THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

SUPREME AND COUNTY COURTS AND IN ADMIRALTY

AND ON APPEAL IN THE

FULL COURT

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

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

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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.
THE HON. WILLIAM HENRY POPE CLEMENT.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

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HIS HON. WILLIAM NORMAN BOLE,	New Westminster
HIS HON. THE HON. CLEMENT FRANCIS CORNWALL,	Cariboo
HIS HON. WILLIAM WARD SPINKS,	Yale
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HIS HON. JOHN ROBERT BROWN,	Yale
HIS HON. FREDERICK CALDER,	Cariboo

ATTORNEYS-GENERAL:

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

MEMORANDA.

On the 27th of September, 1906, the Honourable Lyman Poore Duff, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Puisne Judge of the Supreme Court of Canada, in the room and stead of the Honourable Robert Sedgewick, deceased.

On the 7th of December, 1906, His Honour William Henry Pope Clement, Judge of the County Court of Yale and Judge of the County Court of Kootenay, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Lyman Poore Duff, appointed a Judge of the Supreme Court of Canada.

On the 8th of January, 1907, John Robert Brown, Barrister-at-Law, was appointed Judge of the County Court of Yale, in the room and stead of the Honourable William Henry Pope Clement, appointed a Judge of the Supreme Court of British Columbia.

On the 8th of January, 1907, Frederick Calder, Barrister-at-Law, was appointed Judge of the County Court of Cariboo in the room and stead of His Honour The Honourable Clement Francis Cornwall, resigned.

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REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY v. SAM KEE.

FULL COURT

1906

Jan. 10.

V., W. & Y. Ry. Co. v. Sam Kee

Statutes, construction of—Supreme Court Act, 1904, Sec. 100—Railway Act, 1903 (Dominion), Secs. 162 and 168—"Event" read distributively—"Issue" as distinguished from "event"—Costs of and incidental to arbitration—Costs of Appeal.

Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903 (Dominion), which award, by reason of section 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the Railway Company appealed to the Full Court, advancing several distinct grounds of appeal, on all of which, with the exception of the rate of interest allowed by the Arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.:—

Held (IRVING, J., dissenting): (1.) That the word "event" in section 100 of the Supreme Court Act, 1904, may be read distributively.

(2.) That section 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the Full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by section 100 of the Supreme Court Act, 1904.

(3.) That the success of the appellant company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken.

FULL COURT
1906
Jan. 10.

V., W. & Y. RY. CO. v. SAM KEE

MOTION for judgment on determination of an appeal from the award of arbitrators appointed under the provisions of the Railway Act, 1903 (Dominion), argued at Vancouver on the 17th and 20th of November, 1905, before IRVING, MARTIN and DUFF, JJ.

Argument

Cowan, K.C., for Sam Kee: The costs must be dealt with under section 162 of the Railway Act, 1903. The Full Court, by section 168, is given power to review the award of the arbitrators, and in doing so, sits as a court of original jurisdiction, but that does not include the power to award costs. He cited *In re Arbitration between Holliday and Mayor, &c., of Wakefield* (1888), 57 L.J., Q.B. 620. The court is sitting as a court constituted by the Railway Act; it takes its jurisdiction from that Act and its practice from the Supreme Court Act. If the Railway Act is silent as to the costs of the appeal, then, following the practice in England, under the Judicature Act, the court here is not bound by the Supreme Court Act on that point. "Event" is defined by section 162 of the Railway Act. Our award stands for an amount in excess of that offered by the Railway Company, and therefore we are entitled to our costs, and if the court construes "event" according to section 162 then respondent is entitled to the costs of the appeal as well as of the arbitration. Supposing, however, the court does not read section 162 as we do, then we come under one of the exceptions in section 100 of the Supreme Court Act, dealing with the title to land. He cited *Re Bronson and Canada Atlantic R.W. Co.* (1890), 13 Pr. 440 at p. 441. The case here is much stronger than the *Holliday* case, because this court is not bound by the Supreme Court Act in the same way as the court in the *Holliday* case was bound by the Judicature Act. "Event" should be read distributively. He cited *Forster* v. *Farquhar* (1893), 1 Q.B. 564 at pp. 569 and 570. In any event the question of the rate of interest could have been settled without an appeal book; in fact the point on which the appellants succeeded was not in appeal. He referred to Annual Practice (1905), p. 943, and the cases there collected; also *Myers* v. *Defries* (1880), 5 Ex. D. 180 at p. 185.

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Martin, K. C., for appellants: The *Holliday* case does not apply here at all. He cited *In re Gonty and Manchester, Sheffield and Lincolnshire Railway Co.* (1896), 2 Q.B. 439, as shewing that the Court of Appeal has power, under the Arbitration Act, 1889, to deal with costs. "Event" refers to all questions at the trial, not on the appeal. He also referred to *Clay* v. *Allen*, decided at the last sittings of the Full Court.

Cur. adv. vult.

10th January, 1906.

IRVING, J.: Sam Kee, having obtained an award from arbitrators, appointed under the Railway Act, which award by reason of section 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the Railway Company appealed, advancing some five distinct grounds of appeal; on all of these but one the Railway failed.

Mr. *Martin* now asks for the costs of the appeal. His application requires us to consider section 100 of the Supreme Court Act, 1904, which declares that "the costs of every appeal to the Full Court and of the trial and hearing of every cause or matter shall follow the event," except (*a*), (*b*), (*c*) and (*d*). The exceptions need not be mentioned as we are not concerned with them.

Prior to the passing of the statute in question, the general rule as to the costs of an appeal was that the successful party was entitled to his costs (see the *Memorandum* (1875), 1 Ch. D. 41), nevertheless the Court had full discretion over the costs of the appeal, and would sometimes in a proper case refuse costs to a successful party.

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The costs of trials were governed by rule 751, which provided that where any cause was tried with a jury "the costs should follow the event." The statute we are now considering uses the same expression—"costs shall follow the event," but uses, most inaptly, "in connection with appeals."

Now, what was the event of this appeal? Sam Kee had been awarded as compensation a sum of money, which the arbitrators declared was to bear interest at six per cent. until paid, and as the sum awarded exceeded the sum offered by the Company, the costs were to be borne by the Company. The Company on the

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appeal succeeded in having the rate of interest lowered from six per cent. to five per cent., but failed to set aside the award, or reduce the compensation. Substantially the Company failed, but they succeeded on one point. In a case of this kind prior to the passing of section 100, the court could have either said we will give no costs, or we will apportion the costs; but I think the object of section 100 was to deprive us of this power. If we, by reading the word "event" distributively, hold that we have power to apportion the costs, are we not nullifying the Act of Parliament?

IRVING, J.

