and there was no necessity for stipulating any time for payment of the other portion by the owners, for the purpose, as Mr. *Taylor* argued, of ascertaining the amount to be contributed, as this became ascertainable *instanter* by reference to the schedule in section 3 of the former by-law.

All that the City was empowered by this legislation to do was to forego up to two-thirds any portion of the original debt, and so far as I can see this legislation did not empower the corporation to make the contribution conditional on the time of payment being changed. At any rate, even if it was competent to the municipality or expedient to stipulate for the payment of the balance by a certain day, it was not necessary to do so in the by-law, and it could have been done just as well by resolution, and even if it were necessary I see nothing to prevent the time named in the by-law being extended by a resolution.

The powers of the Corporation are exercisable in different modes; some by the Mayor, others by the Mayor and Clerk; some by by-law, and others again by resolution; and I do not think that any rule can be deduced from the Act that in cases unprovided for any one mode is universally to be adopted to the exclusion of the others. I do not think that in the case of debts due to the Corporation it can be laid down as an invariable rule that the only way in which the time for payment can be extended is by the passage of a by-law. No doubt a resolution granting an extension of time which would practically amount to an exoneration from the debt might be carried at a Council meeting at which only a bare quorum was present and without proper consideration, but unreasonable resolutions may be quashed as well as unreasonable by-laws.

HUNTER, C.J.

There being nothing then in any of the Acts to require an extension of time for the payment of debts to be done by by-law rather than by resolution, I think in this case it was competently done by resolution. That being so, the City Treasurer was in error in refusing to accept the amount tendered, and the action must be dismissed with costs, the moneys in Court, less such costs, to be paid over to the Treasurer.

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The appeal was argued at Victoria on the 26th of June, 1905, before IRVING, MARTIN and MORRISON, JJ.

W. J. Taylor, K.C. (*Mason*, with him), for plaintiffs, appellants.

Bodwell, K.C., and *Helmcken, K.C.*, for defendant, respondent.

Cur. adv. vult.

20th July, 1905.

The judgment of the Court was delivered by

IRVING, J.: The Council in 1892 pursuant to the powers conferred by section 273 of the Municipal Act, 1892, passed by-laws for the prolongation of Broad street from Pandora street to Cormorant street, and in pursuance of the system then in force with reference to the assessment for local improvements, assessed the adjacent property with the whole cost of the proposed improvements.

The share in proportion assessed against the defendant's property was $1,040, or ten annual instalments of $104. The total sum required including the amount necessary to form a sinking fund and interest was $18,000.

It was urged by Mr. *Bodwell* that the by-law was bad in that the sum of $18,000 (1.) included the price of a lot required for the prolongation of the street; and (2.) interest to accrue due. These two items he said were not fairly included within the word "cost."

Judgment

The learned Chief Justice did not deal with these subjects, and I presume from his silence that they found no favour with him.

Referring to Biggar, 11th Ed., p. 910, I find the following note:

"The term costs includes the contract price for work, probably also engineering expenses connected therewith, the cost of advertising and serving notices, the expense of the issue of debentures, any discount on their sale, and the interest upon any loans obtained thereunder."

In the case of prolonging a street it seems to me that the word "costs" would properly include the purchase of the land required for the prolongation.

In 1899 the Municipal Act was amended so as to permit the City to contribute one-third, afterwards increased in 1902 to

two-thirds, of the cost of this particular improvement. The section is as follows:

> The Council of the City of Victoria shall have power by by-law (which need not be submitted to a vote for the assent of the electors) to contribute any amount not exceeding one-third of the cost of the improvements mentioned in the Broad Street Local Improvement Assessment By-law, 1892, by re-paying such proportion to the persons who have made payments under said by-law, or their personal representatives, and by deducting such proportion from the instalments remaining to be paid under said by-law."

In July, 1902, the Council purporting to act under the powers conferred on them by the above section, passed a by-law called the Broad Street Assessment Relief By-law by which they declared that "all persons in class D. (of whom Mr. Meston was one), who should on or before the 10th of November pay to the City such a sum as would, with the amounts already paid, make up one-half of the total assessment as provided by the original by-law in the last column of the schedule in section 3 thereof" (by reason of the omission to provide for the payment of interest this sum was $540 only), should be excused from making any further payment.

Now, if Mr. Meston had then and there paid the sum of $540, I am inclined to think with the learned Chief Justice that the City would not have any right to exact from him, as they now propose to do, any interest; but that question does not now arise, as he did not pay the sum of $540, or any other sum before the 10th of November.

The consequence was that another clause of the by-law came into operation, which clause provides that the "date of payment named, that is, the 10th of November, 1902, is of the essence of this by-law, and should the amounts directed not be paid on the day named the right of the Corporation to recover the total assessment shall remain in full force and virtue as if this by-law had not passed."

As Mr. Meston neglected to take advantage of the condition, I have arrived at the conclusion that he must pay the full amount of the assessment.

The contention he raised before the learned Chief Justice was that the time was extended from the 10th of November to the

HUNTER, C.J.
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CITY OF VICTORIA v. MESTON

Judgment

1st of December by virtue of the two resolutions of the Council, and that on the 1st of December he did pay, or at any rate tendered, to the City Treasurer the sum of $540.

The learned Chief Justice came to the conclusion that the extension of the time by the two resolutions in question was all sufficient to alter the by-law. As I understand it, his judgment depends upon the question as to whether or not the fixing of time was an essential part of the by-law. It seems to me that is not the point, but the question is this, the time having been fixed by the by-law, can it now be changed by resolution? No authority was cited to us on this point, and I presume no authority can be found. A resolution can no more alter a by-law than it can alter a statute. A by-law is not an agreement but a law binding on all persons to whom it applies whether they care to be bound by it or not: *per* Lindley, L.J., in *London Association of Ship Owners and Brokers* v. *London and India Docks Joint Committee* (1892), 3 Ch. 242 at p. 252. "The by-law has the same effect within its limits and with respect to the persons upon whom it lawfully operates as an Act of Parliament has upon the subjects at large:" Lord Abinger, in *Hopkins* v. *Mayor, &c., of Swansea* (1839), 4 M. & W. 621 at p. 640.

REX v. NEIDERSTADT.

IRVING, J.

1905

Oct. 12.

REX v. NEIDERSTADT

Certiorari—Inland Revenue Act, R.S.C. 1886, Cap. 34—Liquor License Act, 1900, B. C. Stat., Cap. 18—B.N.A. Act, Sec. 92, Sub-Sec. 9—Constitutional law—Dominion and Provincial licences.

A brewer, although holding a licence under the Inland Revenue Act to carry on business as such, may not sell beer within the Province unless he has first obtained a licence under the Provincial Liquor Licence Act.

APPLICATION for a writ of *certiorari* to remove into the Supreme Court a conviction made by J. F. Armstrong, Stipendiary Magistrate, at Cranbrook, whereby the applicant, Neiderstadt, was convicted of an offence under the Liquor Licence Act, 1900; argued at Nelson, before IRVING, J., on the 5th of October, 1905.

On the 18th of September, 1905, the defendant was convicted before J. F. Armstrong, Stipendiary Magistrate, at Cranbrook, of having sold intoxicating liquors in quantities of less than two gallons, without having first obtained a licence under the Provincial Liquor Licence Act, 1900, Cap. 18, Sec. 66. The defendant was a brewer, holding a licence as such under the Inland Revenue Act, R.S.C. 1886, Cap. 34, authorizing him to carry on the trade or business of a brewer of malt liquors in his brewery at Moyie, B. C. The defendant relying on the authority of his Dominion licence, made the sales in respect of which he was convicted.

Statement

O'Shea, for the applicant: The applicant being licensed under the Inland Revenue Act, to carry on the trade or business of a brewer, is entitled to manufacture and sell, and the Provincial liquor licence law can have no application to him. If that Act applies, brewers would be unable to sell, notwithstanding their Dominion licence unless they had also obtained a Provincial licence; and this might be refused them. The Province undoubtedly has the right to fix a licence for brewers as a matter

Argument

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of taxation, but not as a matter of regulation of the trade. *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231; *Severn* v. *The Queen* (1877), 2 S.C.R. 70; *Regina* v. *Halliday* (1893), 21 A.R. 42 and *Regina* v. *Scott* (1875), 34 U.C.Q B. 20.

Argument

Lennie, for the Crown: *Regina* v. *Halliday* and the cases there referred to shew that legislation for regulating the sale of liquor is exclusively within the jurisdiction of the Provincial Legislatures. Section 66 of the Liquor Licence Act, 1900, plainly prohibits the sale of liquor without a licence obtained under that Act, and this legislation is *intra vires*: see Lefroy on Legislative Power in Canada, p. 719 and cases there referred to. Section 174 of the Inland Revenue Act, R.S.C. 1886, Cap. 34, under which the applicant's licence was issued, is intended to provide for licensing the manufacture merely of an article subject to excise duties.

13th October, 1905.

Judgment

IRVING, J.: In my opinion this application must be dismissed on the authority of the case of the *Brewers and Maltsters' Association of Ontario* v. *Attorney-General for Ontario* (1897), A.C. 231. Under sub-section 9 of section 92 of the British North America Act, the Provincial Legislature has power to require a brewer, duly licensed as such by the Dominion Government, to take out a licence, under the Provincial statute, to sell intoxicating liquor manufactured by such brewer. The above mentioned case is so exactly on all fours with this case that it seems to me only necessary to call attention to the decision rendered by the Judicial Committee in the appeal taken by the Brewers and Maltsters' Association of Ontario under the Ontario Act. It may seem anomalous that brewers should be licensed by the Dominion to carry on the trade of brewing, and at the same time be subject to the Provincial Legislature, but with that the Court is not concerned. The statute under which the conviction was made being *intra vires*, the conviction must be upheld.

Application dismissed.

REX v. GOLDEN.

MORRISON, J.

1905

Oct. 25.

Criminal Code, Sec. 591—Statement of accused—Signature to—Evidence against him on charge of forgery.

REX v. GOLDEN

The signature of a prisoner to the Statement of Accused at the preliminary hearing, may be tendered as evidence against him at his trial on a charge of forgery.

The prisoner was tried at the October (1905) Assizes in the City of Vancouver, before MORRISON, J., charged with having forged a post office money order. At the preliminary hearing in the police court he was unrepresented by counsel, and after the case for the prosecution was closed, the magistrate read over to him the warning set out in section 591 of the Code, after which the prisoner replied that he had nothing to say, whereupon the Magistrate asked him to sign his name to the statement which he had just made, which the prisoner did.

Statement

On the trial at the Assizes, counsel for the Crown tendered the signature of the prisoner signed under the circumstances mentioned, in order to have it compared by an expert with the writing on the post office order. This was the only specimen of the writing of the accused which the Crown had.

Bowser, K.C., for the prisoner, objected to this signature being put in evidence as it was obtained improperly from him by the Police Magistrate when the prisoner was unrepresented by counsel and when he had just been told that anything he said would be used in evidence against him, and after that warning he declined to say anything. Anything he wrote would be on the same basis as if he had spoken it; that he did not wish in the police court to give evidence either for or against himself, and the signature obtained under these circumstances should not afterwards be used as evidence against him on his trial.

Argument

Maclean, K.C., D.A.-G., for the Crown, referred to Form T, mentioned in section 591, as being authority for obtaining the prisoner's signature, if he was willing to sign same.

MORRISON, J., *held*, that the signature so obtained might be put in evidence.

Judgment

HUNTER, C.J.

1905

Nov. 1.

REX v. McGREGOR.

Criminal law—Certiorari—Summary convictions—Record of proceedings—Appeal, right of depending upon record—Criminal Code, Secs. 856, 631, 590, 591.

REX
v.
McGREGOR

The omission of the Magistrate to have the evidence taken in writing at the hearing before him is fatal to the conviction.

Statement

APPLICATION for a writ of *certiorari* to quash a conviction made by G. E. Corbould, Esquire, Police Magistrate for the City of New Westminster, under the summary convictions part of the Criminal Code, convicting McGregor of being a loose, idle, disorderly person or vagrant, having no peaceable profession or calling to maintain himself by, who for the most part supports himself by the avails of prostitution, and sentenced therefor to six months' imprisonment. Argued before HUNTER, C.J., on November 1st, 1905, at New Westminster.

Argument

McQuarrie, for the Crown, took the preliminary objection that the rule *nisi* did not disclose any grounds, and cited *Reg.* v. *Beale* (1896), 11 Man. L.R. 448.

W. J. Whiteside, for the prisoner, referred to Crown Office Rule 66, and the forms prescribed by the English Crown Office Rules.

The Chief Justice overruled the objection on the ground that it was not necessary to state the grounds on which the motion was made (except perhaps those mentioned in the forms in Short & Mellor's Crown Office Practice, as to which it was not necessary to decide), but if they are not stated it may necessitate an adjournment.

On the merits Mr. *Whiteside* contended that there was no evidence in writing as required by the Criminal Code, Sec. 856, Sub-Sec. 3, Secs. 590 and 591, and cited *Denault* v. *Robida* (1894), 8 C.C.C. 501.

Judgment

HUNTER, C.J.: The conviction is clearly bad. There is nothing to shew on what evidence the prisoner was convicted,

or even to shew how he pleaded, there being no record kept of the proceedings. It is new to me to learn that the validity or the scope of a conviction is to depend on the justice's memory, which may not be called into action for months or even years after the event. If there is no record how can there be any effective remedy or appeal?

While I am free to admit that the learned magistrate who recorded this conviction is eminently fair and upright in the performance of his duties, yet I must not be a party to overlooking a bad precedent. The law would indeed degenerate into a thing of contempt if it came to pass that Justices of the Peace, most of whom are not learned in the law, were permitted to assume the role of irresponsible autocrats.

Judgment

Conviction quashed.

REX v. WILLIAMS.

Criminal law—Habeas corpus—Criminal Code, Part LV., Secs. 785, 786, 789, 790—Summary trial—Election by accused—Costs—Action.

The omission by the magistrate to hold the preliminary inquiry as provided in section 789 of the Code, to enable him to decide whether or not the case should be disposed of summarily, invalidates the conviction.

Held, further, that the omission to inform the accused as to the probable time when the first court of competent jurisdiction would sit, was also fatal.

APPLICATION for a writ of *certiorari* to quash a conviction made by George Pittendrigh, Esquire, Stipendiary Magistrate for the County of New Westminster, acting for G. E. Corbould, Esquire, Police Magistrate, under Part 55 of the Criminal Code relating to summary trials of indictable offences, convicting Edward Williams of theft of a net valued at $150. Argued at New Westminster, before HUNTER, C.J., on November 10th, 1905.

Statement

HUNTER, C.J.

1905

Nov. 10.

REX
v.
WILLIAMS

The affidavit of the prisoner stated that at the trial he was not told that he had the right to be tried by a jury, and that he did not plead guilty.

The affidavit of the magistrate set forth that before committing the prisoner to gaol he reduced the charge to writing, read it to the prisoner, put the question to him required by section 786 of the Code and explained to the prisoner that he was not obliged to plead or answer, but if he did so he would be committed for trial in the usual course. The prisoner thereupon consented to summary trial and pleaded guilty.

Bowes (*H. L. Edmonds*, with him), submitted that Pittendrigh, Stipendiary Magistrate, was not a Stipendiary Magistrate for the City, and not being a Police Magistrate, had no jurisdiction under section 785 of the Code to try the case, and further that the provisions of sections 789 and 790 of the Code had not been complied with inasmuch as the evidence for the prosecution was not first taken to enable the magistrate to form an opinion as to whether the evidence adduced for the prosecution was sufficient to put the prisoner upon his trial; that without taking evidence, the magistrate first put to the prisoner the question mentioned in section 786 of the Code and that before such question is put, it is a condition precedent that the evidence for the prosecution be taken.

Argument

W. J. Whiteside, for the Crown, relied upon the affidavit of the magistrate shewing that sections 786, 789 and 790 of the Code had been substantially complied with; and that even if it should be held that section 789 had not been fully complied with by the taking of evidence for the prosecution as required, the prisoner having pleaded guilty, it was not a case in which he should be set at liberty, but that he should be sent back for a new trial. He referred to section 752 of the Code and contended that the judge hearing an application of this nature had the power which should be exercised in this case and send the prisoner back for a new trial. The wording of the section by the inclusion of *certiorari* seemed to contemplate a case of this kind and is not confined to cases where prisoner stands committed and is awaiting trial.

HUNTER, C.J.: This conviction is bad on two grounds. It appears that the magistrate did not hold the preliminary inquiry required by section 789 for the purpose of enabling him to decide whether or not the case should be disposed of summarily, but simply asked the prisoner how he pleaded and offered him his election, and did not inform him as to the probable time of the sitting of the next court of competent jurisdiction.

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v.
WILLIAMS

One object of the statute in requiring this preliminary inquiry is obviously to prevent there being a second prosecution of the accused on the same facts for any graver offence than that which the magistrate has power to try. For instance, if it had appeared here that there was really a robbery instead of a mere theft, the authorities might have felt compelled to prosecute for that offence notwithstanding the conviction for theft. A second prosecution on the same facts is of course discreditable to the administration of justice when it can be avoided.

Judgment

The second ground is also fatal. In omitting to inform the accused as to the probable time when the first court of competent jurisdiction would sit the prisoner was not given the requisite information to enable him to properly make his election. It is true the exact date could not be stated, but it would have been sufficient to have informed him that such court is held every spring at New Westminster.

It was argued that the prisoner suffered no real injustice as the evidence was overwhelming to convict him of the theft. The answer is that no person can be adjudged a criminal and sent off to prison except according to law, and the safety of every person, whether accused or not, lies in repressing such looseness in criminal procedure.

Conviction quashed.

DUFF, J.

1905

NOV. 27.

WALLACE v. FLEWIN

WALLACE v. FLEWIN *ET AL.*

Water Clauses Consolidation Act, 1897, Sec. 36—Appeal from Commissioner under — Provisions of — Power of Commissioner to amend record — Section 2—"Record."

A Commissioner, prior to the passage of the amendment of 1905, having adjudicated upon an application for a record, and having made the appropriate entry, is *functus officio*, and has no power to amend such record.

Any such amendment, being a nullity, cannot be reviewed in any proceedings under section 36.

PETITION under section 36 of the Water Clauses Consolidation Act, 1897, for cancellation of a water record.

Flewin, Water Commissioner at Port Simpson, issued a water record in February to one Keith, and subsequently, in March, at the request of Keith, amended said record to read as having been granted to Keith and Hamilton.

Statement

Wallace applied under section 36 of the Water Clauses Consolidation Act for an order cancelling the said record, and the petition was heard by DUFF, J., at Victoria on November 27th, 1905.

Bodwell, K.C. (*Oliver*, with him), for the petitioners.

Bowser, K.C., for the respondents.

DUFF, J.: By section 2 of the Water Clauses Consolidation Act, 1897, "record" is defined to be "an entry in some official book kept for that purpose."

Prior to the amending Act of 1905, the Commissioner having adjudicated upon an application for a record, and having made the appropriate entry, was in my opinion *functus officio*. If under the law as it then stood, the Commissioner had power to amend a record, it must have been by virtue of some implication capable of being derived from the provisions of the Act; and moreover—as there is nothing in those provisions restricting the mode of its exercise—such a power, if it existed, must have

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been exercisable by the Commissioner, after any lapse of time, with or without notice to persons whose rights might be affected, and indeed *ex mero motu suo*. The effectual exercise by the Commissioner of the powers expressly conferred by the Act does not depend upon the existence of any such subsidiary power; and there is therefore no ground for holding that it was impliedly given. The amending Act of 1905 confirms this view.

Consequently, what the Commissioner did in March—being *extra fines mandati* and a nullity—cannot by virtue of section 36, be reviewed in these proceedings as the "decision of a Commissioner under this part of the Act."

Judgment

IN RE ROBERT TELFORD.

MORRISON, J.

1905

Feb. 2.

FULL COURT

Nov. 8.

IN RE TELFORD

Medical Act (B.C. Stat. 1898, Cap. 9; 1899, Cap. 4; 1903, Cap. 4; 1903-4, Cap. 4; 1905, Cap. 6)—Committee of Council, inquiry by—Medical Council, appeal to judge from—Persona designata—Medical practitioner—Removal from Register—"Infamous or unprofessional conduct"—Meaning of—Costs.

A young unmarried woman, being pregnant, having to the knowledge of T endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. T, supposing that it might be necessary to expel the contents of her uterus owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition, by causing them to believe that she had been operated upon for appendicitis. This was done in a private sanitarium, under T's exclusive control, and without professional or other consultation. T informed her father (whom she resided with and was dependent upon), in answer to inquiries as to his daughter's condition, that she was suffering from appendicitis. The incision made by T could serve no purpose relating to the health of the patient. The woman died from the effects of attempts at abortion.

T was afterwards prosecuted on a charge of manslaughter, but was acquitted. The Medical Council, however, after a formal inquiry by a

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Committee of Council, resolved to erase his name from the Register of medical practitioners. From this decision he appealed to a judge of the Supreme Court.

Held, reversing the decision of MORRISON, J., that T was guilty of unprofessional conduct, and that the order of the Medical Council, erasing his name from the Register, should be restored.

Held, as to costs, that, the proceedings being in substance *ad vindicatam publicam*, in the absence of express enactment, the Legislature did not intend to confer the power to award costs.

APPEAL by the Council of the College of Physicians and Surgeons of British Columbia from the judgment of MORRISON, J., dated the 2nd of February, 1905, reversing and setting aside the order of the said Council of the College of Physicians and Surgeons of British Columbia erasing the name of Dr. Robert Telford (respondent) from the British Columbia Medical Register.

Statement

The appeal from the Medical Council to MORRISON, J., was argued at Vancouver on the 1st and 2nd of February, 1905.

The facts are set out in the reasons for judgment of MORRISON, J.

A. E. McPhillips, K.C., and *Davis, K.C.*, for the Medical Council, appellants.

Joseph Martin, K.C. (*Rowland*, with him), for Dr. Telford, respondent.

MORRISON, J.: Dr. Robert Telford, a duly qualified medical practitioner, was cited to appear on the 30th day of November, 1904, before a Committee of the Council of the College of Physicians and Surgeons of British Columbia appointed pursuant to the Medical Act, to answer certain charges contained in a notice, which is in the words following:

MORRISON, J.

"ROBERT TELFORD, Esq., M.D.,
"Burrard Sanitarium,
"Vancouver, B. C.

"SIR:—

"In the matter of the Medical Act, 1898, and amending Acts.

"Information having reached the Council of the College of Physicians of British Columbia tending to establish that in the treatment of the late Hattie Bowell of Vancouver, you performed a fake operation for the purpose of deceiving and making it appear that the said patient was suffering

from appendicitis, when you were fully aware of the fact that such was not the case; and further the neglect upon your part to acquaint the parents of the deceased with the true facts and of what the deceased was really suffering from, or her then condition.

"And whereas, in the opinion of the Council, the facts as at present advised appear to the Council to be such as to warrant and entitle the Council to have an inquiry under the provisions of the Medical Act, 1898, and amending Acts, and as to whether you have been guilty of infamous or unprofessional conduct in any respect in relation to the aforesaid matters.

"Therefore, take notice that on the 30th day of November, 1904, at ten o'clock in the forenoon, the Committee of Inquiry of the Council appointed in that behalf, will meet at O'Brien Hall at the City of Vancouver, and will then and there institute an investigation into the truth of the allegations with a view to decide whether on all or any of the above grounds your name ought to be erased from the British Columbia Register. At that investigation you are hereby invited and requested to be present. You will also take notice that the meeting of the Committee of Inquiry of the Council is fixed peremptorily for the day hereinbefore mentioned, on which day the inquiry will be prosecuted whether you attend or not.

"I have the honour, etc.,

"C. J. FAGAN,

"Registrar."

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A quorum of said committee sat on the above date, and was composed of Drs. A. P. Procter, R. Eden Walker and C. J. Fagan.

Dr. Telford appeared with counsel and gave evidence under oath. Counsel also appeared on behalf of the Medical Association.

MORRISON, J.

In due course the Committee submitted their report to the Council of Physicians and Surgeons and at the same time transmitted a copy of the transcript of the proceedings before them, which included the evidence given at the coroner's inquest on the body of the late Hattie Bowell, and also the evidence taken at the police court on the hearing of certain criminal charges against Dr. Telford.

In their report, which consists of a recital of the fact of their convening and the presence of the appellant and counsel and the substance of the charge, they also add: "The Committee in reporting the facts as directed to the matters to be inquired into have to specially report as follows:" Then follows a brief resume of the evidence of Dr. Telford and a reference to an alleged admission of his counsel.

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I find that Dr. Telford had a full and fair hearing before the Committee. I did not deem it advisable to order further inquiry by the Committee of Council.

The result, apparently, of a consideration by the Medical Council of this report consists of the separate findings of Drs. Walker, Procter, O. M. Jones, Fagan and J. C. Davie, all of whom, with the exception of Dr. Davie, express the opinion that Dr. Telford's name should be erased, and his name was accordingly erased from the Medical Register. He now invokes the provisions of the Medical Act and appeals from that decision.

Drs. Walker, Procter, Jones and Fagan in dealing with the part of the charge referring to the "fake" operation appear to ignore, or not to have appreciated the evidence, which is not contradicted, as to the patient's condition at the time, and the circumstances under which she happened to be under Dr. Telford's treatment, and Dr. Telford's motives in acting as he did. To illustrate the very extreme views of some of the Council I refer to Dr. Walker who finds that Dr. Telford was an accessory to "her wrong-doing," the evidence of wrong-doing being that she was pregnant and attempted or had some one attempt to commit abortion upon her before she had consulted or knew Dr. Telford. The reason he gives for his finding on this branch of the charge is that "the confidence which exists between a medical man and his patients would at once be broken if such a principle of deceit as fake operations were to be recognized or practised in the profession;" and this seems to be substantially the reason upon which Drs. Procter and Fagan base their findings.

MORRISON, J.

As I read the evidence, what Dr. Telford did, tended to deceive, not the patient, but the parents or others who could not be interested except with motives of idle or mischievous curiosity. It seems to me the object of the deception must be looked at, in the absence of evidence of malpractice, as well as whom the acts complained of deceive.

Dr. Jones impresses me as being more solicitous for the parents than for the patient, and characterizes the operation as illegal, presumably in that the parents were not informed of the patient's true condition. The circumstance that the alleged

operation was performed in a private sanitarium seems also to have had some weight with him in coming to his conclusion that Dr. Telford's conduct was both "disgraceful and infamous," and this in the absence of evidence reflecting in any way upon that institution or even suggesting that it was not efficiently and properly maintained and conducted. There is no evidence or suggestion that the so-called fake operation in any way led to or caused the patient's death. The patient voluntarily sought asylum in the sanitarium, and Mrs. Macdonald, a friend of the family, who, it is alleged, acted towards her in the capacity of companion with the solicitude of a mother, knew she was there and implored Dr. Telford to withhold from her parents the fact of her being there, as well as her condition, giving reasons which should appeal to any rational human being.

Dr. Fagan, who simply deemed the operation unnecessary for the purpose of deceiving, and characterized the neglect to acquaint the parents of the true condition of the patient as being "unwise and grossly wrong in principle," yet finds such conduct both "infamous and disgraceful."

Perhaps it might only be necessary for me to know the opinion of so eminent a practitioner as Dr. Davie, as expressed in his finding to justify me in reversing the Council's decision. He says:

"I have carefully considered the report made by the Executive Committee of the Medical Council appointed to take evidence as regards the charges against Dr. Telford, of Vancouver. MORRISON, J.

"The first charge is that he performed a fake or sham operation on the late Miss Hattie Bowell. The evidence adduced makes it clear that Dr. Telford made an incision through the skin and fat of the abdominal wall, as though he were going to operate for the removal of the appendix. This cannot properly be called an operation, although the making of an incision is established beyond doubt by the evidence.

"The second charge is that he made this incision for the purpose of deception. In my opinion, this was an extremely foolish and unnecessary procedure; it could serve no good purpose and could only deceive the most ignorant person. In fact it was useless as a means of deception.

"As regards the third charge, that he hid her condition from her parents, medical men are frequently not in the habit of accurately informing parents, or anyone else, of the true condition of a patient, the lay mind being incapable, from want of knowledge, of understanding accurately the statement of a medical man, if he tried with the utmost care to make

MORRISON, J. himself clear. As regards hiding her true condition from her parents, I cannot bring myself to blame Dr. Telford, as he did it without doubt to spare the feelings of the parents, to shield the girl from the consequences of her folly and to enable her to retain her status in society; while no good purpose would have been served had he acquainted her family with her true condition.

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"I consider the action of Dr. Telford, as regards the fake operation, to have been the action of a foolish person, and an improper and unprofessional act, and that he, in this matter, is deserving of severe censure. As regards his deceiving the parents or the community, I do not blame him, as he did it in defence of a woman."

Did the charge or the findings turn on, or the evidence disclose, the consequences upon the patient of Dr. Telford's treatment, or even hint that her condition before her death or her death were in the remotest way caused by anything Dr. Telford did, I would hesitate before disturbing the decision of the Council.

MORRISON, J. But the reasons for the findings of the majority of the Council who received and considered the Committee's report, though doubtless commendable as an expression of a missionary desire to emphasize to the profession the proper degree of solicitude to be displayed for parents' feelings in such circumstances as those under consideration, are not, in my judgment, sufficient to justify their action in removing Dr. Telford's name from the Medical Register and thus depriving him of the means of making a legitimate livelihood in his profession.

The appeal was argued at Vancouver on the 8th and 9th of April, 1905, before IRVING, MARTIN and DUFF, JJ.

Davis, K.C., for appellants: The evidence in this appeal discloses that the respondent was at least an accessory after the fact. It is common ground that an abortion was worked on the patient either by herself or with the assistance of some person or persons not known to this Court: see section 63 of the Criminal Code. The patient admitted to the respondent such facts as

Argument

proved beyond question that an abortion or an attempt to commit an abortion had taken place; therefore the crime had been committed to the knowledge of the respondent. It followed that the subsequent acts of the respondent, as shewn by the evidence, notably in performing the "fake" operation, *i. e.*, the incision to import an operation for appendicitis, was in the way

of "comforting and assisting" and within the meaning of section 63. He reviewed the evidence to shew that the conduct of the respondent was all in the way of deception, not even advising the parents of the facts, when importuned in the matter, but made deliberate misstatements; this, certainly could not be deemed to be other than what the Medical Act aimed at, *viz.*, "infamous or unprofessional conduct," which entitled the Council to erase his name from the register.

A. E. McPhillips, K.C., on the same side: The Council have the right to remove for infamous or unprofessional conduct in any respect. In England the statute is much narrower than our own. It says, "guilty of infamous conduct in a professional respect." The words have received a judicial interpretation in the case of *Allinson* v. *General Medical Council* (1894), 63 L.J., Q.B. 534, but it is to be noticed that the judges there say that it is not an exhaustive definition, but only one to cover the case there under discussion. On the other hand, our Medical Council may erase the name for merely unprofessional conduct. This being so, we submit that the Council, being composed of the leading practitioners of the Province, is the best judge as to what is such a breach of professional ethics as deserves punishment: see *Re Washington* (1893), 23 Ont. 299. See also the case of *In re Weare* (1893), 62 L.J., Q.B. 596, for misconduct in a solicitor. Even the acquittal on the criminal prosecution does not debar his being struck off rolls: see remarks of Lord Esher, M.R., at p. 600.

Argument

See *Allbut* v. *General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400 at pp. 401-2, shewing our law differs from that of England and Ontario, in that "unprofessional conduct" alone is sufficient. In England it is "infamous conduct in any professional respect," but must be "infamous:" *Allinson Case, supra.* See *Ex parte Partridge* (1887), 19 Q.B.D. 467, (1890), 25 Q.B.D. 90; *In re Hill* (1868), 37 L.J., Q.B. 295 and *Ex parte Brounsall* (1778), 2 Cowp. 829, for distinction between "infamous" and merely "disgraceful conduct."

Upon the question of costs: as the proceedings in this appeal were taken under a particular statute, that Act alone is the code

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which guides the judge in awarding costs. That if it is silent as to costs, then the judge has no jurisdiction to award costs thereunder. The Medical Act provides the machinery by which the court can be set in motion by a party deeming himself wronged by the decision of the Council. He can appeal to a judge of the Supreme Court, but the judge hearing the appeal is made a *persona designata* by the statute—an arbitrator appointed under the Act, and, as such, he hears the appeal. He merely administers the duties imposed upon him by the Act, and has no power to go beyond it. The Act being silent as to costs, see *In re Isaac* (1838), 4 Myl. & Cr. 11 at p. 15; *In re Cherry's Settled Estate* (1862), 31 L.J., Ch. 351; *In re Strachan's Estate* (1851), 9 Hare, 185; *In re Charity Schools of St. Dunstan-in-the-West* (1871), L.R. 12 Eq. 537; *Re Lord Stanley of Alderley's Estates* (1872), L.R. 14 Eq. 227 at p. 229; *In re Vancouver Incorporation Act* (1902), 9 B.C. 373; Jepson on Lands Clauses Acts, p. 201 and An. Pr. (1905), 938.

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Joseph Martin, K.C. (*Rowland*, with him), for the respondent: If the Court is bound by the opinion of the Medical Council, what would be the good of an appeal? The Court is now untrammelled by any outside consideration, and the only extent to which the Court may be guided by the opinion of the Council is as to the credibility of the witnesses. The Court is confined to the charge, and no one has a better right to determine the question as to whether the respondent has done an act which would be deemed a menace or danger to the public. The Court must act on its own motion about such matters; it must not take into consideration any power which there is vested in the Medical Council to re-instate this man, because, so far as the facts before the Court go, the respondent is suspended for ever from practising his profession. As to the girl being in the sanitarium at the expense of the parents, she made up her mind to go there without the knowledge of her parents. The father went to respondent, who kept him informed, and then respondent had the statement of Mrs. Macdonald that the ordinary relations of parent and child did not exist between the deceased and her father and mother. This position is strengthened by the statement of Mr. Bowell that Mrs. Macdonald took the place of a

mother to the deceased. Drs. Walker and Procter seem to misrepresent the position of affairs as to the bogus operation; here the circumstances were quite different for the operation was not done to deceive the patient; she knew of it and was a party to it. As to criminality on the part of the respondent, it was never any object of his to conceal any crime; he was not trying to conceal anything from the police, but from the parents, to save them and the girl. He had not exhibited any such disregard of his responsibilities and duties as to justify his being struck off the rolls.

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IRVING, J.: I concur with my brother DUFF.

IRVING, J.

MARTIN, J.: After a further consideration of this matter I am unable to say that the five members of the Council of the College of Physicians and Surgeons of British Columbia came to an erroneous conclusion when they all declared that the accused had been guilty of unprofessional conduct in the premises. Even that member of the Council who took the most favourable view of his case, on the ground that he was endeavouring to shield a female patient, states that it was "an improper and unprofessional act . . . deserving of severe censure."

In arriving at this view I wish it to be understood that I do so quite irrespective of said unanimous finding of the Council, though I am not prepared to accept the contention of the respondent's counsel that the Court should absolutely ignore the opinion of medical men on what is or is not unprofessional conduct of their fellow practitioners, and I notice that in the judgment which the same counsel seeks to support the learned judge lays much stress in his client's favour upon the view of the member of the Council before referred to. The statute, section 35, empowers the Council to act where there has been infamous or unprofessional conduct "in any respect," and in my opinion effect will have to be given to these words in a case even where the public is not directly concerned as it undoubtedly is here.

MARTIN, J.

It is clear from the accused's own admission that he knew the woman in question had been guilty of a crime (see section 273 of the Criminal Code) and in such circumstances, and in a

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case of this gravity, it was his manifest duty to act cautiously and circumspectly. Instead of so doing he acted in a way that his counsel admits was "foolish," but contends was nothing worse. I regret I cannot take this very lenient view of his case. It is clear to me that he disregarded his plain duty to the public, to his profession, and, having regard to all the circumstances, to the parents of the unfortunate girl. His attitude after the discovery was not that of mere passivity, but of very marked and misdirected activity, and the planning and carrying out of the scheme of a bogus operation for the purpose of general deception cannot, in the public welfare, be countenanced from any point of view.

It is not necessary to decide whether or no what he did was sufficient to bring him within the operation of the Criminal Code, section 63, as an accessory, as is contended by the appellants, for it is not "infamous" conduct (which the commission of a crime would be) but "unprofessional" conduct that we are primarily considering, and here the impropriety has been gross. The Legislature has, for the public interest, conferred benefits and privileges upon the medical profession, but they carry corresponding responsibilities and obligations, which must, on proper occasions, be recognized and enforced, as in this case, otherwise the Executive of that profession would fail in the performance of its manifest duty.

MARTIN, J.

It follows that the appeal should be allowed and the order of the Council restored.

As to costs, I do not think that the special kind of an appeal which came before my brother MORRISON can, having regard to section 4 of the amending Act of 1904, come within the expression "trial and hearing" in section 100 of the Supreme Court Act. That, I think, refers to procedure in tribunals of first instance, especially as applied to this matter. By the original section 45 of the Medical Act of 1898, the appellate judge had jurisdiction "as to costs," but by the amending Act of 1904 these words were left out, and I do not think the deficiency is supplied by the new expression "or make such other order in the premises as to the judge may seem right." The case of *In re Vancouver Incorporation Act* (1902), 9 B.C. 373, is a direct

authority that an appeal to "a judge of the Supreme Court" is to him as *persona designata*; also see *Williams* v. *Grand Trunk Ry. Co.* (1905), 36 S.C.R. 321, and there could be no further appeal without further provision, which here, however, is made by the proviso in said section 4.