The Company have succeeded in reducing the amount of the award. That seems to me to be the determining event, and therefore the Company in my opinion should have the costs of the appeal. But I wish it to be understood that I do so with reluctance, and in obedience to the Act of Parliament.

MARTIN, J.: By the result of this appeal is raised the question of the proper construction of the word "event" in section 100 of the Supreme Court Act, a section which, I may say, has already inflicted hardship upon litigants, for which the Legislature and not this court is responsible, because we have been unable to prevent it.

It is admitted that if there are distinct issues on an appeal, just as on a trial, the word must necessarily be read distributively to give due effect to it, but it is urged that there are no such issues here, but a question merely of the amount of compensation, and if the award is reduced, be it ever so little, then the appellant must have the costs of the appeal. If the case

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were as simple as that, then there could be only one construction of the word "event," and, following *Dallin* v. *Weaver* (1901), 8 B.C. 241, the appellant would succeed.

But at the outset the objection is taken by the respondent that we have no jurisdiction over costs, and *In re Arbitration between Holliday and Mayor, &c., of Wakefield* (1888), 57 L.J., Q.B. 620; 20 Q.B.D. 699, is relied upon. Now, assuming that case is otherwise applicable, the English section 34, on which it is based, speaks of "costs of such arbitration and incident thereto," whereas the corresponding section 162 in our Railway

Act, 1903, speaks only of the "costs of the arbitration."

Mr. *Cowan* contends that the words "and incident thereto" do not enlarge the scope of the section, and cites *Re Bronson and Canada Atlantic R.W. Co.* (1890), 13 Pr. 440, in support of his contention; but while I agree that the words in question generally do not enlarge the scope of the term "costs" in the ordinary practice of the Court, yet I am unable to say that such is the case in a special appeal of the present nature founded on the Federal statute. I think the words "practice and procedure" in section 168, sub-section 2, are sufficient to introduce said section 100 of the Supreme Court Act regarding costs, and consequently I cannot agree that the meaning of the word "event" should be controlled by what was the event before the arbitrators under section 162, instead of the event of the appeal before this Court. To put it briefly, if there were no section in the Supreme Court Act regarding the costs of this appeal I think it would be open to this Court to award such costs of it as it thought just.

Though there could be only one result of this appeal if the appellant were successful, *viz.:* the reduction of the award, more or less, yet that was sought to be accomplished on several distinct grounds which had no necessary relation to one another, and were just as distinct as many issues which are formally raised on pleadings, and were in fact, on the argument, dealt with separately. The language of Lord Justice Bowen in *Forster* v. *Farquhar* (1893), 1 Q.B. 564, at pp. 569-70, is singularly applicable to such a case, dealing as it did with costs consequent upon various "heads of damage," and I adopt it as the principle on which the case at bar should be decided. The "separate heads of controversy were different issues" there, as here, and the way the principle should be worked out herein is that the appellant is entitled to the general costs of the appeal "from which must be deducted the costs of the portions of his claim, as to which the defendants have succeeded. The items to be allowed to each party can be ascertained without much difficulty by the master upon taxation." I quote from Lord Justice Bramwell's judgment in *Myers* v. *Defries* (1880), 5 Ex. D. 185.

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It may happen, as was suggested, that this will work out in

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such a way that the appellants herein will actually be indebted to the respondent, but that is the reasonable consequence of having achieved but a very little portion of success in a very long argument—they only partially succeeded on one issue, or "separate" head, out of many; therefore "event" must be construed distributively here as it would be at a trial.

DUFF, J.: Mr. *Cowan* on behalf of the respondent contends that we have no power over the costs of this appeal. He advances his contention thus: Section 162 of the Railway Act provides that "if by an award of arbitrators made under this Act (*i.e.*, Chap. 58, Dominion statutes, 1903), the sum awarded exceeds the sum offered by the company, the costs of arbitration shall be borne by the company." In this case the Company is entitled to the costs of arbitration under that section, and it is said that costs of appeal form part of the costs of arbitration. This last proposition is based mainly upon several decisions as to the effect of section 34 of the Land Clauses Consolidation Act, 1845, and chiefly upon the decision of the Court of Appeal in *In re Arbitration between Holliday and Mayor, &c., of Wakefield* (1888), 20 Q.B.D. 699 at p. 720. In that case it was held that the costs of a special case stated by the arbitrator for the opinion of the Queen's Bench Division and of an appeal from the decision of the Queen's Bench Division thereon were "costs of such arbitration and incident thereto" within the section referred to, and consequently that the Court of Appeal had no control over them.

DUFF, J.

I do not think the principle of that decision applies here. In that case the arbitrator gave alternative awards depending upon the determination of the questions raised by the special case. As pointed out by Lopes, L.J., the award could be neither conclusive nor definite until these questions were determined. Costs incurred in the course of proceedings were costs necessarily incurred in arriving at the result of the arbitration, and therefore costs incidental to the arbitration. Here the award is self-sufficient for all the purposes of the arbitration and the appeal must, I think, be regarded as an independent proceeding.

There is a further question involved in the point raised by

Mr. *Cowan* which has been to me the occasion of some perplexity, and that is whether section 168 which confers the right of appeal to this Court does at the same time confer upon this Court any power to award costs. The section provides that "upon such appeal the practice and proceedings shall be, as nearly as may be, the same as upon an appeal from the decision of an inferior court to the said court." I have had some difficulty in satisfying myself that this language is broad enough to connote the power of the court to award costs, but I find that the courts of Ontario have since 1877 (see *In re Canada Southern R.W. and Norvall* (1877), 41 U.C.Q.B. 195, and *Re Birely* (1897), 28 Ont. 468 at p. 472), uniformly acted upon the view that the language was sufficient for this purpose, although in all the cases I have seen the point seems to have passed *sub silentio*. I think that this course of judicial practice (although not binding on us), coupled with the fact that the form of the legislation has during the same period remained unaltered, is a sufficient ground for maintaining our jurisdiction.

We come now to the question of substance which is raised by Mr. *Martin's* contention that, having succeeded in obtaining the judgment of this Court reducing from six per cent. to five per cent. the rate at which the interest awarded by the arbitrators was by them directed to be calculated, he is for that reason entitled to the whole costs of the appeal. This contention is based upon the words of section 100 of the Supreme Court Act which are as follows: "The costs of every appeal to the Full Court shall follow the event" except in certain cases not here material. It was pressed upon us with great earnestness, but I am unable to find anything in its support except those arguments which twenty-five years ago were pressed upon the Court of Appeal in *Myers* v. *Defries* (1880), 5 Ex. D. 180, and by that court rejected. By that decision it was settled that under the rule which provided that in actions tried by a jury the costs should follow the event, the word "event" should be read as "events," and that the determination of any separate issue is an event within the rule. If the plaintiff succeeded on one issue he had—since he was compelled to come into court to enforce his demand—the general costs of the action. But of all issues on

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which he failed he was obliged to pay the costs. This, as Bowen, L.J., pointed out in *Forster* v. *Farquhar* (1893), 1 Q.B. 364, was a just and reasonable application of the maxim "he pays who loses" which the rule was intended to embody.

Since the Legislature has extended the application of this rule to all classes of actions, and to appeals in all classes of proceedings, I should not, as at present advised, think that to be an adequate rendering of the word "event" which should confine its import to the determination of that which is, in the strict sense, an issue. At least with respect to appeals I see no reason why that term should not be held to extend to the determination of any question which can be segregated from the mass of questions in controversy, and respecting which it is practicable to apportion the appropriate costs.

However we are not concerned with that here. The point on which the appellant Company has succeeded in this appeal is a point entirely unconnected with any of the other questions involved—a point to which the term issue may be applied if that term be capable of application at all to questions arising on an appeal. So, too, with the questions on which the respondent has succeeded. Therefore I see no escape from the conclusion that on the true construction of this enactment the respondent is entitled to the costs attributable to the action of the appellant Company in raising these questions.

DUFF, J.

This case, indeed, affords a striking example of the burlesque which would at times attend the application of the section in question according to the construction proposed. The appellant Company appealed against a decision of arbitrators who had awarded the respondent the sum of $12,000 with interest at the rate of six per cent. from a certain date. Success in its main contentions (on which it failed) would have involved a reduction of the amount awarded by nearly one-half. The success actually achieved effects a reduction equivalent to something less than one per cent. of that amount. Moreover the argument relating to the question on which the appellant Company succeeds lasted but a few minutes, and the material facts could be stated in a single paragraph; while the argument relating to those questions on which the respondent succeeded lasted two

days, and the material affecting them expanded into the contents of nearly four hundred type-written pages. We are asked to hold that the costs of this lengthy argument and voluminous material should be paid by the respondent (who succeeded on the only questions to which they related) to the appellant, who thrust on the respondent the litigation of these questions and was beaten in it—and this to give effect to the maxim "he pays who loses."

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I should add that in the case of *Clay* v. *Allen*, decided at the last sittings of the Full Court, and relied upon by Mr. *Martin*, the appellant achieved a substantial success and he was not beaten upon any distinct question with respect to which the costs would have been readily apportionable. Moreover on the question of costs it was an unargued case.

DUFF, J.

Judgment for respondent, with costs.

MORTON AND SYMONDS v. NICHOLS.

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Contract—Specific performance—Option to purchase mineral claim—Time of the essence—Tender of instalment of purchase money—Intoxication.

Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet by the very nature of the property dealt with, it is clear that time shall be of the essence.

Where the transaction is an option, or unilateral contract, for that reason time is to be taken as intended to be of the essence.

Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction.

ACTION for specific performance of an option to purchase certain mineral claims. The option was dated the 30th of June, 1905, and made between Nichols, the defendant, and Morton and Symonds, the plaintiffs. It acknowledged the receipt of $40 paid

Statement

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by the plaintiffs, and provided that the balance of the purchase price of the property should be paid as follows: $1,000 on the 7th of July, 1905, and $8,960 on or before the 30th of June, 1907. And there was a proviso that after the payment of the $1,000 the intending purchasers might examine the property for the purpose of satisfying themselves as to its value, etc.

The defence was, firstly, that the defendant was drunk when he signed it; secondly, in the event of that defence failing, that the plaintiffs had not complied with an essential condition of the option, namely, the payment of the $1,000 on the 7th of July.

The action was tried before HUNTER, C.J., at Victoria, on the 25th and 26th of February, 1906.

R. T. Elliott, for plaintiffs.

W. J. Taylor, K.C., and *Twigg*, for defendant.

HUNTER, C.J.: As to the first defence. I am of the opinion that it cannot be maintained. There is no doubt undeniable evidence to shew that Nichols on the 29th of June had got into a state of intoxication at about six o'clock, and that on the 30th he was indulging freely during the whole of the day, principally in company with a man named Atkinson. And there can be no question that he was in what I may possibly best describe as a condition of semi-intoxication when, on the evening of that day, he went into the saloon of one of the plaintiffs, Morton, and signed a document dated on that day, which was drawn up by Morton, and the terms of which are practically the same as the terms of the document on which the action is brought.

Judgment

I have come to the conclusion with respect to that document of the 30th, that while, as I say, the defendant Nichols was undoubtedly in a state of semi-intoxication, he was not incapacitated to the extent that I could say that his mind did not go with the agreement, and that he did not understand the nature of the transaction with which he was concerned. I find on inspection of the signature that there is nothing in it that would suggest to me that he was in a condition of complete intoxication, or that the intoxication had proceeded to such an extent as to enable me to say that he was not understanding the nature of the instrument that he was signing.

The same may be said, only *a fortiori*, of the document which is being sued on. On that day, the 3rd of July—as a matter of fact this document was executed on the 3rd of July—he had in compliance with the request of the plaintiffs proceeded down to Mr. *Higgins*' office for the purpose of having this former arrangement of the 30th drawn up in some kind of legal shape. It is not in dispute that at that interview there was a discussion between all the parties to the suit, at which Mr. *Higgins* was present, over the plaintiffs' desire to have the time extended within which to pay the $1,000, that Nichols steadfastly, in fact peremptorily refused to give any extension; that he desired to consider the proposition, to use his own language, to sleep on it; that thereupon the plaintiffs, rather than lose the benefit of the option, consented to have the thing drawn up as it was originally drawn up in the document of the 30th. And the agreement was so drawn up.

On inspecting the defendant's signature to this document, I find there is nothing in it to suggest in the slightest degree that he was so far intoxicated as not to understand fully the nature of the transaction which he was entering into. Comparison of that signature with the signature he gave in court satisfies me that he was just as competent to sign at that time as he was before me, as the signatures are as much alike as they can be. And I saw nothing in his conduct in court to suggest to me that he was in the slightest degree under the influence of liquor. The signature is in exact alignment with the typewriting which is above it; in no sense can it be said to be a sprawling signature, and so far as I can see the man that wrote that signature has a pretty firm pen, although he is evidently a man of not very much education, in fact possibly to some extent, illiterate. Now, I consider that that is a circumstance which is more weighty than any of the evidence given by the parties; in fact, inspection of the signature, coupled with the admission on all sides as to the discussion about an extension of time, satisfies me that while no doubt he had been imbibing freely, his will was still with him, and that he understood well enough what he was about.