As to the costs of the appeal at bar, I am of the opinion that the true construction of said section 4 is that they should be viewed in the same light as those below, *viz.*, that we have not jurisdiction over them.

DUFF, J.: We are to decide two questions: Was the respondent guilty of infamous or unprofessional conduct in respect of the matters comprised in the charges against him? And if so, was his misconduct of such a character as to justify the imposition of the extreme penalty of expulsion?

As to the first question: We must after his trial and acquittal by the County Court Judge put aside any suggestion that the respondent was concerned in procuring an abortion; and attending to that circumstance I am not prepared to say that his actions can justly be described as infamous, but I regret that I cannot conclude that he should escape condemnation on the charge of unprofessional conduct.

His patient, a young unmarried woman, who, being pregnant, had to his knowledge unsuccessfully endeavoured to effect a miscarriage, asked him to perform on her a criminal operation for abortion. The respondent, supposing that it might be necessary to expel the contents of her uterus owing to the patient's condition arising from these unsuccessful attempts, inflicted a wound on her body with the object of enabling him and his patient the more effectually and easily to deceive her parents and others with respect to her real condition by causing them to believe that she had been operated on for the removal of the appendix. This he did in a private sanitarium under his own exclusive control and without professional or other consultation. I may add that her father (whom she resided with and was dependent on) was, in answer to his inquiries as to his daughter's condition, informed by the respondent that she was suffering from appendicitis; and I should also say that the incision

MORRISON, J. made by the respondent did and could serve no purpose relating to the health of the patient.

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A more careful consideration of the views of MORRISON, J., and of the able argument addressed to us in behalf of the respondent has not altered the view I formed at the hearing of the appeal that the Medical Council was justified in treating this conduct as unprofessional. The Legislature has conferred on that body the power to erase from the register the names of physicians and surgeons on being satisfied after proper inquiry that such persons have been guilty of unprofessional conduct. That enactment assumes the existence of some standard of professional conduct, or of some negative limits of professional conduct which shall be regarded in the exercise of that jurisdiction.

It is not necessary, I think, to define these limits, and I do not attempt it. Of course the primary end with every physician and surgeon is the health of those who are the objects of his professional attention. But, subject to this paramount consideration, when one considers the fact (not disputed, but demonstrated to superfluity for them who doubt, by the evidence taken on this inquiry) that the practice of abortion is a prevalent practice in this Province; and the grave and visible menace to the social welfare which the practice involves, it will not, I think, be denied that an obligation rests upon them to whom the community has committed the exclusive privilege of practising medicine and surgery (not as individuals only, but more especially as a body exceptionally recognized by the law) that they shall not abuse the professional status which the law sustains or pervert the professional skill which the law protects, to practices which if general would manifestly facilitate the spread of this most dangerous evil. Nor can I perceive how it can be successfully maintained that the deliberate breach of this obligation by a physician or surgeon, to no purpose connected with the bodily health of a patient, does not fall within the description "unprofessional conduct" as that phrase is used in section 36 of the Medical Act. *Leges mente intelligendæ*; and one cannot suppose that in enacting this section the Legislature left out of view a matter so weighty in its bearing on the relations of the medical profession to the community at large. When, there-

DUFF, J.

fore, a surgeon, under the colour of practising his art and under the protection of his professional status, for no purpose relating to the health of a patient, prostitutes his skill and his status in performing a wholly pretended operation in circumstances such as those disclosed in this case, I cannot doubt that, in the absence of some instant compelling moral necessity, he brings himself within the language of that section as having passed beyond the bounds of reasonably justifiable professional conduct; and if in support of this view any argument be needed, surely it is sufficient to say that if such things may be legitimately practised, they may be generally practised; and that the general sanction of such practices would give a great and almost incalculable impulse to the growth of the kind of crime which I am compelled by the nature of this case so much to discuss.

The respondent acted under the spur of no compulsion. There was none in the state or situation of his patient; none in the state or situation of those whom he might properly regard by reason of their relation to her. His exculpation is urged on two inconsistent grounds: First, he says that he was impelled by his apprehensions concerning the effect upon her parents of their discovery of his patient's true condition; and, second, that he did not care a "snap of his finger" for her parents, but was influenced only by his apprehensions of future disclosure to the world. Of these, the first may be dismissed as mere vague surmise, having no foundation but the extravagant fears of his patient, and no warrant to recommend it to any man of moderate firmness and intelligence; the second, in view of the fact that his patient's intended husband knew and was responsible for the facts, seems destitute of substance; and at all events presents no justification which would not exist in any case in which a surgeon, yielding to the like importunities, should be persuaded to perform the like service. Mr. *Martin* strongly pressed upon us the view that, at the decisive moment, the respondent was not a free agent; that his hand was forced by the rapid development of events beyond his control. Although I am not insensible to the infirmities under which, after the fact, one attempts to analyze and appraise a course of conduct pursued under some anxiety and stress of mind; I cannot doubt

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that the respondent's embarrassments followed naturally and inevitably from the fact that, at the outset, he consented to palter with his obvious duty.

But, in truth, the question in these cases is not an ethical question. The professional tribunal appointed to investigate them cannot, in the nature of things, set before itself the task of reading the secret counsels or weighing the motives or balancing the weaknesses and the temptations of the person against whom the accusation of misconduct is levelled; they must assume that he is gifted with that share of knowledge and judgment and self-control which his status as a physician and surgeon implies; and on that assumption and by that standard his conduct must be tried.

As to the second question: The Legislature gives to physiscians and surgeons certain exclusive privileges. The Legislature does this, not for the benefit of a specially favoured class, but because the public interest demands that persons exercising these privileges shall be competent persons of good repute fit to sustain the delicate and confidential relations in which such practitioners are in the course of their duty commonly involved. I therefore agree with the contention of Mr. *Martin* that the answer to this question turns upon the result of the inquiry whether the respondent's misconduct marks him as a person unfit to be entrusted with the privileges of his profession.

DUFF, J.

I regret to say that I cannot find any ground for disagreeing with the conclusion of the Medical Council on this question. The course pursued by the respondent from the first interview with McHarg down to the completion of the pretended operation (as shewn by the undisputed evidence) was not, in my opinion, that of a person having fit notions concerning the obligations associated with his privileged position as a physician and surgeon. And I cannot say that the Council was wrong in thinking that his conduct placed him beyond the pale of discretionary lenity.

The proceedings being in substance *ad vindicatam publicam*, I do not think that, in the absence of express enactment, we can take it that the Legislature intended to confer the power to award costs.

Appeal allowed.

P. (otherwise C.) v. P.

MARTIN, J.

1905

Nov. 3.

P. *v.* P.

Nullity of marriage—Impotence in the man—Non-consummation.

Where consummation of the marriage is, on the part of the husband, a practical impossibility, the wife is entitled to a decree of nullity of marriage.

PETITION by the wife for nullity of marriage.

The petitioner alleged a ceremony of marriage in Victoria on the 30th of July, 1904, and non-consummation thereof by reason of the respondent's impotence.

After the ceremony the petitioner lived with the respondent at Victoria for a period of 24 days, during which period the respondent on frequent occasions endeavoured to consummate the marriage, but without success, although he had, as alleged by the petitioner, every possible access and opportunity afforded him. The parties then ceased to live together, and at a meeting arranged between them, eight months later, the respondent admitted his condition had not improved.

The petitioner further alleged in her petition that the physical cause rendering the respondent incapable of consummating the marriage was wholly incurable by art or skill, and would so appear upon inspection, but since the service of the petition upon him, he had gone away to parts unknown.

Statement

The medical testimony, based upon the state of facts deposed by the petitioner was that, at least so far as the petitioner was concerned, the respondent was impotent, with no prospect of any favourable change in his capacity; and that as a result of personal inspection no physical impediment existed in the petitioner.

The petition was heard by MARTIN, J., without a jury, at Victoria, on the 13th of October, 1905.

R. T. Elliott, for the petitioner.

The respondent did not appear.

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P. *v.* P.

3rd November, 1905.

MARTIN, J.: There is no doubt about the sincerity of this action; and on the facts proved, and in the light of the authorities cited, *viz.*: *G.* v. *M.* (1885), 10 App. Cas. 171; *G.* v. *G.* (1871), L. R. 2 P. & D. 287; *F.* v. *P.* (falsely called F.) (1896), 75 L.T.N.S. 192; *B.* v. *B.* (1901), P. 39 and *W.* v. *W.* (1905), 74 L.J., P. 112; the petitioner must succeed. There is direct evidence of the respondent's continued inability to consummate the marriage despite the encouragement of the petitioner, and so far at least as she is concerned, it may, as Lord Watson said in *G.* v. *M.*, *supra*, p. 199, "be confidently affirmed that he is not in the ordinary sense of the term *vir potens*" and that "the marriage never would have been consummated had they continued to cohabit, and that consummation being thus a practical impossibility," the petitioner is entitled to the remedy which the Court can give her, *i.e.*, a decree *nisi* annulling the marriage.

Judgment

Decree nisi.

HUNTER, C.J.

1905

Oct. 11.

REX v. GRINDER.

Criminal law—Handwriting—Proof of in criminal prosecution—Accused giving evidence on his own behalf.

REX *v.* GRINDER

A prisoner, called as a witness in his own behalf, cannot be compelled to furnish a specimen of his handwriting.

At the Clinton Fall Assizes, Joseph Grinder was charged with having stolen a horse from one Kaiume. At the time he got it from the Indian it was said he signed a memorandum, under a false name, setting out the terms upon which he had obtained the horse. The prisoner was tried and the jury disagreed. A second trial then took place. The prisoner was called as a witness on his own behalf and after he had given his evidence-in chief and had been cross-examined by counsel for the Crown, he was asked by

Statement

MORRISON, J., the presiding judge, to write from his dictation a copy of the said memorandum. *Henderson*, for the prisoner, objected to the prisoner being required to furnish any specimen of handwriting. The learned judge overruled the objection and the specimen of the prisoner's handwriting so obtained was submitted to the jury as part of the evidence in the case for comparison with the above mentioned memorandum.

The jury again disagreed. A change of venue was then obtained and the prisoner was again tried at the Vernon Fall Assizes, on the 11th of October, 1905, before the Chief Justice. The Crown then sought to prove the handwriting of the accused by tendering memorandum which MORRISON, J., had requested the prisoner to write. *Henderson* objected to the use of this document upon the ground that it had been improperly obtained.

Statement

Maclean, K.C., D.A.-G., for the Crown.
Henderson, for the prisoner.

HUNTER, C.J.: With great deference to my learned brother, I am of opinion that the prisoner cannot be compelled to provide a specimen of his handwriting merely because he goes into the box. I do not think, when the framers of the Code gave a prisoner the privilege of testifying on his own behalf, that they contemplated that he could be forced to create new real or objective evidence against himself. It is true he renders himself liable to cross-examination and prosecution for perjury, if need be, but he is none the less an accused person, and therefore ought not to be compelled to criminate himself to any further extent than that which may strictly arise out of the cross-examination. Suppose a man accused of forging his father's signature, and the Crown has made out a *prima facie* case to shew that he passed the document. He goes into the box to prove an *alibi*, and therefore a case of mistaken identity. If forced to write his father's name and his handwriting is like his father's, what avails the *alibi?*

Judgment

I think I must reject the memorandum.

The prisoner was, however, convicted upon the other evidence against him.

HUNTER, C.J.

1905

Nov. 9.

JOHNSON v. DUNN.

Contract — Performance of when no time mentioned — Parol evidence— Admissibility of—Reasonable time—Assignment—Notice—Injunction— Damages—Nominal.

JOHNSON v. DUNN

Where no time is specified between the parties for the carrying out of a contract, the law implies that it should be carried out within a reasonable time, having regard to all the circumstances.

If there be an undue delay on the part of either party, the other party has the right to notify him that unless the contract is carried out within a specified time, such time to be reasonable, the contract will be considered at an end, and where the work to be done requires a considerable period of time he may also fix a reasonable time for its commencement.

Statement

ACTION for damages for trespass, and for an injunction, tried by HUNTER, C.J., at New Westminster, on the 1st of November, 1905. The facts are fully set forth in the judgment.

Martin, K.C. and *W. M. Grey*, for plaintiff.
Bowes, for defendant.

9th November, 1905.

Judgment

HUNTER, C.J.: The plaintiff is the owner of a quarter section of land, and on October 16th, 1902, entered into a written contract with the Hazelmere Mill Co., Ltd., whereby the latter were to cut and purchase the cedar timber thereon at the rate of 40 cents per cord for shingle bolts. The sum of $150 was paid to the vendor on account of the purchase in December; it was variously estimated that there was between $400 and $800 worth of shingle bolt timber available.

The contract is silent as to the time of performance, and the Company on the 3rd of March, 1905, assigned the benefit of the contract to one Kinney, under whose authority the defendant entered and began to cut the bolts in August last, when stopped by an *interim* injunction.

No written notice was given to the plaintiff of the assignment, and no bolts having been cut pursuant to the contract, the

plaintiff notified the Company on May 13th, 1905, by a notice dated May 12th, that the carrying away of the timber must be commenced within two months from the date of the notice, and finished within two years. Neither the defendant nor his principal was served with this notice, but both became aware of it a few days afterwards, and the defendant admittedly did not commence work within two months of the time when it came to the knowledge of Kinney.

Parol evidence, subject to exception, was given to shew that at the time of signing the contract, the plaintiff had stipulated that the work should commence within three months from the date of contract, and that it should be finished within three years. I do not think, however, that it is necessary to consider whether this evidence is admissible, or, if admissible, what is its effect, as the plaintiff, by giving the notice of the 12th of May, pursued his rights on the footing that no time was stipulated between the parties.

That being so, it is well settled that the law implies that the contract should be carried out within a reasonable time, having regard to all the circumstances of the case; and that if there is undue delay on the part of either party, the other has the right to notify him that unless the contract is carried out within a specified time, such time to be a reasonable time to allow for its completion, he will consider the contract at an end: Chitty on Contracts, 14th Ed., p. 354; Leake on Contracts, 4th Ed., p. 599 and cases cited. Then, if he may fix a time for its completion, I do not see why, when the thing to be done consists not of an isolated act, but of work requiring a considerable period of time, he may not fix a reasonable time for the inception of the work in order that he may know definitely within a reasonable time whether the other party intends to carry out the contract.

Judgment

Assuming then, that Kinney was entitled to notice, which I very much doubt (no written notice of the assignment having been given to the plaintiff nor the assignment produced), the only question is whether the notice in question was reasonable. In my opinion it is, both as to the time of commencement and as to the time of completion. The Mill Company had constructed the greater part of the skidway necessary to get the bolts down

HUNTER, C.J. 1905 Nov. 9. JOHNSON v. DUNN

to the creek, and the two months allowed by the notice was ample time to enable the defendant to complete the way (a distance of about 60 rods) and to commence getting out the bolts, especially at that time of the year. As to the time fixed for completion, one witness swore that it could be done within six months, another that he would like seven years. In my judgment two years was a reasonable time to allow for taking the cedar timber off this tract. The defendant cannot expect to be allowed such a length of time as would make allowance for all possible contingencies, or would enable him to reap the maximum amount of profit possible at the expense of the plaintiff.

Judgment

As to the suggestion that the plaintiff was crowding matters with a view to selling to some one else at a larger profit, if the notice was legal and reasonable, as I find it is, the motive is immaterial.

Only nominal damages having been proved, there will be judgment for the plaintiff for $5 and costs.

There is nothing in the case to warrant the continuance of the injunction.

SAYWARD v. DUNSMUIR AND HARRISON.

HARRISON, CO. J.
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May 22.

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SAYWARD v. DUNSMUIR AND HARRISON

Mechanic's lien—Time for filing—B.C. Statute, 1900, Sec. 23, Cap. 20—Principal and agent—Authority of agent—General—Particular—General authority conferred verbally—Subsequently limited by writing—Notice to third party of such limitation—Judgment in personam—Evidence—Conflict of.

Whether material is supplied in good faith for the purpose of completing a contract, or as a pretext to revive a right to file a lien, is a question of fact for the trial judge and his decision on such fact should govern.

Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting *bona fide*.

Whether authority has been conferred on an agent is a question of fact, which may be proved by shewing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred.

When the relationship of debtor and creditor is established on the hearing of a claim for a mechanic's lien, the jurisdiction of the County Court judge to give a judgment *in personam* arises under section 23 of the Mechanics' Lien Act Amendment Act, 1900.

Per DUFF, J.: A finding of fact, based entirely upon the inference which the trial judge has drawn from the evidence before him, may be freely reviewed by the Court of Appeal. [*Hood* v. *Eden* (1905), 36 S.C.R. 476 at p. 483].

A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons dispute its existence.

Decision of HARRISON, Co. J., affirmed.

APPEAL from the decision of HARRISON, Co. J., in an action for a mechanic's lien, tried before him, and on an order on further consideration made by him in the said action.

Statement

The trial took place at Victoria on the 8th, 9th and 10th of May, and the order on further consideration was made on the 22nd of May, 1905.

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The facts are fully set forth in the reasons for judgment of the learned County Court judge.

R. T. Elliott, for plaintiff.
Barnard, for defendant Mrs. Dunsmuir.
Helmcken, K.C., for defendant Harrison.

HARRISON, Co. J.: The plaintiff claims a mechanic's lien in respect of $1,200 worth of lumber used in and about the Driard hotel, the property of the defendant Mrs. Dunsmuir, and of which the defendant Mr. C. A. Harrison, is the lessee.

By deed dated the 11th of May, 1904, Mrs. Dunsmuir leased to C. A. Harrison "all that messuage or hotel with the appurtenances thereto belonging, known and occupied as the Driard hotel, together with the furniture, fixtures, chattels and effects specified in the schedule, together with the licences" attached to the premises for keeping the same open as a hotel and for the vending of wines and spirituous and malt liquors, at a rental of $700 per month. The lessee covenanted to keep up and renew the liquor licence and to obtain, hold and renew all other licences for the lawful and proper carrying on of the hotel business, and to personally carry on during the term the trade and business of a hotel keeper and licensed victualler of the highest class, upon the demised premises and to use the premises as a first-class hotel and licensed victualling house only.

The lessor, Mrs. Dunsmuir, covenanted to keep the said hotel and premises, and the said furniture, chattels and effects insured against loss or damage by fire in the sum of $75,000. And in case of destruction or damage of the premises or any part thereof by fire with all convenient speed to spend and lay out all moneys received in respect of insurance in rebuilding or reinstating in a good and substantial manner the premises so destroyed or damaged, and in case such money should be insufficient, to make good such deficiency out of her own moneys.

Subsequently the premises were damaged by fire and the defendant Dunsmuir received from the insurance company $18,900. The agent for Mrs. Dunsmuir (his authority to act is so far not disputed) authorized the defendant Harrison, to have the premises rebuilt and reinstated; no bills of quantities, speci-

fications or plans were got out, but it appears to have been considered that the necessary works could be done within the amount received from the insurance company by Mrs. Dunsmuir, and in case Harrison got them done for less, Mrs. Dunsmuir was to pay him the difference for his trouble.

The defendant Harrison proceeded to order labour and materials, and among other things, made an arrangement with the plaintiff, on Mrs. Dunsmuir's account, to supply the lumber required at a trade discount. And on the 18th of July, 1904, he wrote Mrs. Dunsmuir's agent stating that he had arranged for repairs to the hotel and its furnishings, but that he did not assume any sort of liability for payments or any part thereof, and he requested that a written memorandum which he inclosed should be signed by Mrs. Dunsmuir. The agent answered, stating that the defendant Harrison was authorized to superintend and carry out all repairs and improvements to be made to the Driard hotel and its furniture, etc., not to exceed a total of $17,942.59. He requested that the defendant Harrison should confer with him each day and report progress and hand in estimates of cost, no material to be supplied except on Harrison's written order, and bills accompanied by vouchers and certified time sheets to be turned in at the end of each week or oftener if requested. He also stated that under no circumstances would Mrs. Dunsmuir expend anything further than the above amount upon these repairs to the hotel, and if further liability was incurred it was to be at defendant Harrison's own risk. If the repairs on which the defendant Harrison was engaged in reinstating the hotel in as good or better condition than it was before the fire, came to less than the sum named, the difference between the cost of such repairs and $17,942.59 would be paid to defendant Harrison on the completion of the repairs, for his own use.

To this the defendant Harrison answered that he would not be responsible for the works, the amount of the insurance received by Mrs. Dunsmuir was over $1,000 more than the sum named, that he intended to stay within his rights under the lease, but would have all repairs made in accordance with their previous understanding as economically as possible, that he could not tell what the cost of the repairs contemplated would be,

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but had every confidence in their costing less than $16,000, and went on to claim that certain repairs and improvements would be outside of repairs in consequence of the fire. He practically declined to accede to their request to call on them every day to report, and said they could come to the hotel to get the information they wanted. He also notified them that it was a matter for themselves to consider as to the liability incurred or that might be incurred. To this letter no reply was made, and the defendant Harrison continued to order material and to employ labour, etc., on Mrs. Dunsmuir's account, and Mrs. Dunsmuir employed some one to superintend what was being done, and her agent paid various bills so incurred in her name.

The plaintiff, Sayward, on the orders of Harrison, went on supplying lumber. When his bill reached some $1,200 the defendant Dunsmuir's agent refused to pay him, claiming that her payments out for materials, labour, etc., had reached the limit of the amount she intended to pay, $17,942.59. The plaintiff saw defendant Harrison and informed him Mrs. Dunsmuir's agent had refused to pay. Harrison stated that he ought to be paid by Mrs. Dunsmuir, but that there were two door casings ordered sometime previously which had not yet been supplied. Sayward sent the casings and they were put in the building.

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Insofar as the lien is concerned, the defendant Mrs. Dunsmuir says the lien was filed too late; that the work was finished before the door casings were supplied; that the door casings were collusively and fraudulently ordered and supplied afterwards to bring the last supply of materials within the statutory period for filing the lien.

No collusion or fraud was proved; on the contrary, I think these casings were *bona fide* ordered and supplied, and they were used in the building. The defendant Harrison, under the supervision of the defendant Dunsmuir's superintendent, was still going on and no doubt would have continued going on repairing had not the defendant Dunsmuir's agent, in pursuance of the Mechanics' Lien Act, some six weeks after the door casings had been put in place, posted a notice that she declined to be responsible for the door frames. There is no doubt that the door frames were in place of frames previously burnt out, and there is no

doubt from a view of the premises that more door frames and more extensive repairs generally could have been made to the basement part of the building to the advantage of the property from the point of view of safety to people using or employed about the basement, and in view of the hotel being as the lease describes it of the first class. In the most extreme view against the material man, *i. e.*, that the vague supposition that without plans, estimates or specifications, the works and material would not cost more than $17,942.59, in other words that Harrison had contracted in consideration of $17,942.59 to do certain works which certainly was not the case, Sayward would have been entitled as a sub-contractor to his proportionate part of that sum.

Here the defendant Mrs. Dunsmuir hired or ordered and received supplies and paid through her own agent and chose to go on doing so, and paid utterly regardless of claims which had been running on from the very inception of the work in respect of materials which were supplied under the inspection of her own superintendent, and which supplies could as regards the material man, have been cut short at any time she chose.

Outside of the supply of the door frames it was contended that the supply of the materials, etc., did not come within the Mechanics' Lien Act, as there was no request beyond $17,942.59. But here it must be remembered Harrison was not a contractor and Sayward a sub-contractor. The works were done and material supplied at the request of the owner who was the paymaster. Here there was no intervening contractor and contract price. Sayward, I take it, was a contractor and not a sub-contractor, but it is said that by such an arrangement as is alleged to have been made with the defendant Harrison, the Mechanics' Lien Act has no effect. Here the material man never contracted himself out of the Mechanics' Lien Act, though if the owner had wished him to do so and he had so agreed, there was a provision in the Mechanics' Lien Act by which it might have been done. And I do not think he can be defeated by so simple an expedient as the one resorted to here.

It is also contended that the defendant Mrs. Dunsmuir is not liable personally to plaintiff, as Harrison, it is said, was her

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agent with a limitation on his authority, to keep within $17,942.59, that he exceeded that authority, and that she had already paid out more than that sum for labour and materials to other persons, including another lien placed on the building.

Here one of the parties to a contract under seal (the lease) practically takes the stand that she can place her obligation under it on the shoulders of the other party to whom she is liable under that contract and impose terms and vary it without his consent. The real object was to repair this hotel so that it could be used and carried on as a first-class hotel, and the defendant Harrison was subject to supervision placed in her stead by the defendant Dunsmuir to effectuate this object for her. Had the correspondence terminated with the letter of the defendant's agent stating that she would not pay more than $17,942.59, I should think that the proper interpretation to place on that letter would be this: We both desire and need this hotel to be repaired and improved as a first-class hotel, it may or may not cost more than $17,942.59; if it does cost more my share will only be that sum; if I have to pay more in consequence of your exceeding that amount you will be responsible to me for the difference. That letter fully contemplated that further liability might be incurred, and how was anyone outside of the two defendants to know when the exact limit of $17,942.59 was reached. And it is hard to see anything in that letter which at the worst prevents payment of Sayward's bill, of which certainly the major part, if not the whole of it, was incurred before that supposed limit was reached. And if the idea was that the whole expenditure on the hotel should be only $17,942.59, surely it would have been easy enough for both parties to have placed that statement over their signatures and to have provided there should be no extras either within or outside the contract; nor would this letter have spoken of further liability. The defendant Mrs. Dunsmuir had a superintendent on the ground seeing that only what was required was supplied, and she could at any time have prevented the total cost being more than $17,942.59 if she had chosen to take the possible chance of going without the building being put in running

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order as a hotel, or first-class hotel, and risking any claim against her which Harrison might have.

But the defendant Harrison refused to carry on the repairs and improvements on such terms, and in the face of this refusal he was still allowed to go on, but under Mrs. Dunsmuir's supervision.

In view of Mrs. Dunsmuir having contracted to rebuild and reinstate the premises, and having authorized the defendant Harrison to superintend and carry out all repairs and improvements, the kind and character of which were left to defendant's discretion, I find that she requested plaintiff to supply this material, and that he did so; and that the plaintiff is not affected by any supposed under-estimate of either her own, or the agent she employed, or any question of outstanding liability between her and them, or any of them as to the ultimate cost of the works at large.

The defendant is not entitled to discount under these circumstances.

I declare plaintiff is entitled to a mechanic's lien upon the premises described in the plaint, and in view of section 23 of the Mechanics' Lien Act Amendment Act, 1900, to a judgment against the defendant Joan Olive Dunsmuir personally.

Costs as in judgment.

By the judgment of the learned County Court judge it was

"ordered and adjudged that the plaintiff has established and has a valid mechanic's lien upon and against Victoria City lots 412 and 413, together with the buildings thereon known as the Driard hotel, and that the said lien be enforced and that further consideration of the action should be adjourned."

By the order on further consideration it was

"ordered and adjudged that the plaintiff should recover judgment against the defendant Dunsmuir for the sum of $1,000 and costs, pursuant to the provisions of section 23 of the Mechanics' Lien Act Amendment Act, 1900, and that the plaintiff do recover by virtue of his mechanic's lien his costs of this action."

The appeal was argued at Victoria on the 29th of June, 1905, before IRVING, MARTIN and DUFF, JJ.

Barnard, for defendant Mrs. Dunsmuir, appellant: The defence is that the doors supplied in November were ordered

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after the defendant Mrs. Dunsmuir had repudiated the account, and were ordered for the purpose of reviving the right to file a lien, and there is evidence to shew that it was generally understood around the hotel that these doors were not to be put in; also that they were unnecessary. Sayward admits that he knew there was trouble about the account on the 12th of October, and the letter of the 26th of October also shews it. Sayward also was aware of the extent of Harrison's authority to bind Mrs. Dunsmuir when he, Sayward, supplied these doors. Further, we posted the proper statutory notice, giving Sayward and all others timely and legal warning.

As to the personal judgment, the learned judge could not give this personal judgment for $1,000 unless there was a good lien, and in any event he could not give it in the County Court, as the amount exceeded $1,000 and the excess was not abandoned. Harrison was a special agent, not a general agent, and the duty of Sayward in dealing with him as such was to ascertain the extent of his authority: Story on Agency, 7th Ed., 147, Sec. 133; p. 151, Sec. 136; *Pole* v. *Leask* (1863), 33 L.J., Ch. 155 at p. 161; Story, pp. 142 (note) 143; *Fenn* v. *Harrison* (1790), 3 Term Rep. 757 at p. 760; Chitty on Contracts, 228; *Jordan* v. *Norton* (1838), 4 M. & W. 155; *Sickens* v. *Irving* (1859), 7 C.B. N.S. 165; *Attwood* v. *Munnings* (1827), 7 B. & C. 278.

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As to the lien: *Irwin* v. *Beynon* (1887), 4 Man. L.R. 10; *Summers* v. *Beard* (1894), 24 Ont. 641 and Order VII., r. 1, County Court Rules.

R. T. Elliott, for plaintiff, respondent, cited *London and South Western Railway Co.* v. *Gomm* (1882), 20 Ch. D. 562 at pp. 581 and 586; Harrison had an interest in the land: *The Duke of Beaufort* v. *Neald* (1845), 12 Cl. & F. 248 at p. 273; there is no such thing as giving a particular agency on general matters of business: *Bryant, Powis & Bryant* v. *Quebec Bank* (1893), A.C. 170 at p. 180; *Watteau* v. *Fenwick* (1892), 1 Q.B. 346.

[IRVING, J., referred to *Morel Brothers & Co., Limited* v. *Earl of Westmorland* (1904), A.C. 11.]

We prove we had authority: *Robinson* v. *Montgomeryshire Brewery Company* (1896), 2 Ch. 841; *Governor and Company*

of the Bank of Ireland v. *Trustees of Evans' Charities in Ireland* (1855), 5 H.L. Cas. 389. Before the sum mentioned by appellant was reached the bulk of the material now in question was supplied; and that the limit was not exceeded when these goods were supplied is not shewn affirmatively.

As to jurisdiction, the effect of section 23 of the amending Act of 1900 is that the County Court has jurisdiction to give judgment for any amount; but here judgment has been given for $1,000. The doors supplied in November were necessary according to the evidence, and the judge has so found.

Barnard, in reply.

Cur. adv. vult.

3rd November, 1905.

IRVING, J.: This is an appeal from a judgment and an order made on further consideration in the same case by his Honour Judge Harrison.

By the judgment it was declared that the plaintiff had established a mechanic's lien upon the Driard hotel and that the lien should be enforced and that further consideration should be reserved.

By the order on further consideration it was adjudged that the plaintiff should recover against the defendant Mrs. Dunsmuir judgment for the sum of $1,000 and costs pursuant to the provisions of section 23 of the Mechanics' Lien Act, 1900, and also that the plaintiff should recover by virtue of his mechanic's lien his costs of this action.

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Mrs. Dunsmuir appeals. Mr. Harrison, who was a defendant, does not appeal. By consent of all parties the judgment and order on further consideration are to be treated as one final order.

The defendant, Mrs. Dunsmuir, is the owner of the Driard hotel, the other defendant, Harrison, is the lessee under a lease dated 11th May, 1904, under which he holds the premises for three years from the 11th of May, 1904.

The lease contains a covenant on the part of the lessor that she will insure and keep insured the premises, and that in the case of destruction or damages to the premises she

"will with all convenient speed spend and lay out all moneys received

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in respect of such insurance in rebuilding or reinstating in a good and substantial manner the premises so destroyed or damaged, and in case such moneys shall be insufficient for such, shall make good such deficiency out of her own moneys."

The lease also contained an option of purchase.

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A fire having taken place in the Driard hotel on the 26th of June, 1904, and an adjustment having been made by which the sum of $18,905.63 was payable to Mrs. Dunsmuir in respect of the loss, an interview took place on the 16th of July between Mr. Rogers (Mrs. Dunsmuir's agent) and Mr. Harrison, the lessee of the hotel, as to putting the hotel in order. Mr. Harrison says Mr. Rogers instructed him to get the work done to the best of his ability and make the best arrangements he could for Mrs. Dunsmuir, and there was at that time no limitation placed upon him whatever; that they there discussed questions relating to the repairs. Mr. Rogers says there was a conversation, but instead of authorizing Harrison to act for Mrs. Dunsmuir, he gave Harrison to understand that he (Harrison) was to do the work—that he (Harrison) was at liberty to order his material where he pleased, and to have his work done as he wished, but Mrs. Dunsmuir would not meet the bills until she saw that the hotel was in as good shape as it was before the fire. Mr. Rogers says:

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"My recollection is clear that Harrison then mentioned the question of lumber to me and that I said to him that Sayward had I believed the largest business in lumber, but that as Harrison was his own boss he could order as he pleased, we had nothing to do with it. In the same way he asked me as to what foreman I should like on the work. I said if we were doing the work or had anything to do with it, we would have Catterall, who was adjusting the loss for us. But Harrison was his own boss I said and could employ his own foreman. And he said in that case he would employ Walter Anderson."

Now that conflict of testimony the learned County Court judge has found in favour of Mr. Harrison. I think, having regard to what is said by Lord Davey in *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73 at p. 83, we must accept that decision as correct.

On the 18th of July Mr. Harrison wrote to Mr. Rogers a letter in the following terms:

"As per your request I have arranged for repairs on the Hotel Driard and its furnishings. All contracts are let to the best of my ability and in

ways that I consider best for Mrs. Dunsmuir and myself, I do not however assume any sort of liability for payments on any part thereof."

Again, on the 19th of July Mr. Harrison wrote to Mr. Rogers stating that he was acting as Mrs. Dunsmuir's agent, but that letter will be set out at length later on.

Immediately after the interview of the 16th, Mr. Harrison proceeded to let contracts to various tradesmen. In particular, he saw Sayward, the plaintiff, and arranged with him for the supply of lumber on Mrs. Dunsmuir's credit, stipulating that Mrs. Dunsmuir should receive a trade discount of 10 per cent. Lumber was accordingly delivered, the first delivery being dated the 16th of July, the second on the 19th. Lumber was supplied during the months of July and August down to the 1st of September, at or about which date the delivery of lumber ceased, except as to two items which I shall presently mention. All this was being charged up to Mrs. Dunsmuir, and she was so informed: see letters of the 18th and 19th of July, written by Mr. Harrison to her agent.

On the 19th of July Mr. Rogers wrote to Harrison the following letter:

"I beg to acknowledge receipt of yours of 18th inst., contents of which I have noted. In reply to same and in confirmation of our various conversations *re* repairs to the Driard hotel, I beg to advise that I am authorized by Mrs. Dunsmuir to make the following arrangements with you, *viz.:* You are authorized to superintend and carry out all repairs and improvements to be made on the Hotel Driard and its furniture, fixtures and machinery, such repairs and improvements not to exceed a total of $17,942.59. You are to confer with me or my representative every day, and report progress and hand in estimates of cost. No material is to be supplied except on your written order, and all bills accompanied by such vouchers and time sheets, certified to by your timekeeper, are to be turned in at the end of each week, or oftener if occasion may require. Under no circumstances will Mrs. Dunsmuir expend anything further than the above amount upon these repairs to the hotel; and if further liability is incurred it will of course be at your own risk.

"As you are aware I have joined in the application for a blanket accident policy to cover guests, employees, etc., the premium for which will be in the neighbourhood of $100, which will be charged against above amount for the time being.

"Provided that the repairs which you are engaged upon reinstate the hotel in as good or better condition than it was previous to the recent fire, any amount which you may save upon the total cost of such repairs, that

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is to say, the difference between the cost of such repairs and the above figure of $17,942.59, will be paid to you on completion of the repairs for your own use. Mrs. Dunsmuir also authorizes me to abate your rent under the terms of your lease for a period of three months from the time repairs are completed.

"This is as far as my instructions permit me to go, and I cannot advise that Mrs. Dunsmuir, who is at present in ill health, will feel disposed on her recovery to make any further concession.

"As you are aware, I will be absent from Victoria for some time to come, and in my absence Mr. G. H. Barnard will act as my representative in the premises. You will kindly report to him as above, and he will have control of the above funds and of all matters connected with the premises.

"In regard to accident insurances, I will be obliged if you will notify all your contractors in writing that they are responsible for any accidents that may happen to their employees, and kindly keep and furnish Mr. Barnard with a correct copy of each of such notifications."

This letter, it will be observed, is a very substantial departure from the verbal instructions previously given to Harrison on the 16th, and upon which, as we have already seen, the plaintiff was acting. On the 19th Mr. Harrison wrote to Mr. Rogers as follows:

"You will also recall that in a conversation had with me many days previous to your letter of the 19th instant you instructed me to get these repairs made. I now have all the repairs under contemplation and am having everything done on what I consider the most economical basis possible. In fact, I am doing many things that in my own judgment are being done in too stingy a manner; I am at the same time doing everything in my power to have the total cost come within the figure shewn me by yourself and that published in the daily paper. I have purchased every article at the best establishments I can find and have asked for the very lowest net spot cash prices.

"I wrote you a letter several days ago on this same subject, and again I will say to you that I will not be responsible for said repairs or any portion of them being done on the Hotel Driard on account of the recent fire, or other causes that may have been in existence previous to the fire. . .

"As stated in my previous letters to you, I believe your intention is to treat me right in the matter, and I am certainly doing my part to see that Mrs. Dunsmuir is being given every advantage at my disposal in the matter of repairing her hotel and in the way of catering to the business.

"In regard to the liability incurred or that may be incurred and as to whether Mrs. Dunsmuir and you see fit to carry the policy which I had taken out some days ago, that is a matter for yourselves to consider. You had instructed me to superintend and have made the repairs and I considered that as your agent it was the proper thing to take out a policy to cover accidents."

The work of repairing was completed—or discontinued—between the 2nd and 4th of September, and on the 10th of September all Sayward's bills which had been handed to Mr. Harrison were by him sent to Mr. Rogers.