Judgment

Therefore, the defence of intoxication cannot prevail, and I

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do not think it requires any reference to authority to establish the proposition that before a defence of this kind can be sufficient, the court must be clearly shewn that the intoxication had proceeded to such an extent as to make it reasonably certain that the party was not able to understand the transaction, or had not his will with him in the transaction, and that he was subject either to duress, or to be taken an undue advantage of by the other party.

Then, turning to the option itself, there is a clause which provides that the sum of $1,000 shall be paid on the 7th of July. Now, of course by the provisions of the Judicature Act, stipulations as to time are to receive the same construction by the court as they did formerly in the courts of equity. As far as I can gather from the cases referred to by the learned counsel on both sides—in fact, it has always been my understanding of the matter, the cardinal principle is that stipulations as to time are not treated in courts of equity as being *prima facie* of the essence of the contract. But where there is something in the nature of the property, such as for instance, reversionary interests, or where the property is of a wasting character, or in England, in connection with the sale of public houses, as going concerns, or where the property is of fluctuating value, and I think also in the case of options and unilateral contracts, there is this exception carved out of the rule, that is to say, that such stipulations, although not expressly made of the essence, would be deemed to be of the essence in a court of equity.

Judgment

Now, this is a contract for the sale of property which is of a peculiarly fluctuating value, namely, mineral claims. There is no class of property that is of more fluctuating value, I presume, than mineral claims. So, although there is no stipulation that time shall be of the essence of the option, yet by the very nature of the property dealt with, it is clear that time shall be of the essence. And I would say that having regard to the fact that it is an option or a unilateral contract, for that reason I would have come to the same conclusion, that is to say, that time was intended to be of the essence. But I think the matter is settled beyond peradventure by the admissions of all parties

to this suit. The evidence is clear to the effect that there was a request to have the extension of that particular time for the payment of that particular sum; and it is just as expressly admitted on all hands that the request was refused. In other words, there can be nothing more certain than this, that all the parties to this contract understood perfectly well that time was to be of the essence, and that the $1,000 was to be paid on that particular day. I might point out, too, that for some peculiar reason, there is not the latitude allowed for the payment of that sum of $1,000, that there is for the larger sum of $8,960, because the stipulation is that that $1,000 is to be paid on the 7th, not on or before the 7th, and the balance of $8,960 is to be paid on or before the 1st of June, 1907. So that all the facts and circumstances point but one way, and that is that it was the clear intention of the parties that the $1,000 was to be paid on the 7th of July.

That being so, we have to consider what was the duty of the plaintiffs under those circumstances. Now, the law is clear, and as I understand it, it has been settled ever since the time of Queen Elizabeth that where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction. This, indeed, seems somewhat obvious, because if it is the payor's duty to pay in legal tender it must be handed to the payee in order that he may have a chance to count over and object, and if it is to be handed to him he must be sought out and found. So far as I know the rule is absolute and unqualified, with this one exception, that where the payee by his own conduct makes it impossible for the covenantor to fulfil the covenant, then a court of equity will not allow him to complain and to set up the non-fulfilment of it in a suit. Where the payee deliberately evades the payor, for the purpose of rendering the performance of the covenant impossible, then of course it is his will that the covenant should not be performed, and it is only reasonable under such circumstances that the court should prevent him from insisting on the non-performance provided the covenantor makes the tender within a reasonable time according to the circumstances after the evasion ceases,

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HUNTER, C.J. and satisfies the court that he was ready and willing to pay the money at the stipulated time.

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That brings us to this, is there anything in the circumstances of this case which enables me to say that there was anything done by the defendant to render it impossible for these plaintiffs to carry out the covenant to pay upon the 7th? Now, the undoubted facts are that the defendant was first of all within the jurisdiction, that during a portion of that day he was out at Saanich, only a short distance away from the city. I am of the opinion that if he had been at Saanich the whole day, unless he was there for the purpose of evading the tender, it would have been the duty of the covenantors to have hunted him up and paid him the money there, or at all events tendered it to him there. But the fact is that he was not there during the whole day, that he was in Victoria after about 11 o'clock that morning, that he was frequently at his then usual place of abode, the Western hotel, that he was on the principal streets during a portion of the day; and so far as I can see there is not a shred of evidence to suggest to me the conclusion that he was in any way, shape or form endeavouring to evade the performance of the covenant. On the other hand, it is admitted by the plaintiffs that they did not get the money together until about 3 o'clock on that day, that is to say, at the time when banking business is at an end for the day; and not only that, but they made no attempt whatever to find this man with the money; it is true that they had messengers a short time before, in the earlier part of the day, trying to hunt up his whereabouts; but they made no attempt to approach this man with the money until about 10 o'clock that night. Now, there is some suggestion made to me that about a quarter to 12 that night they made another visit to the Western hotel, and that they were informed by the proprietress, or by some party there in charge, that he was there, but they were not allowed in. Well, I have no recollection of that evidence being given at the trial, and it may possibly have been that there was some evidence of that given in discovery, but I will assume that to be the case, and that they were informed that Nichols was in the hotel, and that he was in his room. I am still of the opinion that that is not a

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finding within the legal duty; that to use the language of Baron Parke, it was their duty to find him at their peril. In other words, to get in touch with him in such a fashion that they were able to tender him the money in a sufficient time before the expiration of the 24 hours to enable him to properly check up the money. I have come to the conclusion that the covenant was not performed within the time imposed upon the covenantors, and that there was no attempt made by the covenantee to render the performance impossible. That being so, unless it could be made out to my satisfaction that there was some equity raised to prevent the defendant from holding the plaintiffs strictly to their covenant, I do not see how I can interfere. There is no doubt that the primary rule of all courts of equity is to hold the parties to their intention—to give effect to their intentions just as much as in a court of law.

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Now, I accept without reserve the statement of Lord Cairns in *Tilley* v. *Thomas* (1867), 3 Chy. App. 61 at p. 67. My conception of that, however, differs from the view taken by Mr. *Elliott*. I can see nothing on which I can ground any interference. Lord Cairns says:

"The legal construction of the contract is, in my opinion, such as I have expressed, and the construction is, and must be, in equity the same as in a Court of law. A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for the steps toward completion, if it can do justice between the parties, and if (as Lord Justice Turner said in *Roberts* v. *Berry*), there is nothing in the 'express stipulations between the parties, the nature of the property, or the surrounding circumstances' which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, when it is said that in equity time is not of the essence of the contract."

Judgment

Now, I understand that to mean simply this, that where it is apparent from the stipulation itself, from the nature of the contract, such as I think to be the case in this suit, or where it appears from the surrounding circumstances that there was an express understanding between the parties that time was to be of the essence, the Court has no power to interfere, unless the performance of the covenant is deliberately made impossible by the act of the covenantee. In this case the failure was entirely

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That being the case, I think it follows that the action must be dismissed with costs.

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Action dismissed.

DUFF, J. (In Chambers)

CHISHOLM v. CENTRE STAR MINING COMPANY.

1906

Jan. 31.

Practice—Arbitrator's fee under Workmen's Compensation Act, 1902, B. C. Stat. 1902, Cap. 74—Arbitration Act, Schedule to (R.S.B.C. 1897, Cap. 9).

CHISHOLM v. CENTRE STAR

The Schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act, and the arbitrator's fee must be dealt with by a practice analogous to that prevailing prior to the Arbitration Act on a reference directed by the Court.

APPLICATION to fix fee of arbitrator under the Workmen's Compensation Act, argued before DUFF, J., at Victoria on the 30th of January, 1906.

Heisterman, for plaintiff: Rule 45 of the Workmen's Compensation Rules is sufficiently large to cover the allowance of the arbitrator's fee. He cited *In re an Arbitration between Walker & Son and Brown* (1882), 9 Q.B.D. 434, and submitted that the word "arbitration" should receive as wide an interpretation.

Argument

As to the *quantum* of the allowance: as the Registrar exercised his discretion in allowing the $25 fee, the amount will not be reduced unless it is shewn that he proceeded upon a wrong principle or that the amount granted is excessive.

The schedule to the Arbitration Act is only applicable to submission to arbitration, and the proceedings under the Workmen's Compensation Act do not come within the definition of "submission" contained in section 25 of the Arbitration Act. Where a reference is directed by the Court pursuant to the

provisions of the Arbitration Act, the arbitrator's fee is fixed by the Court, and the schedule does not govern.

We then have to revert to the practice which prevailed as to arbitrator's fees before the passage of the Arbitration Act. This is set forth in Russell on Awards at p. 222 *et seq.*; see also p. 224.

If it were held that the arbitrator's fee could not be taxed, the result would be that the employee would have to pay the arbitrator's fee in every instance, as the employer would be under no liability to pay as in the case of a written submission to arbitration, and the employer need never take up the award.

H. G. Lawson, for defendant Company: The plaintiff is bound by the tariff of fees mentioned in the schedule to the Arbitration Act. The effect of section 23 is to bring this arbitration within the Act. The words in the section "as if the arbitration were pursuant to a submission," makes the Act apply to any arbitration whether it is pursuant to a submission or not.

Argument

As the award was consented to and the proceedings before the arbitrator did not last an hour, a fee of $5 under the third item of the tariff to the Arbitration Act alone is taxable.

If the Arbitration Act does not apply, no fee whatever can be taxed, because under rule 45 of the Workmen's Compensation Rules, 1904 (B.C. Gazette, 1904, p. 296), the statutes, provisions and rules in force as to allowance and taxation of costs in Supreme Court actions shall apply and there is no jurisdiction under the rules or tariff of costs to award a fee to an arbitrator.

31st January, 1906.

DUFF, J.: I think the schedule to the Arbitration Act does not apply, and that the arbitrator's fee must be dealt with by a practice analogous to that prevailing prior to the Arbitration Act in the case of a reference directed by the Court.

Judgment

I am unable to say that the fee charged in this case is unreasonable in the circumstances. It seems, however, obviously desirable that a schedule of the fees to be allowed to arbitrators in proceedings under the Workmen's Compensation Act should be fixed by legislation.

Order accordingly.

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Costs—"Event," what constitutes—Supreme Court Act, 1904, Sec. 100.

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By section 100 of the Supreme Court Act, 1904, the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specific exceptions set out in the said section 100.

MOTION for costs after judgment, argued at Victoria before HUNTER, C. J., IRVING and MARTIN, JJ., on 15th January, 1906.

Sir C. H. Tupper, K. C., for the intervener: The term "event" used in section 100 of the Supreme Court Act, 1904, does not apply to probate cases, in a long line of which it is shewn that the estate pays the costs where the heir is not guilty of any wrong act, and invariably, where there are any suspicious circumstances, such as the testator having acted oddly, or where he drank heavily, the court has said it is a proper case to investigate. The statute does not apply where a fund in court is concerned, or in the propounding of a will.

[HUNTER, C.J.: This is not a case of propounding a will; you attacked the will and set up fraud and other grounds.]

Argument

No, this is propounding a will in every respect, and in all probate actions "the costs following the event" means all costs are paid out of the estate. The court cannot penalize anyone for seeking to establish his rights in such cases. Though failing in his contention, the heir-at-law, on proof of the will, is entitled to costs out of the estate, because he must act then, as afterwards he can never dispute the will; he has the right to be satisfied how he is disinherited. He cited *Berney* v. *Eyre* (1746), 3 Atk. 387; *Wright* v. *Wright* (1832), 5 Sim. 449; *Freer* v. *Peacocke* (1847), 11 Jur. 247; *Browning* v. *Budd* (1848), 6 Moore, P.C. 430; *Stacey* v. *Spratley* (1859), 4 De G. & J. 199; *Williams* v. *Henery and Others* (1864), 3 Sw. & Tr. 471, 12 W. R. 1,015, 33 L.J., P. 110; *Tippett* v. *Tippett* (1865), 35 L.J., P.

41; *Smith* v. *Smith* (1866), L. R. 1 P. & D. 239; *Hooton* v. *Dennet* (1868), 17 L.T.N.S. 670; *Davis* v. *Gregory and Francis and Others* (1873), 42 L.J., P. 33, 21 W.R. 462; *Orton* v. *Smith* (1873), 42 L. J., P. 50; *O'Kelly* v. *Browne* (1874), 9 Ir. R. Eq. 353; *Cousins and another* v. *Tubb* (1891), 65 L.T.N.S. 716; *Williams* v. *Coker* (1892), 67 L.T.N.S. 626; *Shortman* v. *Shortman* (1893), *ib.* 717; *Brown* v. *Penn* (1895), 12 T. L. R. 46; *Browning* v. *Mostyn* (1897), 66 L. J., P. 37; *Wilson* v. *Basil* (1903), 72 L.J., P. 89, (1903), P. 239; *Maxwell* v. *Maxwell* (1870), 39 L.J., Ch. 698.

Bodwell, K.C., for plaintiff: The court must look upon this as an action to recall the probate; this is not an action *inter partes*. We could have come into court and cited the executor to appear, and we are in the same position as the intervener, because if there had been no will plaintiff would have been entitled.