On or about the 10th of October, that is, shortly after the 31 days limited for filing a lien had expired, it became apparent that Mrs. Dunsmuir would not pay this bill, alleging as a reason that the amount she had authorized Harrison to expend had been exceeded.

On the 29th of October, Mr. Rogers told Sayward that Harrison had no authority to order goods on Mrs. Dunsmuir's credit.

On the next day Harrison called Sayward's attention to the fact that certain doors ordered in August had not been delivered, and at Sayward's request Harrison gave him a written order to deliver the doors.

The lien was filed on 3rd December within 30 days of the delivery of the doors. On hearing that these doors had been delivered Mr. Rogers caused a notice to be posted on the premises under section 7, Cap. 132, R.S.B.C. 1897; section 10, Cap. 20, 1900.

The learned County Court judge gave judgment for the plaintiff for a lien against the Driard hotel and also judgment against Mrs. Dunsmuir personally for $1,000 under section 23 of the Act of 1900, and costs under section 20 of the Mechanics' Lien Act.

The 4th and 6th grounds of appeal are as follows:

"(4.) That it was not shewn that the said materials were furnished or supplied at the request of the defendant Dunsmuir.

"(6.) That the evidence shews that the said materials were not ordered by the defendant Dunsmuir or by any person having authority from her in that behalf."

As a discussion of these points brings out most of the facts of the case we had better deal with them first.

Whether authority has been conferred upon an agent is a question of fact to be proved to the satisfaction of a jury. This fact may be proved by shewing that it was expressly given, or the acts of recognition by the supposed principal may be such that the jury will infer that the agent was duly appointed.

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Each case must be decided on its own peculiar circumstances, for what in the eyes of a jury would be sufficient in one case to raise the inference of appointment and the nature of the authority might not satisfy another jury.

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It is to be remembered that the burden of proof is on the person dealing with anyone as an agent through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it.

Now, in this case, as I have already pointed out, Mr. Rogers on the 16th authorized Mr. Harrison to do all things necessary for Mrs. Dunsmuir. For this business then Mr. Harrison was clearly "general agent" for Mrs. Dunsmuir; before his appointment was revoked he had entered into the agreement with the plaintiff that he should supply all the lumber required and that it should be charged to Mrs. Dunsmuir who was to have the benefit of a 10 per cent. discount. It was understood between Mr. Rogers and Mr. Harrison, and therefore between Mrs. Dunsmuir and Mr. Harrison that lumber would be required. It would be well known to Sayward & Co. that Mrs. Dunsmuir was the owner of the property, and it would be equally well known to him that she personally would not take any part in the supervision of the repairs. It was known to Mr. Rogers that lumber was being supplied.

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After the arrangement with the plaintiff had been entered into, and some of the lumber delivered, Mr. Rogers wrote the letter of the 19th of July limiting Mr. Harrison's powers, but no notice was given to the plaintiff. Having regard to the fact that the original appointment was of such a character as to lead the plaintiff to believe that it was a general continuing agency, *i. e.*, to continue till revoked or the work completed, I think it was incumbent on Mr. Rogers to give such notice.

If this first appointment had not been a general agency, then I would agree with Mr. *Barnard* that notice to the plaintiff was not necessary, and that it was the plaintiff's duty to ascertain from Mrs. Dunsmuir that Mr. Harrison had been authorized to act for her. It has been laid down by high authority that the

prudent course for anyone dealing with a person acting as the agent of another is to require from the principal a distinct statement as to how far the agency extends. But in this case, owing to the previous general agency, I think the proper conclusion is that Mrs. Dunsmuir permitted Harrison to hold himself out as her agent on and after the 19th of July. The extent of Harrison's authority as between Mrs. Dunsmuir and the plaintiff could be measured by the extent of the authority conferred on him by the previous agency. Or perhaps it would be better to put it this way: that Mrs. Dunsmuir having on the 16th appointed Mr. Harrison her general agent for the making of these repairs is estopped from setting up the limitation subsequently placed upon his powers as against the plaintiff, who acted *bona fide*, and to whom no notice was given of the subsequent limitation.

As a matter of fact Sayward & Co. did not know that Harrison derived his authority to act as Mrs. Dunsmuir's general agent from Mr. Rogers. Sayward did believe that Harrison was, in some way or other authorized to pledge her credit. The fact that he was not aware of the true source of authority cannot, in my opinion, make any difference: see *Hambro* v. *Burnand* (1904), 2 K.B. 10, where the defendants were held liable on certain written authorities given by them notwithstanding that they were not shewn nor was their existence known to the plaintiffs.

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The plaintiff's claim to lien is resisted on the ground that the claim was filed too late and that the last two items, namely, door casings, were ordered and supplied for the express purpose of extending the time so as to enable Mr. Sayward to file a lien. The material was delivered as follows:

Between the 16th of July and 1st of September (many items)	$1,237 21
On 5th of November, 2 door frames and cartage	5 00
	$1,242 21

If the delivery of these two door frames does not extend the time for filing the lien, the plaintiff must fail so far as his lien is

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concerned, as the time for filing a lien in respect of the items delivered before the 1st of September would have expired on or about the 4th or 5th of October. The lien affidavit was filed on the 3rd of December, 1904, within the 31 days limited by section 8 of Cap. 132, as amended by section 12 of Cap. 20, 1900.

In *Morris* v. *Tharle* (1893), 24 Ont. 159, and *Robock* v. *Peters* (1900), 13 Man. L.R. 124, the case of materials being supplied from time to time under a general arrangement previously entered into was considered.

Having regard to those decisions it appears to me that in the circumstances of this case if the material was supplied in good faith and for the purpose of completing an order previously given and not colourably to revive the lien, the delivery of such material would extend the time for filing the lien in respect of the earlier items.

Whether the material was supplied in good faith for the purpose of completing the contract or as a mere dodge to revive the lien was a question of fact for the learned County Court judge, and as he has found that point in favour of the plaintiff, his decision on that point should govern us.

IRVING, J.

Mr. *Barnard* relied upon *Summers* v. *Beard* (1894), 24 Ont. 641, but that case, which was the case of a contractor being called in, after the completion of the contract, to remedy defects, has no application to the case of material *bona fide* ordered and supplied under the original agreement: see *Robock* v. *Peters*, *supra*, per Killam, J., at p. 136.

As a consequence of Mr. Harrison being held authorized to pledge Mrs. Dunsmuir's credit, jurisdiction was conferred by section 23 of the Mechanics' Lien Act Amendment Act, 1900, upon the County Court judge to give judgment in the same manner (*i.e.*, *in personam*), and to the same extent (*i.e.*, up to $1,000), as if such indebtedness had been sued upon in the County Court in the ordinary way. I think this jurisdiction would attach even if the claim for a lien were to fail.

I would dismiss the appeal.

MARTIN, J.

MARTIN, J.: There is no good ground, in my opinion, for reversing the judgment below, and I quite agree with his

Honour that immediately upon the receipt of Harrison's letter in reply to that of Rogers, there should have been no trifling in the matter, because in the circumstances to negotiate verbally was to open the door to that conflict on the verbal evidence which later took place, as might have been expected, and very naturally the learned judge preferred to determine Harrison's position chiefly from the point of what he wrote beforehand, and not from what the other side says he afterwards verbally agreed to. He seems to have been satisfied with the truth, in the main, of Harrison's story and he has accepted his version of the facts in issue, and I cannot see how, on the evidence before us, we can reasonably be asked to reverse that finding. I am not prepared, for the like reason to differ from him, and find that Harrison and Sayward were in collusion regarding the lien. Sayward certainly spoke frankly, but that is commendable, and it seems to me that it is at most only a case of suspicion. The evidence of Hickey shews the doors in question were necessary for the reasons he gives, and the judge has specially so found.

As regards the jurisdiction of the County Court to give a personal judgment, I am of the opinion that the true construction of section 23 of the Mechanics' Lien Act Amendment Act, 1900, is that once the relationship of debtor and creditor is established upon the hearing of the claim, the jurisdiction arises. This is but following up the idea of the exclusive and summary jurisdiction the County Court possesses under section 16 of the principal Act, R.S.B.C. 1897, Cap. 132. At first I was inclined to think that the jurisdiction under section 23 was unlimited, and not restricted to the ordinary limitation of $1,000, but on further consideration I would find it difficult to give due effect to the subsequent words "to the same extent, etc.," without holding that they restricted the jurisdiction to the extent to which it is ordinarily exercisable. But it is not necessary to determine the point, for the judgment here was only for $1,000.

MARTIN, J.

I cannot agree with the contention that under this section it was necessary for the creditor to abandon the excess as an ordinary plaintiff must do under section 35 of the County

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Courts Act: that procedure has no application to the situation dealt with by said section 23.

The appeal should be dismissed with costs.

FULL COURT
Nov. 3.

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DUFF, J.: The real controversy between the parties in this action turns, in my opinion, upon the answer to the question whether it is open to the defendant Mrs. Dunsmuir to dispute the plaintiff's contention that the defendant Harrison was authorized to pledge her credit in respect of the repairs and improvements to the Hotel Driard referred to in the letter of the 19th of July, 1904, addressed to Harrison by Mr. Rogers. I have come to the conclusion that this question must be answered in the negative.

The determination of this question is not, I think, controlled by the finding of the learned trial judge with respect to the nature of the oral arrangements which, it is contended, were made prior to the writing of that letter. The learned trial judge does not base his finding upon any view respecting the intrinsic credibility of the witnesses whose evidence was under consideration, but entirely upon the inference which, in his opinion, is to be drawn from the subsequent correspondence; and a finding of fact based on such considerations is to be freely reviewed by a Court of Appeal: see *Hood* v. *Eden* (1905), 36 S.C.R. 476 at p. 483, *per* Taschereau, C.J.

DUFF, J.

I think the probabilities of the case support the statement of Mr. Rogers that from the beginning he did not intend to confer upon Harrison, and believed that he was not conferring upon him any power to pledge Mrs. Dunsmuir's credit. I accept his statement that his view of the authority conferred upon Harrison was that Harrison was authorized to expend on repairs and improvements on the Driard hotel a certain definite sum of money, the proceeds of the insurance policy—and that only. This view is not inconsistent with the conclusion, for reasons which will be apparent as I proceed, that Harrison himself, on the other hand, believed that Mr. Rogers was conferring upon him a power to pledge Mrs. Dunsmuir's credit.

The letter of the 19th of July, 1904, is, I think, susceptible of being read as appointing Harrison an agent for the expenditure

of the fund only; but it is not open to dispute that on the other hand Harrison was justified in reading it as an authority to pledge Mrs. Dunsmuir's credit to the amount mentioned in the letter, subject to such other limitations as on the fair construction of the letter should be deemed to have been placed upon the scope of that authority. There is also, I think, little doubt that the latter is the more reasonable construction; and I am bound to say that had I been in Harrison's place I should have so read the document. That Harrison acted upon the assumption that he was authorized as Mrs. Dunsmuir's agent to pledge her credit is clear; and it follows as of course that as between Mrs. Dunsmuir and Harrison it is not now open to her to contend that his real authority was not in this respect that which he conceived it to be, and which he in fact exercised: *Ireland* v. *Livingston* (1872), L.R. 5 H.L. 395 at p. 416. Still less I apprehend, is it open to Mrs. Dunsmuir to dispute, as against the plaintiff, that the construction which was reasonably placed by Harrison upon the instrument creating his authority, and which formed the basis upon which he dealt with the plaintiff, was the true construction.

I do not accede to the contention of Mr. *Elliott* that we are in favour of persons dealing with him on the assumption that he had such authority, and without notice of any specific limitation of it—to take the letter I am discussing as conferring on Harrison the authority of a general agent in the business to which it relates. To test the point, let us reduce Mr. *Elliott's* contention to its simplest terms: A authorizes B to pledge his credit in the purchase of mercantile supplies to the extent of a $1,000. Can it be contended that if B proceeds at once to pledge A's credit with C to the extent of $2,000 A is bound by B's act in the absence of notice to C of the limitations of B's authority? Thus, merely to state the proposition is, I apprehend, to answer it.

DUFF, J.

I am not at this moment touching the case which would commonly arise under an authority of the character which we are now discussing, namely the case of purchases extending over a period of time, and in which A should from time to time recognize B's authority to pledge his credit by making payments on

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account of such purchases, thereby holding out B as his general agent in the business of such purchases. In such a case, and in the absence of notice to such persons, A's responsibility to persons dealing with B would be limited only by the scope of his apparent agency. That is not the case we are considering, because there is no evidence here to shew that the plaintiff acted on the faith of any belief based upon appearances for which Mrs. Dunsmuir was responsible; but, on the contrary, he frankly admits that he accepted Harrison's own assurance as to the existence and scope of his business relations with Mrs. Dunsmuir.

While, however, I do not think there was any duty cast upon Mrs. Dunsmuir to communicate to the plaintiff, or anyone else, the limitations expressed in the letter of the 19th of July, 1904, in my opinion, in this litigation the burden is cast upon the defendant to shew at what point of time in his dealings with the plaintiff on behalf of Mrs. Dunsmuir, Harrison exceeded the authority conferred by that letter. On this point there is no evidence, and we must take it, I think, in the absence of evidence, that when Harrison, in Mrs. Dunsmuir's name, purchased the goods for the price of which this action is brought, the limit of his authority had not been exceeded; and that consequently the liability on each item in the plaintiff's account came into being as the liability of Mrs. Dunsmuir as incurred by Harrison, her *alter ego*.

DUFF, J.

Mr. *Barnard's* argument seemed to involve the proposition that if in the aggregate expenditure Harrison exceeded the amount placed at his disposition, then no liability was created against Mrs. Dunsmuir in respect of any of Harrison's transactions on her behalf; which in turn involves this: either that no liability on the part of Mrs. Dunsmuir was to come into existence until after the completion of the repairs; or that any liability, as incurred, should be subject to be defeated if the limits of Harrison's authority should be exceeded. But it seems too clear for argument that neither of these propositions can be maintained once the authority to pledge credit is established.

Nor can effect be given to the contention on the part of Mrs. Dunsmuir that since the onus is on the plaintiff to prove agency,

he must in this case shew that Harrison did not exceed his authority. In the first place, the plaintiff ought not to be called upon to prove a negative. In the next place, the facts necessary to enable one to reach a conclusion on the question are in the possession of Mrs. Dunsmuir and her agent. And in the third place, there can be no doubt that at the beginning of his transactions with the plaintiff, Harrison was acting within the limits of his agency; and applying a presumption of fact commonly recognized in courts of law, we may assume, until the contrary is proved, that a state of things once existing continued.

Mr. *Barnard* relies upon some observations of Lord Cranworth, reported in *Pole* v. *Leask* (1863), 33 L.J., Ch. 155 at p. 162, delivered in the course of a dissenting judgment, which are as follows:

"The burden of proof is on the person dealing with any one as an agent, through whom he seeks to charge another as principal. He must shew that the agency did exist and that the agent had the authority he assumed to exercise, or otherwise that the principal is estopped from disputing it."

I do not think these observations have any application here. It is not to be supposed that Lord Cranworth intended to say that in an action involving the proof of agency the burden of proof might not shift, as in other cases. Here, the agency is proved; the extent of the authority is proved; and with respect to part of the transaction, with which the principal is sought to be charged, it is not and cannot be disputed that the authority was legitimately exercised. There is nothing in the observations quoted which, in my judgment, affects the validity of the reasons I have given for thinking that, at the point at which the case was left, the onus rested on Mrs. Dunsmuir to shew that her agent's authority was exceeded, and that onus not being sustained, the question in dispute must be determined against her.

DUFF, J.

On my view of the effect of the letter of the 19th of July, 1904, I have still to consider Mr. *Barnard's* contention that Harrison's agency was limited by the directions contained in the following paragraph:

"You are to confer with me or my representative every day, and report progress and hand in estimates of cost. No material is to be sup-

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plied except on your written order, and all bills accompanied by such vouchers and time sheets, certified to by your time-keeper, are to be turned in at the end of each week, or oftener, if occasion may require."

and that such directions not having been complied with by Harrison in his dealing with the plaintiff, Mrs. Dunsmuir is relieved from liability. In the first place, in my opinion, these words ought to be read as placing no limitation on Harrison's authority. The correct way, I think, of looking at them is to regard them as setting forth a mere domestic arrangement; and for this, if there were no other reason, that any other construction would obviously expose third persons with whom a liability should be incurred to the contingency of having his debt defeated by a condition subsequent. But, in any case, assuming the terms of that paragraph to limit the scope of Harrison's authority, I do not think that Mrs. Dunsmuir is entitled, as against the plaintiff, to insist upon that limitation. There can be no question that if a principal permit his agent in transactions with third persons within the general scope of the agent's authority, to ignore directions which the principal has given respecting the manner in which that authority is to be exercised, the principal cannot afterwards, to the prejudice of such third person, rely upon such directions as affecting the authority. In the present case, Mr. Rogers states that he appointed an architect for the express purpose of insuring the observance of these provisions; and the evidence of the architect shews that he was aware of the fact that with respect to the supply of materials the agent was not observing them; this knowledge was Mrs. Dunsmuir's knowledge.

DUFF, J.

In this view of the questions I have discussed, it is not necessary to consider whether by reason of the correspondence between Harrison and Mr. Rogers between the 18th and 21st of July, 1904, Mrs. Dunsmuir is estopped from disputing that Harrison was her general agent to effect the repairs and improvements referred to in that correspondence. I refer to it only because on the argument I expressed myself as strongly inclined towards the view that the estoppel was established. A person who, knowing that another, having no authority, is assuming to act as his agent—or, which is the same thing, that

an agent with a limited authority is assuming in his name to exercise a general authority—stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards against such third persons dispute its existence. Assuming the relationship of principal and agent to have already existed between Mrs. Dunsmuir and Harrison, I think that the letter of the 21st of July was a sufficient notice to Mr. Rogers that Harrison intended to assume the character of a general agent in the business referred to; and that if no further communication had taken place, Mrs. Dunsmuir could not escape the application of the rule I have stated. But the rule rests upon this foundation—that the principal knew, or ought to have known, that the agent has assumed, or intends to assume, a false authority; and after considering the evidence of Mr. Rogers and the architect, to the effect that after the letter of the 21st of July, Harrison agreed to observe the limitations expressed in the letter of the 19th of July respecting the amount to be expended, I am not prepared to hold that in this case the existence of this condition has been established.

On the questions raised respecting claim for a lien I concur with my brother Irving.

I concur that the appeal should be dismissed with costs.

Appeal dismissed.

DUFF, J.

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Sept. 15.

RE RAILWAY PORTERS' CLUB

RE RAILWAY PORTERS' CLUB.

Statute—Construction of—Public Inquiries Act, R.S.B.C. 1897, Cap. 99—Jurisdiction of Commissioner—Benevolent Societies Act, R.S.B.C. 1897, Cap. 13—Club—Benevolent Society.

The Corporation of the City of Vancouver petitioned the Lieutenant-Governor in Council, alleging that certain societies incorporated under the provisions of the Benevolent Societies Act, were abusing their corporate powers and applying them to purposes other than those authorized by the statute, and praying that, under the powers thereby conferred, these societies be dissolved. The Lieutenant-Governor in Council appointed a commissioner under the authority of section 4 of the Public Inquiries Act to inquire into the facts bearing upon the allegations contained in and the prayer of the petition:—

Held, that the power of the Lieutenant-Governor in Council to dissolve societies created under the provisions of the Benevolent Societies Act, though not for any public purpose, is one of the powers of government exercisable by the Executive, and the investigation of the facts leading to a conclusion on the question whether that power shall be exercised, as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters connected with the good government of the Province, within the meaning of section 4 of the Public Inquiries Act.

Statement

APPLICATION on behalf of the Railway Porters' Club, of the City of Vancouver, for an order prohibiting Mr. H. A. Maclean, a commissioner appointed by the Lieutenant-Governor in Council to inquire into the management and conduct of certain clubs in the said city, established under the provisions of the Benevolent Societies Act, from conducting any investigation, upon the ground of want of jurisdiction in the Lieutenant-Governor in Council to make such appointment.

The application was argued before DUFF, J., at Vancouver, on the 15th of September, 1905.

Argument

Wade, K.C., in support of the application: The scope of the Public Inquiries Act is confined to inquiries into the conduct of public business, such as the management of various departments of the government, administration of justice and municipal affairs. If the commissioner appointed here has power to inquire into the affairs of private clubs merely because they are

established under a public Act, he could also investigate the affairs of incorporated companies and partnerships.

Maclean, K.C., D.A.-G., contra.

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DUFF, J.: The Municipality of Vancouver has petitioned the Lieutenant-Governor in Council alleging that certain societies incorporated under the Benevolent Societies Act are abusing their corporate powers and applying them to purposes opposed to those authorized by that statute; and praying that under the powers thereby conferred [section 16] these societies be dissolved.

The Lieutenant-Governor in Council has, under the authority of the Public Inquiries Act, appointed a commissioner to inquire into the facts bearing upon the allegations and the prayer of this petition.

On behalf of some of the societies, Mr. *Wade* objects that such an inquiry—involving an investigation of the management of individual corporations not created for any public purpose—does not come within the scope of that Act. I do not agree with this contention. Section 4 of the Act in question is as follows:

"Whenever the Lieutenant-Governor in Council deems it expedient to cause an inquiry to be made into and concerning any matter connected with the good government of this Province, or the conduct of any part of the public business thereof, including all matters municipal or the administration of justice therein, and such inquiry is not regulated by any special law, the Lieutenant-Governor in Council may by Commission intituled in the matter of this Act, and issued under the Great Seal of the Province, appoint Commissioners or a sole Commissioner to inquire into such matter."

Judgment

It seems impossible to say that the facts alleged in this petition charging a large number of organizations (deriving their corporate status from the Provincial Legislature) all domiciled in one community, with abuse of their corporate powers, may not materially touch the "good government" of the Province. The precise nature of the abuses complained of is not before me; but one can easily conceive that they might be of such a character as unhealthfully to affect the public morals; and that, in such a case the subject-matter of this petition would be within the scope of the section I have just quoted, is, I think, outside the region of dispute.

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There is another consideration which supports my view. The power of the Lieutenant-Governor in Council to dissolve these societies is one of the powers of government exercisable—under the authority of a legislative enactment—by the Executive of the Province. The investigation of the facts; the deliberation on the facts leading to a conclusion on the question whether the power shall be exercised; as well as the determination to exercise it, and the executive act in which the determination culminates, are all matters which, in the language of the section are "connected with the good government of this Province;" and in my opinion are as well matters concerning and connected with the conduct of the "public business" of this Province.

Judgment

Application dismissed.

MORRISON, J.

1905

Oct. 12.

IN RE CHIN CHEE

IN RE CHIN CHEE.

Habeas corpus—Immigration Act—"Passengers," definition of—Resident of Canada afflicted with disease, returning from abroad—"Immigrants" defined—Statutes—Construction of.

A resident of Canada, returning from a visit abroad is not a "passenger" or an immigrant who is subject to the provisions of the Immigration Act.

MOTION by Chin Chee, a Chinaman, detained by the Canadian Pacific Railway Company, on an order from the Dominion Government to make absolute a summons for a writ of *habeas corpus* to the Canadian Pacific Railway Company to try the right to detain the applicant.

Chin Chee, a resident of the City of Vancouver, and domiciled in Canada for some ten or more years, obtained leave to visit China, provided he returned within one year. He reached British Columbia within the specified period, by one of the Canadian Pacific Railway Company's steamers, but on his being found afflicted with a disease known as trachoma, he was detained by the medical officer of the Dominion Immigration Department. This officer pronounced the disease incurable, and ordered the steamship Company to deport the applicant.

Statement

T. R. E. McInnes, for the applicant.

C. B. Macneill, K.C., for the Dominion immigration authorities: The Dominion Government has power by the statute 2 Edw. VII., Cap. 14, Sec. 1 (Dominion) to deport not only immigrants, but all passengers landing at Canadian ports, when such passengers are afflicted with an incurable disease. Said chapter 14 amends section 24 of the Immigration Act, R.S.C. 1886, Cap. 65, as follows:

"24A. The Governor-General may, by proclamation or order, whichever he considers most expedient, and whenever he deems it necessary, prohibit the landing in Canada of any immigrant or other passenger who is suffering from any loathsome, dangerous or infectious disease or malady, whether such immigrant intends to settle in Canada, or only intends to pass through Canada, to settle in some other country.

Argument

"2. Such prohibition may be absolute or may be accompanied by permission to land for medical treatment only, for a period to be determined upon as provided by order or proclamation."

He also referred to the definition of the word "passengers" in the original Act as follows:

"The expression 'passengers' applies to all passengers as well as the immigrants usually and commonly known and understood as such, but not to troops or military pensioners or their families, who are carried in transports or at the expense of the Government of the United Kingdom."

MORRISON, J., *held* that the word "passengers," within the meaning of the statute, did not apply to persons domiciled, or resident, in Canada, returning from a visit abroad; that to make the statute applicable to such cases would work great hardship, which was never intended by Parliament in passing the Immigration Act; that the Act applied to immigrants and to persons of that class commonly called immigrants, and to foreign passengers or citizens of any foreign country who might land at Canadian ports; and that to stretch the meaning of the word "passengers" to include home-coming residents of Canada would be unreasonable.

Judgment

The applicant to be discharged from custody. No costs.

Application allowed.

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MILNE v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED.

Promissory note—Collateral security—Crediting proceeds of—Suspense account—Creditor—Right of to appropriate—Intention of debtor—Set-off—Concealment—Funds ear-marked for specific use—Principal and surety—Further consideration—Directions—Account—Statute of Limitations—Cumber v. Wane—doctrine in.

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K. made and gave to R. Bros. four promissory notes of $2,500 each, with interest at 12 per cent. R. Bros. obtained the indorsement of M. to these notes, discounted them with the defendant Company and deposited as collateral security for the payment of the notes 500 shares of the capital stock of the Vancouver Gas Company. Subsequently, R. Bros. obtained a second loan on two other promissory notes, to which K. was also a party, and as security, deposited 500 additional shares of the Vancouver Gas Company. M. was not connected with this loan, nor the security deposited in respect of it, although he claimed to be entitled to the benefit of the security.

In an action against K., R. Bros. and M., the defendant Company signed judgment against K. for $10,634.23 in respect of the first four notes; but on the same day, though prior to so signing judgment, they also took judgment against him for $21,000 in respect of the second loan.

Following on this the defendant Company threatened to proceed to judgment against R. Bros. and M. and actually did sign judgment against R. Bros. for $21,180.23; but M. for himself obtained a four months' extension of time by depositing 250 additional shares of the Vancouver Gas Company. These shares were deposited as collateral security for the four notes of $2,500 each, and were to be returned to M. if within the four months agreed upon he paid the defendant Company a sum not less than $6,000 on account of the said notes.

Before the judgment in the action, the subject of this appeal, was given, the defendant Company received dividends on the first 500 shares deposited $2,657.80, and in respect of the 250 shares deposited by M. $1,328.90, both of which sums were placed to the credit of the K.-M. account. The defendant Company also received a dividend in respect of the 500 shares deposited by R. Bros. for the second loan, but this was not credited to the K.-M. account.

M., who was president of the Gas Company, got his wife to purchase the whole 1,250 shares for $8,000, which amount M. contended "was to be placed to his credit until the notes of K. were relieved or paid." This

sum was carried in a suspense account to the credit of M. from December, 1894, to October, 1901.

In October, 1901, the defendant Company transferred this sum of $8,000 from M's account and placed three-fifths of this amount to the credit of the said four notes, and two-fifths to the credit of the notes of R. Bros.

In February, 1900, the defendant Company agreed to receive from K., or his nominee, the sum of $15,000 in consideration of which they were to assign to him or his nominee the above mentioned judgments of $10,634.23 and $21,180.23, together with certain securities (mortgages) held by them. This money arrived in August, 1900, but the defendant Company did not reach a final settlement with K's nominees, C. & S., until November, 1901.

In the meantime, they had an action pending against M for a settlement, but abandoned the proceedings; and M. brought this action for a declaration that he had been discharged from liability to the defendant Company as surety for or as indorser of the said four notes; for an account of what had been received by the defendant Company in respect of the securities deposited by him with them under the circumstances above set out; and for payment of the amount so found:—

Held, that prior to the appropriation by the defendant Company, in payment of K's liability, of the moneys standing to the credit of M. in their hands, there was neither an actual satisfaction of K's liability, nor any enforceable agreement by which the defendant Company bound itself to compound with K., and that consequently the appropriation in question was valid.

That the defendant Company might rightfully appropriate the moneys received from K's nominees, C. & S., in liquidation of any of K's liabilities, and having appropriated them in payment of a liability in which M. was not concerned, M. was not entitled to an account of those moneys.

Per DUFF, J. (*dissentiente*)—That on the evidence, on or before the 20th of August, 1900, there was an agreement concluded between C. & S. (executors of the will of K's uncle), the defendant Company and K., by which it was stipulated that the sum of $15,000, then held by the Bank of British North America, to the credit of C. & S., should be paid to the defendant Company, and accepted by it in full satisfaction of K's personal indebtedness to the defendant Company; and that for the benefit of K. the defendant Company were to assign the securities set forth in a certain letter dated the 28th of February, 1900, including certain judgments specifically described in the reasons for judgment; and that in these circumstances the subsequent refusal of the defendant Company to accept performance by K. was sufficient to deprive it of the power of resorting to property in its hands belonging to the surety, M.

That the judgment of DRAKE, J., involves the adjudication that by reason

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of the dealings between the defendant Company and K., M's liability was discharged as of the 28th of February, 1900, and consequently that, at the time of the appropriation by the defendant Company of the moneys of M. in its hands, there was no debt owing by him in respect of which these moneys could be appropriated.

That in any case, by reason of the course of dealing among the defendant Company and K. and C. & S., the attempt of the defendant Company to appropriate the proceeds of the settlement in liquidation of K's separate indebtedness (thereby exposing K. to an action by M. for indemnity in respect of the moneys paid by the latter), was a fraud upon the settlement, and that in this action the defendant Company could not be allowed to say that these proceeds had been thus wrongfully appropriated, when they might have been rightfully appropriated in full relief of M. and K.

Decision of MORRISON, J., reversed.

APPEAL from MORRISON, J., who, on a motion to confirm the Registrar's report, and on further consideration, gave judgment, on February 8th, 1905, for the plaintiff in the sum of $4,607.96, made up as follows: (a) $1,600, the value of 250 shares of the capital stock of the Vancouver Gas Company deposited by the plaintiff with the defendant on 23rd February, 1894, under circumstances mentioned below; and $896.37 interest thereon from 31st December, 1894; and (b) $1,328.95 the value of certain debentures issued as dividends in respect of the above mentioned 250 shares; and $782.64 interest thereon from 15th July, 1894.

Statement

On the 10th of August, 1892, one James Cooper Keith made and gave Rand Bros. four promissory notes for $2,500 each. These were renewed, the renewals bearing interest at 12 per cent. per annum after maturity until paid. Rand Bros., having obtained Dr. Milne's indorsement on these notes, discounted them with the defendant Company (hereinafter called the Bank). In August, Rand Bros. deposited as collateral security for the payment of the notes 500 shares of the capital stock of the Vancouver Gas Company.

On the 2nd of December of the same year, Rand Bros. obtained from the Bank a second loan on two other promissory notes, to which last mentioned notes Keith was also a party, and as security for this loan, deposited 500 additional shares of the capital stock of the Vancouver Gas Company. Neither this December loan nor the security therefor was connected in any

way with the plaintiff in this action, although the plaintiff claimed that he was entitled to the benefit of this security.

On the 3rd of July, 1893, the Bank commenced an action against Keith, the plaintiff and Rand Bros. for the amount due upon the Keith-Milne notes, and on the 2nd of October signed judgment against Keith for the sum of $10,634.23. On the same day, but prior to signing this judgment, they had taken judgment against him for $21,000 in respect of the December loan.

In the early part of 1894, the Bank threatened to proceed to judgment against Rand Bros. and Milne. Judgment was signed against Rand Bros. on 2nd October, 1893, for $21,180.23, but the plaintiff was able to obtain a four months' extension of time by depositing 250 additional shares as collateral security on the terms set out in the following letter:

"Vancouver, B. C., 23rd Feb'y, 1894.

"DR. G. L. MILNE,

"Victoria, B. C.

"Dear Sir:

"In consideration of your transferring to Mr. William Farrell 250 shares of Vancouver Gas stock as collateral security for four notes of $2,500.00 each, signed by James Cooper Keith and endorsed by yourself and Mr. C. D. Rand, we agree to suspend entering up judgment against you for four months from date, and if during the interval above mentioned you cause to be paid in to us on account of above mentioned notes a sum not less than $6,000.00 we hereby agree on behalf of Mr. Farrell to re-assign above mentioned collateral security. Statement

"This letter will be handed you by our agents Messrs. Dalby & Claxton on receipt of the 250 shares above mentioned duly endorsed.

"Yours respectfully,

"W. R. ROBERTSON."

The $1,600 in the judgment appealed from are the proceeds of these 250 shares.

In July, 1894, the Bank received dividends on account of the first lot of 500 shares deposited with the Keith notes $2,657.80, and in respect of the 250 shares deposited by Milne $1,328.90. The total sum so received in respect of these 750 shares was placed to the credit of this Keith-Milne account. The sum of $1,328.90 is the item in the judgment appealed from.

In respect of the other lot of 500 shares held as security for

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the December loan, the Bank also received a dividend, but this sum is not to be credited to the Milne-Keith account.

Towards the end of 1894, Dr. Milne, who was president of the Vancouver Gas Company, becoming apprehensive that the Bank might take measures for enforcing their rights as holders of these 1,250 shares, thought that it would be in the interest of the Gas Company and himself that the shares should be in the hands of some friendly person. He therefore got his wife to buy the three lots of shares for $8,000. This sale was completed on the 31st of December, 1894. Dr. Milne says it was arranged that "the whole amount of $8,000 was to be placed to his credit until the notes of Keith were relieved or paid."

Statement

On the 31st of October, 1901, the Bank transferred the above sum of $8,000 from the account of Dr. Milne, placed three-fifths thereof to the credit of the first four notes, and two-fifths to the credit of the notes of Rand Bros. personally (the December loan).

The remainder of the facts are fully set out in the reasons for judgment.

The trial took place before DRAKE, J., at Vancouver on the 31st of October, 1903.

Bowser, K.C., and *Wallbridge*, for plaintiff.
C. B. Macneill, for defendant Corporation.

2nd November, 1903.

DRAKE, J.

DRAKE, J.: The evidence discloses the fact that Milne was an indorser of Keith's notes for $10,000 payable to Rand Bros. who discounted them and put up 500 shares in the Gas Company as collateral. The notes not being paid at maturity, the defendants who discounted the notes refused to renew without further collateral security was put up. Milne accordingly put up 250 shares of Gas stock, and he says that he purchased this stock and Rands' stock [1,250] for his wife who paid $8,000 for them. This sum was left with the defendants, as Milne alleges, to his credit until such time as Keith should pay his notes. Keith was indebted to the defendants in other moneys for which he had given mortgages, and the defendants got judgment

against him for $20,000, and also on February 24th, 1894, a judgment for $10,000 on the notes. On the 25th of February, 1900, the defendants agreed to release Keith from all liabilities, including the notes for $10,000, in consideration of a cash payment of $15,000, and this money arrived in August, 1900, and the defendants were notified of it. Keith in the meantime had paid, as he says, upwards of $10,000 on account of his liabilities to the defendants. The defendants had placed the $8,000 to a suspense account in their books and there it remained until October, 1901. At that time the defendants were suing the plaintiff as indorser of these notes, but abandoned their action and kept back the final settlement with Keith until November, 1901, although the money was lying in the Bank waiting to be paid over; the object admittedly was to try and force Milne to a settlement. After they had closed with Keith and assigned to him the judgments for the notes and for the mortgages, and freed him from all liabilities to them, they still proceeded with their action against Milne, but finally abandoned it. The defendants hold the notes *in terrorem* over Milne, and although they are alleged to be barred by the Statute of Limitations they have not cancelled his signature. The plaintiff is entitled to have his name cancelled on the notes and on the renewals and I so order. The plaintiff also desires to have an account taken of the amounts actually due and paid on the notes in question, and I think sufficient has been disclosed to entitle the plaintiff to relief he asks. If, as the plaintiff alleges, the $8,000 was held on account of the notes, that would leave only $2,000 and interest due thereon. The defendants have also received certain debenture moneys from the Gas Company in respect of these shares and also considerable sums from Rand Bros. of which they must furnish an account. The only account which is produced in evidence is practically useless and furnishes no information.

DRAKE, J.

The following accounts will have to be taken: An account of all moneys received by the defendants from any parties to the notes in or towards payment thereof; an account of moneys due on the notes with interest as agreed, up to the time when judgment was obtained, and then at lawful interest only, up to the

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date of the agreement to discharge Keith, which was 28th February, 1900. Also an account of what would be due in case the plaintiff was only entitled to two-fifths of the $8,000.

In order to fix the amount it will be necessary to ascertain the amount paid by Keith to the defendants both in respect of his mortgages and of these notes. Further consideration and costs reserved.

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The following is the operative portion of the decree made in pursuance of the decision of DRAKE, J., the 2nd of November, 1903:

This Court doth declare that the plaintiff is released and discharged from all liability as surety or indorser of four promissory notes for $2,500 each dated the 10th day of August, 1892, made by James Cooper Keith payable to Rand Brothers three months after date, and doth order and adjudge the same accordingly.

And this Court doth further order and adjudge that the signature of or indorsement by the plaintiff on each of the said promissory notes be cancelled by the District Registrar of this Court at Vancouver and that for this purpose the said notes be delivered to him by the defendant.