Davis, K.C., for defendant, appellant: The arguments and cases cited in support go back before the Supreme Court Act. In England there is a different rule altogether, because there is a provision in the Judicature Act by which the rules in probate actions shall remain in force; there is no such rule here. Every case is covered in the matter of costs, and the only way in which the English rules could apply here would be where there is no rule of our own governing. None of the exceptions in section 100 of the Supreme Court Act apply to this case. Defendant here is not sued as an executor. If the "event" had been decided against him, what then? One half of the action here has nothing whatever to do with probate; it is directed towards setting aside a certain agreement between plaintiff's mother and the defendant, and plaintiff not having succeeded on that point, she has no standing at all. This case has nothing to do with propounding a will. The "event" can here only be two-fold: one the setting aside of the will, and, second, the setting aside of the agreement. The second became unnecessary for the court to deal with by reason of their having come to a certain decision as to setting aside the will. So that that was the only event in the appeal, and that event is in our favour.

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Luxton, K.C., on the same side: If probate in solemn form was all the plaintiff required, she could have filed a caveat; but here she has attacked the will and raised every species of fraud. As to costs out of estate, he cited *Page* v. *Williamson* (1902), 18 T. L. R. 770; *Fyson and Others* v. *Westrope and Cutting* (1859), 1 Sw. & Tr. 179; *Swinfen* v. *Swinfen* (1859), 27 Beav. 148; *Ireland* v. *Rendall* (1866), L.R. 1 P. & D. 194; *Tomalin* v. *Smart* (1904), P. 141 and *Crickitt* v. *Crickitt* (1902), P. 177.

Argument

In all the cases in the list cited by plaintiff there was some reason to induce the court to grant costs out of the estate; there is no such reason here.

Sir C. H. Tupper, in reply.

Cur. adv. vult.

25th January, 1906.

HUNTER, C.J.: Upon the delivery of our judgments we were asked to make an order allowing the costs of the plaintiff and intervener out of the estate. It is, in my opinion, unnecessary to consider what order we should have made under the old practice, or to examine the numerous authorities cited, as the recent Supreme Court Act has deprived us of any discretion. It is enacted in explicit terms that "the costs of every appeal to the Full Court and of the trial and hearing of every cause or matter shall follow the event," with certain specified exceptions. It has not been made to appear to us that this case comes within any of the exceptions. It was urged, however, that the Legislature could not have intended to sweep away the discretion formerly possessed by the court in certain cases to order an unsuccessful party's costs to be paid out of the fund or estate; but in order to give effect to this argument we should have to insert words in the statute which are not to be found in it. Eminent jurists have frequently protested against holding an enactment to be elliptical, or that the ordinary meaning should be cut down on the theory that if the matter had been brought to the attention of the Legislature its will would have been differently expressed except where it is necessary to avoid a construction which the Legislature could not possibly have

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intended: see for example the remarks of the different law Lords in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107; and in *Salomon* v. *Salomon & Co.* (1897), A.C. 22.

Moreover, I think the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specified exceptions.

In this view the language of Lord Herschell in the *Vagliano* case above cited is apt. He says, at p. 144:

> "I think the proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view. If a statute, intended to embody in a code a particular branch of the law, is to be treated in this fashion, it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated."

No layman who proposed to conduct his own case would ever suspect that any exception, other than those specified, was lurking in the plain and unambiguous words of this section, and that a fund to which he unsuccessfully defended his right could be engulfed by an order for the payment of his adversary's costs; and I find nothing in the statute to indicate that the Act is addressed only to members of the legal profession.

There were, however, in reality two distinct appeals, one a preliminary appeal from the refusal to amend and allow further evidence, and the other the main appeal from the judgment. It was necessary in order to fully prosecute the main appeal to make the preliminary appeal, and while it is true that the success of that appeal and the production of the further evidence effected nothing in the end, it was none the less a distinct and severable appeal within the meaning of the phrase "every appeal" in the statute, and the "event" was favourable to the plaintiff and intervener.

In the result the defendant is entitled to the costs of the main appeal, including the further evidence as against both plaintiff and intervener, while they are each entitled to their costs of the

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preliminary appeal, such costs to be set off *pro tanto* against those due to the defendant.

IRVING, J., concurred in the reasons for judgment of HUNTER, C. J.

MARTIN, J.: Whatever may heretofore have been the practice regarding costs of appeals and trials, in my opinion section 100 alone now regulates such matters and deprives the court of all discretion. The language is sweeping, extending to "every appeal" and to "every cause or matter," and the only thing that remains for the court to do is to determine what the "event" is, save, of course, in the case of certain excepted matters which do not extend to the case at bar. Such being my view, I pass to the consideration of the word "event" as applicable to this appeal, leaving aside, as I did in the case of *V., W. & Y. Ry. Co.* v. *Sam Kee*,* any question of the propriety of consequences of the section.

The situation is peculiar, because when the appeal first came on to be heard there was a preliminary application to amend the statements of claim of the plaintiff and the intervener and take further evidence in support thereof respecting the execution of the will in California, which proposed amendment had been refused by the learned trial judge. This Court, however, saw fit to allow the amendment on the short ground that it raised a question of substance and that though the application was made late in the trial it was nevertheless, in the peculiar circumstances, only a question of terms. Further evidence was directed to be taken, and the hearing of the appeal was adjourned in the meantime, and the question of costs reserved.

MARTIN, J.

Having regard to our decision in *Sam Kee's* case, *supra*, I am clearly of the opinion that the word "event" may properly be read distributively to meet these very unusual circumstances, and the fact that the result of our judgment is that the application turned out to be unnecessary or fruitless does not detract from the force of the contention that the "event" so far as concerns the amendment is that we decided it should have been

* Reported *ante* p. 1.

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allowed originally, and the plaintiff and intervener had to come to us to get that right established. Such being the case, there is, so to speak, an "event" within an "event"—the one quite independent of the other.

I think, therefore, the order should be that the costs of this appeal so far as they relate to the application to amend should be allowed the appellants, while the remainder of them should go to the respondent following the event of the main appeal.

Application refused.

THE CANADIAN CANNING COMPANY, LIMITED v. FAGAN AND FOSTER.

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Taxes, distress for—Assessment Act, R.S.B.C. 1897, Cap. 179, Secs. 80, 87, 88—Notice of sale—"At least ten days"—"Ten clear days"—Time, computation of—Damages, exemplary, excessive—New trial for assessment of damages.

The provision in section 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser *ab initio*.

Section 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under section 80.

APPEAL from the judgment of DUFF, J., in an action tried by him at Vancouver on the 17th of March, 1905.

The plaintiff Company was organized in 1899 for the purpose of acquiring and operating certain salmon canneries. The defendants were tax-collecting officials of the Provincial Government. Of three canneries purchased by the Company, two of them were from the liquidators of defunct companies. One of

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these, the Star cannery, was in arrears for personal property tax for 1894, 1895, 1896, 1899, 1900 and 1901. Claim was made by defendant Fagan for these arrears, together with arrears in respect of the other properties from 1899. The Company contended that they were liable only for taxes on their property acquired since their incorporation, and tendered the sum of $890 in satisfaction of all claims to the end of 1902, which was refused; distress was made on the goods and chattels of the Company and in pursuance of a notice dated the 5th of August, 1902, a sale was had on the 15th of certain goods of the Company for $825 and costs. This notice was given under section 88 of the Assessment Act, which requires that the Collector shall give "at least ten days' public notice of the time and place of such sale."

At the trial the case turned on this point, DUFF, J., holding that the notice was one day short.

Martin, K.C., for plaintiff Company.
Cane, for defendants.

DUFF, J.: I have come to the conclusion in this case that I will give judgment for $1,500. I quite appreciate what Mr. *Cane* says with regard to Mr. Fagan, that he was acting under instructions, but the amount I award over and above what the Company paid for the goods is done to mark my disapproval of the course which was taken by the taxing officials of the Provincial Government, which in my judgment was a high-handed and arbitrary action, and utterly inexcusable. I think it exceedingly lucky that these people have not had a jury to meet. In a case of general warrants one hundred years ago a Secretary of State was visited with £15,000 damages. Without any power to do it he sent a man hunting through another man's papers. And I am not sure but a jury might take a very strong view with regard to the responsibility of the official who, without proper justification, issued a distress warrant against a company's goods, but I think the sum that I have mentioned is sufficient to make it perfectly and clearly understood that that sort of thing cannot be tolerated in this country. We are not under any bureaucratic system at all here, and the rights of the

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subject are just as clearly and distinctly defined as the rights of the Crown. They are purely legal rights, and the right of the Crown to levy taxes is a right given by the statute, and no other right; and no assessment officer or official of the Government has any greater right than that of any private citizen to walk into a man's place of business or his house and take goods. He has the right the law gives him and no other right. Of course the judgment will carry costs.

The appeal was argued at Vancouver on the 10th and 11th of November, 1905, before IRVING, MARTIN and MORRISON, JJ.

Maclean, K.C., D. A.-G., for defendants, appellants: This appeal arises out of a certain distress made for taxes. Some three canneries were in default for personal property tax for 1899, 1900 and 1901, and one of them was in default for 1894, 1895 and 1896. In 1899 the three canneries were acquired by the Canadian Canning Company. The Collector demanded payment of taxes in arrear, but the new owners set up that they were not aware of the arrears, and advised that suit be taken instead of making distress; but distress was made by the Collector taking some cases of canned salmon instead of the plant or other property of the Company, the taking of which would interfere with the working of the canneries. The sale occurred, the notice being dated 15th of August, 1904, and the goods sold and bought in by the Company for $905, being taxes $825 and the balance costs. The Company then brought an action against the Collector and at the trial the point was taken that apparently the notice of sale was one day short of the requisite time.

Argument

If two remedies are open for collection of a debt, the person collecting has the option, that is the plaintiff. Here there was no vindictiveness shewn in the course taken, and it is very strong ground to take that, because a person adopts one of two courses open to him he should be fined. The judgment is entirely wrong that the proceedings for recovery of the taxes in arrear should be by suit. By section 121 of the Assessment Act, R.S.B.C. 1897, Cap. 179, it was not open to the Crown to adopt any other course than proceedings by distress. As to the

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notice, there is nothing to shew that it was not given on the very first moment of the first day, and if so there were ten clear days' notice. In any event there is no hard and fast rule as to the computation of time. He cited *Young* v. *O'Reilly* (1864), 24 U.C. Q.B. 172; *Regina* v. *St. Mary, Warwick* (1853), 1 El. & Bl. 817 and *The Queen* v. *The Mayor, &c., of Liverpool* (1838), 8 A. & E. 173. A day is a day whether the words "at least" be omitted or not. The court here is unfettered by any hard and fast rule, and there is no reason for establishing one. There are numbers of American decisions on the point.

[IRVING, J.: It is hardly worth while going into American law for the purpose of quoting authorities. You can get decisions there for almost any proposition you care to set up. There are altogether too many American reports being cited. The English decisions we generally follow; and we of course look to the Canadian decisions. For myself I do not care about American decisions.

MARTIN, J.: Unless in mining cases and probably one or two other branches of law, I may say that I quite agree with my learned brother that where we have ample authority ourselves we should not go to a foreign jurisdiction for it; and of course we are bound to follow our own courts, no matter what these American decisions shew.]

Argument

He cited *In re Railway Sleepers Supply Company* (1885), 29 Ch. D. 204. Here the notice is a ten days' notice; no question of termini; assuming this notice insufficient, it did not thereby cause any damage to the Company; they were there and bought in the goods themselves. Even where the distress is illegal, and the owner of the goods goes to the sale and buys them in, the only damage which he can suffer would be the amount at which he buys them in. Here the distress is legal and the only illegality set up is one day's notice short.

As to damages he cited *Attack* v. *Bramwell* (1863), 3 B. & S. 520; *Biggins* v. *Goode* (1832), 2 C. & J. 364; *Rodgers* v. *Parker* (1856), 18 C.B. 111 and Mayne on Damages, 7th Ed., pp. 456-462.

Martin, K.C., for respondent Company: The main object of the action was to shew that the Company did not owe anything

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to the Province in respect of taxes. There is no such thing as a lien for personal property tax; the Government sues the person. The appellant has confused this with landlord and tenant cases, which are altogether different in principle: see Woodfall's Landlord and Tenant, 17th Ed., 858; also *Shultz* v. *Reddick* (1878), 43 U.C. Q.B. 155 at p. 161. The case of *Attack* v. *Bramwell* (1863), 3 B. & S. 520, cited by appellant, shews the measure of damages, where the landlord was a trespasser, to be the full value of the goods, and not the value of the goods minus the rent. Here the parties seizing are trespassers. The learned trial judge was right in the matter of time; it is settled that "ten days at least" means ten clear days; if you have a period between two days for doing anything, it is always clear days. *Young* v. *O'Reilly, supra,* is not in point; neither is *Regina* v. *St. Mary, Warwick* (1853), 1 El. & Bl. 816.

He referred to Chitty's Archbold, p. 1,435; *The Queen* v. *The Aberdare Canal Company* (1850), 19 L.J., Q.B. 251; *Mitchell* v. *Foster* (1841), 9 Dowl. P.C. 527; *Robinson* v. *Waddington* (1849), 18 L.J., Q.B. 250; *In re Railway Sleepers Supply Company* (1885), 29 Ch. D. 204; *Re Ontario Tanners Supply Co.* (1888), 12 Pr. 563; *Rae* v. *Gifford* (1901), 8 B. C. 273; (1902), 9 B.C. 192; *In re North: Ex parte Hasluck* (1895), 2 Q.B. 265.