And this Court doth further declare that the plaintiff is released and discharged from all liability as surety or indorser of four promissory notes for $2,500 each in the pleadings mentioned, given in renewal of the notes above mentioned and dated the 14th day of November, 1892, made by James Cooper Keith, payable to the defendant three months after date, and doth order and adjudge the same accordingly.

And this Court doth further order and adjudge that the signature of or indorsement by the plaintiff on each of the said last mentioned promissory notes be cancelled by the said District Registrar of this Court at Vancouver, and that for this purpose the said notes be delivered to him by the defendant.

And this Court doth further order and adjudge that the following accounts be taken:

(1.) An account of all moneys received by the defendant in or towards payment of the said notes or the judgments recovered thereon by the defendant against the said Rand Brothers and James Cooper Keith and whether the same were received by the defendant from any parties to the said notes or from any other person or persons.

(2.) An account of all moneys due on the said notes with interest as agreed up to the date when judgment was obtained thereon and from that date at lawful interest up to the 28th day of February, 1900, and that no interest be allowed after that date.

(3.) An account of all moneys received by the defendant from the said James Cooper Keith or from anyone on his behalf in respect of the

said promissory notes and the judgment recovered against him thereon and of all securities given by him or Rand Brothers on account of the said notes or judgments, and also in respect of a certain other judgment for $21,180.23 recovered on the 2nd day of October, 1893, by the defendant against the said James Cooper Keith and certain mortgages and other securities received by the defendant from the said James Cooper Keith or from anyone on his behalf.

(4.) An account of what would be due on the said notes in case the plaintiff was only entitled to three-fifths of the sum of $8,000 received by the defendants from the sale of 1,250 shares of the Vancouver Gas Company, Limited, and three-fifths of the amount received from the sale of the debentures.

And this Court doth hereby direct that the said accounts be taken before the District Registrar of this Court at Vancouver.

Further consideration and costs reserved.

The appeal was argued at Vancouver on the 19th and 20th of June, 1905, before IRVING, MARTIN and DUFF, JJ.

Davis, K.C. (*Marshall*, with him), for the defendant, appellant, Corporation: After reciting facts leading up to letter from defendants to Keith in February, 1900, that they would release him from all indebtedness and hand over the securities and judgment for $15,000, submitted that this was not a binding agreement on the part of defendants, but only an offer; there was no acceptance, and was only an offer to accept a smaller amount under the doctrine in *Cumber* v. *Wane* (1732), 1 Str. 426. Stress was laid, in support of Dr. Milne's contention that not only he should be released, but that the Gas Company stock should be released, on the fact that defendants had given him no notice. Argument

Defendants contend that there should be a new trial, as DRAKE, J., referred the matter to the Registrar, and DRAKE, J., having resigned in the meantime, the matter came before MORRISON, J. If it had been a mere matter of figures which had been referred to the Registrar, it would have been all right, but the learned trial judge left very important matters to the Registrar for settlement. All that was needed from the Registrar by trial judge were the figures, and having obtained a full and proper report from the Registrar of the accounts between the parties, then the trial judge would be in a position to decide. But in the Registrar's report there is nothing adverse to our claim. He cited *Cory Brothers & Co.* v. *Owners of Turkish*

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Steamship "Mecca" (1897), A.C. 286, as to the right of appropriation of money of a debtor by a creditor, and *Seymour* v. *Pickett* (1905), 21 T.L.R. 302, on the same point.

W. S. Deacon, for respondent: As to the preliminary objection that MORRISON, J., had no jurisdiction to determine the matter, and that a new trial must be had, assuming the various questions were not adjudicated at the hearing, DRAKE, J., had power to reserve them for further consideration: Odgers on Pleading, 5th Ed., pp. 316-7. Proceedings subsequent to the hearing may be brought on before another judge where it is not practicable and convenient to bring them on before the trial judge; Supreme Court Act, Sec. 59; and here DRAKE, J., had resigned before the action could be brought on for hearing on further consideration. Rules 349 and 361 do not contain any such limitation as is contended for by the defendants. The test as to whether the matter was determinable on further consideration is whether or no the decree at the hearing put it in train of investigation: *Passingham* v. *Sherborn* (1839), 9 Beav. 424; *Jones* v. *Morrall* (1852), 2 Sim. N.S. 241; *Pattenden* v. *Hobson* (1853), 22 L.J., Ch. 697. The Registrar's report must be in such form that the Court can form an opinion: *Macintosh* v. *G.W.R. Co.* (1863), 1 De G.J. & S. 443; *Stott* v. *Meanock* (1862), 31 L.J., Ch. 746. Examples of matters not adjudicated at the hearing but decided on further consideration occur in *Bate* v. *Hooper* (1855), 5 De G. M. & G. 338; *Pattenden* v. *Hobson, supra; In re Barclay* (1899), 1 Ch. 681; *Attorney-General* v. *Tomline* (1880), 15 Ch. D. 150; Odgers on Pleading, 5th Ed., pp. 316-7; and, as instances of the original hearing taking place before one judge and the hearing on further consideration before another, see *Bate* v. *Hooper, supra; Aglionby* v. *James* (1850), 4 De G. & Sm. 7; *Pritchard* v. *Draper* (1830), 1 Russ. & M. 191. MORRISON, J., was entitled to look at the evidence taken at the trial: Rule 388; *In re Chennell* (1878), 8 Ch. D. 492; *Stott* v. *Meanock, supra;* and he had jurisdiction to hear the matter: Supreme Court Act, Sec. 59; *Smeeton* v. *Collier* (1847), 17 L.J., Ex. 57, *Rex* v. *Tanghe* (1904), 10 B.C. 297.

Argument

As to the merits: Plaintiff is entitled to a return of his moneys because the principal debtor, Keith, paid the indebted-

ness. DRAKE, J., found at the hearing that the defendants had agreed on 28th February, 1900, to release Keith in consideration of $15,000. When, therefore, this amount was paid in August following, there was no existing indebtedness to which plaintiff's moneys could be applied in October, 1901. The doctrine of *Cumber* v. *Wane* is inapplicable because the payment was to be made by third parties, *viz.*, by Cooper and Smith: Smith, L.C., 11th Ed., Vol. 1, p. 351. Nor was it any the less a settlement with the principal debtor because the form the transaction took was that of an assignment of the judgments to Cooper and Smith, Keith's cousins, and executors of his uncle's estate and who were merely his nominees. Keith's intention in paying this amount, as defendants knew, was to extinguish his liability, and effect should be given to this intention: Am. & Eng. Encyclopaedia of Law, Vol. 2, pp. 447, 452; *Newmarch* v. *Clay* (1811), 14 East, 238 at p. 243. The court may draw correct conclusions as to the intention of the parties: *Adams* v. *Claxton* (1801), 6 Ves. 226 at p. 230. If this payment of $15,000 be not taken as a satisfaction of the indebtedness, the settlement becomes no settlement, and is a fraud on the principal debtor who paid the money on this understanding. *Nevill's Case* (1870), 6 Chy. App. 43, De Colyar on Guarantees, 228. The defendant's contention that there was no binding agreement till November 6th, 1901, is not open to them, because the trial judge has found that the date of the agreement was 28th February, 1900, and by the decree has directed that no interest be allowed them after that date in the taking of the account directed, and the defendants have not appealed from the decree. Defendants adopted this as the date on the taking of the accounts before the Registrar, their manager, Houlgate, swearing in his affidavit verifying the account that they sold the judgment to Cooper and Smith on the 28th of February, 1900. If, in view of the finding of the trial judge on this point, the matter is still open, plaintiff contends the trial judge reached a correct conclusion upon the evidence on this point. The documents carrying out the agreement are dated the 20th of August, 1900, this being the date the money was here and in the Bank ready to be paid over, to the knowledge of the defendants, and if the 28th of February, 1900, is not

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accepted as the date, the 20th of August, 1900, should be. The alleged appropriation in October, 1901, was merely an attempt on the defendants' part to realize on a judgment they had parted with the previous year. The judgment appealed from is right for another reason. Milne was an accommodation indorser and a mere surety: Chalmers on Bills of Exchange, 5th Ed., pp. 220 and 223; Rowlatt on Principal and Surety, pp. 5 and 200; *Cook* v. *Lister* (1863), 32 L.J., C.P. 121. The intention of Keith's transaction with defendants was to extinguish the debt, and that being so the transaction amounted to a release, though in form it was an assignment: Rowlatt, 254; Roscoe's *Nisi Prius*, 16th Ed., p. 465. The release of the principal debtor was a release of the surety: *Nevill's Case, supra*; Rowlatt, 255; *Rees* v. *Berrington* (1795), 2 Ves. 540; *Bolton* v. *Salmon* (1891), 2 Ch. 48 at p. 54. It is sufficient that the defendants knew plaintiff was a surety at the time of their dealing with Keith: McLaren on Bills of Exchange, 2nd Ed., 348, and cases there cited. Plaintiff's moneys stood ear-marked in a separate account to his credit taking the place of his securities and a release of the surety releases his securities: *Bolton* v. *Salmon, supra, Dixon* v. *Steel* (1901), 70 L.J., Ch. 794. The defendants' contention that their claim against the plaintiff was barred previously to their entering into negotiations with the principal debtor, and that they were therefore free to deal with the principal debtor disregarding the plaintiff, is untenable: Am. & Eng. Encyclopaedia of Law, Vol. 22, p. 859; *Courtenay* v. *Williams* (1844), 3 Hare, 539; *Kemp* v. *Westbrook* (1749), 1 Ves. 278; *Wiley* v. *Ledyard* (1883), 10 Pr. 182. Also upon the ground that there was an express agreement that plaintiff's moneys should be held as security in place of his shares until Keith, the principal debtor, should pay the notes the plaintiff is entitled to recover. The Registrar has found in plaintiff's favour as to this and his finding ought not to be disturbed. A proportion of the $15,000 paid by Keith or his nominees for these two judgments should be credited, in which case the defendants would be overpaid and plaintiff would be entitled to recover on that ground: Rowlatt, 206; *Perris* v. *Roberts* (1681), 1 Vern. 34; *Coates* v. *Coates* (1863), 33 Beav. 249; *Hood* v. *Coleman* (1900), 27 A.R.

Argument

203. There was evidence that defendants dealt with the plaintiff and he with them on the understanding that Rands' second deposit of 500 shares made in December, 1892, was being held as security for this indebtedness, and on this ground the proceeds of those shares and debentures should be applied accordingly.

Davis, in reply, cited *Welby* v. *Drake* (1825), 1 Car. & P. 557.

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Cur. adv. vult.

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IRVING, J. [after reciting the facts, proceeded]: There is a conflict of testimony as to what the arrangement arrived at was, but it is certain that the total amount received was carried to a suspense account in the books of the Bank and ear-marked with Dr. Milne's name.

Mr. Farrell, the Manager of the Bank, says, "The reason that I kept it there (*i. e.*, to the credit of a suspense account) was that it was hoped and believed that Keith would pay the full amount, and in that case Milne would be entitled to his proportion of the 1,250 shares back, and the balance would be applied to Rands' other loan," referring to the December loan.

Dr. Milne argues that because it was placed to his credit in the books of the Company, he is entitled to have it regarded as a payment of $8,000 made by him on account of the Milne-Keith notes, regardless of the fact that 500 shares were deposited as security for a loan with which he was in no way concerned.

IRVING, J.

The Registrar, in his report, has found that the Bank did not agree to apply the proceeds of the 500 shares deposited in December in liquidation of the Milne account. I agree with the finding of the Registrar on this point. But he reported that the Bank agreed with the plaintiff that $4,800 "the proceeds of the 750 shares should be held substitutionally merely, as security for the plaintiff's indorsement of the said notes until such time as the maker, Keith," should pay the same.

Milne contends that this finding means that the 750 shares, or the cash equivalent, $4,800, should be held by the Bank in suspense for all time, and that whenever Keith should pay the full amount he, Milne, should receive back the $4,800.

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The officers of the Bank say that there was no such indeterminate agreement contemplated. It is hard to see why they should enter into an arrangement so inconsistent with their interest.

An examination of the evidence, if we bear in mind the rights of the parties, will shew that the Bank could never have agreed to the arrangement Dr. Milne now contends for.

On the 31st of December, 1894, the Bank's position was this, they were entitled to sell these 750 shares, without any notice to Dr. Milne or Mr. Keith.

In ordinary course, the Bank, after having made the sale, would have credited the Milne-Keith account with the proceeds, $4,800, but as they were willing to allow Dr. Milne to remain in as favourable a position as he would have occupied if the shares had not been sold (see Farrell's evidence), it was arranged that the moneys received for the shares should continue to be regarded as a security to the Bank (in lieu of the shares) for the payment of the Keith notes. Generally, when a creditor turns securities into money, the indebtedness is reduced the moment the money comes into the creditor's hands. In fact it is a payment by the debtor (or his surety) on account: see *Molsons Bank* v. *Cooper* (1898), 26 A.R. 571, but the creditor and the surety may agree that instead of the money being at once appropriated to the reduction of the debt, it shall be placed to the credit of a suspense account. This was the course adopted in *Commercial Bank of Australia* v. *Official Assignee of the Estate of Wilson & Co.* (1893), A.C. 181, where there was an express agreement that the Bank should not be bound to apply the funds received until such time as the Bank should think fit.

In this case Dr. Milne, having found a purchaser for the shares, was able to obtain a concession which, until recalled, placed him in a very favourable position—and when this concession was recalled, he would revert to the usual position of a surety.

After the Bank had deposited the money to the credit of the suspense account it was open to them, whenever they deemed it prudent or proper to appropriate it to the payment of the principal debt. They had the matter in their own hands. That was

their object in converting the shares into cash. As soon as they made the appropriation it would operate as a payment on account.

Such being the position of the parties, can it be supposed for one moment that the Bank would voluntarily agree to hold this $4,800 (for it must be remembered that there was no consideration moving from Milne to the Bank for this promise) on any terms less favourable to themselves than those upon which they held the shares?

It seems to me absurd to suppose that the Bank having power to sell the shares for cash at any minute would agree to give up their right to appropriate the moneys substituted for the shares for an indefinite period. The transaction of 31st December, 1894, amounted to this, and nothing more—the Bank promised that they would hold the sum of money, $4,800, substituted for the 750 shares in lieu of the shares, on the same terms and conditions upon which the shares had been held. I think the Registrar's report should be amended by striking out the words "until such time as the maker, Keith, should pay the same."

The plaintiff's own evidence, in my opinion, does not bear out his contention. [The learned judge here quoted the evidence.]

I cannot on such evidence hold that it was intended that the debtor should be consulted as to when and under what circumstances the creditor should be at liberty to put an end to the suspense account by appropriating the proceeds of their securities.

IRVING, J.

On the 31st of October, 1901, the Bank exercised their right of appropriation by crediting the Milne-Keith account with $4,800, the proceeds of 750 shares. The sum of $3,200, the proceeds of the 500 shares deposited in December was credited to the December loan account. Down to that day therefore if Keith had tendered to them the entire amount due for the Milne notes, the Bank would have been justified in taking from him the full amount and returning to Milne his $4,800, but after that date, all they were in a position to demand from Keith was the balance after giving credit for this $4,800, the appropriation, as I have already said, operating as a payment on account.

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In March, 1901, at an interview between Dr. Milne and the officials of the Bank, a statement was handed to Milne. I am rather inclined to the opinion that the handing of this account in itself amounted to an appropriation of the $4,800 as of that date, but as nothing turns on that point, I shall accept the date of appropriation found by the Registrar. The March statement after giving credit for cash received in the summer of 1900 for dividends and $4,800 (the equivalent of 750 shares) shews a balance due on 31st December, 1900, from Milne of $4,362.86.

On the 27th of May, 1901, the Bank issued a writ against Milne for the sum of $4,308.62.

On 13th March, 1901, Dr. Milne's statement of defence to the action was delivered, in which he claimed, *inter alia*, that after the notes had become due the plaintiff had released him by giving time to Keith in pursuance of a binding agreement without his consent. Immediately after this statement of defence had been delivered the Bank discontinued the action.

Dr. Milne then (16th May, 1903) brought this action claiming (1.) a declaration that he had been discharged from all liability to the defendant as surety or indorser of the said promissory notes or otherwise in respect thereof. To this the defendant makes no objection. (2.) An account of what had been received by the defendant in respect of the said 250 shares deposited by the plaintiff. To this the defendant does not object. (3.) Payment by the Bank of the amount found on the taking of the said account to have been so received, with interest; and, lastly, $5,000 damages. This claim for damages was dropped at the trial.

IRVING, J.

On the hearing, which took place before DRAKE, J., it was shewn that Keith was indebted to the Bank in the way I have already mentioned.

The following facts were established. That on the 2nd of October, 1893, the Bank had taken judgment against him for $10,634.23 on the four notes indorsed by Dr. Milne, and they had also—but prior thereto—taken judgment against him for the sum of $21,180.23 in respect of the two other notes given by Rand Bros. in December.

In addition to the above, the Bank held certain mortgages made by Keith and others.

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On the 28th of February, 1900, negotiations were opened by Keith with the Bank with a view to his obtaining a release from all liability (which then amounted to some $33,000 over and above this judgment) on payment of the sum of $15,000. On that day the Bank wrote to Keith a letter offering to transfer to him or his nominees all securities and free him from all liabilities (other than certain mortgages) if he should pay them the sum of $15,000 in March or April. This was a mere offer, and was never accepted by Keith; or if accepted, he did not carry it out; but in August, 1900, he succeeded in making arrangements with some of his relatives, Messrs. Cooper & Smith, by which they agreed that they should advance the sum of $15,000. Subsequently, *viz.*: on 20th August, 1900, they transmitted the money to the Bank of B.N.A. at Vancouver and caused the defendant Bank to be notified of their readiness to close the transaction.

But the Bank (anticipating litigation with Milne) did not see fit to carry out the transaction until the 6th of November, 1901, when they executed an assignment to Messrs. Cooper & Smith of the two judgments; and at or about the same time wrote to them a letter promising to execute any further assignment or papers necessary to vest in them by documents which could be registered all debts owing to the Bank by J. C. Keith, and all claims and demands against him and all securities therefor (with the exception of a certain mortgage transaction not connected with this suit).

IRVING, J.

No appropriation of this $15,000 was made by Messrs. Cooper & Smith. Mr. *Deacon* contended before us that one-third of this sum should be applied on the Milne-Keith account and that the remaining two-thirds should be applied on the $21,180 judgment. But in the absence of any appropriation by the debtor the right of appropriation is with the creditor: *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (1897), A.C. 286; *City of London* v. *Citizens Insurance Co.* (1887), 13 Ont. 713.

DRAKE, J., found that the object of the Bank in not accepting the money in August, 1900, was to force from Milne a settlement. He granted a decree declaring Milne was released from the notes, from all liability as surety or indorser on the

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four notes and the renewals thereof, and ordered that his signature on the notes should be cancelled, and directed that certain accounts should be taken.

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I have made up the accounts as directed by him, with the following results:

Four notes due 17th Feb., 1903	$10,000 00	
Int. thereon at 12% to 2nd Oct., 1893, to date of judgment	741 28	
Int. on $10,634.23 from 2nd Oct., 1893, to date of stat. change of rate: *viz.*, 23rd July, 1894, at 4%	342 20	
Int. on $10,634.23 from 23rd July, 1894, to 28th Feb., 1900 (date of letter to Keith)	3,573 05	
		$14,656 53

No interest thereafter.

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9th May, by cash debentures	1,944 60	
Int. on $1,944.60 to 28th Feb., 1900, at 6%	667 30	
18th June, by cash	1,935 00	
Int. from date to 28th Feb., 1900, at 6%	660 00	
11th July, by cash	107 12	
Int. from date to 28th Feb., 1900, at 6%	36 15	
31st Dec., by cash	4,800 00	
Int. at 6%	1,486 40	
		11,736 57
Balance due on notes		$ 2,919 96

The plaintiff in his surcharge and falsification put his case in different ways:

IRVING, J.

First—That the proceeds of the debentures were not to be applied in payment of the notes, but simply carried to a suspense account for an indefinite period.

Second—In the alternative, that had the proceeds been rightly applied, then the defendants should be charged with $10,634.83 received from Messrs. Cooper & Smith.

The Registrar made two reports. I have already mentioned most of the facts found by him, and where I have been unable to arrive at the same conclusion as he has I have pointed it out. It will be sufficient to say now that he found that the defendants had received on the 11th of July, 1894, on account of the dividend and debentures issued in connection with the 250 shares deposited by Milne the sum of (b) 1,328.95; that the sum (a) of $16,000 (the cash equivalent for the 250 shares) was held

merely as security for the plaintiff's indorsement on the said notes "until such time as the maker Keith should pay the same."

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DRAKE, J., having resigned, the case came before MORRISON, J., on a motion to vary the report and for judgment on further consideration, who, on these reports, gave judgment in favour of the plaintiff for the items (a) and (b) above mentioned, with interest.

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It was argued before us that the facts established that the debtor himself had satisfied the debt and that the true date of the release or assignment was the 20th of August, 1900, on which day the money was in Vancouver ready to be turned over to the Bank. The answer is that Keith was acting as an intermediary only and there was no binding agreement with him or Messrs. Cooper & Smith until 1st November, 1901. Up to that date the Bank was not bound to them nor they to the Bank in any way, and consequently Milne's position was not in any way affected. Can it be supposed for a moment that the Bank on the 28th of February, 1900, when they proposed to accept $15,000 from Keith, intended to give up the money they then held to the credit of the suspense account?

Then it was contended that this document although in the form of the assignment of the debt to Messrs. Cooper & Smith was really a release to Keith from all liability. It is not a release in form. Whether it is so or not in fact depends not on the Bank but upon the good will of Messrs. Cooper & Smith. Of course, Messrs. Cooper & Smith might have asked for a release, but they, for some reason or other, elected to take an assignment to themselves. Had the Bank been asked to execute a release, terms reserving the Bank's rights against Milne might have been inserted, or a greater sum demanded. It seems idle to speculate upon what might have happened. Here we have an assignment by the Bank to Messrs. Cooper & Smith who thereupon became Keith's creditors. Does it make a difference to Milne's legal position as to the motives Messrs. Cooper & Smith had when they took an assignment of the debt? In my opinion we must regard an assignment to these friendly creditors exactly in the same way as we would an assignment to

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strangers: see *Fitzroy* v. *Cave* (1905), 2 K.B. 364; and as to motive generally, *Allen* v. *Flood* (1898), A.C. 1. So far as I can see Milne's position is not affected in any way by this assignment.

Lord Justice Turner in *Wheatley* v. *Bastow* (1855), 7 De G.M. & G. 259, says at p. 279:

"The creditor is, no doubt, under the obligation of preserving the securities, which he takes from the principal debtor, for (as observed by the Vice-Chancellor) the surety may entitle himself to the benefit of those securities, and if any of them be lost by the act or default of the creditor, the surety may be wholly or partially discharged, but the creditor enters into no contract with the surety not to assign the debt or the securities. The law gives him the right to assign them; and if he does so assign them, the obligation which attached upon the creditor attaches upon the assignee. The position of the surety is in no respect altered. The assignee, on the other hand, acquires by the assignment all the rights of the assignor, and it is difficult, I think, to see how the surety can be in a better position against the assignee than he was in against the assignor.

"The surety, it is said, has the right to know who is the assignee; but, admitting this right, the question still remains, is the right of the assignee against the surety destroyed because the fact of the assignment has not been communicated to him? On whom does the law cast the onus of finding the creditor? Generally speaking, as I conceive, upon the debtor; but, apart from this consideration, the surety, if he has no notice of the assignment, may pay the creditor, and the payment, as I apprehend, will be perfectly good against the assignee; and if, upon the payment being made or tendered, the creditor be required to deliver, and does not deliver any securities held by him, the surety would, no doubt, be entitled to relief in this Court, and to stay any proceedings by the creditor. It is to be remembered in these cases, that a surety though a favoured debtor is still a debtor, and that he may at any time relieve himself by paying the debt; and further, that if notice to the surety of the assignment of the debt be held to be necessary, serious impediments to assignments by creditors may in many cases be created."

The Bank in making up their claim against Milne charged him, or rather the loan account, with the sum of $110 incurred in 1894 for legal expenses. So far as I can see there is no evidence given to support this charge.

Mr. Justice DRAKE seems to have been of opinion that interest at the agreed rate should only be allowed up to 28th February, 1900, but as I have already pointed out there was no binding contract made until November, 1901.

In my opinion, the Bank were quite within their rights in

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appropriating the proceeds of the 750 shares and debentures to the payment of these four notes, and that they were not bound to apply any portion of the moneys received by them on assigning their debt to Messrs. Cooper & Smith to relieve Dr. Milne.

I would allow the appeal. The judgment should be set aside, the report varied as above indicated, and judgment entered for defendants.

MARTIN, J.: So far as the question of jurisdiction is concerned I am of opinion, after considering the authorities cited, that it must be decided in favour of the respondent.

Then as to the right to an account. That depends upon the assignment to Cooper & Smith. The money received thereon, $15,000, was admittedly not appropriated by Keith, but it was, I think, appropriated by the only remaining person competent to do it, *i. e.*, defendant's manager, Houlgate, in the way mentioned on pp. 67 and 68 of the appeal book, and when he received the money on November 6th, 1901. The plaintiff's share of the $8,000 which had been for years standing to his credit in a suspense account, awaiting results, was appropriated on October 30th, 1901, as the manager had the right to do: *Cory Brothers & Co.* v. *Owners of Turkish Steamship "Mecca"* (1897), A.C. 286; *Seymour* v. *Pickett* (1905), 21 T.L.R. 302.

I cannot agree that the expression used by the plaintiff, that the proceeds of the sale were to be held "until Mr. Keith would pay the indebtedness" or similar language, is to be taken literally; in the circumstances it must be construed as being referable to collateral security merely, and without such an unusual and unreasonable limitation, having no restriction as to time.

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The important question, on which the whole case turns, is, was there any binding contract before November 1st, 1901? Before going further I should here say that I am unable to accept the contention, so important for the plaintiff's case, that Keith in February, 1900, acted as the agent of Cooper & Smith, and that the arrangement he then made was theirs.

The first letter of 28th February, 1900, was their proposal in answer to Keith's request, and in it the defendant was dealing with Keith alone, and even if it could be taken to be a binding

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agreement, and in my opinion it clearly could not, it was limited as to time, *i. e.*, "March or April," and was never carried out; there is nothing in it that would justify the inference that he was in any way connected with Cooper & Smith, to whom was written the letter of November 1st next year. The test is—can it be said there was a contract before November, 1901, which could have been enforced against the defendant? No weight in the circumstances can be attached to the assignments being dated the 20th of August of that year, and in my opinion there was not such an agreement, and such being the case the plaintiff cannot succeed in this action.

Though I am unable to give effect to the argument of Mr. *Deacon* yet I none the less appreciate the manner in which he had got up a case which is a difficult one, till the facts are established, whereupon it becomes simple, to me at least. The appeal should be allowed with costs.

DUFF, J.: On the 10th of August, 1892, the plaintiff indorsed four promissory notes made by Keith in favour of Rand Bros. for $2,500 each. These notes Rand Bros. discounted with the defendant Company, transferring to the defendant Company at the same time, as collateral security for their obligation on the notes, 500 shares in the capital stock of the Vancouver Gas Company.

The notes matured on the 14th of November, 1892, and not being paid, were renewed on that date by notes of similar tenor with the addition that the renewal notes, on their face, provided for the payment of interest at the rate of 12 per cent. after maturity. The renewal notes, having in their turn been dishonoured, proceedings were commenced by the defendant Company against all parties in July, 1893, and judgment was recovered against Keith on the 2nd of October of that year, and against Rand Bros. on the 24th of February, 1894. The plaintiff, in order to prevent the proceedings against him being pressed to judgment, arranged with the defendant Company that he should, and he accordingly did, assign to them 250 shares in the capital stock of the Vancouver Gas Company as collateral security for his obligation under the notes, on the terms (which

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are expressed in a letter to him from the defendant Company), that for four months the defendant Company were to abstain from proceeding with their action against him, and that, within that period, the plaintiff should have the right to redeem the security on the payment of $6,000.

In the meantime, I should add, Rand Bros. had assigned to the defendant Company additional shares in the capital stock of the Vancouver Gas Company to the number of 500 as security for the re-payment of a separate loan made by the defendant Company to them subsequent to the inception of the plaintiff's liability on the original notes.

I should also add that the plaintiff indorsed for the accommodation of Rand Bros. and that this fact was known to the defendant Company at the time the original notes were discounted.

No payments having been made on any of the liabilities of Rand Bros. to the defendant Company, and the defendant Company desiring to realize on their securities, the plaintiff, in December, 1894, procured a purchaser for the whole of the shares (numbering in all 1,250) in the capital stock of the Vancouver Gas Company held by the defendant Company as security in the manner which I have already mentioned, for the sum of $8,000. This sum of $8,000 was placed by the defendant Company to the credit of the plaintiff, and the first question arising on the appeal is, whether there was any, and, if so, what, special arrangement between the plaintiff and the defendant Company at the time of the sale of these shares.

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Before discussing this question it will be convenient to mention that after the assignment by the plaintiff to the defendant Company of the 250 shares I have mentioned, and before the expiration of the period of four months during which, under the arrangement which I have described, proceedings against the plaintiff were to be suspended, a distribution of the proceeds of the sale of certain debentures was made by the Vancouver Gas Company amongst the holders of the stock. The moneys allotted in respect of the 1,250 shares held by the defendant Company as security were paid in three instalments, making a total of $6,664.50. This sum had been placed to a separate account

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to the credit of Rand Bros. for a reason which will presently appear.

One of the plaintiff's contentions is that at the time of the sale of these shares in December, 1894, an agreement was made between himself and Mr. Farrell, Managing Director of the defendant Company, that the proceeds of the sale of 750 of the 1,250 shares (that is to say, the sum of $4,800), and the moneys allotted to the defendant Company in respect of the same 750 shares (that is to say, the sum of $3,986.72), should be placed by the defendant Company in a separate suspense account to the credit of the plaintiff, there to remain as security merely for the payment of the sums due on the promissory notes in question until Keith should pay the same.

The Registrar has found that such an agreement was entered into. The result of my examination of the evidence is that in my opinion it does not support this finding of the Registrar. The account given by the plaintiff of the transaction between himself and Mr. Farrell was that there was an express agreement between them that the proceeds of the sale of the whole 1,250 shares and of the debentures allotted in respect of these shares should be held as security for this payment. As the Registrar has rejected this account of the transaction, it is not necessary to refer to it beyond saying this, that it indicates the indefiniteness of the transaction as it took shape in the mind of the plaintiff at the time of the trial. The truth seems to be that all parties believed that expectations which Keith had, depending upon the death of an uncle, would so be realized as to enable him to pay all his indebtedness. In that event it was desirable in the interests of the defendant Company that the whole of the proceeds of the sale of the 1,000 shares of the Vancouver Gas Company stock, which had been deposited by Rand Bros., should be so entered on their books that they would be at liberty to apply it in liquidation of Rand Bros.' separate indebtedness. Therefore, it was in the interest of the defendant Company that these two sums of $8,000 and $6,644 should be credited to a suspense account, and that its appropriation should be left to await the arrival of the time when they hoped that Keith would be in a position to liquidate the whole of his indebtedness. If

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an appropriation were made before that event, the effect would be that if Keith should become able to meet the whole of the liability on these notes, the defendant Company, having applied the proceeds of 500 of the 1,000 shares on the same liability, might have some difficulty in so re-adjusting the payments as to make the proceeds of these shares available in respect of the separate indebtedness of Rand Bros.

Now, the legal rights of the defendant Company with respect to the proceeds of the sale of the 250 shares transferred to the defendant Company by the plaintiff, and of the debentures allotted in respect of these shares at the same time, to my mind are clear. At the expiration of the four months during which proceedings were, according to the arrangement between the plaintiff and defendant Company, suspended as against the plaintiff, the shares transferred to the defendant Company by the plaintiff were in my opinion subject to be sold without notice to the plaintiff: *Deverges* v. *Sandeman, Clark & Co.* (1902), 1 Ch. 579. The debenture proceeds, which in the meantime had been received by the defendant Company, being an accretion to their security, were held by them subject to the same terms as the shares were held, and were subject as part of the *corpus* of that security to be appropriated in liquidation of the liability on the promissory notes at the expiration of that period. At the time of the sale of the shares, therefore, the defendant Company was entitled legally to sell them, and to apply the proceeds of this sale as well as the proceeds of the debentures allotted in respect of these shares in liquidation of this debt, without notice to the plaintiff. The shares transferred to the defendant Company by Rand Bros. had, on the other hand, been subject to sale since the maturity of the original notes; and the proceeds of the sale of these shares and of the debentures allotted in respect of them stood therefore in the same position in this respect as the moneys arising from the sale of the 250 shares I have just referred to. In my opinion, only clear evidence should be accepted sufficiently to establish an arrangement varying the legal rights of the defendant Company with respect to this security; and after a careful examination of the evidence I am unable to come to the conclusion that there is any satisfactory

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proof of such an agreement. The plaintiff's own statements are confused and self-contradictory, and giving him the fullest credit for a desire on his part accurately to state his recollection, I am unable to ascertain from his statements precisely what was the arrangement which, according to his recollection, was made at the time. The evidence of Mr. Farrell seems to be sufficiently explicit as to the object of the management of the defendant Company in entering the sums in question in the manner in which they were entered; and their intention that the entries should remain as they were until the time should come when the defendant Company would be in a position to know whether they might reasonably expect to realize the full amount of the indebtedness from Keith, or, if not, how much of it. It is quite consistent with the evidence that this intention was communicated to the plaintiff, as in my opinion it was; and there is really nothing in the plaintiff's evidence which carries us beyond this point, namely, that the defendant Company intended to do that which in the circumstances they considered it to be in their interests to do. It is hardly necessary to say that a mere statement of intention of that character, even though acted upon by the plaintiff, would not give rise to any contract establishing an alteration of the legal rights of the defendant Company as against the plaintiff. I do not discuss (because I think it is unnecessary) how far Mr. Farrell's communications with the plaintiff at this time, by lulling the plaintiff into security, taken together with the defendant Company's active concealment afterwards of its dealings with Keith may affect the plaintiff's rights in this action.

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The two sums which I have referred to then, on the 31st of December, 1894, stood at the credit of the plaintiff and Rand Bros. respectively, as a substituted security for the debts referred to, subject to be appropriated as to three-fifths of them at the will of the defendant Company in liquidation of the indebtedness on the promissory notes.

It is contended on behalf of the plaintiff, that by the conduct of the defendant Company, before any appropriation was made the defendant Company lost its right of appropriation. I have

come to the conclusion that this contention is supported by the evidence.

On the 28th of February, 1900, the defendant Company addressed and delivered to Keith the following letter:

"With reference to our negotiations and conversations in connection with your indebtedness to this Corporation, amounting to $33,527.94, as per annexed statement, if you can make arrangements to pay me some time in March or April the sum of not less than $15,000 I will transfer to you or your nominee the following securities and free you from all liability to this Corporation, *viz.*:

"Judgment 2nd of October, 1893, $21,180.23.

"Judgment 1st of October, 1893, $10,634.23.

"Mortgages and interest amounting to $30,339.32, covering lots 612, 615, 616, south half of lot 620, 614, all in North Vancouver. Blocks 1, 2, 3, 4, 5, 6, 7, of District lot 367. Lots 14, 15, 16, and 17, block 67, sub-division 185, City of Vancouver, also Anglo-B.C. Packing Company, 50 preference shares, and Anglo Packing Company 50 ordinary shares."

On the 6th of November, 1901, the arrangement proposed in this letter was finally carried into effect by the assignment to two persons mentioned, Smith and Cooper, who were Keith's cousins (and the executors of his uncle, who had in the meantime died), of the securities mentioned in the letter, and the two judgments, both apparently dated 2nd of October, 1893, one being the judgment against Keith on the promissory notes, and the other being the judgment against Keith for the sum of $21,180.23 in respect of other debts; and by the payment to the defendant Company of the sum of $15,000, together with a further sum which, in the meantime, had been advanced to the plaintiff by the defendant Company for the payment of taxes in respect of the properties affected by the arrangement.

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Between the 28th of February, 1900, and the 6th of November, 1901, the sums realized from the sale of shares and debentures were applied by the defendant Company as to three-fifths of these sums in payment of the indebtedness on the promissory notes, and as to two-fifths, in payment of the separate indebtedness of Rand Bros.

There was some discussion on the argument before us on the question of the date when these appropriations must be deemed to have taken place; the defendant Company contending that it was effected in March, 1901, by the delivery to the plaintiff of a

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statement shewing the state of his account with the defendant Company at that time, in which the appropriation was treated as having been made; and, on behalf of the plaintiff, that it was not made until the 30th of October, 1901. In my opinion, it is immaterial which of these dates is accepted. I am unable to appreciate the grounds upon which rests the contention that the delivery of the account in March, 1901, did not amount to sufficient evidence of an appropriation. But at all events, I have come to the conclusion that prior to this date, namely, on or before the 20th of August, 1900, there was an agreement concluded among the three parties, Cooper & Smith (the executors of the will of Keith's uncle), the defendant Company, and Keith, by which it was stipulated that the sum of $15,000 then held by the Bank of B. N. A. to the credit of Cooper & Smith should be paid to the defendant Company and accepted by it in full satisfaction of Keith's personal indebtedness to the defendant Company; and that for the benefit of Keith the defendant Company were to assign the securities set forth in the letter of the 28th of February, 1900, including the judgments which I have specifically described.

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On the whole I conclude that in face of the admissions of Houlgate, on a matter peculiarly within his knowledge, the defendant Company cannot successfully resist the contention that the evidence discloses an agreement such as I have stated. There was delay in completion, for the purpose as Houlgate admits, and DRAKE, J. finds, of aiding the defendant Company in their attempts to force a settlement from the plaintiff; but to that delay, Keith was not a consenting party, and that which was delayed was not the concluding of the bargain but the carrying out of the bargain. The fact that the judgments and securities were assigned to Cooper & Smith, to my apprehension presents no difficulty. Keith's testimony to the effect that Cooper & Smith promised him to pay his debts and that the ultimate form of the transaction was adopted for his protection only was not attacked either by contradiction or by cross-examination; and although, in form, his evidence undergoes some change after the judgment of DRAKE, J., his evidence at the trial plainly shews that this was understood by Houlgate.

The substance of the agreement as expressed in the offer of 28th February, 1900, and as explained in the evidence of both Keith and Houlgate was the release of Keith, involving of course, the release of the securities. The assignments were mere pieces of conveyancing, designed to carry out this arrangement in the manner best suited to Keith's protection. In view of this position taken at the trial respecting the nature of the transaction, I do not see how it is now open to the defendant Company to contend that as against it the transaction is to be treated otherwise.

What then, was the legal effect of this compact? Mr. *Davis* contended that it was not a legally enforceable contract, and that it had therefore no effect upon the legal relations between Keith and the defendant Company. That it did not discharge the judgment debts is at once evident. I do not suppose that anyone would contend that, at law, it would have been an answer to an action on the judgment. It could not have been pleaded as an accord and satisfaction in answer to an action on a simple contract debt overdue at the time it was entered into. But that it was, if my view of the facts be correct, an enforceable agreement, I see no reason to doubt; Keith, Cooper & Smith being, as they were, able and ready to discharge their obligations under it, I do not understand on what principle it could be held that in face of it the judgments could be enforced against Keith, either by action or otherwise. And more, in my opinion, at the suit of Keith the agreement would have been specifically enforced against the defendant Company. Keith was a party to it, and beneficiary under it, and clearly could maintain an action upon it. Specific performance of a contract to assign choses in action will be granted: *Wright* v. *Bell* (1818), 5 Price, 325 at p. 331. And there seems no reason why the fact that the assignment is for the benefit of the debtor should make any difference, assuming of course that the requirements with respect to consideration are satisfied. Here, no such difficulty arises, because the payment was to be made by third persons, who were parties to the contract.

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We have now to consider how far this transaction affected the rights of the defendant Company as against the plaintiff. Treat-

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ing it only as an alteration in the terms of the contract between the creditor and principal debtor, the first question is whether it was an alteration of such a character as to discharge the surety. It was a transaction behind the surety's back, and therefore comes within the condemnation pronounced by Lord Loughborough, in *Rees* v. *Berrington* (1795), 2 Ves. 540; nor was the alteration unsubstantial; nor am I clear that it is a case in which it is self-evident that the alteration could not be otherwise than beneficial to the surety, so as to bring it within the exception stated by Cotton, L.J., in *Holme* v. *Brunskill* (1878), 3 Q.B.D. 495 at p. 505. But if the agreement itself did not effect the discharge of the surety, it seems clear that the creditor lost his right of appropriation by reason of his subsequent conduct. "The liability of the surety cannot exceed that of his principal": *U. S.* v. *Allsbury* (1866), 4 Wall. 186. Therefore, the defendant Company being bound to accept the sum of $15,000 in full satisfaction of Keith's indebtedness, the surety's liability was limited to this sum. From the time of completion of the bargain the moneys were available to meet this liability; the creditor was urged to take them, and refused; and this refusal on the part of the creditor to accept performance of the principal debtor was in itself, in my opinion, sufficient to deprive it of the power of resorting to property in its hands belonging to the surety: see Rowlatt on Principal and Surety, 143. When one considers that the creditor's object in pursuing this course was to enable it in violation of good faith to force a settlement from the surety by concealing from him the arrangement just completed with the principal debtor, there seems nothing left to hang a doubt on: see *Goring* v. *Edmonds* (1829), 6 Bing. 94 at p. 97, *per* Tindal, C.J., and *Polak* v. *Everett* (1876), 1 Q.B.D. 669, *per* Blackburn, J.

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But, assuming this conduct had not the effect of releasing the plaintiff, the plaintiff's liability being limited to the sum payable under the fresh arrangement, the moneys belonging to the plaintiff in the defendant Company's hands and by them appropriated in payment of Keith's indebtedness in March, 1901, must be applied in reduction of the sum thus due; and when that sum was ultimately, in November, 1901, paid in full by Keith,

this payment should, to the extent of the plaintiff's moneys thus appropriated, be treated as a payment to the use of the plaintiff and recoverable by him.

But, let us suppose that the agreement of August, 1900, is to be treated as in substance an agreement to assign Keith's debt to Smith & Cooper. Since the purchasers, from the moment the agreement was concluded, were willing to complete and were pressing for completion, there seems to be no reason why the rule in *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, should not be applied and the purchaser thereafter treated as the owner of the debt and securities; it would seem strange indeed if the creditor by delaying completion for the reasons which operated in this case could, to the disadvantage of the surety, avoid the application of that rule. It follows that the principal debt having passed from the hands of the creditor there was nothing to which the money of the plaintiff in the creditor's hands could be appropriated, when the creditor in March, 1901, assumed to appropriate them.

Thus far, on the basis of fact, that prior to any appropriation of the plaintiff's money an agreement of the character I have described was concluded; but I do not think the plaintiff, for success in this action, depends upon this view of the facts. It is well-settled law that unless he reserves his rights against the surety, the creditor discharges the surety by entering into any compact with the debtor of such a character that, consistently with it, the liabilities of the surety cannot be enforced to their full extent: *Owen* v. *Homan* (1851), 3 Mac. & G. 378 at p. 407. And this is put on the ground that to permit the creditor to assert the liability of the surety in such circumstances would be a fraud on the principal debtor: *Lewis* v. *Jones* (1825), 4 B. & C. 506 at p. 515, approved by Willes, J., in *Bateson* v. *Gosling* (1871), L.R. 7 C.P. 9 at p. 14; *Nevill's Case* (1870), 6 Chy. App. 43. In *Ex parte Gifford* (1802), 6 Ves. 805 at p. 807, Lord Eldon put it thus:

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"Upon the faith of such a transaction with the principal, if there was no reserve of remedy against other persons liable, in order to secure the intended effect of such a contract to discharge him upon such a payment, you must almost of necessity infer that the party is not to take a remedy over against others, or which would forthwith bring upon the party dis-

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charged all the evil, from which the prior moment the other had agreed to discharge him."

I have not found any case in which the principle has been applied to compel a creditor to repay to a surety moneys paid by the surety prior to a composition with the debtor. If, in such a case the debtor knew of the payment, the bargain with the creditor could hardly be held, apart from express stipulation, to involve an undertaking on the part of the creditor to protect the debtor against the surety's right of indemnity in respect of such a payment. And it might very well be held that the debtor, knowing of the existence of a guarantee and dealing with the creditor without inquiry as to the state of the account between the creditor and the guarantor, would be in a like position. But it is not easy to see why the case of a surety (of whose liability the debtor is in ignorance) having made payments on account of the debtor's liability should not be within the principle. In such a case the pretended release is, to the extent of such payments, no release, and therefore a fraud upon the debtor. But we are not, I think, in this case required to consider the general question. The judgments which the defendant Company offered to release were judgments as they stood on the 28th of February, 1900; the assignments they delivered were assignments executed as of the 20th of August, 1900. The subject-matter of the transaction as set forth in the evidence I have quoted at length was the indebtedness of Keith as it stood prior to any reduction by payments on behalf of the surety. Keith did not know the fact that the plaintiff was a guarantor, and there was an undertaking by the defendant Company that the only guarantor of whose liability Keith was aware—Rand Bros.—should be discharged.

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That Keith and the assignees believed that by virtue of the settlement the whole of Keith's indebtedness or liability in respect of the notes on which the judgment was founded, was, if not discharged, made subject to their dominion and control; that Houlgate knew of that belief, and knew, also, that Keith and his assignees were consummating the settlement on the faith of it—these are propositions of fact, admitted almost in terms by Houlgate, and most certainly not open to dispute. In

these circumstances, the defendant Company would be, as against Keith, and the assignees estopped from asserting that by the appropriation of the moneys of a surety in their hands after the 20th of August and before the completion of the settlement, the liability of Keith to the defendant Company had been reduced to less than it appeared, with the consequence that, notwithstanding the settlement, Keith was still exposed to an action for a large sum of money in respect of these same promissory notes. Is this estoppel available to the plaintiff in this action? If an action by a creditor may be resisted by a surety on the ground that the assertion of the creditor's claim is a fraud on the rights of the debtor arising out of a composition with the creditor, why may it not be said that a defensive position, in assuming which the creditor is violating rights of a similar character, shall not be available to him? "Nothing can be better settled than this, that when a man does an act which may be rightfully performed, he cannot say that that act was intentionally and in fact done wrongly": *In re Hallett's Estate* (1880), 13 Ch. D. 696 at p. 727, *per* Jessel, M.R.

Be that as it may, I apprehend the principle referred to at least involves this—that after the settlement the creditor will not be permitted actively to do anything in fraud of the settlement which will expose the debtor to an action by the surety for indemnity in respect of his suretyship. It follows that the creditor, in the circumstances here, was bound to appropriate the proceeds of the settlement in relief of the surety, and to the extent necessary to that purpose those proceeds must be treated as moneys paid to the use of the plaintiff.

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It is to be observed that the application of the principle with which I have just been dealing does not depend upon the view which may be taken of the legal relation between the assignees and Keith. I have already given my view of this relation; but assuming that as between themselves, Keith had no legal control of the judgments and securities assigned, still Keith instigated and procured the settlement, was a party to it, was within the equity of it, and is entitled to enforce the rights arising out of it. And the defence set up in this action is as much a fraud upon him as if he had been the sole party to it. And so clearly

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was the attempt, against the good faith of the settlement, to appropriate the proceeds of it to Keith's manifest disadvantage. Mr. *Davis* relied strongly on *Wheatley* v. *Bastow* (1855), 7 De G.M. & G. 261. The resemblance between that case and this is superficial only. There, a brother and sister being interested in a certain fund in court charged their respective interests to secure a debt, one of them as surety only. The creditor assigned the debt and the securities without the knowledge of the surety; and it was contended that the surety was thereby discharged. It was held that he was not. There the debtor was no party to the arrangement. The eminent counsel who argued the appeal put their case chiefly on that point. But, further, in this case, the claim against the plaintiff was never assigned. Houlgate's evidence is that the promissory notes themselves were never asked for by the assignee and were not included in the arrangement. And the judgment of Mr. Justice DRAKE directing the delivery up of the notes for cancellation of the signature of the plaintiff is conclusive on that point. Indeed, the whole argument, founded on *Wheatley* v. *Bastow, supra,* is destroyed by the judgment of DRAKE, J., who in adjudicating that the liability of the plaintiff as surety was discharged, bases that adjudication either upon a finding of the existence of a completed bargain in August, 1900, such as I have described, or upon the effect of the settlement. In either case, *Wheatley* v. *Bastow, supra,* has no application; because if that case does apply, the transactions in question must be held not to be attended by the legal consequence of the discharge of the surety, and the plaintiff's liability still remains. Mr. *Davis* argued that the declaration I have referred to was based upon the fact that the liability of the plaintiff was statute-barred; I have never before heard it suggested that a court would order the delivery up for cancellation of any instrument merely because the liability created could no longer be enforced by action because of the operation of the Statute of Limitations.

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Lastly, with reference to the judgment of DRAKE, J., I see no escape from this—that this judgment involves an adjudication that, by reason of the dealings between the defendant Company and Keith, the plaintiff's liability was discharged as of the 28th

of February, 1900. It is true that on that date there was in fact no completed arrangement between the parties. The learned judge probably took the view that the legal fiction involved in the doctrine of relation might properly be brought into play for the purpose of doing justice.

I have not thought it necessary to refer in detail to the course pursued by the officers of the defendant Company from the beginning of the negotiations for settlement down to the completion of it: It was characterized by a studied concealment from the surety of the transactions with Keith; and by a studied concealment from Keith of the transactions with the surety. That the object of this course was to enable the defendant Company to obtain from the surety more than he should rightfully pay is shewn by its conduct after the consummation of the settlement. Industrious or aggressive concealment has always been visited by the courts as they visit fraud; and I should be sorry to think that the court is entirely impotent in face of an injustice so flagrant as that sought to be accomplished here. The appeal should be dismissed with costs.

Appeal allowed, Duff, J., dissenting.

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IN RE GEORGE D. COLLINS.

Extradition — Perjury — Self-imposed oath — Alimony suit in California— Jurisdiction of California court—Warrant of committal—Jurisdiction of Extradition Commissioner—Description of offence—Particulars— Materiality—Truth of statement in affidavit—Criminality, evidence of— Habeas Corpus.

(1.) Perjury is an extradition crime within the meaning of the Treaty and the Act.

(2.) Where the alleged crime is perjury, it is sufficient if the oath was administered in compliance with the formalities of the demanding country.

(3.) A warrant of committal remanding a prisoner for extradition is sufficient if it states the offence for which he is committed.

(4.) Such warrant, issued by an Extradition Commissioner under the authority conferred by the Extradition Act, is valid if issued in the form prescribed by the Act.

(5.) The ordinary technicalities of criminal procedure are applicable to proceedings in extradition to only a limited extent.

(6.) Where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way.

(7.) Where the demanding country is one of the States of the United States of America, it is sufficient if the imputed crime be a crime according to the law of that State, although not an offence against the general laws of the United States.

In re Windsor (1865), 6 B. & S. 522, commented upon.

(8.) One test of determining whether the evidence is such as would justify the committal of the accused for trial if the crime had been committed in Canada, is to conceive the accused pursuing the conduct in question in this country, and then to transplant along with him his environment, including, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting the law supplying the definition of the crime which is charged.

Statement

HEARING upon the return of a writ of *habeas corpus* before DUFF, J., arising out of the decision in an extradition proceeding before LAMPMAN, Co. J., acting as an Extradition Commissioner under the Extradition Act, R.S.C. 1886, Cap. 142.

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The facts are set forth in the decision of the Extradition Commissioner.

Higgins, for the State of California.
Helmcken, K.C., and *W. J. Taylor, K.C.*, for the accused.

19th August, 1905.

LAMPMAN, CO. J.: The prisoner, George D. Collins, who was until recently an attorney practising in San Francisco, is charged with having on 30th June last committed perjury in San Francisco, and I am asked to order his committal for surrender to the authorities of the State of California under the provisions of the Extradition Act.

The perjury is alleged to have been committed by the prisoner by his making false statements in an affidavit verifying his answer to the plaintiff's complaint in an action in the Superior Court of the State of California in and for the City and County of San Francisco, wherein one, Charlotta Eugenie Collins, was plaintiff, and the prisoner, George D. Collins, was defendant, and in which action the plaintiff by her complaint alleged *inter alia* that she and defendant intermarried in San Francisco on the 15th of May, 1889, and she prayed for a decree of the Court that defendant be required to pay her such sum as the Court should deem reasonable and proper for the maintenance and support of herself and children. The complaint was verified by plaintiff's affidavit, and on the 30th of June, 1905, the defendant's answer was filed, and in it defendant (after taking the objection that the Court had no jurisdiction of the subject-matter of the action) denies that he and plaintiff intermarried at any time, and verifies his answer by affidavit. In swearing that he and plaintiff were never married, it is charged that the prisoner committed perjury.

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In May, 1905, the prisoner was indicted in San Francisco for bigamy, the allegation against him being that on the 23rd of April, 1905, he married in Chicago one Clarice McCurdy, notwithstanding that his first wife (Charlotta) was alive, and that his marriage to her was in full force and effect; and during the proceedings before me the prisoner was still under the said indictment

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for bigamy, he having fled from San Francisco to escape trial thereon.

The first point argued before me was that perjury was not an extradition crime. I held that it is.

Section 3 of the Canadian Extradition Act of 1886 provides:

"In the case of any foreign state with which there is at or after the time when this Act comes into force an extradition arrangement, this Act shall apply during the continuance of such arrangement; but no provision of this Act which is inconsistent with any of the terms of the arrangement shall have effect to contravene the arrangement, and this Act shall be so read and construed as to provide for the execution of the arrangement."

The Act provides that it shall have no application where it is inconsistent with any Treaty, and at the time of the passing of the Act, the Ashburton Treaty, which was the one then in force, did not contain perjury as one of the extraditable crimes, and therefore it had no effect, and was inapplicable in a case in which perjury was charged; but in 1889, or 1890, a new Treaty arrangement (including perjury as an extraditable crime) was entered into for the purpose of extending the list of crimes not specified in the old Treaty. By section 3 of the Act provision is made that its terms shall apply while the provisions of the arrangement remain in force; the effect of that section 3 is that so soon as the new arrangement came into force the provisions of the Act applied to it.

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It is argued, as I understand the argument, that the Act could have no force without a subsequent Act or Order in Council making its provisions applicable to the new extradition arrangement, but the Act itself provides, without the necessity of any Order in Council, that it shall apply to any new arrangement.

In the case of *In re Levi* (1897), 6 Que. Q.B. 151, Mr. Justice Wurtele has held that perjury is an extraditable offence, although possibly the same point was not taken before him. However, I must hold that perjury is an extraditable offence.

The other objection to be disposed of is in reference to sections 145 and 148 of the Criminal Code defining perjury. Now, for the determination of this point, it has been assumed for the purpose of the argument that the law of California does require that an answer to a plea in an action for maintenance should be veri-

fied by affidavit, and it was on that basis the argument took place.

Section 148 of the Code provides that perjury may be committed by swearing falsely in an affidavit, where by any Act or law in force in Canada or in any Province of Canada, it is required or permitted that facts be verified on oath or affidavit. It is argued that because it is not shewn that in an action for maintenance brought in Canada an affidavit verifying the answer to the complaint is required, therefore the facts alleged do not constitute perjury. I do not think it is necessary to shew that.

I have no doubt an indictment for perjury would lie under section 148, in respect of a false statement contained in an affidavit of verification of a plea in an action for maintenance brought in Canada, if the affidavit were required or permitted.

In the evidence tendered before me were some depositions taken in San Francisco; these depositions or affidavits purport to be signed at the foot by the deponent, and at the lower left hand corner there appears the following *jurat*: "Subscribed and sworn to before me this 14th day of July, 1905. William P. Lawlor, presiding Judge of the Superior Court of the State of California in and for the City and County of San Francisco," and the seal of the said Superior Court is attached. The signature of Judge Lawlor was verified by Thomas B. Gibson, a witness before me.

It was contended that the affidavits were not certified as required by section 10, sub-section 2 (a) of the Extradition Act, but I think that the *jurat* contains all that the Act requires, and the evidence of the witness Gibson completes the authentication. It is contended that Judge Lawlor might have signed some additional certificate which could have been written on the back or the margin of the affidavits, but I cannot see that it would have added anything to the meaning which the *jurat* conveys; it would probably have contained more words than the *jurat*, but the learned judge could do no more than certify that he was a judge, and that the affidavit was subscribed and sworn to before him, and he has in effect certified both those facts.

The complaint in the maintenance action on its face shews

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that the defendant's alleged desertion of the plaintiff had not continued for a year, and it is argued that therefore the Superior Court had no jurisdiction to entertain the cause, hence there could be no perjury.

Section 137 of the Civil Code of California provides that when the wife has any cause of action for divorce as provided in section 92 of the Code, she may maintain in the Superior Court an action against the husband for maintenance; in section 92, wilful desertion is given as one of the grounds of divorce, and by section 107 wilful desertion must continue for one year before it is a ground for divorce.

Mr. Whiting, an assistant district attorney of San Francisco, who was called by the prosecution, says that notwithstanding section 137, he thinks the Superior Court has some equitable jurisdiction in maintenance actions enabling it to grant some relief to a plaintiff even though the desertion were for less than a year, and in support of his opinion he refers to *Galland* v. *Galland* (1869), 38 Cal. 265; *Murray* v. *Murray* (1896), 47 Pac. 37 and some other cases.

Mr. Collins, who gave evidence on his own behalf, says that the Superior Court had no jurisdiction, and that his demurrer should have been allowed, but instead it was overruled and an order for interim alimony was made by Judge Graham of the Superior Court. As to whether Mr. Whiting or Mr. Collins is correct on this point is immaterial in the view I take. This objection, it seems to me, is rather an objection to the sufficiency of proof or allegations of the cause of action, and not to the jurisdiction to try the case. The action was brought in the proper Court. The case of *Regina* v. *Ewington* (1841), Car. & M. 319, strongly relied on by Mr. *Taylor*, rather strengthens me in my opinion: see the remarks of Lord Abinger at p. 324.

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The objection that no oath was ever administered to accused was strongly relied on. The evidence of Mr. Henry is that accused came to his office with the affidavit already signed, and producing it said: "Mr. Henry, that is my signature, and I swear to the statements therein being true," and at the same time raising his right hand, whereupon Mr. Henry signed his name to the *jurat*, impressed the affidavit with his notarial

seal and handed it to accused. It is argued that no oath was in fact administered according to the law of either Canada or the United States. No English or Canadian decision on the precise point was cited, but I think according to the law of Canada the oath was administered. *Rex* v. *Lai Ping* (1904), 11 B.C. 102, may be usefully referred to in this respect, and also *O'Reilly* v. *People of State of New York* (1881), 86 N.Y. 154, which latter case was relied on by accused, but it seems to me altogether against his contention.

Then as to whether it was administered in California, *i.e.*, according to California law. In *People* v. *Simpton* (1901), 65 Pac. 834, there are some expressions by the Court which it is contended indicate that the oath in question was not administered, and that the affiant could not be subject to the penalties for perjury. Section 2,094 of the Code of Civil Procedure lays down the form to be observed in administering an oath, but by section 121 of the Penal Code it is provided:

"It is no defence to a prosecution for perjury that the oath was administered or taken in an irregular manner, or that the person accused of perjury did not go before, or was not in the presence of, the officer purporting to administer the oath, if such accused caused or procured such officer to certify that the oath had been taken or administered."

Mr. Whiting says his opinion is that the curative provisions of section 121 apply here, and that the objection that the oath was not administered is not a good one. I should think any court would be slow to hold that a person charged with perjury who went before a notary, said he swore to the truth of certain statements, and at the same time holding up his right hand, was in a better position than one who sent his affidavit to a notary by an office boy, and thus procured the notary's certificate that the affidavit had been sworn to before him.

According to section 121, the actual administration of the oath is not necessary; the procuring of the officer's certificate that the oath was taken is enough; and that was done in this case. Since the amendment in 1905 to the provisions of the Penal Code respecting perjury, the older California decisions are of very little assistance; they seem to emphasize the necessity for the amendments: see the remarks of HUNTER, C.J., and IRVING, J., in *Rex* v. *Hutchinson* (1904), 11 B.C. 24.

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That the facts deposed to constitute perjury according to the law of Canada I am satisfied, and I think the accused has failed to shew that they did not constitute perjury according to the law of California. Had he shewn this he would probably be entitled to his discharge: see the decision of Mr. Justice Street in *Rex* v. *Watts* (1902), 3 O.L.R. 368, 5 C.C.C. 246.

The accused in his evidence stated that in 1888 he entered into a contract marriage with Agnes M. Newman, and at her solicitation he consented to the religious marriage in 1889 at the Church of St. John the Baptist in San Francisco. This religious marriage he said was with Agnes M. Newman, and not with Charlotta Eugenie Newman, as stated in the marriage certificate, and the evidence of the witnesses Newman and Curran and the affidavits of Charlotta E. Collins and Florence Newman. The contention on behalf of accused is that the contract marriage in 1888 was good according to the law of California at that time, and that even if he were married to Charlotta Newman in 1889 the marriage was not valid, and therefore the statement in the affidavit denying the marriage was true.

This evidence of the accused is so at variance with the rest of the evidence that I cannot accept his statement as to the contract marriage; to believe it I must be satisfied that the religious marriage in 1889 was to Agnes M. Newman, and not to Charlotta E. Newman. On the back of the marriage licence and certificate there is the indorsement "Geo. D. Collins and Charlotta E. Newman," and this indorsement is in the handwriting of the accused; at least Mr. Groom says it is, and he was not cross-examined (although accused denies it is his handwriting) on that point, and it was not charged or even suggested that he was one of the many alleged conspirators against the accused. It is contended the name "Charlotta Eugenie" was inserted in the marriage licence by mistake, and a fairly plausible explanation of how that mistake was made is given, but unless accused was married to Charlotta, why he wrote the name of "Charlotta E. Newman" on the back of the marriage licence is inexplicable.

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I think the evidence is sufficient to put the accused on his trial, and I determine that he must be committed to gaol pending surrender.

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The accused applied to DUFF, J., for a writ of *habeas corpus*, on the return of which argument took place on the 19th, 22nd, 23rd, 25th, 29th and 30th of August, 1905.

W. J. Taylor, K.C., and *Helmcken, K.C.*, for accused.
Higgins, for the State of California.

Without calling on counsel for the State of California, the following judgment was, at the conclusion of the argument, delivered by

DUFF, J.: It will be convenient at the outset to consider some questions which come before me for the first time, because in the nature of things they could not come before the Extradition Commissioner; I mean those arising on the objections taken to the validity of the warrant of committal.

Broadly speaking, two objections are taken. First, it is said that the warrant, being issued in a proceeding before a judicial officer of a limited statutory jurisdiction, should shew on its face that the statutory pre-requisites of his jurisdiction have been complied with. Secondly, it is said that the description of the offence contained in the warrant is insufficient.

In my opinion, these objections are both disposed of by reference to the Extradition Act, R.S.C. 1886, Cap. 142. Section 20 is as follows:

"The forms set forth in the second schedule to this Act, or forms as near thereto as circumstances admit of, may be used in the matters to which such forms refer, and, when used, shall be deemed valid."

Judgment

The form of the warrant of committal under consideration is precisely in accord with the form prescribed by the statute. An examination of the Act convinces me that the true construction of section 20 is that the validity of a warrant of committal, issued under the authority conferred by the Act, does not depend upon the presence within the warrant of any element which is not indicated by the form provided by the statute. The recital, the absence of which, according to the contention of Mr. *Tuylor*, invalidates the warrant, is not a matter which, from the examination of the statutory form, would appear to have been within the contemplation of the Legislature as forming a part of it.

In support of the objection, several cases are relied upon: *In*

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re John Anderson (1861), 11 U C.C.P. 9; *Ex parte Besset* (1844), 6 Q.B. 481 and *Ex parte Zink* (1880), 6 Q.L.R. 260 at p. 266.

With regard to the first two of these decisions, it is to be observed that they are decisions on the law as it existed prior to the passing of the Extradition Act of 1886, and prior to the passing of the Extradition Act of 1870; and in neither case had the court to deal with the section I have just read, or any provision analogous to it.

With regard to the last of these decisions, namely, the decision of Mr. Justice Cross, that decision was, it is true, delivered subsequently to the passing of the Act of 1877, which contains provisions substantially the same as those of the Act of 1886, respecting the object I am now discussing. A section corresponding to section 20 appears in that statute, and a form corresponding to Form 2 in the schedule of the Act of 1886 also appears there. But an examination of the opinion of Mr. Justice Cross in that case shews that this section and this form were not in that case relied upon by the prosecution, and the effect of them is not discussed by him.

Apart altogether from the authorities to which I am about to refer, I should have thought that in the absence of any discussion on the question or any direct decision on the question, the coercive force of the section itself is such that I should be obliged to treat the decision of Mr. Justice Cross as one which I ought not to follow in this case. The matter, however, does not depend on my own unsupported opinion. It is, I apprehend, hardly open to doubt since the decision in *In re Bellencontre* (1891), 2 Q.B. 122 at pp. 126 and 144. In that case an objection was taken to the form of the committal issued by Sir John Bridge under the Extradition Act of 1870; and at page 144 of the report, Mr. Justice Wills uses this language:

Judgment

> "The warrant is statutory in its form, and is not to be construed as an ordinary English common-law document, and it is not at all necessary, in my judgment, that there should be anything like the same particularity that there would be in respect of the warrant of committal to the gaols of this country under ordinary circumstances. For these reasons, I am of opinion that this *habeas corpus* ought not to issue."

In two cases decided recently by the Supreme Court of the United States, one in 1902, and the other in 1903, a similar

opinion is expressed by that court concerning the attitude to be adopted in extradition cases towards these questions of technical procedure. The view of the Queen's Bench Division, in the case referred to—the view twice repeated by the Supreme Court of the United States in the cases I am about to read from—is that the technicalities of the criminal practice should not be allowed to smother or encumber the administration of the procedure prescribed by these modern statutes for the purpose of carrying out the obligations we have assumed under this vastly salutary international arrangement.

The language of Mr. Justice Brown, delivering the judgment of the Court in the case of *Grin* v. *Shine* (1902), 187 U.S. 181 at p. 184, is as follows:

"These treaties should be faithfully observed, and interpreted with a view to fulfil our just obligations to other powers without sacrificing the legal or constitutional rights of the accused. In the construction and carrying out of such treaties, the ordinary technicalities of criminal proceedings are applicable only to a limited extent. Foreign powers are not expected to be versed in the niceties of our criminal laws, and proceedings for a surrender are not such as put in issue the life or liberty of the accused. They simply demand of him that he shall do what all good citizens are required and ought to be willing to do, viz.: submit themselves to the laws of their country. Care should doubtless be taken that the treaty be not made a pretext for collecting private debts, wreaking individual malice or forcing the surrender of political offenders; but where the proceeding is manifestly taken in good faith, a technical non-compliance with some formality of criminal procedure should not be allowed to stand in the way of a faithful discharge of our obligations. Presumably at least, no injustice is contemplated; and a proceeding which may have the effect of relieving the country from the presence of one who is likely to threaten the peace and good order of the community is rather to be welcomed than discouraged."

Judgment

In *Wright* v. *Henkel* (1903), 190 U.S. 40 at p. 57, Chief Justice Fuller, delivering the judgment of the court, used this language:

"Treaties must receive a fair interpretation according to the intention of the contracting parties, and so as to carry out their manifest purpose. The ordinary technicalities of criminal proceedings are applicable to proceedings in extradition only to a limited extent."

That is the principle which I apply here.

It should further be observed that in *In re Bellencontre, supra*, the description of the offence was not characterized by any

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greater particularity than the description of the offence contained in the warrant now before me. I must say, that at the first blush I was disposed to think that there was some ground for the contention that as the Treaty provides that the person who is extradited shall be tried only on the charge upon which the extradition is based, the warrant of committal ought to describe the offence with particularity and precision. But whatever virtue I might find in that argument, if the matter were *res integra*, the decision of the Queen's Bench Division in *In re Bellencontre*, *supra*, is conclusive, and is a decision which I am bound to follow.

It follows that effect should not be given to the objections taken to the warrant of committal.

I now come to consider the substantial questions raised with regard to the power of the Extradition Commissioner on the evidence before him to commit the prisoner for surrender.

One general observation should be made at the outset. I do not sit to hear an appeal from the Extradition Commissioner. I can only deal with the jurisdiction of the Extradition Commissioner to make the order which he has made.

The conditions of extradition which have been discussed in the course of this argument, and which are all more or less material here, are, firstly, that the imputed crime shall be a crime within the Extradition Treaty; secondly, that it should be an extradition crime within the Extradition Act of 1886; thirdly, that it should be a crime within the law of the demanding country; and fourthly, that the Commissioner shall have before him such evidence of criminality as, if the crime had been committed in Canada, would, according to the law of Canada, justify the committal of the accused for trial.

Judgment

Before discussing these conditions in detail, I think I ought to refer to a case which was cited during the course of the argument a good many times, which I think should no longer be followed in its entirety, although it was the decision of a tribunal of the highest character for learning, for judicial distinction and judicial authority. The demanding country is strictly the United States; but within the rules just mentioned, in this case the law of the demanding country is the law of California, and when I say that the imputed crime must be a crime within the

law of the demanding country, I mean that the imputed crime must be a crime under the law of California. In *In re Windsor* (1865), 6 B. & S. 522, it was held that where the United States demands extradition of a person in Great Britain on a charge that such person has committed a crime in the United States, the crime charged must be shewn to be an offence against the general law of the United States. The Court proceeded under a misapprehension in respect to the federal laws of the United States, assuming against the fact that there is a common criminal law of the United States. That case has several times been commented on in the course of Canadian decisions; and quite recently in the case of *Wright* v. *Henkel, supra*, the misconception was pointed out by the Supreme Court of the United States, and that Court stated that insofar as the decision involved the view I have just mentioned, it is not to be followed in the United States. That view, which was after all an opinion on a question of fact rather than one of law, I think, must now be regarded as given *per incuriam*. And the requirement, as I have said, which is a condition of the power of the Extradition Commissioner to commit for extradition in this case is that the imputed crime shall be a crime under the law of the State of California.

[After fully discussing the facts and law bearing on the contention that there was no evidence bringing the applicant within the law of the State of California respecting perjury, and concluding that such contention could not be supported, the learned judge proceeded]:

Judgment

Now, there is another condition of extradition, requiring that there shall be such evidence of criminality as, if the crime had been committed in Canada, would, according to the law of Canada, justify the committal of the accused for trial by an examining magistrate.

The exact language in the Treaty is as follows:

"Provided that this shall only be done upon such evidence of criminality, as according to the laws of the place where the fugitive, or person, so charged was found, would justify his apprehension and commitment for trial, if the crime, or offence, had been there committed."

The material provisions of the Extradition Act allied to this

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provision of the Treaty, which I shall read together, are section 2, sub-section (*b*):

"The extradition crime may mean any crime which, if committed in Canada, or within Canadian jurisdiction, would be one of the crimes described in the first schedule to this Act;"

section 11:

"If, in the case of a fugitive alleged to have been convicted of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, prove that he was so convicted, and if, in the case of a fugitive accused of an extradition crime, such evidence is produced as would, according to the law of Canada, subject to the provisions of this Act, justify his committal for trial, if the crime had been committed in Canada, the judge shall issue his warrant for the committal of the fugitive to the nearest convenient prison;"

and section 24:

"The list of crimes in the first schedule to this Act shall be construed according to the law existing in Canada at the date of the alleged crime, whether by common law or by statute, made before or after the passing of this Act, and as including only such crimes, of the descriptions comprised in the list, as are, under that law, indictable offences."

It is argued that there was not sufficient evidence of "criminality" within these provisions, because, in the first place, the proceeding in which this affidavit was made has no analogy, or, at all events, the Extradition Commissioner had no evidence before him that it has any analogy in any part of Canada; and that if an affidavit verifying a defence had simply been filed, as in this case, it could only here be treated as an impertinence; that the oath in such a case could not be regarded as having been administered under the authority of any law or statute in force in Canada, or in any Province of Canada, and that, therefore, according to the law of Canada, perjury could not be assigned upon any statement made under its sanction.

Judgment

I should first clear up one point, which in the course of some interlocutory observations during Mr. *Taylor's* argument, Mr. *Higgins* endeavoured to make. It appears that the plea in question, and the affidavit verifying it, were read upon an interlocutory application for alimony. And it was contended by Mr. *Higgins* that the affidavit was made not merely to be used as complying with the provisions of the Code of Civil Procedure, which I have referred to, and which requires a verification of the plea, but it was made for the purpose of being used as evi-

dence on that application. I do not know whether the Extradition Commissioner dealt with that view of the subject or not. I should hesitate to say that the evidence of the counsel for the accused on that application, upon which the contention was based, was of such a character as to justify the view that the affidavit was used on that proceeding as evidence of any fact stated in the plea. The evidence upon it is ambiguous, and certainly one fair view to be taken of it is that the pleading was read to shew the issues, and to shew the state of the cause simply. And I deal with the case on the assumption that this affidavit is to be treated as an affidavit made only for the purpose of verifying a plea in accordance with the rule of practice referred to.

The contention, I think, is based upon an erroneous conception of the effect of that provision of the Treaty. The meaning of the Treaty provision and the meaning of section 11, which specifically provides that the evidence shall be such evidence as would justify the committal of the accused for trial if the crime had been committed in Canada, have been the subject of a great deal of discussion in Canada and in the United States.

It was held by Sir John Beverley Robinson and Mr. Justice Burns in *In re Anderson* (1860), 20 U.C.Q.B. 124, that that section, and the provision of the Treaty I have read, were to be taken only as providing that the law of Canada is to supply the test by which one is to determine the admissibility and the *quantum* of evidence required, and not as requiring that the acts of the accused shall bring him within the imputed crime as defined by the law of Canada.

Judgment

It is contended that this view has not been generally followed; and in support of that some Canadian cases and a number of American cases are cited, and a quotation is made from Moore on Extradition (the leading American text book) at p. 525, which reads as follows:

> "It has been held that the rule that the evidence must be such as to justify commitment for trial at the place where the fugitive is found, if the offence had there been committed, applies not only to the admissibility and the amount of the evidence required for that purpose in the particular place, but also to the definition of the offence."

It cannot be successfully maintained that this paragraph

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states the settled American law on this subject; because in *Wright* v. *Henkel, supra,* the Supreme Court of the United States treated the question as still open. It is however, in my opinion, not necessary to decide between these conflicting authorities; and I propose to deal with this application as if the view expressed by Mr. Moore (and most favourable to the accused) were correct; and the view of Sir John Beverley Robinson and Mr. Justice Burns, a view which cannot be sustained.

One further point may be conceded for the purposes of the present discussion; and I mention it only that I may not be supposed to have given a decision upon it. The tribunal over which the Extradition Commissioner presides is a Federal Tribunal established by the Parliament of Canada for the "Administration of a Law of Canada." If the Commissioner may take judicial notice of the procedure prevailing in the Superior Courts of British Columbia, I know no reason why his judicial cognizance may not extend to the procedure prevailing in such courts in every part of Canada; and, if that be so, I am unable to say that among the materials upon which he proceeded there was not the fact that a practice corresponding to the California practice referred to obtains in Quebec and in Manitoba. I pressed counsel for assistance on this point, but have had none. The case referred to, *The King* v. *Koops* (1837), 6 A. & E. 198, decides only that a judge presiding at the assizes has not judicial cognizance of the practice of a special statutory tribunal such as the Insolvent Debtors' Court. Besides the reasoning based upon that case proves too much. It is not arguable that a judge presiding at a criminal assize in British Columbia would not have judicial cognizance of the practice of the Supreme Court of British Columbia. In the absence of a satisfactory argument, I express no decided opinion upon the point, and will assume that in the absence of evidence of any such practice the Commissioner was bound to take it that no such practice exists.

Judgment

Now it is contended by the applicant that on the authorities to which I have referred, you have to go through the conduct upon which the criminal charge is based, and you have to come to the conclusion that the identical acts, if done in this country, would have constituted a crime under the law of Canada.

Taken with due qualifications, we need not quarrel with that; but it is obvious that there must be some qualification. In the first place, the Treaty itself, which, after all, is the controlling document in the case, speaks not of the acts of the accused, but of the evidence of "criminality;" and it seems to me that the fair and natural way to apply that is this: you are to fasten your attention, not upon the adventitious circumstances connected with the conduct of the accused, but upon the essence of his acts in their bearing upon the charge in question. And if you find that his acts so regarded furnish the component elements of the imputed offence according to the law of this country, then that requirement of the treaty is complied with. To illustrate: I apprehend that in the case of perjury the accused cannot be heard to say, "the oath on which the charge is based was administered by A.B., an officer who had no authority to administer oaths in Canada (although duly authorized in the place where the oath was taken) and, consequently, if I had done here the identical thing I did there (*viz.*, the taking of an oath before A. B.), perjury could not have been successfully charged against me." The substance of the criminality charged against the accused is not that he took a false oath before A. B., but that he took a false oath before an officer who was authorized to administer the oath. Any other view would, I conceive, simply make nonsense of the Treaty.

Judgment

On the other hand, to get an illustration of what I should regard as a correct application of this provision—let us take the *Anderson Case*: Anderson was a slave in Missouri, one of the slave States of the American Union. According to the law of that State, citizens of the State were not only entitled, but were bound to assist in the capture of runaway slaves. Digges was a citizen of the State. Anderson was escaping. Digges attempted to capture him in accordance, not only with his legal right, but with his legal duty. Anderson, in resisting capture, killed Digges. Anderson fled to Canada; he was indicted in Missouri, charged with murder, and his extradition was demanded. It was held by a majority of the Court of Queen's Bench, that in considering the question whether there was evidence of criminality in accordance with the law of Canada, you had to deal with the

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case on the assumption that Digges, in attempting to capture Anderson, was acting with legal authority. It is true that Anderson was afterwards discharged from custody because of certain technical defects in the proceedings. The decision of the Court of Queen's Bench on that matter of substance was, however, not interfered with, although the opinion of the majority of the Court upon the construction of section 11 of the statute which I have already given, has been referred to with disapproval since. It seems to me that in substance the decision of Sir John Beverley Robinson and Mr. Justice Burns is correct in that case, and their decision is an example of the fair and proper application of the provisions in question.

The point cannot be put better than it is put by Sir Edward Clarke. On page 250, in the foot-note, he says:

"In Anderson's case this question did not necessarily arise. The crime charged against him upon the facts stated was murder by the law of England as well as by that of the United States. The question whether the circumstances shewed sufficient provocation to reduce it to manslaughter, was one for the jury, and one with which the Canadian Courts had nothing to do. Nor had these courts any right to inquire into the justice, or policy, of the legislative enactment under which the arrest was attempted to be made. That was a matter for the consideration of the foreign country, and could not, however it was resolved, affect the nature of the crime. An illustration may be given in the English Act, 14 & 15 Vict., cap. 19, by which if three poachers are out together at night armed, any person is authorized to apprehend them. It is very probable that American judges would disapprove of that Act as part of what they might consider an iniquitous system of game laws; but so long as it remains upon the English statute-book, a poacher killing a person, so attempting to apprehend him would unquestionably be guilty of murder, and England would have an indisputable right to claim him under the treaty. So far as this question was decided in the case of Anderson, it was decided rightly."

Judgment

One may look at it in two ways. One may take it that one is to apply one's mind to the conditions existing in the demanding State, or that one is to conceive the accused, and the acts of the accused, transported to this country. In the first case, one is to take the definition of the imputed crime in accordance with the law of Canada and apply that to the acts of the accused in the circumstances in which those acts took place. If in those acts you find that the definition of the crime is satisfied, then you have the statutory and Treaty requisites complied with. In the

second case, if you are to conceive the accused pursuing the conduct in question in this country, then along with him you are to transplant his environment; that environment must, I apprehend, include, so far as relevant, the local institutions of the demanding country, the laws affecting the legal powers and rights, and fixing the legal character of the acts of the persons concerned, always excepting, of course, the law supplying the definition of the crime which is charged.

Treating the matter in that way, then what have we here? If my view of the law of California is correct, we have this: we have the fact that there was a proceeding pending in a court of competent jurisdiction, the practice of which court authorized a certain affidavit to be made in that proceeding. The affidavit was made, and it contains a wilfully false statement of fact. In other words, in addition to all the other elements of perjury, you have an oath taken in a judicial proceeding before a court of competent jurisdiction after a manner in which it was authorized by law. These facts make up the substance and essence of the "criminality" charged against the accused. If you transfer these facts to this country, you get the offence of perjury within the law of Canada.

But, it is further said that those things which were done by the accused would not amount to perjury if they were done here, because, in addition to the matters I have mentioned, certain essential formalities of a valid oath, according to the law of Canada, were not observed. One of the defects relied upon is the failure of the deponent to touch the Gospels. That objection, I think, is set at rest by the section of the British Columbia Evidence Act of 1902, not referred to during the argument, but which, in British Columbia, authorizes an oath to be taken by raising the hand, thus dispensing with the kissing, or touching of the book, and importing into this country the practice prevailing in Scotland. That seems to me entirely to dispose of that point.

Judgment

Then again, it is said that by the law of Canada, the failure on the part of the notary to administer the oath in the sense of repeating the obligatory words is fatal to the legal validity of the oath. I have already given my reasons for thinking—if it were

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necessary to decide that question—that what was done here was sufficient to constitute a valid oath in this country. But I do not think that the prosecution is driven to that. In my opinion, where the real essence of the oath is preserved, and the formalities are sufficient by the laws of the demanding country, no mere deviation from strict ceremonial, according to the practice here, would be sufficient to prevent the application of this treaty and this statute. In other words, if what is done is in substance the administration of an oath, as that rite is generally understood, then, so long as the requirements of the jurisdiction in which the oath is taken are complied with, so that the oath, as taken, is there regarded as legally binding on the conscience of the party taking it, and subjecting him to the penalties of false swearing, you have a sufficient compliance with the treaty and statute. The substance of the matter is the taking of an oath in a foreign jurisdiction, in accordance with, and after the manner which, by law, is sanctioned in that jurisdiction.

It seems to me that the other is the reasonable construction and in this case, as I am satisfied that the Extradition Commissioner properly held that the evidence before him furnished a *prima facie* case that the oath was validly taken according to the law of California, it is not necessary, I think, to decide whether there was sufficient evidence that the ceremonial prescribed by the law of this country was punctiliously observed.

Judgment

I have only this to add, and I think the language which I have read, from the opinion of Mr. Justice Brown, in the case of *Grin* v. *Shine*, *supra*, should be repeated with emphasis when you are dealing with an arrangement between two countries, having three or four thousand miles of common frontier, affording unexampled opportunities for the escape of persons accused of crime from either country to the other.

The result will be that the prisoner will be remanded to custody under the warrant issued by the Extradition Commissioner, from which he was taken by the writ of *habeas corpus*.

Application refused.

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Malicious prosecution—False arrest—Termination of criminal proceedings—Return of "no bill" by grand jury—Production of—Sufficiency—Honest belief of prosecutor—Reasonable and probable cause—Evidence Act, R.S.B.C. 1897, Cap. 71—Damages.

There cannot be a record of proceedings between the King and an accused person in a criminal prosecution until at least a "true bill" has been found by the grand jury.

The production by the proper officer of a certified copy of the Bill of Indictment, returned "no bill," is sufficient in view of the provisions of the Evidence Act, R.S.B.C. 1897, Cap. 71.

Where the act, in respect of which the criminal proceedings were launched, was done in the light of day, in open view of the defendant, and in pursuance of a statutory right, the trial judge was right in leaving it to the jury to say whether, in the circumstances, the defendant really thought the plaintiff was a thief.

Judgment of MORRISON, J., affirmed, IRVING, J., dissenting.

APPEAL by defendant from a verdict and judgment thereon for $1,500 and costs recovered against him by the plaintiff in an action for false arrest and malicious prosecution.

The defendant Morgan as one of the owners of the Lucky Jack mineral claim, located at Poplar Creek on the 9th of July, 1903. On the 7th of December in the same year, the plaintiff, acting in pursuance of his rights as a placer miner, located a placer claim called the Shamrock, within the boundaries of the Lucky Jack. Plaintiff applied in due form for a record of the said placer claim, but the Gold Commissioner, by virtue of his "powers and duties as Gold Commissioner," ordered the posts of the Shamrock placer claim to be moved so as to take that claim entirely without the boundaries of the Lucky Jack mineral claim. He then brought an action praying for a declaration that the order of the Gold Commissioner was null and void, and for an injunction against Morgan and the Great Northern Mines, Limited, restraining them from interfering with the plaintiff, Tanghe, in the working of his placer claim; and for other relief. The result of this action is reported *ante*, p. 76.

Statement

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Statement

On the Lucky Jack there was at the time of the location of the Shamrock placer claim, and within the boundaries of the Shamrock, an exposed free milling white quartz ledge. On portions of this ledge, when located, gold was exposed prominently, the ore in places being so valuable and easily detachable that it was necessary to place a guard over it. There were also at the side and within a few feet of and below the ledge, detached pieces of quartz containing appreciable values in gold, and a number of these pieces also lay on the top of a faulted portion of the ledge, in the position where they had been dislodged from the ledge by the course of nature. The plaintiff claimed these loose fragments, alleging that they were "float" and not "rock in place," and therefore the property of the placer owner. While gathering up some of these pieces of rock in a sack, the plaintiff was, on October 27th, 1903, arrested on a charge of stealing ore from the owners of the Lucky Jack and on November 5th he was committed for trial at the assizes at Nelson on May 17th, 1904, when the grand jury returned "no bill."

The action was tried at Rossland on the 13th and 14th of December, 1904, before MORRISON, J., and a jury.

The following are the questions submitted to and the answers of the jury:

(1.) Did the defendant take reasonable care to inform himself of the true state of the case? No.

(2.) Did he honestly believe the case which he laid before the Magistrate? No.

(3.) Was the defendant actuated by any indirect motive in preferring the charge? Yes.

(4.) Damages, if any? $1,500.

A. H. MacNeill, K.C., for plaintiff.
J. A. Macdonald, for defendant.

The appeal was argued at Vancouver on the 6th and 7th of June, 1905, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument

J. A. Macdonald, K.C., for defendant, appellant: The circumstances were that Tanghe was in the habit of locating placer claims near or below the dump of quartz claims. He had previously

prospected over this very ground and found nothing; but he heard of a strike on the Lucky Jack, and having inquired whether a placer claim could be staked over a mineral claim, he went out and staked the Shamrock over the Lucky Jack, knowing that the latter was under a bond for sale at the time. This placer location was made over a steep rocky face and away from water. This did not shew *bona fides* in staking the Shamrock. As to the first question submitted to the jury, he cited *Giblin* v. *McMullen* (1868), L.R. 2 P.C. 317, as shewing that there is a preliminary question for the judge whether there is any evidence upon which a jury can properly proceed to find a verdict for the party producing it; also *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247. Morgan was in possession of the claim, and Tanghe's colour of right had been done away with by the order of the Gold Commissioner, and Morgan believed that the Gold Commissioner had authority to move the stakes. Further, the termination of the criminal prosecution was not properly proved; the proper officer should have made up a record; "no bill" is only a fragment of a record; a formal record or exemplification should have been put in: *The King* v. *Smith* (1828), 8 B. & C. 341; *McCann* v. *Preneveau* (1885), 10 Ont. 573 and *Aston* v. *Wright* (1862), 13 U.C.C.P. 14.

As to damages: Evidence was wrongly admitted. Plaintiff should have proved that legal expenses claimed were properly incurred; if he wanted to recover damages he must prove affirmatively that he has suffered damages and incurred the costs claimed. There was nothing before the jury to guide them as to damages, and there was misdirection in that the jury were told to find as to reasonable and probable cause.

Argument

A. H. MacNeill, K.C., for plaintiff, respondent: As to proving the acquittal on the criminal prosecution, the statement of defence does not raise the issue; he should raise the question specifically; an empty denial is no good: *Hogg* v. *Farrell* (1895), 6 B.C. 387. If in issue, the matter is governed by the Canada Evidence Act, Secs. 11 and 74: *Hewitt* v. *Cane* (1894), 26 Ont. 133.

[HUNTER, C.J.: But did you not put it in issue by giving evidence?]

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As to damages and the bill of costs claimed, there is nothing in the amount found to shew any wrong basis of valuation.

On the question of reasonable and probable cause, Tanghe had to represent his claim or it would have lapsed in the seventy-two hours under the statute; it was recorded on the 24th of October, and would have expired at midnight of the 27th. The ore he took was in a small bag, which held so little as to be out of the question in a charge of theft. He was there in a *bona fide* assertion of his legal right, and Morgan knew it, so that there could not be reasonable and probable cause for Morgan's action: see *Brooks* v. *Warwick* (1818), 2 Stark. 389; *James* v. *Phelps* (1840), 11 A. & E. 483; *Michell* v. *Williams* (1843), 11 M. & W. 204 and *Huntley* v. *Simson* (1857), 27 L.J., Ex. 134.

Argument

Macdonald, in reply: Morgan knew of the Gold Commissioner's ruling, and believed he had authority to make it. When therefore he found plaintiff going to the ground in defiance of that ruling, he, Morgan, was justified in his acts. Plaintiff must shew that Morgan did not believe in the legality of the Gold Commissioner's decision. The judge must decide whether there is any evidence of want of *bona fides*, and if there is no such evidence he must not submit the matter to the jury. As to the admission of the bill of costs, this might have affected the amount, and so the case should go back for a new trial; but the greater part of the bill is outside of this case. The verdict cannot be reduced without the consent of both parties: *Watt* v. *Watt* (1905), A.C. 115.

Cur. adv. vult.

8th November, 1905.

HUNTER, C.J.: It is well settled that in an action for malicious prosecution the question of reasonable and probable cause is for the judge to decide, and that any material facts which enter into the determination of the question are for the jury to pass on if in dispute.

HUNTER, C.J.

The questions submitted by the learned judge were those propounded by Cave, J., and approved by the House of Lords in *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247. I do not, however, gather from the cases that it has anywhere been laid down that these questions are to be submitted in every

case of malicious prosecution; if that were so, it would be to thrust every such action into a sort of bed of Procrustes, and in this particular case I am unable to perceive the necessity for the first question, as the defendant must have known all the material facts. I am, however, of opinion that the learned judge was eminently right in leaving it to the jury to say whether the defendant really thought the plaintiff a thief. There were circumstances *pro* and *con:* in favour of the defendant was the fact that the Gold Commissioner had decided (wrongly it is true, as afterwards determined by the Court), that the plaintiff had no right on the ground covered by the defendant's claim; that the defendant found the plaintiff in the act of carrying off some rock from the ground; and that he had consulted the local constable as to his rights; while on the other hand in favour of the plaintiff was the fact that the mining laws permit the location of a placer over a mineral claim; that he could not be said to be wrong in refusing to abide by the order of the Gold Commissioner, as the law required him to be on the ground representing and working his claim, and his claim would have expired at midnight on the day of his arrest if he had absented himself; that he took the rock not *clam et clandestim,* but in the open light of day in view of the defendant, and in the ordinary way in which a miner would take it for experimental purposes. Under such circumstances it is idle to contend that the question of the *bona fides* of the defendant's belief in the charge of theft was not one peculiarly for the jury.

HUNTER, C.J.

Two other points raised by the learned counsel for the appellant are so hollow as hardly to require notice.

The first was as to the proof of the favourable termination of the criminal proceedings. It is hardly necessary to deal seriously with the suggestion that the production by the proper officer of a certified copy of the bill of indictment, returned "no bill," was not good enough proof, especially in view of the provisions of the Evidence Act. I peremptorily decline to follow the invitation of the learned counsel to delve into the technicalities surrounding the drawing up and proof of records which troubled the judges of a generation ago in Ontario.

The other objection was that there was no valid proof of the

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plaintiff having incurred expense in defending himself against the charge. The plaintiff swore that he was indebted to his solicitor, and producing the latter's bill of costs said he did not dispute it. He did not need to produce it; all he was called on to do was to swear to the debt and if there were some items in the bill which were not properly attributable to the expense of defending the criminal charge, this should have been brought out in cross-examination. As it was, the bill was allowed to go to the jury as unimpeached evidence in corroboration of the plaintiff's testimony, and very probably they took it for granted that the full amount had been incurred in connection with the prosecution.

With the amount of the verdict, we are not concerned, as it clearly cannot be called excessive.

The appeal should be dismissed.

IRVING, J.

IRVING, J.: I entertain a different opinion as to the proper method of proving that the prosecution complained of was determined in the plaintiff's favour.

Bremmer v. *Bremmer* (1904), 9 O.L.R. 69 is probably the latest case on this point, but that decision turned on the fact that the magistrate was not required to reduce his decision into writing. Like the proceedings discussed in *Reid* v. *Maybee* (1880), 31 U.C.C.P. 384, there was a mere inquiry before an inferior court.

In the present instance the proceedings were in the Court of Oyer and Terminer and General Gaol Delivery—a Court of Record, the proceedings of which are, except as provided in section 726 of the Code, properly proveable in this Court by the production of the record: see *Reg.* v. *Coles* (1887), 16 Cox, C.C. 165. That is a *nisi prius* decision, it is true, but of value as giving the view of Fitzjames-Stephen; and see *Hewitt* v. *Cane* (1894), 26 Ont. 133.

It was said during the course of the argument that there could be no record drawn up in the Court of Oyer and Terminer as there was no trial. With all deference I think that is a mistake. In the fourth volume of Chitty's Criminal Law (Ed. 1826), par. 187, will be found a form of record.

I would allow the appeal.

MARTIN, J.: In regard to the first point, that the termination of the criminal proceedings in favour of the plaintiff has not been satisfactorily proved, it is only necessary to say that they have been proved to the full extent which they were capable of, and no more can be required because no more is possible. There was no indictment found by the grand jury because that body threw out the bill of indictment preferred to it against the accused. The misapprehension of the situation has largely arisen by omitting to keep in mind the real distinction between an "indictment" and a "bill of indictment," which is pointed out in the opening words of Archbold's Criminal Evidence (1900), and again referred to on p. 90. Such being the case I see no ground to support the contention that a certified copy of the record should have been made up and produced at the trial, because there was no "record," in the real sense of the word, to make up, for there cannot, properly speaking, be a "record" between the King and the accused till at least a "true bill" has been found against the latter. It is doubtless correct to speak of a bill of indictment, with the grand jury's indorsement "no bill" on it, as a public record, and one of the records of the Court of Assize in a wide sense, but it is not the record, though the proceedings have been briefly noted, according to our modern practice, in the court records by the Clerk of Assize. None of the cases cited is therefore in point except *McCann* v. *Preneveau* (1885), 10 Ont. 573, which I shall come to later. That of *The King* v. *Smith* (1828), 8 B. & C. 341, is an authority for the contention that after indictment found there must be a record regularly drawn up, though it should be noted that the caption is no longer a necessary part of the record: Criminal Code, par. 726.

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Here we have a copy of the bill of indictment certified by the Clerk of Assize under the seal of the Court, and by operation of either section 11 or 14 of the Evidence Act, Cap. 71, R.S.B.C. 1897, it has the same effect as the original. Upon the bill being thrown out, as the indorsement upon it states, the accused would be entitled to his discharge in due course, strictly speaking when the grand jury is discharged, Archbold, *supra*, 92, and it is not to be inferred that there was any other proceeding taken against

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him on the original charge, because no other proceedings thereon could, according to our practice, be had at that assize without new evidence, and the inference would be that having been discharged from custody he was still at liberty. It would be for the other side to establish later proceedings which, though legal, are of very rare occurrence—in this Province at least: Roscoe's Criminal Evidence (1898), p. 166; Archbold, *supra*, 92. By reference to section 726 of the Criminal Code it will be seen that provision is made for "making up the record of any conviction or acquittal," etc., and the entry of record of "the arraignment and the proceedings subsequent thereto," but none of these provisions relates to the present case for there was no indictment, no arraignment and no trial, and consequently the expression "making up of the record" in the ordinary sense of the word does not apply to the case at bar. At the most there would be merely an entry by the Clerk of Assize in the record book of the court, which entry in England was more or less lengthy and formal, but in our Assize Courts the practice is to make merely a brief note of the return of "no bill." That entry, however, would not give any more information than what is indorsed on the bill of indictment itself. I am therefore of the opinion that the termination of the proceedings in his favour has, in the circumstances, been established by the plaintiff. I am fortified, I may say, in this conclusion by the language of Mr. Justice

MARTIN, J.

MacMahon in *Hewitt* v. *Cane* (1894), 26 Ont. 133 at p. 147, wherein he says:

> "The only case which, according to my view, the indictment can be used as proof of the determination of the criminal proceedings is where the bill has been ignored by the grand jury."

The case of *McCann* v. *Preneveau*, *supra*, cited in support of the objection is, I find on careful examination, really an authority against it, for Mr. Justice Galt says, at p. 576, that the allegation of "no bill" may be proved by the production "of a copy of the indictment duly proved," which was done here. I confess I find some difficulty in exactly understanding that case, for the report and the judgment are self-contradictory on this point. In my opinion, an original bill of indictment so indorsed proves itself.

Then as to the main question of "reasonable and probable cause," in regard to which this case reminds me of the saying of Mr. Baron Bramwell in *Huntley* v. *Simson* (1857), 27 L.J., Ex. 134 at p. 136: "I know no cases more difficult than these as to want of reasonable and probable cause."

It is urged, first, that the learned judge left this question to the jury instead of deciding it himself. Now, it is true that since the House of Lords decided the case of *Lister* v. *Perryman* (1870), 39 L.J., Ex. 177, it must be taken as "settled law," as Lord Colonsay says, or as "beyond doubt," as Lord Chelmsford puts it, that the judge must determine that question, nevertheless it is also clear, as shewn by the same case, that in order to do so he may call the jury to his assistance and decide it on facts found by them. And see the recent case of *Cox* v. *English, Scottish and Australian Bank* (1905), A.C. 168 to that effect. It is not an easy course to follow, and as Lord Colonsay said: "upon a careful consideration of the decisions, it seems to me impossible to deduce any fixed and definite principle to guide and assist the judge in any case that may come before him." In *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q.B.D. 440, the matter is so fully considered by a strong Court of Appeal that it seems almost presumptuous to add anything more to it. Lord Justice Bowen points out three ways in which the judge may proceed, and a careful perusal of this very lucid judgment will dispel much of the uncertainty in the case at bar. While it is doubtless true that in some portions of the learned trial judge's charge there are certain somewhat loose and involved expressions which, if considered by themselves would go to shew that he was leaving that question to the jury, yet on the other hand he clearly expressed himself in other places to the contrary, and told the jury that he was putting the first and second questions to them so as to assist him in performing his duty. I quite admit that if the learned judge had adopted the unusual and hazardous, though legal, course (see *Abrath's Case*, p. 458) in cases of this nature of leaving the jury to find a general verdict, there would probably be ground for saying that the jury had been misdirected. He did not do so, however, but very properly put the questions adopted in *Abrath's Case*, and after a careful

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perusal of his whole direction to the jury I am unable to say that the defendant has suffered thereby, and the inference from the judgment entered is that the judge necessarily determined it in the plaintiff's favour. At the same time I feel bound to say, with every respect, that it would have been more satisfactory if no doubt had crept in regarding the course he intended to adopt, for the duty of a judge to take care that what he is doing is made clear to the parties is pointed out by the Privy Council in *Cox's Case*, *supra*, at p. 171.

Much was said about Morgan's belief after learning the decision of the Gold Commissioner as set out in his letter of the 24th of October, and while it was admitted that if it were not for that decision Morgan's action could not be justified, yet it was strongly pressed upon us that Morgan believed it to be a valid decision of a competent tribunal, and therefore it could not be said that he had not reasonable and probable cause for what he did, even though it turned out to be an illegal and void decision. But in my opinion, the question does not lie in such a narrow compass, for in all the peculiar circumstances Morgan might well have believed that the decision was valid and yet not have believed that the plaintiff was acting as a criminal as distinguished from a mere trespasser who was openly asserting, however erroneously, what he believed to be his statutory mining rights. There was more than a mere scintilla of evidence on which the jury founded their answers to the questions, and therefore their finding should not be disturbed. The truth of this matter is, in my opinion, what was said in *Huntley* v. *Simson*, *supra*, at p. 137, that this was "a blunder on the part of the defendant, and . . . . one of those blunders which it is just as well that anybody should be punished for."

MARTIN, J.

Then the damages are objected to on two grounds. First, that there are certain items in the bill of costs which have no relation to this matter, and should not have been included therein, nor gone before the jury. The only recorded objection to the bill was that it was "not evidence," this being raised when the plaintiff said that it was the bill rendered to him for his expenses of defending the prosecution, and that he did not dispute it at all. It is, as I understand it now, urged that the bill

should have been proved item by item, or with more particularity at least. But it is customary to prove professional charges in connection with damages in a general way, leaving the other side to object in particular if so desired, and I think it is too late now to seek to attack any of the items. The judge stated in his charge that there was no dispute as to the amount of the costs, and then was the time to have cleared up the matter. Second, it is contended that the direction as to damages should have been fuller. There is certainly not very much on the subject, but the three chief elements, loss of liberty, damage to character, and expense, are mentioned, and the jury were told that the *quantum* was solely in their discretion which should be exercised "in regard to the surrounding circumstances." I do not think we should be warranted in positively requiring anything more in a class of action wherein the amount of damages must necessarily be peculiarly within the unfettered discretion of the jury.

MARTIN, J.

The result is that the appeal should be dismissed with costs.

Appeal dismissed, Irving, J., dissenting.

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LASELL v. THISTLE GOLD COMPANY, LIMITED (NON-PERSONAL LIABILITY), AND ADAM HANNAH.

Agreement—Corrupt or illegal consideration—Promise of benefit to employee—Fraud on Company by its manager—Fraud.

L., being the manager and part owner of a mining company which was in financial difficulties and owing him some $1,600 on account of salary, agreed with H. that the latter should acquire the outstanding debts of the Company, obtain judgment, sell the property at sheriff's sale and organize a new company in which H. was to have a controlling interest. L. was to refrain from taking any steps towards winding up the Company, and in consideration therefor he was to be given in the new company a proportionate amount of fully paid-up and non-assessable shares to those held by him in the old company. He also agreed not to reveal this understanding to certain of the shareholders:—

Held, MORRISON, J., dissenting, that if any consideration passed, it was an illegal consideration, a fraud on certain of the shareholders and a breach of trust.

A man who occupies the position of superintendent or manager of a mining company is not engaged to facilitate the remedies of creditors, but to protect the interests of the company.

Decision of MARTIN, J., reversed.

APPEAL by the defendant Hannah from the judgment of MARTIN, J., in an action tried by him at Vancouver on the 11th of July, 1905, and from the order made thereon dated the 17th of July, 1905, except insofar as the said order dismissed the action as against the defendant Company.

Statement

In the years 1899 and 1900, the plaintiff was largely interested in the Sutherland Gold Mining Company, Limited (Non-personal Liability), owning one-eighth (62,500) of the shares, the capital of the Company being 500,000 shares of a par value of $1 each.

The Company having become financially embarrassed, defendant Hannah proposed to acquire some of the outstanding debts of the Company, obtain judgment, sell the property at sheriff's sale, buy it in and organize a new company in which he was to have the controlling interest.

At this time it was agreed between the plaintiff and the

defendant that the plaintiff should refrain from taking any steps to wind up the Company, and that upon the organization and incorporation of the new company the defendant would give the plaintiff a proportionate amount of fully paid-up and non-assessable shares in the new company to those held by him in the old company.

The defendant afterwards acquired a promissory note of the Company amounting to about $3,000, brought an action, recovered judgment, and the Company's property was sold at sheriff's sale on the 29th of December, 1900, the defendant being the purchaser.

The plaintiff, under his agreement with defendant, refrained from taking any steps in relation to the shares held by him in the Sutherland Company.

The defendant afterwards promoted the Thistle Gold Company, Limited (Non-personal Liability), which was duly incorporated on the 18th of March, 1901, with a capital of $100,000 divided into 100,000 shares of $1 each. The plaintiff claimed to be entitled to 12,500 fully paid up shares in the new company, or their value, and brought this action to establish his claim.

Statement

Wilson, K.C., A.-G., for plaintiff.
Belyea, K.C., and *Morphy*, for defendant Hannah.

15th July, 1905.

MARTIN, J.: That the defendant Hannah undertook to issue to the plaintiff 12,500 shares of stock in the new company, as an equivalent for his shares in the old, is admitted, but it is said that there was no consideration for the promise. I am unable to take this view, and hold that there was a good consideration therefor in at least one respect. Then, it is said that the plaintiff should not be allowed to invoke the assistance of this court against Hannah, because he was a confederate of the latter in a secret arrangement by which some of the shareholders (without valuable consideration) of the old company, then in financial difficulties, were to be closed out of their holdings therein by means of a sale of the Company's assets under Hannah's judgment, which assets were to be bought in by Hannah and a new company formed in which other old shareholders (for value)

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were to participate. This feature of the case has caused me some difficulty, and I must say that the unnecessarily surreptitious manner in which the transaction was carried out does not commend itself to me, and as a matter of business morality, apart from strict legal right, the parties concerned have laid themselves open to censure at least, and it would have been much better, as in fact was frankly admitted by counsel, if they had acted openly. I believe, however, that Hannah's intentions were to act in the manner which he thought would best preserve the interests of those shareholders who had given valuable consideration for their holdings as distinguished from those who had not, and, consequently, as the others really suffered no loss, I have concluded, though after some hesitation, and in view of the above and other circumstances, not to condemn this as a fraudulent transaction, though it is one I do not like and hope will not be repeated, for a very slight change in the circumstances would make me take a contrary view.

Objection was taken to the variance between the precise allegation in paragraph 4 of the statement of claim as to the agreement to "refrain from taking steps to wind up the said company" and the proof adduced, but that, as I intimated, is very largely a matter of form, and an amendment will be allowed if necessary to meet the evidence.

MARTIN, J.

As to the defendant Company, it is admitted that the action must be dismissed, and as that is the "event," the costs must follow, because this is not a case wherein, by section 100 of the Supreme Court Act, I have a discretion. The plaintiff is entitled to 12,500 shares as prayed, or their value, which from the evidence must be fixed at par, and the costs must follow the event.

The appeal was argued at Vancouver on the 16th of November, 1905, before HUNTER, C.J., IRVING and MORRISON, JJ.

Belyea, K.C., and *Morphy*, for Hannah, defendant, appellant: The letter from Hannah to Lasell of 16th November, 1900, under which the reorganization arrangement was made, was a mere offer, and amounted to nothing, especially as Hannah had then, as a matter of fact, begun his action on the note. Even if there had been consideration for Hannah's promise

Argument

to protect Lasell's interests there was no legal consideration for it, and besides the arrangement was illegal, because Lasell as manager was the representative of the whole Company and therefore had no right to enter into any such arrangement. Lasell's undertaking to refrain from taking steps to oppose the reorganization was mere empty verbiage, as the only step he could take would be to wind up the Company, and as the Company was bankrupt there was nothing to wind up. Further, Lasell had assigned his claim. It amounted to an arrangement with a mere outsider with respect to the affairs of this Company, a contract contrary to public policy and a fraud on the shareholders; one which he could not come into court for support of: *Holman* v. *Johnson* (1775), 1 Cowp. 341 at p. 343; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549, which is practically on all fours with this, shewing that if there is an element of corruption or illegality in the contract it will not be enforced. As to the assignment of Lasell, see *Fitzroy* v. *Cave* (1905), 2 K.B. 364; *Alexander* v. *Automatic Telephone Company* (1900), 2 Ch. 56.

Bloomfield, for plaintiff, respondent: The Company was not bankrupt, its only indebtedness was about $5,000. As to reorganization scheme, Hannah's letter to Lasell in which he promised that every dollar should be repaid, shewed that there was no intention of shutting out any one.

Argument

[HUNTER, C.J.: Hannah says himself he was only acting for those who on his representations had put money into the Company.]

As to the question of consideration: He was to get his shares, and the other shareholders were to get theirs. The trial judge found, also, there was good consideration. The amount of Lasell's claim when Hannah heard of it could have no effect on the bargain. The consideration, if any did pass, was 62,500 shares, and there was also Lasell's waiver of his claim for $1,600, which passed to Hannah himself or to him as trustee for someone, and he cannot now come and set up the plea that there was no consideration. There is, further, nothing to shew illegal consideration, as Hannah says what he did was for the benefit of all concerned.

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[IRVING, J.: Yes; for the benefit of all his friends who were concerned.]

He cited *Derry* v. *Peek* (1889), 14 App. Cas. 337, as shewing that however unbusinesslike a man may be in his dealings, he is not therefore fraudulent.

As to the question of the valuation of the shares at par,

[HUNTER, C.J.: For my part, I do not care about hearing you on the computation of damages, because I do not think you are entitled to judgment.

IRVING, J.: I am of the same opinion.]

HUNTER, C.J.: It seems to me, Mr. *Bloomfield* is on the horns of a dilemma. Assuming that the alleged promise is not too vague to found any legal claim upon, there was either no consideration for it or, if there was, it was an illegal one; or, at any rate, illegal in part.

On the 16th of November, Hannah writes to Lasell, who was superintendent and manager of the Company, as follows:

"After thinking over the affairs of the Sutherland Co. and consulting Mr. Sutherland and my attorney, I have concluded that the only way to get matters on to a satisfactory footing is to take up the outstanding debts of the company, to sue for judgment, acquire the property and organize a new company, in which I, representing those who have put in money or rendered services to the company, shall hold an absolutely controlling interest until at least every dollar shall have been repaid. This step has been rendered necessary by reason of certain suits against Mr. Sutherland, which on account of Mr. Sutherland's fault, had very unjustly threatened to embarrass him badly, lose to him many of his shares and place the con-

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trol of the company in uncertain hands. In order not to give Mr. Sutherland's claimants any advantage, I have not thought it well to let my intentions in Minneapolis be known, and I think it will be well for you not to mention the matter to any one for the present. I should have liked to have talked with you before taking this step, but this has been rendered impossible because rapid action was absolutely necessary. I hope, nonetheless, that you approve and that you will aid us in every way possible to put the new company on its legs. Under the new management, you will know exactly with whom you have to do, and I have no doubt results will be accomplished that were quite impossible under the old style. I purpose to take care of you and to take care that your interests are properly protected.

"Matters had got into such a tangle in Minneapolis that it was quite impossible for Mr. Shepherd or anyone else to raise money.

"By advice of Mr. Cran, I have employed Mr. Stuart Henderson to sue

on the bank's note which the bank has transferred to me. I have also arranged to take up the Shermer and McKenna notes and to take up all the cheques issued up to the date that you rendered an account to Mr. Shepherd which I suppose covers everything excepting your own services. But of this, please advise me by first mail to Minneapolis whence I return this evening. We do not want any cheques dishonoured.

"I hope you realize that I have put myself to so much trouble in coming here and taking up the company's debts not for the purpose of making money, but for the purpose of keeping Mr. Sutherland from falling into poverty in his old age, and of doing what I can to see that the money I have been instrumental in aiding him to put into the company shall be paid back. Had I foreseen at the beginning the present difficulties, my name would never have appeared in the connection. I do not now hold a single share of stock, nor have I received a single dollar of compensation. Notwithstanding this, I hope that your judgment and management will enable me to be finally paid for what I have done."

Now it is evident on the face of this letter that Hannah proposes, by means of a collusive judgment, to oust those shareholders who, from his point of view, gave no value for their shares, from having any beneficial interest in the property, and to form a new company in which only a few of the others including Lasell were to be allotted any stock, and this promise to protect Lasell is confirmed by a subsequent telegram.

If the matter rested here, I do not see how any one can maintain that this bargain was not illegal. A man who occupies the position of a superintendent or manager of a mining company is not engaged to further the interests of creditors or of particular shareholders at the expense of other shareholders, and if he actively aids a creditor to recover a judgment which he knows is being taken for the purpose of advancing the interests of one set of shareholders at the expense of the others with a view to gaining a benefit for himself, then he is departing from his duty as the trusted agent of the company, *i. e.*, all the shareholders, and is committing a fraud upon those members of the company whose interests are being sacrificed.

That he actively aided Hannah in this scheme is evident from the letter in which he says:

"I am telegraphing Henderson" (*i.e.*, the solicitor whom Hannah had retained to get the judgment) "to-day to push the sheriff's sale, and you may rest assured I shall do all in my power to further the business in hand. I can see no objections to your alterations and proposals. What do you propose to do with Wendell's stock? I wish to have him protected," etc.

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Mr. *Bloomfield*, however, argued that the consideration moving from Lasell to support the promise was the forbearance on Lasell's part to proceed with his own claim.

Assuming that the forbearance formed part of the concluded agreement, which is not by any means clear, there is no doubt that by the same agreement Lasell was also to assist in the wiping out of the old and the organization of the new company from which by common design certain shareholders were to be excluded. That being so, the consideration was illegal, in part and the illegality cannot be severed.

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Mr. *Bloomfield* also stoutly insisted that Lasell was not conscious that he was being invited into betraying the interests of these shareholders. If that is so, then all I can say is that there is such a thing as criminal innocence.

The parties are *in pari delicto*, and the appeal should be allowed and the action dismissed.

IRVING, J.

IRVING, J.: The defendant Company and Hannah set up the defence that there was illegality, *viz.*, at the time of the supposed agreement. We are told by Mr. *Bloomfield* that this defence was abandoned at the trial. Mr. *Belyea's* recollection does not agree with that of Mr. *Bloomfield* on this point. To my mind it makes very little difference whether this defence was or was not abandoned by counsel.

Ex parte Simpson (1809), 15 Ves. 476; *Cracknall* v. *Janson* (1879), 11 Ch. D. 13; *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724 and *Connolly* v. *Consumers' Cordage Co.* (1903), 87 L.T.N.S. 347, are authorities for the proposition the court will take notice of fraud and will not allow the parties to escape the consequences of their own wickedness. It seems to me that fraud is abundantly established.

[Here the learned judge dealt with the facts.]

MORRISON, J.

MORRISON, J.: I regret that I cannot agree with my brother judges in this matter. I am not satisfied that Lasell was a party to any fraudulent scheme on the part of Hannah, or that he understood that there was any fraudulent design on Hannah's part. I think that Lasell had a controlling position from which he receded upon making this arrangement which Hannah

alleged was to be for the benefit of the Company and all the shareholders.

I would dismiss the appeal.

Appeal allowed, Morrison, J., dissenting.

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THE KING v. THE SHIP NORTH.

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Admiralty law — Foreign vessel fishing within three-mile limit — Capture outside limit — Continuous pursuit — Jurisdiction of Dominion and Province over fisheries — Condemnation and forfeiture.

The American schooner North was discovered by the Dominion Government steamer Kestrel hove-to engaged in halibut fishing in Quatsino Sound, Vancouver Island, and within the three-mile limit. She had at the time all her fishing boats out, but on observing the approach of the Kestrel some four or five miles off, but also within the three-mile limit, the schooner picked up two of her dories and stood out to sea. The Kestrel made pursuit, deviating slightly from her course in such pursuit to pick up one of the schooner's fishing boats with its crew, and overhauled and seized the schooner about one and three-quarter miles outside the three-mile limit. At the time of seizure there were freshly caught halibut lying about on the schooner's decks:—

Held, that the pursuit having been begun within the three-mile limit, and having been continuous, the seizure was lawful.

The stopping to pick up the fishing boat and its crew, as evidence of the offence committed by the schooner, was not a break in the continuity of the pursuit.

Observations as to the jurisdiction of Canada and the Province, respectively, over fisheries.

TRIAL at Vancouver before MARTIN, Local Judge in Admiralty. The facts fully appear in the reasons for judgment. The trial took place on the 27th and 28th of July, 1905, and was adjourned for argument, which was heard at Victoria on the 3rd of August, 1905. Statement

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Wilson, K.C., A.-G., for the owners of defendant ship, took the objection that in any event the seizure was unlawful, as the vessel was beyond the territorial jurisdiction of Canada. The case is entirely one of jurisdiction. No crime has been committed, there is no property in the fish, and, assuming the facts to be correct, all that has been violated is a regulation requiring that a foreigner should not fish in Canadian waters without a licence. A violation of this regulation gives no right to pursue a vessel beyond the territorial jurisdiction. A British ship within the territorial jurisdiction of a foreign state is subject to that jurisdiction, but when beyond it the ship is British territory. He cited *Lesley's Case* (1860), Bell, C. C. 220; *The Queen* v. *Carr* (1882), 10 Q.B.D. 76; *Marshall* v. *Murgatroyd* (1870), L.R. 6 Q.B. 31; *The Queen* v. *Keyn* (1876), 2 Ex. D. 63; *The Queen* v. *Anderson* (1868), L.R. 1 C.C. 161; *Cranstoun* v. *Bird* (1896), 4 B.C. 569. There is no provision in the Dominion statutes imposing any punishment on the men for infringing the fishery regulations, so that their detention on board the Canadian ship amounted to imprisonment, and was therefore unlawful.

Argument

Macdonell, for the condemnation of the ship: A ship found committing an offence within the jurisdiction may be followed beyond it, provided the pursuit be continuous; and it cannot be said that the Kestrel, in stopping to pick up the dories, abandoned the pursuit. He cited *Hudson* v. *Guestier* (1810), 6 Cranch, 283; *Church* v. *Hubbart* (1804), 2 Cranch, 187 and *The Alexander* (1894), 60 Fed. 914.

Wilson, in reply: *Hudson* v. *Guestier*, *supra*, is distinguishable in that the judgment is *obiter* on the point that a vessel may be seized without the jurisdiction for an offence committed within. He cited *Rose* v. *Himely* (1808), 4 Cranch, 240.

25th August, 1905.

MARTIN, L.J.A.: This case raises important questions relating to the fisheries of this Province in general and to the extensive and valuable halibut banks of Vancouver Island in particular.

Judgment

There is, and can be from the evidence, very little dispute about the facts, which are clear, and I find as follows: That on the morning of the 8th of July last the foreign schooner North,

alleged in its statement of defence to be "navigated according to the laws of the United States of America," was hove-to and unlawfully engaged in halibut fishing in Quatsino Sound, Vancouver Island, within the three-mile limit, having all all its four fishing boats, dories, out for the purpose; that on observing the approach in obvious pursuit, within the three-mile limit and approximately four or five miles off, of the Canadian Fisheries Protection Cruiser Kestrel, she picked up two of her dories and stood out to sea; that the Kestrel continued in pursuit at her highest speed in the attempt to intercept the North; that in the course of that pursuit the Kestrel observed another dory close to and pulling hard from the land towards the schooner, which dory the Kestrel, after slightly deviating from her course, picked up and seized within the three-mile limit, and, after fixing her position by cross-bearings, continued her pursuit of the North, which she overhauled in about ten to twelve minutes and seized, with the two first-mentioned dories about one and three-quarter miles ouside the three-mile limit. There were freshly caught halibut lying on the North's deck at the time of seizure, which in all the circumstances must be held to have been caught within the limit. There were also several tons of halibut in her hold, but it cannot be said where they were taken. The schooner and the three dories were towed to Winter Harbour, Quatsino Sound, where the fourth dory was afterwards taken when it came in.

Judgment

I may say that quite apart from the admission of the master of the North of his knowledge of wrong-doing, no difficulty is experienced here in regard to fixing the various positions in issue, as was the case in *The King* v. *The Kitty D.* (1904), 34 S.C.R. 673, because they were exactly established by cross-bearings.

So far as the two dories taken within the limit and their tackle, gear and equipment are concerned, it was not argued that they were improperly seized, but as to the schooner and the other dories, it is contended on several grounds that the seizure thereof cannot be justified.

The first is, that no seizure can be made on the high seas for an offence committed within the three-mile limit, which is merely

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an infringement of municipal or local laws or regulations and not a crime in the proper sense of that word, in which case it is admitted a seizure may be made where the pursuit is continuous. Here the pursuit was begun within the three-mile limit and was clearly continuous, which in fact was not nor could be seriously disputed, for it would be as unreasonable to contend that its continuity was broken by stopping to pick up within the limit one of the best evidences of the commission of the offence as it would be in the case of a constable in pursuit of a thief stopping to pick up the stolen article which the pursued threw away in the course of his flight. Indeed, the inference is stronger and the act more advisable in the case of a poaching vessel with her boats out in the ordinary course of fishing operations, because the boats are manned by members of her crew who are a living and active part and parcel of her engaged in breaking the law: see on the wide meaning of "fishing" and "preparing to fish," the case of *The Queen* v. *The Ship Frederick Gerring, Jr.* (1896), 5 Ex. C.R. 164, (1897), 27 S.C.R. 271; the cases reported and cited in Stockton's Admiralty Digest (1894), on pp. 200 and 598-600; those on the Behring Sea Seal Fishery in this Court; and on the same subject in the United States Court of Admiralty, *The James G. Swan* (1892), 50 Fed. 108; *The Kodiak* (1892), 53 Fed. 126 and *The Alexander* (1894), 60 Fed. 914.

Judgment

As regards the rights of merchant vessels in foreign ports, it was said in the leading case of *The Queen* v. *Anderson* (1868), L.R. 1 C.C. 161 at p. 166, that "when vessels go into a foreign port they must respect the laws of that nation to which the port belongs," though they may there be still subject to the laws of their own country as though they were on the high seas: *Ib.* and *The Queen* v. *Carr* (1882), 10 Q.B.D. 76; *Marshall* v. *Murgatroyd* (1870), L.R. 6 Q.B. 31.

It has likewise been repeatedly laid down by the Supreme Court of the United States, adopting the language of Chief Justice Marshall in the celebrated case of *The Exchange* (1812), 7 Cranch, 116, at p. 144, that

"When merchant vessels enter (foreign ports) for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would

subject the laws to continual infraction, and the government to degredation, if such . . . . merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." Followed in *United States* v. *Diekelman* (1875), 92 U.S. 520, and *Wildenhus's Case* (1886), 120 U.S. 1.

There is no case in the English or Canadian reports on this first point, but it has been dealt with by American courts. *Church* v. *Hubbart* (1804), 2 Cranch, 187, is a case where an American ship was seized by the Portuguese Government outside of the three-mile limit for a violation of the prohibition of the Crown of Portugal against all trade by foreigners with its colonies, or hovering off their coasts for that purpose. [The learned Judge here quoted the language of Chief Justice Marshall at pp. 234-5-6.]

In *Rose* v. *Himely* (1808), 4 Cranch, 240, the majority of the judges of the same court gave a decision which, it is true, cannot be reconciled with that just cited, but I draw attention to the fact that three of the judges, Livingston, Cushing and Chase, JJ., did not express themselves on the present point, and Mr. Justice Johnson dissented. But the matter must, in my opinion, be considered as settled by the subsequent case of *Hudson* v. *Guestier* (1810), 6 Cranch, 280, decided by the same court, wherein *Rose* v. *Himely* is overruled, all the judges concurring, with the exception of Chief Justice Marshall, who gives an explanation (p. 285) of his misapprehension in regard to his former view being shared by certain of his colleagues. In that case it was held that a ship may be seized on the high seas for a breach of municipal regulations committed within the territorial jurisdiction. The court said:

Judgment

"If the *res* can be proceeded against, when not in the possession or under the control of the court, I am not able to perceive, how it can be material, whether the capture was made within or beyond the jurisdictional limits of France, or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she (France) interfered with the jurisdiction of no other nation, the authority of each being there concurrent."

There the capture was more than two leagues at sea, and the ship was condemned for trading to the revolted ports of the Island of Hispaniola contrary to the ordinances of France.

The Supreme Court of Louisiana in *Cucullu* v. *Louisiana*

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Insurance Co. (1827), 16 Am. Dec. 199, followed the principle laid down in *Church* v. *Hubbart, supra.* See p. 207.

And, *a fortiori*, the right would exist after the territorial waters had been actually entered and violated.

This view is, as would be expected, to be found in the text books on the subject, and I proceed to give extracts from the latest of them.

[The learned Judge here quoted from Woolsey on International Law, 6th Ed., 1898, p. 71, par. 58; p. 365, par. 212; Taylor on International Public Law (1901), p. 307, par. 262; p. 310, par. 267; Hall's International Law, 4th Ed., pp. 213, 215, 263, 266; Phillimore's Commentaries on International Law, Am. Ed. 1854, Vol. 1, p. 179.]

The case of *Church* v. *Hubbart* is referred to in the American note, but the editor does not seem to have been aware of the later and broader decision in *Hudson* v. *Guestier*.

This distinction between seizures made upon the high seas which are the exclusive property of no nation and the general property of all nations, and seizures made within the territory of another state is, I find, illustrated in a striking manner by Lee on Captures in War (1803), 123, wherein he lays it down in the case of war, though it is said to be "the most that can be allowed," that

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"During the engagement, it is lawful to pursue the flying enemy into another government; for the same reasons as Philip the Second, King of Spain, in an edict he published relating to criminals in the year 1570, par. 76, permitted the delinquent to be pursued into the territories of another. But it is one thing to begin force, and another to press forward with force in the heat of action. In a word, the very being in the port of a friend forbids us to commence any force there; but it does not prohibit the use of any force which was begun without the bounds of his territory, while the matter is warm; for we may then pursue it into the very territory of our friend. And, though this is a question little noticed by writers on public justice, yet this distinction appears quite reasonable."

Over the waters within the three-mile limit the chief heads of jurisdiction generally asserted by nations are four: (1.) The prohibition of hostilities; (2.) the enforcement of quarantine; (3.) the prevention of smuggling; and (4.) the policing of fisheries; and this last, involving the assertion and protection of the exclusive right of its subjects to fish within said limit, is cer-

tainly not the least important duty of a State. So far as this continent is concerned, it is of much consequence in view of the great value of the fisheries, and this "police jurisdiction" by the two nations chiefly concerned (Canada and the United States) has been acquiesced in for a long period, and is admitted, so it is unnecessary to discuss it. As regards the North Atlantic fishery, its history is given by Wharton in his International Law Digest (1886), Vol. 3, pars. 300-1; and see Hall's International Law, *supra*, 99 and 154, on British American fisheries generally. Though poaching the fisheries of a friendly nation is not essentially a crime, yet, as was said by the Supreme Court of Canada in *The Queen* v. *The Frederick Gerring, Jr., supra*, it is a "nefarious business," and one which "so far as Canadian waters are concerned has been prohibited and criminalized," and the cases hereinbefore cited shew that the Governments of Canada and the United States have endeavoured rigidly to suppress the depredation of their waters by foreigners.

It follows from all the foregoing that the seizure herein was lawful. Such being the case, it becomes unnecessary to consider the question of the alleged extent of Quatsino Sound from Cape Cook to Topknot Point, on the "headland to headland" theory, which raises a very involved question which I see has been in recent years considered by the Supreme Court of Newfoundland in *Rhodes* v. *Fairweather* (1888), Newf. Dec. 321; see also an appeal from that Court on the same question in *Direct United States Cable Co.* v. *Anglo-American Telegraph Co.* (1877), 2 App. Cas. 394; and *Mowat* v. *McFee* (1880), 5 S.C.R. 66.

Judgment

The remaining question is that the Government of Canada, as a result of the *Fisheries Case* (1898), A.C. 700, is not vested with the authority to prevent any one from fishing, and has no *status* except for revenue purposes; in other words, that while it has the right to control, it has not the right to absolutely prohibit foreign nations, and that it is the Province of British Columbia and not Canada that has, if any one has it, the right of property in the fish and therefore the Federal government has no police jurisdiction. In view of the long continued undisputed exercise of this right by the Federal power, as shewn by a perusal of the cases already cited, and others such as *The Grace* (1894),

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4 Ex. C.R. 283; and *The Queen* v. *The "Henry L. Phillips"* (1895), *ib.* 419, (1896), 25 S.C.R. 691, it would seem to be somewhat late to raise the point. Indeed it has been laid down in the former case, p. 288, as follows:

> "Now it is also an axiom of International law that every state is entitled to declare that fishing on its coasts is an exclusive right of its own subjects, and therefore the Act respecting fishing by foreign vessels is strictly within the powers of the Parliament of Canada, and we must look to that statute for the express authority to protect the subjects in their fishing rights, and for the penalties incurred by any foreign vessel for infringing those rights."

And then follows the reference to the statute shewing that it does in its first section provide for the issue of a licence to a foreign ship, and the onus is upon such ship when fishing in our waters to prove its possession of a licence: *The Queen* v. *The "Henry L. Phillips," supra.* Here there is no evidence of a licence, nor of the nationality of the owners; all before the Court on that point is that the vessel was navigated according to the laws of the United States. It was laid down in the *Fisheries Case* 713, that

> "It is impossible to exclude as not within this power (raising money) the provision imposing a tax by way of licence as a condition of the right to fish. It is true that, by virtue of s. 92, the Provincial Legislature may impose the obligation to obtain a licence in order to raise a revenue for provincial purposes; but this cannot, in their Lordship's opinion, derogate from the taxing power of the Dominion Parliament to which they have already called attention."

Judgment

And further, at p. 716:

> "The enactment of fishery regulations and restrictions is within the exclusive competence of the Dominion Legislature, and is not within the legislative powers of Provincial Legislatures."

While these rights are not proprietary, they are manifestly of such a nature that it is within the competence of the Federal power to exercise the sovereign rights which have been delegated to it by the British North America Act, and protect, in the interest of the nation at large, those fisheries which it is authorized to regulate and license. I can find nothing in the *Fisheries Case* which goes to support a contrary view.

The judgment of the Court is that the schooner North, her boats, tackle, rigging, apparel, furniture, stores and cargo are condemned and declared forfeited to His Majesty.

Order accordingly.

GINACA AND MOUROT v. THE McKEE CONSOLIDATED HYDRAULIC, LIMITED.

FULL COURT

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Nov. 8.

GINACA v. McKEE

Leaseholders and placer miners—Respective rights of to water—Water Clauses Consolidation Act, 1897, Amendment Act, 1904, effect of—Lease and placer claim—Difference between—Placer Mining Act, Sec. 90.

It was the intention of the Legislature, by section 29 of the Water Clauses Consolidation Act, as enacted by Sec. 2 of Cap. 56, 1903-4, to secure to free miners, occupants of placer ground, whether they hold as original locators or as leaseholders, that continuous flow of water which the section specifies.

A free miner having obtained certain rights on one creek under section 29, does not forfeit them because he obtains additional rights on another creek under another section.

The enactment contained in said Chapter 56 of 1903-4, shews a clear intention to cut down the rights of holders of water records, and to increase the benefits accruing to the individual free miner under the Placer Mining Act.

Per IRVING, J. (*dissentiente*): A leasehold, being held under a lease granted pursuant to the recommendation of the Gold Commissioner, on the representation by the applicant that the ground is abandoned as placer ground, the term "location" would not be properly applied to it.

Decision of HENDERSON, Co. J. (Mining Jurisdiction), affirmed.

APPEAL from the decision of HENDERSON, Co. J. (Mining Jurisdiction), in an action tried by him at Atlin, on the 7th, 8th and 9th of September, 1904. Statement

The facts are stated in the reasons for judgment of MARTIN, J.

Kappele, for plaintiffs.

A. D. Taylor, and *Mason*, for defendants.

The appeal was argued at Vancouver on the 13th of June, 1905, before IRVING, MARTIN and MORRISON, JJ.

A. D. Taylor, for appellants.

Kappele, for respondents.

Cur. adv. vult.

8th November, 1905.

IRVING, J.: The short question in this case is: Are the IRVING, J.

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plaintiffs, who are holders of two leases situate on McKee Creek, issued under the provisions of Part VII. of the Placer Mining Act, entitled as against the defendants to the benefits of section 29 of the Water Clauses Consolidation Act, 1897, R.S.B.C. Cap. 190, as re-enacted in section 2 of Cap. 56, 1903-4, as follows:

"In any case where all the water in any stream has been recorded for mining purposes and *placer mines*, either before or after the date of such record, are located and *bona fide* worked either above or below the point of diversion, the owner or owners of such placer mines shall be entitled to the continuous flow in said stream past, or to divert into or upon or through, such mine or mines sixty inches if two hundred or less be diverted by such record, and ninety inches if three hundred inches be diverted by such record, but no more; and such owner or owners shall be entitled to the full use of such water for such distance above or below such mine or mines as shall be necessary for the continuous and economical workings of said mine or mines and the carrying away of tailings and debris arising therefrom: Provided, however, that such owner or owners may divert a greater quantity than above specified upon paying to the holder of said record compensation for the damage he may thereby sustain; and in computing such damage the cost of the ditch shall be considered."

The following clauses are found in section 2 of the Act:

"Mine" shall include "claim" and "mineral claim," and shall mean any land held or occupied under the provisions of the mining laws of the Province, for the purpose of winning and getting therefrom minerals, whether precious or base; and whether held in fee simple or by virtue of a record or lease; and "owner of a mine" shall mean owner of a mine as above defined.

"In defining any word or expression used in this Act relating to mines and minerals and not by this section expressly defined, reference may be had to the interpretation section of the Mineral Act, 1896, and of the Placer Mining Act."

IRVING, J.

There is no definition of a "placer claim."

Turning to the Placer Mining Act we find that "placer claims" are divided into creek claims, hill claims, dry diggings, bar diggings, bench diggings and hill diggings, and that leaseholds are not mentioned.

Owing to the definition of the word "mine" above given doubt may exist as to whether or not a leasehold is included in the words "placer mine," but the expression "located" is inapplicable to a leasehold. A creek claim, or any of the other five classes of claims into which placer claims are divided is held by location and record, but a leasehold is not.

A leasehold is held under a lease granted by the Gold Commissioner, and the word "location" would not be properly applied to it in many respects. It is quite different from an ordinary placer claim. In the first place, an ordinary placer claim is taken up as of right; a lease, on the other hand, is a concession granted by the Government on the report of the Gold Commissioner, usually in creek diggings on the representation by the applicant that the ground is abandoned.

This difference between a "lease" and a "placer mining claim" is clearly recognized in section 90 of the Placer Mining Act, which requires the applicant for a lease to post a notice on the post nearest to the placer mining claims then being worked.

IRVING, J.

For these reasons I think the learned County Court judge was mistaken, and that the appeal should be allowed.

MARTIN, J.: The defendant Company, the appellant, has a water record for 1,000 inches under the Water Clauses Consolidation Act, on McKee Creek, Atlin Mining Division, and the plaintiffs are free miners and leaseholders on the same creek under a mining lease granted by the Gold Commissioner on August 24th, 1903, under Part VII. of the Placer Act.

The plaintiffs claim that by virtue of section 2 of the Water Clauses Consolidation Act, 1897, Amendment Act, 1904, amending section 29 of the original Act, they are entitled to a continuous flow of 90 inches of water out of McKee Creek, which claim the defendant Company resists, the supply of water being insufficient for both parties.

MARTIN, J.

The first ground of appeal taken by the Company is that said section relates only to individual miners and cannot be invoked by leaseholders, and weight is attached to the use of the words "placer mines" and "located" in that section, and to the original section 61 of the Placer Act of 1891 as shewing the intention of the Legislature to so restrict it, for it is argued that the language of section 61 can only apply to the case of a free miner's actual location of a placer claim. The section is none too clear and there certainly is cause for raising the objection, but the construction very largely depends upon the interpretation

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section of the Water Clauses Act, and there has been an important change in the language, *e.g.*, the present section now declares that "the owner or owners of such placer mines shall be entitled to the continuous flow," etc. The plaintiffs contend that they come within this language as being wide enough to cover leaseholders who are "owners of a mine" under the definition of "mine" as given in the Water Clauses Consolidation Act.

In my opinion, since the expression "owner of a mine" is "expressly defined," to quote the final clauses of the interpretation section, there is no necessity to resort to the Placer Act, and the expression in the present relation "owner of a placer mine" is synonymous with "owner of a mine," and "placer mine" with "mine," for only placer mines are dealt with by said sections 29 and 2. I do not think, having regard to the whole section, that undue importance should be attached to the word "location" for it is manifestly not used in the strict technical sense of that term. But even if we have to turn to the Placer Act we find that "mine," "placer mine" and "diggings" are synonymous terms, and that sufficiently covers the point, that it is laid down that "'placer claim' shall mean the personal right of property or interest in any placer mine."

My view of the section is that the broad intention of the Legislature was to secure to the occupants, free miners, of placer ground, whether they hold their "mines" as original locators, or their assignees, or as leaseholders, that continuous flow of water which the section specifies; I cannot agree that it was intended to favour actual locators as distinguished from other free miners.

MARTIN, J.

The second objection is that because the plaintiffs have, for use on their claim, a water record on another creek they cannot concurrently hold on this creek what has been held to be an equivalent to a statutory record: *Brown* v. *Spruce Creek Power Co.* (1905), 11 B.C. 243, 2 M.M.C. 254.

To my mind, this objection is untenable. Once a free miner obtains certain rights on one creek under the section he does not forfeit them simply because he obtains additional rights on another creek under another section. If he cannot obtain enough water under his statutory record to work his claim, surely he can do so from any other source by whatever lawful means is other-

wise open to him under the Act. Simply because his rights are various they are not necessarily antagonistic. At the same time it may possibly be, as contended, that where a free miner has obtained a record on a creek he could not afterwards claim his statutory amount of water on the same creek, but as to that I express no opinion, because the point does not directly arise.

Finally, it is urged that since the defendants' record was issued under the old Act the plaintiffs have no right to more than the 60 inches allowed by that Act, and not the 90 inches authorized by the amendment of 1903-4. But the object clearly of the amendment was to increase the benefits accruing to the free miner, and the section itself is plain because it declares that it shall have application "in any case . . . . either before or after the date of such record." This is, to my mind, a clear intention to cut down the rights of the holders of water records, and the plaintiffs are entitled to the 90 inches which the Court below has given them judgment for.

MARTIN, J.

The appeal should be dismissed with costs.

MORRISON, J.: I concur.

MORRISON, J.

Appeal dismissed, Irving, J., dissenting.

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1905

June 20.

COPE v. S. S. RAVEN AND MAYHEW.

Admiralty law—Exchequer Court—B. C. Admiralty District—Jurisdiction—Action in rem—Arrest of ship—Action between co-owners for account.

COPE v. S.S. RAVEN

This Court has as large a jurisdiction as the High Court of Admiralty, and therefore in an action between the co-owners for an account the ship may be arrested.

Statement

MOTION by the defendant Mayhew, joint co-owner of a ship which had been arrested in an action *in rem* at the suit of the plaintiff, the joint co-owner, to set aside the warrant of arrest and release the ship therefrom. Argued at Vancouver, before MARTIN, Local Judge in Admiralty, on June 7th and 17th, 1905.

Argument

Sir C. H. Tupper, K.C., for the motion: There is no authority for proceeding *in rem* under 24 Vict., Cap. 10, Sec. 8: "*The Pieve Superieure*" (1874), 43 L.J., Adm. 20. Unless plaintiff can shew that section 35 of Cap. 10, *supra*, confers jurisdiction on Colonial courts, no action lies *in rem* for an account between co-owners. He cited *Hall* v. *The Ship Seaward* (1892), 3 Ex. C.R. 268; Howell's Admiralty Practice; *The Rochester & Pittsburg Coal and Iron Co.* v. *The Ship The Garden City* (1901), 7 Ex. C.R. 34 and 94.

Wintemute, contra: The Colonial Courts of Admiralty Act, 1870, confers jurisdiction on Colonial courts, and section 2 of that Act makes sections 8 and 35 of 24 Vict., Cap. 10, applicable to Colonial courts: see sections 3 and 4 of our Admiralty Act. He cited *The Idas* (1863), Br. & Lush. 65; *The "Two Ellens"* (1872), L.R. 4 P.C. 161; *The Pieve Superieure* (1874), L.R. 5 P.C. 482; *The Cella* (1888), 13 P.D. 82; *Coorty* v. *The Steamship George L. Colwell* (1898), 6 Ex. C.R. 196; *The Rochester & Pittsburg Coal and Iron Co.* v. *The Ship The Garden City* (1901), 7 Ex. C.R. 34 and 94 and *Hall* v. *The Ship Seaward* (1892), 3 Ex. C.R. 268.

20th June, 1905.

Judgment

MARTIN, LO. J. A.: While agreeing with the defendant's counsel that there is no decision on the point raised on this

application, yet in view of the clear language of the various statutes under consideration, I experience no difficulty in coming to a conclusion thereon. It is admitted that the joint effect of sections 8 and 35 of the Admiralty Courts Act, 1861, is to confer upon the High Court of Admiralty jurisdiction *in rem* in an action for an account between co-owners. But it is submitted that the like jurisdiction is not conferred upon this court by the Colonial Courts of Admiralty Act, 1890, Sec. 2, Sub-Sec. 2, and the Admiralty Act, 1891, Secs. 3 and 4.

The said sub-section 2 provides that a Colonial Court of Admiralty may exercise admiralty "jurisdiction in like manner and to as full an extent as the High Court in England," and the said jurisdiction "may be exercised either by proceedings *in rem* or proceedings *in personam:* section 35.

I am unable to take the view that anything more than the said Acts was necessary to confer jurisdiction upon this court in the premises, and even assuming, as is contended, that rule 37 (*d*) carries the case no further, it was unnecessary, in my opinion, to provide for by that rule that procedure which was authorized by the statute conferring jurisdiction. Furthermore, and in any event, rule 228 declares that, "in all cases not provided for by these rules, the practice for the time being in force in respect to Admiralty proceedings in the High Court of Justice of England shall be followed." I point out that though the words are "and earnings" in section 8, yet they are "or earnings" in rule 37 (*d*), and must be so construed.

Judgment

As was said by the learned judge of the High Court of Admiralty in a decision on the earliest Act in question, other "reasons might be given in support of this construction, but I need not look for motives when the words of the Act are plain": *The Idas* (1863), Br. & Lush. 65.

Suffice it to say that I can find nothing in the said Acts or rules which indicates that it was the intention that this court should have less jurisdiction than the High Court of Admiralty. The motion will be dismissed with costs to the plaintiff in any event.

Motion dismissed.

BOLE, CO. J.

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Nov. 22.

McADAM v. KICKBUSH.

McADAM v. KICKBUSH.

Non-suit, motion for—Evidence in rebuttal, rejection of—Burden of proof—Damages.

In an action of replevin, plaintiff proved ownership and rested his case. Defendant then moved for a non-suit, the decision on which was reserved until he had presented his case. Plaintiff offered evidence in rebuttal to meet the case made by defendant, which was rejected on the ground that evidence to prove the non-existence of the tenancy alleged would be merely confirmatory of the plaintiff's case, and the action was disposed of by allowing defendant's application for a non-suit:—

Held, that in the circumstances, the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case on the plaintiff; and that the course adopted by the learned trial judge admitted the evidence for the defendant to and excluded the evidence for the plaintiff from review by the Court of Appeal.

Decision of BOLE, Co. J., reversed.

APPEAL from the judgment of BOLE, Co. J., on the trial of an action of replevin heard before him at New Westminster, on the 17th of January, 1905.

The real controversies between the parties were: Was there a tenancy, and if so, was there rent payable at the time of the seizure? The plaintiff proved ownership of the goods. At the close of the plaintiff's case the defendant applied for a non-suit. The learned judge did not then deal with this application, but reserved leave to the defendant to move for the same relief on the motion for judgment. The defendant then proceeded to present his case, adducing evidence to prove the existence of a tenancy and the fact that the rent distrained for was payable at the time of the seizure. The plaintiff offered evidence in rebuttal to meet the case made by the defendant. This evidence the learned County Court judge rejected on the ground that evidence to prove the non-existence of the alleged tenancy would be merely confirmatory of the plaintiff's case. On motion for

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judgment the action was disposed of by allowing the defendant's application for a non-suit.

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Macdonell, for plaintiff.
Bowes, for defendant.

BOLE, Co. J.: In this case, which is an action of replevin, the plaintiff at the trial confined himself to calling his wife to prove ownership and possession of the goods seized, and shewing that they were seized by the defendant under a distress warrant for rent.

The defence, or avowery, as it is called, relied on the fact that the rent, which it was alleged was payable in advance, was due and in arrears at the time of the seizure complained of. The plaintiff led no evidence to shew that defendant had acted wrongfully in distraining these goods, and did not attempt to prove that there was not any rent due from him to the landlord, for whom defendant distrained. At the close of defendant's case, Mr. *Bowes* moved for a non-suit, on the ground that the plaintiff had entirely failed to prove his case, and also relied on the fact that replevin did not lie, as the goods had never practically been out of plaintiff's possession: *Mennie* v. *Blake* (1856), 25 L.J., Q.B. 399.

I reserved leave to move, but for convenience' sake heard defendant's witnesses, subject to the leave reserved. After hearing the argument it seems to me that the proof of the affirmative lay on the plaintiff, and that as he failed to lead sufficient evidence to sustain his contention that defendant wrongfully distrained and unjustly detained the goods seized, he cannot succeed.

BOLE, CO. J.

The procedure in a case which ultimately resolves itself into an action of replevin will be as follows: A's goods or cattle are taken by distress. A then goes before the Registrar (*aliter* in British Columbia) and enters into a replevin bond to prosecute an action against the distrainer, either in the County Court, or in the Supreme Court, and upon executing this bond and giving security, he gets his goods or cattle back. In the replevin action the replevisor is the plaintiff and the distrainer is the defendant, and after the issue of the writ or plaint, as the case may be, the action proceeds in the ordinary way, the onus of the trial rest-

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ing on the plaintiff to shew that the defendant acted wrongfully in distraining his goods: Cunningham and Mattinson on Pleading, 552. See also *Cooper* v *Egginton* (1839), 8 Car. & P. 748 and *Mennie* v. *Blake, supra,* at p. 402.

I think, therefore, I must non-suit the plaintiff with costs.

The appeal was argued at Vancouver, on the 19th of April, 1905, by consent, before DUFF and MORRISON, JJ.

Macdonell, for plaintiff, appellant.

Bowes, for defendant, respondent.

Cur. adv. vult.

22nd November, 1905.

DUFF, J. (after reciting the facts, proceeded): It is first to be observed that in the circumstances the rejection of the evidence tendered by the plaintiff in rebuttal could be sustained only on the ground that the onus of proof on the issues to which it related was at the outset of the case on the plaintiff. Doubtless the course of the learned County Court judge in reserving the disposition of the application for a non-suit until the hearing of the motion for judgment, may be regarded as a prudent one, since in the event of the Court of Appeal taking a view respecting that motion different from that of the learned judge, they would then have before them the whole of the evidence, and consequently be placed in a position to deal with the case; but if evidence was to be received at all it is difficult to understand why the evidence tendered by the plaintiff upon issues on which (if the view of the learned County Court judge respecting the motion for a non-suit were right) the onus was on him should be rejected. As it is, we have before us the defendant's case on the facts. We have not before us the plaintiff's case, and if the evidence produced by the defendant did not, as I think it does, afford sufficient grounds for the disposition of the action we should still have been obliged to send the case back for a new trial unless we agreed with the learned judge's views respecting the defendant's right to a non-suit at the conclusion of the plaintiff's case.

DUFF, J.

It is next to be observed that the learned County Court judge was in error in supposing that after the defendant had presented

his case the suit could properly be decided without regarding the evidence adduced by him. Modern ideas and methods of procedure are incompatible with the notion that a trial can be treated as consisting of evidence-tight compartments. The grand purpose of all procedure is to do justice between litigant parties, and justice would obviously be defeated if a defendant, whose own evidence proves his adversary's case, should be allowed to succeed merely because his adversary's evidence fell short of its purpose.

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Without determining whether the motion for a non-suit should have been allowed at the close of the plaintiff's case, I have very little hesitation in concluding from the whole evidence that there was no rent payable to the defendant by the plaintiff in respect of any tenancy of the property occupied by the plaintiff at the time of the acts complained of. The defendant admitted that the plaintiff went into possession as a purchaser and not as a tenant. Once that admission was made the onus to prove a tenancy and the terms of it—wherever the onus rested before—was cast upon the plaintiff. In my opinion—assuming that the submission proved was sufficient proof of the existence of the tenancy—the evidence utterly fails to establish that under the terms of it any rent was payable before the expiration of one year from the commencement of the tenancy. The defendant's testimony is confused and unsatisfactory; the notice of the 30th of March receives an explanation from the evidence of Kickbush not very creditable to either party; and the evidence of Mr. Bent as to the proceedings connected with the arbitration, taken together with the conduct of the defendant after the month of March (in which month he says the agreement for the tenancy was entered into) satisfies me that there was not in that month or at any time prior to the arbitration any completed arrangement between the parties respecting either the amount of rent reserved or the time when it should be paid. It follows that the plaintiff is entitled to recover possession of the goods.

DUFF, J.

As to damages, there should be a reference to ascertain these, unless the parties can agree. The plaintiff should have the costs of the action as well as of the appeal.

MORRISON, J.: I concur.

MORRISON, J.

Appeal allowed.

MARTIN, J.

1905

Dec. 7.

RE HALL MINING AND SMELTING CO.

RE HALL MINING AND SMELTING COMPANY, LIMITED.

Land Registry Act Amendment Act, 1898, Sec. 24—Fees payable on transfer of realty to new or substituted trustee—Local Judge—Jurisdiction of under section 26, Supreme Court Act.

The fee payable for registration of a transfer of realty to new trustees is based on the value of the lands included in the conveyance to such new trustees.

Observations on section 26 of the Supreme Court Act, 1904.

APPLICATION under the Land Registry Act Amendment Act, 1898, Sec. 24, to determine what fees are payable on a transfer of realty to a new or substituted trustee under the following circumstances. On the 27th of June, 1901, a trust deed to secure debentures for fifty thousand pounds was given by the Hall Mines, Limited, to James Roberts Brown and Flint Ramsay, as trustees for debenture holders, which deed was registered on the same day as against certain lands therein mentioned, and fees were paid on the valuation of said £50,000. James Roberts Brown died on the 23rd of April, 1905, and, under powers obtained in the trust deed, Ernest Prior Ashley was appointed trustee in his place. To carry out such appointment and vest the property in the new trustee, a conveyance dated the 28th of September, 1905, was made from the Hall Mining and Smelting Company, Limited and Flint Ramsay to said Ramsay and Ernest Prior Ashley, which conveyance included the lands in the first trust deed, and some other properties for which Crown grants had been obtained since the execution thereof. The Land Registrar fixed the fees on the registration of the new deed at the same value as before. The Hall Mining and Smelting Company, Limited, contended that only the value of the subsequently acquired property, *viz.*, $9,000, should be estimated.

Statement

The application came on for hearing before MARTIN, J., at Nelson, on the 7th of December, 1905.

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Dec. 7.

RE HALL MINING AND SMELTING CO.

Wragge, for the Company.

H. F. MacLeod, District Land Registrar, in person: The Act does not recognize the transfer of trusts for the purpose of valuation, but only transfers of the legal estate, and the value of the lands included in this conveyance to the new trustees is admittedly £50,000; therefore the fees can only be paid on that sum; there is no provision for anything else.

MARTIN, J.: This is a simple matter. If it had been the case of the small estate of a private person no one would have thought of raising the objection, and the principle is not altered because it happens to be the big estate of a public company. The ruling of the Land Registrar is affirmed.

For the guidance of the profession and of the Land Registrar in the future, I draw attention to the fact that the local judge has jurisdiction over this application; the statute is clear on the point, for this is undoubtedly a "matter in and before the Court" within his jurisdiction as provided by section 26 of the Supreme Court Act. Judgment

Application refused.

CARROLL v. THE CORPORATION OF THE CITY OF VANCOUVER.

DUFF, J.

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Dec. 23.

CARROLL v. VANCOUVER

Land—Compulsory appropriation of by Water Works Company—Powers of Company, whether exerciseable against the Crown—Rights of holder of pre-emption record under the Land Act.

Before the lands of any person can be compulsorily appropriated under the provisions of any statute giving a company or corporation such powers, the area sought to be appropriated must be set out and ascertained in accordance with the terms of the statute.

ACTION to recover possession of part of lot 673, in the North Vancouver Municipality, which part of land included a part of the water works system of the City of Vancouver.

DUFF, J.

1904

Dec. 23.

CARROLL v. VANCOUVER

Statement

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The plaintiff claimed under a tax title deed. The defendants denied the title, and claimed under a conveyance from the Vancouver Water Works Company, setting up that under section 9 of the Vancouver Water Works Act, 1886, they were empowered to enter into and upon any land of any person or persons, and to survey, set out and ascertain such parts thereof as they might require for the purposes of the said water works, and to divert and appropriate so much of the waters of Capilano creek, and its tributaries, as might be necessary for the purposes of their undertaking.

The plaintiff put in evidence his certificate of title. The defendants proved that the water works system, before same was transferred to the city, made a survey, and built the dam which caused the water to back up to a certain extent.

The trial took place at Vancouver, before DRAKE, J., on the 2nd of November, 1903, and before DUFF, J., on the 8th, 15th, 18th and 30th of April, 1904.

Davis, K.C., and *Macdonell*, for plaintiff.

L. G. McPhillips, K.C., and *Hamersley, K.C.*, for defendant Corporation.

23rd December, 1904.

DUFF, J.: The subject-matter of this action, is a portion of lot 673, in the Township of North Vancouver. The land in question comprises the site of a dam and other works used by the defendant Municipality in making the waters of Capilano Creek (a stream which enters Burrard Inlet on its north side) available as a water supply for the inhabitants of the City of Vancouver. The works in question were chiefly constructed by the Vancouver Water Works Company, assuming to act under the provisions of 49 Vict., Cap. 35 (B. C. Statute). Under the authority of 54 Vict., Cap. 73 (B. C. Statute), the defendant Municipality, in consideration of the payment of $454,638.08, acquired all the property, rights, and privileges of the Company; and since the year 1891, the Municipality has been in possession of, and operating the works as a part of its water works system.

The plaintiff in this action claims that neither the Municipality nor its predecessor, the Company, ever acquired a title to the site of these works; that this site, by virtue of a conveyance

made in consideration of the payment of $76 pursuant to a sale for default in payment of taxes by the Clerk of the Municipality of North Vancouver to one McQuillan, and a subsequent conveyance by McQuillan to the plaintiff, expressed to be in consideration of one dollar, is now the property of the plaintiff; and that the possession of the Municipality is an illegal possession.

Nakedly stated, the purpose of the action is, and the plaintiff's complete success in it would involve the payment of compensation to the plaintiff on the basis of the plaintiff's ownership of this property for which the Municipality has already paid the large sum above mentioned. Thus the claim, whatever its demerits, is not lacking in boldness of conception.

But, however summary the disposition which overtakes such a demand *in foro conscientiæ*, in this Court the plaintiff is entitled to insist that his strict legal rights shall be declared and enforced; and if the defendant Municipality has not acquired a title to the property, the Court must give effect to his claim.

I have come to the conclusion that the Company did sufficiently survey, set out and ascertain the site of the dam, and the other works constructed by it at a time when under the terms of its Act it was empowered so to do; and that it thereby acquired a right of occupation and user of the lands so surveyed, set out and ascertained; as well as such an interest in the site itself as might be necessary for the efficient operation and protection of its system; subject, of course, to the right of the holders of interests prejudicially affected to compensation under the terms of the Act.

Judgment

The Water Works Company, entered, surveyed and occupied this site in the years 1887 and 1888; the final location survey was made in the summer of 1887; previously, namely, on the 2nd of February, 1887, one J. D. Palmer had obtained a record of a pre-emption embracing the land afterwards described as lot 673, including, of course, the site in question; subsequently, Palmer, having complied with the requirements of the Land Act, received a Crown grant.

I am inclined to agree that the powers of compulsory appropriation conferred on the Company by its Act of incorporation were not exerciseable against the Crown; but I can see no

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reason to doubt that the moment Palmer obtained his record these powers became applicable as against him to the lands comprised in the record.

As the holder of a pre-emption record, Palmer held not a mere licence or privilege, but a substantial interest in the land itself. His interest, whatever its extent, being the creature of express statutory enactment, was of the highest quality known to the law. The rights of occupation conferred by the Legislature on a pre-emptor are, so long as he complies with the statutory conditions under which he holds them, paramount; the remedies conferred by law for the protection of his rights are available against the world: *Henderson* v. *Westover* (1852), 1 E. & A. 465. On obtaining his certificate of improvements he has a statutory right to a grant of the fee; he is then substantially in the position of a purchaser in possession under a contract for the sale of real estate who has paid the purchase money. In this Court he is regarded as the owner of the land; and to that status he has advanced with each successive step in the performance of the statutory conditions. Neither by licence from the Crown, nor by any other process, except the exercise of its compulsory powers, could the Company, without Palmer's consent, have acquired the right as against Palmer to occupy any part of Palmer's pre-emption for the purposes of its undertaking.

Judgment

In these circumstances it seems clear that the Company's compulsory powers were from the date of the location survey onward to the completion of the works exerciseable against Palmer. In the first place, Palmer's interest is within the plain language of the Act. In the next place, one must not forget that the Land Act expressly forbids the transfer of a pre-emption before the issue of a Crown grant; and if the lands embraced within the limits of a pre-emption were beyond the field open for the exercise of the Company's compulsory powers, it is at least doubtful whether the Company could acquire by any means a right to occupy any part of a pre-emption. That such a matter should have been left in doubt we can hardly suppose to have been within the contemplation of the projectors, who proposed, or of the Legislature which authorized the establishment of the works

required for the purposes of this undertaking on the north side of Burrard Inlet in 1887.

There still remains the question of the plaintiff's rights respecting the lands affected by the action of the defendant Municipality after the acquisition by the Municipality of the Company's rights. In 1893 the Municipality cleared a part of the land situated north of the dam and diverted the course of the stream in the manner shewn upon the plan referred to in the evidence of the engineer of the Municipality. In 1896 some ground situated east of the dam was cleared. In my opinion the Municipality in diverting the course of the stream acted within the powers conferred by the Act, and without expressing any opinion as to the plaintiff's right under the statute to compensation for damage caused by such an act done prior to the commencement of the plaintiff's title, I think his remedy, if any, is confined to that provided by the statute, and consequently that he cannot recover in respect of it in this action.

To the areas coloured green and yellow on the plan referred to in the evidence of the engineer of the Municipality, I do not think that the Municipality has acquired any title. In my opinion, a condition precedent to the acquisition of any title to lands under the compulsory powers conferred by sections 9 and 10 is that such lands shall be set out or ascertained.

I shall not attempt an exhaustive definition of these terms. But it seems clear that no area can be said to have been set out or ascertained within the Act which is incapable of reasonably exact description by reference to the acts relied upon as constituting the setting out or ascertainment. A more lax construction would obviously put the owners of the property expropriated too much at the mercy of the persons exercising the statutory powers. The evidence convinces me that the areas referred to were not set out or ascertained with any reasonable certainty before the commencement of this action.

On behalf of the Municipality it was argued the long possession of the lands in question leads to one of two inferences, namely: that the acts of occupation by the Company and the Municipality were done with the consent of the owners; or that the statutory formalities leading to the acquisition of title have

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been waived. But what are the facts? In August, 1896, the Burrard Inlet R. & F. Co., having been the registered owner of lot 673 since 1892, complained of the Municipality's occupation as illegal, and similar complaints were addressed to the Council of the Municipality from 1901 onwards. There is no evidence that in answer to these complaints the Municipality ever put forward a claim based upon consent or waiver. In these circumstances, in respect of the period since 1892, neither of the suggested inferences is possible.

With respect to the period prior to 1892 the question is of little, if any, importance as the lands used during that period seem to have been embraced within the Company's survey; but I am unable to find on the evidence any facts upon which either of these inferences can be supported.

As to the plaintiff's remedy, I have already said that the damages suffered by reason of the diversion of the stream, and acts necessary thereto, such, for example, as the removal of timber, are properly subjects of compensation under the Act. The same is to be said of timber and other materials taken from the areas last referred to for use in the construction of the works. But in respect of other acts of ownership exercised over these areas since the commencement of the plaintiff's title, the plaintiff may if he thinks it worth while have a reference to ascertain the damages. There will also be, unless the parties agree, a reference to determine the exact area surveyed, set out or ascertained by the Company for the construction of its works before the transfer to the Municipality.

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There is no evidence to shew whether compensation was assessed or paid in respect of the lands taken by the Water Works Company; if the question were before me, I should in the absence of evidence to the contrary, assume that compensation had been paid; but that question is not before me, nor is the question whether in any event the plaintiff is entitled to recover from the Municipality any compensation which Palmer might have been entitled to claim from the Water Works Company, and I express no opinion upon it.

Judgment accordingly.

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Collision—Public rights in navigable waters—Rights and obligations of persons using such waters for the booming and transportation of logs—R.S.C. 1886, Cap. 92, Sec. 2—Negligence of captain—Laches—Time in bringing action—Limitation of.

The statutory provision limiting to one year the bringing of actions against a Municipality does not apply to actions *in rem* in the Admiralty Court:—

Held, on the facts, that the tying of a boom to piles driven on the bank of a navigable river is not an interference with navigation when done in a reasonable manner, for a reasonable period, and at such places as are open to the owner of the boom to do so.

ACTION tried before MARTIN, Local Judge in Admiralty, on the 6th of November, 1905, at Vancouver.

The facts are fully set out in the reasons for judgment.

Cassidy, K.C., for the ship, referred to R.S.C. 1886, Cap. 92, as to piles driven and boom constructed so as to interfere with navigation of a river. He cited *Wilson* v. *Coquitlam* (not reported) and *Queddy River Driving Boom Co.* v. *Davidson* (1883), 10 S. C. R. 222. The only question is whether this particular boom was, if it was one within navigable waters, within the meaning of the Act so as to interfere with navigation. The expression "interfere" does not mean a direct obstruction to the fairway, but something which would interfere with navigation at that point. A person placing an obstruction contrary to the Act is a trespasser and must take the consequences. The ship had a right of access to the landing place without obstruction, and nothing short of leave of the most exact kind can take that boom out of the position of being there at owner's risk. While we might be condemned if guilty of gross negligence, yet there is no negligence proved here, and there is no "wilful collision" as charged in the statement of claim; the navigation was careful and the captain took all ordinary precautions. Evidence is not clear that the ship

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ever struck the boom rope, and if she did that would not constitute negligent navigation, for the proximate cause of the accident was the rope being where it had no business to be.

This is an action *in rem*, and should have been brought within a reasonable time in order to avoid any complications through a transfer of ownership. Here the writ was not issued until 31st July, 1905, and the cause of action occurred in June, 1903. Here there has been a transfer.

Martin, K.C., on the same side, cited *The Kong Magnus* (1891), P. 223; Abbott on Merchant Shipping, 14th Ed., 1,040. As to laches; a municipal corporation cannot be sued after a year. Here the Corporation should have been sued and not the new owner of the ship. There is no explanation of this long delay. The claim is statute-barred in the ordinary courts, and the Admiralty Court should not allow it to be brought in.

Davis, K.C. (*W. Myers Gray,* with him), for plaintiff: A claim is not a stale one which in a little over two years is on trial: *In re Maddever* (1884), 27 Ch. D. 523. The delay must be long and unconscionable and such as to make it a fraud or a hardship. There is no suggestion of that here, for it is admitted that the Corporation of New Westminster is defending the action. It is true that there is a year's limitation to an action *in personam* against the City, but that is no answer to an action *in rem* here. *Wilson* v. *Coquitlam, supra,* does not apply here. It is not to be considered that it is necessary to obtain the approval of the Governor in Council for a boom of logs to be kept in a river for a night or two; Cap. 92, R.S.C. 1886, applies only to permanent structures, such as a wharf or a boom across the river. It is clear that the boom rope in this case was broken by the ship.

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As to negligence; even if the boom was an interference with navigation, defendant must shew that he collided without negligence; he cited *Bank Shipping Co.* v. *City of Seattle* (1903), 10 B.C. 513, and the cases there cited; *The Uhla* (1867), 19 L.T. N.S. 89; *The Zeta* (1893), A. C. 468. But if the boom was where it had a right to be, then the defendant should have kept away. We had permission to tie up the boom, and later it was moved further down after notice received. Defendant had no

authority to run in and use for a wharf that which was a roadway.

As to skilful navigation, the captain admits that an ordinarily skilful navigator could have got out without striking the boom; he struck it and therefore must have been negligent.

29th December, 1905.

MARTIN, LO. J.A.: A question of general importance is raised in this action affecting the public right in navigable waters, and in particular the rights and obligations of persons using such waters for the booming and transportation of logs.

The steamship "Surrey," a double-ended ferry boat owned by the Corporation of New Westminster and operated by it across the Fraser River to a wharf, bridge (or approach) and landing place, also owned, as is admitted in the statement of defence, by the same Corporation, made in the early morning of Tuesday, the 23rd of June, 1903, her first trip to said wharf, and in making her landing used for the first time a scow moored to the down stream (west) side of the approach to the wharf, which scow had been put into position the evening before. Prior to that time, the landing had been made at a more convenient part of the wharf proper, much further into the stream and better situated for the purpose, but owing to the flooded condition of the rapidly rising river, which was running with a current of some six miles an hour, the wharf had become so damaged and unsafe that the scow had to be brought to enable a landing to be effected. It was placed "end on" to the said approach to the wharf, which approach, or as it was sometimes spoken of as a bridge or pier, was of planks set on mud sills, the wharf structure proper, on piles. It is admitted that this new landing place was closer to the bank than the old one, and the scow so placed projected its full length down stream and towards a boom of shingle bolts owned by the plaintiff. The steamer that morning made her landing parallel to the shore, as described by the witness Smith, and lay end on end to the scow so that vehicles were driven straight on board; the other end of the steamer pointed in the direction of the boom; I say "end" because properly speaking she has neither bow nor stern, both ends being constructed so as to be used alternately for either

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purpose; she was about 120 feet long. At that time the boom was not attached to the wharf but was moored by two shore hawsers to two piles (marked B and C on the plan) on the bank above high water mark. At a distance of 315 feet down stream from the outer corner of the lower end of the scow was another pile (marked D on the plan) standing in the stream some 70 feet from the shore line at ordinary high water. The current at the time was always down stream, the flood overcoming the flow of the tide. The boom was also fastened to said pile D, and to another similar pile E lower down and nearer the shore, and these five piles formed part of a set which were driven 18 years ago at that point for the purpose of making booms fast, and have been so used ever since. The Corporation, as well as the officers of the steamer, were aware of the position of the boom, because when the plaintiff began to make it up and fill it with shingle bolts he applied to and got permission to use the wharf for the purpose of unloading bolts therefrom, as set out in the City Clerk's letter of 6th May, 1903. On the 13th of June he had filled his boom, then attached to the wharf, and was waiting for the saw mill company to tow it away, but they did not do so as arranged, and though I am satisfied the plaintiff made every reasonable effort to obtain a tug for that purpose he was unable to do so, owing to the rapid rise of the water which rendered it dangerous to attempt to take the boom through the draw of the Lulu island bridge down the river. On the 18th the plaintiff received a notice from the City Clerk asking him to remove the ropes from the wharf owing to the danger from the increased strain caused by the swift current. On the following day he also received through his brother a letter from the Chairman of the Board of Works, as follows:

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"Mr. C. Kennedy,

"The City Council wished me to see you if you would be kind enough to see your brother about the boom of shingle bolts that is made fast to ferry landing on south side of river. Some of the piles have gone out of place already and the Council is afraid that the extra strain of the boom with so strong a current running might do some damage to the wharf, he could make the boom fast to the boom piles along the shore. Please have your brother attend to this.

"Yours truly,

"W. A. Johnson."

On the next day, Saturday the 20th, he made the boom fast to the shore piles B and C, but did not detach the wharf rope. Next day, Sunday, the captain of the steamer cut this wharf rope after notifying the plaintiff to that effect, and the boom dropped a little down stream and nearer towards the shore and into the position it occupied at the time of the accident. In my opinion, in the unusual and uncontrollable circumstances the captain was justified in cutting the rope on the principle of preservation of property in an emergency, as pointed out by Chancellor Boyd in *Langstaff* v. *McRae* (1892), 22 Ont. 78 at p. 86. The top point of the boom was then some 120 feet from the nearest point of the scow and some 20 feet nearer to the shore. The boom was between 360 and 400 feet long, narrow at the upper end, but at the lower, where the current carried most of the bolts, it widened out into something like the shape of a pear. At a point about 300 feet below the scow the boom was a little further out in the stream than the scow.

A dispute arises as to what happened when the steamer left the scow to return across the river, and the fact that she was the cause of the boom breaking is denied, but I am satisfied beyond doubt on the evidence of the disinterested witnesses that she was, and that it happened by her backing into it, or the main rope which held it. The question then arises, assuming that the plaintiff was justified in leaving the boom in that position, was the steamer guilty of negligence in the premises? On a consideration of all the facts and circumstances, and having regard particularly to the flood in the river, the state of the current, the undermining of the wharf, and the changing of the landing place and the use of the scow for that purpose, thus bringing the steamer for the first time much nearer the shore and boom, I can only come to the conclusion that she was not handled with that "ordinary care, caution and maritime skill" which it is the duty of a prudent mariner to exercise. If the captain had not sufficient appliances to get his vessel away from the scow and out of that position without running the risk he should not have attempted it; it would admittedly have been safe if a line had been attached to the old piles called the Three Dolphins. But the captain's contention in the witness box was

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that a skilful mariner ought to have been able to get his vessel away without resorting to such manoeuvres, and without striking the boom, and he contends he did so. But the facts are against him, and I am afraid that he was more concerned in an effort to "make a schedule trip" as the witness Card calls it, than to lose time in taking the extra precautions that the dangerous state of the locality called for.

And further, and in addition, there is much to be said in favour of the contention of the plaintiff's counsel that in the circumstances it was the duty of the captain to have notified the plaintiff of the danger, if such there was, of the boom interfering with the new landing place. In its former position it had not proved to be any obstruction to the steamer, and even when the landing was changed and moved in closer to the alleged dangerous area, the captain seems to have been satisfied after he took matters into his own hands and cut the rope, thus allowing the boom to drop further down the stream as mentioned. It would have been a simple matter if he still thought the boom was too close to have notified the plaintiff and explained the situation to him, and at least given him the opportunity to move his boom still further down to meet the changed conditions. The truth is, in my opinion, that the captain was satisfied that there was no danger from the scow if the steamer were properly handled.

Judgment

So far, it has been assumed that the boom was lawfully moored along the bank, but the defence is also raised that the plaintiff must be regarded as being a trespasser because he admittedly has not complied with section 2 of the Act respecting certain Works Constructed on or over Navigable Waters, R.S.C. 1886, Cap. 92.

There is unfortunately no definition of the word "boom" in the Act, but manifestly from the context it is, for the purposes of the Act, assumed to be a work of a more or less fixed or permanent nature, like the other class of works dealt with, and the words "constructed," "site" and "built and maintained in accordance with plans approved by the Governor in Council" exemplify this. There are various kinds of booms in use in different parts of Canada ranging from costly fixed and per-

manent structures of great strength and solidity, sometimes miles in length, used in connection with extensive lumbering operations, down to the small and temporary kind frequently made up by the settler in this Province out of timber cut in clearing his land, and filled, *e.g.*, as here, with shingle bolts, from some convenient point on the river bank preparatory to its being towed away like a raft by the purchasers thereof. In the many cases I have consulted I find some of these classes of booms mentioned—thus in *Brace* v. *Union Forwarding Company* (1871), 32 U.C.Q.B. 43, there were Government booms, a permanent toll boom of a boom company and a "pocket boom;" in *Queddy River Driving Boom Co.* v. *Davidson* (1883), 10 S.C.R. 222; and in *Drake* v. *Sault Ste. Marie Pulp and Paper Co.* (1898), 25 A.R. 251, the booms were of a more or less permanent and extensive nature; while in *Crandell* v. *Mooney* (1873), 23 U.C.C.P. 212; and *Langstaff* v. *McRae*, *supra*, they were temporary, and in the latter case "side booms" are spoken of; the definition of boom in Murray's Dictionary, cited at p. 85, is manifestly not an exhaustive one. The expression "to boom a river" is a common and well understood term, and undoubtedly within the scope of the statute, but that is a very different thing from "making up a boom" of logs or bolts on the banks of so great, broad, and deep a river as is the Fraser at the place in question. What is or is not the reasonable use of a navigable river depends upon circumstances, and the river may be used in a great variety of ways. Timber, for instance, may be transported on it, in rafts, booms, scows, or vessels, and in the case of scows and ships they may be and are frequently loaded from the bank direct, especially in the case of shallow-draft, stern-wheel steamers. In this relation I draw attention to a leading authority on the point of navigable waters—*Crandell* v. *Mooney* (1873), 23 U.C.C.P. 212, and particularly to the passage at p. 221 [which the learned judge set out] which Mr. Justice Galt says, p. 222, "contains a full and reasonable exposition of the law."

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This extract was in answer to the contention of the plaintiff's counsel that

"as the Fenelon was a navigable river and public highway, it was the

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absolute duty of the defendant not to obstruct it, or to do anything which in its consequences might prevent steamboats and other vessels from using it at all times."

Mr. Justice Gwynne says, p. 224:

"All persons have an equal right to navigate this river with logs or steamboats, which right must be exercised however in such a manner as not unreasonably to impede or delay another in the exercise of his right."

The passage above cited has been approved, *e.g.*, *Rolston* v. *Red River Bridge Co.* (1884), 1 Man. L. R. 235; affirmed on appeal 12th May, 1885, Cassel's Supreme Court Digest (1893), p. 564; *Drake* v. *Sault Ste. Marie Pulp and Paper Co.*, *supra*, 256; and in the latter case the point is succinctly put by Mr. Justice Osler, p. 257, wherein he says "when the obstruction of the river by the logs ceased to be reasonable it ceased to be lawful;" and in any event the obstruction must be one to prejudicially affect the complainant for, as stated in *Langstaff* v. *McRae*, *supra*, by Chancellor Boyd:

"*Quoad* the plaintiff, it appears to me the defendants were not doing a wrongful act in stretching the boom, nor did any particle of damage arise to him from this act."

In *Brace* v. *Union Forwarding Company*, *supra*, the plaintiff's boom blocked up the whole width of the stream, p. 53, and he did not open it wide enough to permit a steamer to pass, and therefore was held guilty of contributory negligence, but it was laid down that:

Judgment

"The defendants would not be justified in destroying or injuring the boom, merely because it was in the river, if they could by reasonable care on their part have avoided doing so. In abating a nuisance of that description, a private person can interfere with it only to the extent to which it is an injury to him, and obstructing his passage: *Dimes* v. *Petley*, 15 Q.B. 276, 283."

And see further, and generally on the duties and obligations of ships navigating rivers, Coulson and Forbes on Waters, 2nd Ed., 450-3.

As might be supposed, no attempt has been made by any court, at least that I have been able to find after a careful search, to define the meaning of the term "interference with navigation," which as has been seen, depends upon so many and varied local circumstances. But many cases, in addition to those on booms already cited, have been decided in Canada, shewing what that expression includes. Thus, *e. g.*, it has been

held on the facts to extend to crib work and piers in a navigable lake—*Attorney General* v. *Perry* (1865), 15 U.C.C.P. 329; to piles driven in a navigable river—*Brownlow* v. *Metropolitan Board of Works* (1863), 13 C.B.N.S. 768; to piles driven in a public harbour—*Wood* v. *Esson* (1884), 9 S.C.R. 239; to deposit of saw-dust in a navigable river—*Attorney-General* v. *Harrison* (1866), 12 Gr. 466, and *Booth* v. *Ratte* (1892), 21 S.C.R. 637; to tailings from a quartz mill deposited in a public harbour—*The Queen* v. *Fisher* (1891), 2 Ex. C. R. 365; to a bridge over a navigable river—*The Queen* v. *Moss* (1896), 26 S.C.R. 322. On the other hand, for cases where it was held to be no obstruction see *inter alia*, *Rolston* v. *Red River Bridge Co.*, *supra*; *London & Canadian Loan Co.* v. *Warin* (1886), 14 S.C.R. 232; and *Reg.* v. *Port Perry, Etc. R.W. Co.* (1876), 38 U.C.Q.B. 431.

Where an interference is established it is a public nuisance which any one specially damnified has a right to remove, and "nothing short of legislative sanction can take from anything which hinders navigation the character of a nuisance": *Wood* v. *Esson*, *supra*, p. 243; *Queddy River Driving Boom Co.* v. *Davidson*, *supra*, and it is none the less so even if the "obstruction is of the slightest possible degree" and "of the very great public benefit": *The Queen* v. *Moss*, *supra*. And see *Attorney-General* v. *Harrison*, *supra*, p. 470, wherein it is also laid down, p. 472, that "no length of time will legitimize a public nuisance, the soil being in the Crown, and the user the common inheritance of the public at large." That the question of long and notorious user may, however, become an important factor in certain circumstances is shewn by the cases of *Langstaff* v. *McRae*, *supra*, p. 85; and *The Queen* v. *Moss*, *supra*. Nor is a vessel which becomes helplesss by accident strictly confined to the channel generally used in due course of navigation, and if she is forced to leave it and in taking the ground at a place which would have been safe but for an obstruction placed there, and is thereby injured, an action will lie. *Brownlow* v. *Metropolitan Board of Works*, *supra*, p. 789.

Judgment

It does not follow that all portions of a navigable water are used for purposes of navigation, and in rivers especially the nature of a particular locality may change: *The Queen* v. *Moss*,

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supra, p. 335; and see *Attorney-General* v. *Harrison*, *supra*, pp. 471-2; *Gage* v. *Bates* (1857), 7 U.C.C.P. 166 and *Ross* v. *The Corporation of Portsmouth* (1866), 17 U.C.C.P. 195.

Applying all the foregoing principles to the circumstances of the case at bar, I am of the opinion that there has not been an interference with navigation by the plaintiff in the true sense of that term. In so holding I do not wish it to be understood that any person has the right to appropriate to himself any portion of the bank or shore of navigable waters for the purpose of making up a boom of logs, but simply that he may in a reasonable manner and for a reasonable period, having regard to local conditions, make use of such waters at such places as are open to him for that purpose.

So far, then, the defence has failed, but it is pleaded and argued that there have been such unreasonable laches and delay by the plaintiff in enforcing his claim that in the meantime the present owners purchased the ship from the Corporation of New Westminster in good faith and without notice, and that consequently this action *in rem* should not be entertained in this Court. The accident happened on June 23rd, 1903, the action was begun on July 31st, 1905, and the sale to the present owners was made on February 20th, 1905. The authorities on the point are collected in Abbott on Merchant Shipping, 14th Ed., 1901, at pp. 1,039-42 *et seq.* Mr. *Davis* refers to *In re Maddever* (1884), 27 Ch. D. 523, on the general question of mere delay in enforcing legal rights. There is nothing before me to shew that the owners, in any way whatever, have been or will be prejudiced by this not very long delay, and it is not suggested that the Corporation is not in a position to indemnify them for any claim the plaintiff has against the ship; indeed, one of the witnesses for the defence, who had been employed by the Corporation in keeping the wharf and approach in repair, stated that the Corporation was defending the action. No counsel appears for it, however, and while too much weight should not be attached to the statement, yet it is only what would be expected in the circumstances. Assuming it to be correct that in another court the Municipal Corporation could not, owing to a statutory limitation, have been sued after a

Judgment

year, I cannot agree that that fact of itself disentitles the plaintiff to relief here. This defence also fails.

Judgment, therefore, will be entered in favour of the plaintiff, and there will be a reference to the Registrar, assisted by one merchant, to assess damages.

I should add, since it was referred to by counsel, that the case of *Wilson* v. *The "Coquitlam,"* decided by me on the 4th of April, 1902, affords no assistance in the determination of this action, because it was decided simply on the facts, and I had no difficulty in coming to the conclusion that there had been an interference with navigation by the boom of logs then in question.

MARTIN, LO.J.A.

1905

Dec. 29.

KENNEDY v. THE "SURREY"

CENTRE STAR MINING COMPANY, LIMITED v. ROSSLAND-KOOTENAY MINING COMPANY, LIMITED. (No. 2.)

FULL COURT

1905

April 28.

CENTRE STAR v. ROSSLAND-KOOTENAY

Practice—Appeal to Privy Council—Leave—Amount in controversy—Privy Council Rules, 1887, r. 1.*

In determining the question of the value of the amount involved, upon which the right to appeal to the Privy Council depends, the Court, on a motion for leave to appeal, will look at the judgment as it affects the parties, and where it appeared from affidavits in support of the motion that defendants in obeying an injunction would be put to an expense of over £300, they were granted leave to appeal.

MOTION for leave to appeal to the Privy Council from judgment of Full Court, reported *ante* p. 231. It appeared from affidavits used in support of the motion that the defendants would be put to an expense of over £300 in obeying the injunction granted by the Full Court judgment.

Statement

The motion was argued before HUNTER, C.J., MARTIN and DUFF, JJ., on the 28th of April, 1905, at Victoria.

*These rules are set out in the B. C. Gazette, 1888, p. 150.

FULL COURT

1905

April 28.

CENTRE STAR v. ROSSLAND-KOOTENAY

Argument

Hamilton, K.C., for the motion.

Sir C. H. Tupper, K.C., contra, contended that as the judgment on its face was for only $10, the court could not grant leave to appeal: it is not permissible to go outside the record to ascertain the amount in controversy, and where anything remains to be shewn by affidavit, the leave must be obtained from the Privy Council: the test is the amount shewn by the judgment or record: he cited R.S.C. 1886, Cap. 135, Sec. 29; *Allan* v. *Pratt* (1888), 13 App. Cas. 780; *Joyce* v. *Hart* (1877), 1 S.C.R. 321; *Gilbert* v. *Gilman* (1889), 16 S.C.R. 189 at p. 192; *Ontario and Quebec Railway Co.* v. *Marcheterre* (1890), 17 S.C.R. 141 and *Wineberg* v. *Hampson* (1891), 19 S.C.R. 369.

Hamilton, in reply, referred to *Macfarlane* v. *Leclaire* (1862), 15 Moore, P.C. 181 at p. 187.

Judgment

The Court granted leave to appeal.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada, or to the Judicial Committee of the Privy Council.

ATTORNEY-GENERAL FOR THE PROVINCE OF BRITISH COLUMBIA, THE, *ex rel.* THE CITY OF VANCOUVER, v. THE CANADIAN PACIFIC RAILWAY COMPANY (p. 289).—Affirmed by the Judicial Committee of the Privy Council, 27th February, 1906.

ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE v. LUDGATE AND THE ATTORNEY-GENERAL OF CANADA. DEADMAN'S ISLAND CASE (p. 258).—Leave to appeal granted by Privy Council, 8th December, 1904.

BAILEY v. CATES (p. 62).—Affirmed by Supreme Court of Canada, 21st November, 1904.

DOCKSTEADER v. CLARK (p. 37).—Affirmed by Supreme Court of Canada, 27th November, 1905.

KING, THE v. THE SHIP NORTH (p. 473).—Affirmed by Supreme Court of Canada, 6th April, 1906.

LASELL v. THISTLE GOLD COMPANY, LIMITED (NON-PERSONAL LIABILITY), AND ADAM HANNAH (p. 466).—Affirmed by Supreme Court of Canada, 6th April, 1906.

MILNE v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED (p. 402).—Reversed by Supreme Court of Canada, 6th April, 1906.

Case reported in 10 B. C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council.

COAL MINES REGULATION ACT AND AMENDMENT ACT, 1903, *In Re* THE (p. 408).—Leave to appeal rescinded on motion of Minister of Justice, 9th August, 1905.

INDEX.

PRINCIPAL AND AGENT—*Authority of agent—General—Particular—General authority conferred verbally—Subsequently limited by writing—Notice to third party of such limitation.*] Where an agent is vested with general authority, and such authority is subsequently sought to be limited by writing, notice of such subsequent limitation must be conveyed to third parties having dealings with the agent. In the absence of such notice the principal is estopped from setting up the limitation as against a third party acting *bona fide*. Whether authority has been conferred on an agent is a question of fact, which may be proved by shewing that it was expressly given; or the acts of recognition by the principal may be such that the authority may be inferred. A principal who, knowing that an agent with a limited authority is assuming to exercise a general authority, stands by and permits third persons to alter their position on the faith of the existence in fact of the pretended authority, cannot afterwards, against such third persons dispute its existence. SAYWARD v. DUNSMUIR AND HARRISON. **375**

PRINCIPAL AND SURETY—*Promissory note— Collateral security—Crediting proceeds of—Suspense account—Creditor—Right of to appropriate—Intention of debtor—Set-off— Concealment— Funds ear-marked for specific use—Further consideration—Directions—Account—Statute of Limitations—Cumber v. Wane—doctrine in.*] K. made and gave to R. Bros. four promissory notes of $2,500 each, with interest at 12 per cent. R. Bros. obtained the indorsement of M. to these notes, discounted them with the defendant Company and deposited as collateral security for the payment of the notes 500 shares of the capital stock of the Vancouver Gas Company. Subsequently, R. Bros. obtained a second loan on two other promissory notes, to which K. was also a party, and as security, deposited 500 additional shares of the Vancouver Gas Company. M. was not connected with this loan, nor the security deposited in respect of it, although he claimed to be entitled to the benefit of the security. In an action against K., R. Bros. and M., the defendant Company signed judgment against K. for $10,634.23 in respect of the first four notes; but on the same day, though prior to so signing judgment, they also took judgment against him for $21,000 in respect of the second loan. Following on this the defendant Company threatened to proceed to judgment against R. Bros. and M. and

actually did sign judgment against R. Bros. for $21,180.23; but M. for himself obtained a four months' extension of time by depositing 250 additional shares of the Vancouver Gas Company. These shares were deposited as collateral security for the four notes of $2,500 each, and were to be returned to M. if within the four months agreed upon he paid the defendant Company a sum not less than $6,000 on account of the said notes. Before the judgment in the action, the subject of this appeal, was given, the defendant Company received dividends on the first 500 shares deposited $2,657.80, and in respect of the 250 shares deposited by M. $1,328.90, both of which sums were placed to the credit of the K.-M. account. The defendant Company also received a dividend in respect of the 500 shares deposited by R. Bros. for the second loan, but this was not credited to the K.-M. account. M., who was president of the Gas Company, got his wife to purchase the whole 1,250 shares for $8,000, which amount M. contended "was to be placed to his credit until the notes of K. were relieved or paid." This sum was carried in a suspense account to the credit of M. from December, 1894, to October, 1901. In October, 1901, the defendant Company transferred this sum of $8,000 from M's account and placed three-fifths of this amount to the credit of the said four notes, and two-fifths to the credit of the notes of R. Bros. In February, 1900, the defendant Company agreed to receive from K., or his nominee, the sum of $15,000 in consideration of which they were to assign to him or his nominee the above mentioned judgments of $10,634.23 and $21,180.23, together with certain securities (mortgages) held by them. This money arrived in August, 1900, but the defendant Company did not reach a final settlement with K's nominees, C. & S., until November, 1901. In the meantime, they had an action pending against M. for a settlement, but abandoned the proceedings; and M. brought this action for a declaration that he had been discharged from liability to the defendant Company as surety for or as indorser of the said four notes; for an account of what had been received by the defendant Company in respect of the securities deposited by him with them under the circumstances above set out; and for payment of the amount so found:—*Held*, that prior to the appropriation by the defendant Company, in payment of K's liability, of the moneys standing to the credit of M. in their hands, there was neither an actual satisfaction of K's liability, nor any enforceable