Argument

All statutes such as that under which defendants acted are construed strictly against the person exercising any powers under them. Accordingly, if they were right at the outset and afterwards were wrong, then they were wrong, *i. e.*, trespassers, *ab initio.* These taxes were never levied; the Company not having been in existence before 1899 could not be assessed for previous years. Under the Act, Sec. 60, notice is given of assessment, and as soon as a person is assessed, he has an opportunity to appeal; he is then liable (section 80) and any goods he has are liable; but there must have been a taxation against him (section 87). No specific goods are taxed; the levy is against all the goods of the person taxed. Notwithstanding this negligent non-assessment the Company offered to pay the whole amount of taxes claimed to be due if the Government would abandon the penalties for non-payment; and this money

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was tendered. Then, the Assessor assessed, not any person or corporation, but the Star cannery and the Fraser River cannery; an utterly impossible assessment.

Maclean, in reply, cited the *Six Carpenters' Case* (1610), 1 Sm. L.C. 132, and, by permission, *Taylor* v. *Jones* (1860), 42 N.H. 25 (Vol. 46 Am. Digest, Century Ed., 265).

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IRVING, J.: The defendant Fagan, who is the Provincial Assessor and Collector for the County of Vancouver, proceeded to distrain on the goods of the plaintiff for $825 alleged to be arrears of taxes payable by the plaintiff in respect of certain canneries acquired by the Company in 1899.

By a notice dated the 5th of August, the day of sale was fixed for the 15th of August, on which day it was held and the sum of $905, the amount of taxes and costs, realized.

Shortly after the sale, the plaintiffs commenced this action, alleging that there were no taxes due, that the sale was unnecessary and that the distress was excessive and unreasonable, and that there had been no appraisement as required by statute, and they claimed they were entitled to recover, under the statute 2 Wm. & M., Cap. 6, from the plaintiff double the value of the goods distrained, *viz.*: $7,000, evidently proceeding as if this were a distress for rent.

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There was no allegation of special damage.

On the case for the plaintiff being opened, the learned trial judge held that the point (not raised on the pleadings) that the sale was illegal in that the notice required to be given by section 88 was a notice of "ten clear days" was well taken. Having regard to what is said in *In re North: Ex parte Hasluck* (1895), 2 Q.B. 264, I am of opinion that this decision was quite correct. The counsel for the appellants at the trial seems to have regarded a decision on this point as conclusive as to the defendant's defence. Under the circumstances I think we must for the purposes of this appeal assume that the pleadings were amended so as to raise this point.

A discussion took place, and some correspondence, from which it appeared that there was a *bona fide* dispute between the

Company and the Government as to the Company's liability for taxes, was read.

The plaintiffs' manager was examined and stated that the goods seized and sold were of the value of $3,000. The plaintiffs themselves bought in the goods for $905, but there were no findings of fact by the trial judge as to the other points raised in the pleadings. He then assessed the damages at $1,500.

The notice of sale being bad, are the defendants trespassers *ab initio?* I am of the opinion they must be so regarded. The proposition established by *The Six Carpenters' Case* (1610), 4 Co. Rep. 432, that if a man abuse an authority given him by law, he becomes a trespasser *ab initio,* still prevails with respect to distresses other than distress for rent, although in respect of distress for rent the benefits of the Distress for Rent Act, 1737, which has given to the landlord on one hand a fair measure of protection, and to the party aggrieved full satisfaction for the special damage sustained, have mitigated the severity of the common law, the same relief has not been extended to the case of distress for taxes.

Mr. *Maclean* contended that the rule meant gross abuse, and was not applicable to a mistake in law—such as a miscalculation of time limited by statute. I am unable to agree to that. The cases decided before the passage of the Distress for Rent Act, 1737 (ss. 19 & 20 of 11 Geo. II., Cap. 19) establish that very trifling mistakes, involving no real damage to the article distrained upon, made the distrainer a trespasser *ab initio.*

Then as to damages. The learned trial judge proceeded on the ground that the plaintiffs were entitled to recover exemplary damages. With that I shall deal presently. But it was argued before us that the judgment could be sustained on other grounds, and *Attack* v. *Bramwell* (1863), 3 B. & S. 520, was cited by Mr. *Martin* as an authority for the proposition that in the case of trespass *ab initio,* the measure of damages is the whole value of the goods seized. Here the value of the goods sold according to Mr. Welsh is $3,000, but the Company by buying in at $905 lost nothing more than that sum. The case of *Attack* v. *Bramwell, supra,* did not turn on this point. The

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question there was, was the plaintiff entitled to recover the full value of the goods seized, or only their value minus the sum due for rent? Here the point is, are the goods to be regarded as of the value of $3,000 or of $905, the price realized? The bailiff in seizing must be certain that he has seized enough to satisfy his claim: see *Crunnell* v. *Welch* (1905), 2 K. B. 650 at p. 653. He should be guided by what they are likely to realize at a tax sale. If he does not seize enough according to that test, he cannot be said to have made an excessive seizure. No evidence was given as to their value by the test I have just mentioned. In the circumstances of this case, I am of the opinion that the value of the goods must be taken at $905.

If this action had been tried with a jury, it would have been the duty of the judge to have directed them that the proper measure of damages was the value of the goods taken and sold, and that it was a case in which they might properly give the plaintiffs an allowance by way of general damages, if they thought fit. But I think he should have pointed out the principle upon which they should proceed in allowing any damages over and above the value of the goods was under what circumstances the seizure was made and the inconvenience suffered by the plaintiffs, having reference to the parties before the court. The fact that the Provincial Government would ultimately pay the amount of damages seems to me to have been assumed, and

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was given too great a prominence in the case. The great hardship of this case on the plaintiffs strikes me as being to a large degree imaginary. They had ample notice of the intention to distrain unless they paid. The seizure was purely formal. Nothing like contumely or insult is complained of, nor was it shewn that ten days was unreasonably short. The mistake which has rendered these defendants liable was on the construction of a statute.

I think there should be a new trial, with a view to the assessment of damages, unless the plaintiffs and defendants are able to agree on a sum. In the event of a new trial being necessary, the parties should have leave to amend as they may be advised: see on this point the remarks of DRAKE, J., in *Harris* v. *Dunsmuir* (1899), 6 B.C. 505 at p. 517.

I have not lost sight of the rule that the Court of Appeal is slow to interfere on a question of the amount of damage, but it seems to me in this case we should interfere as the defendants are being visited with the sins of the Government. In this connection I think it should be borne in mind that the initiation of the distress, that is, the determination of the question whether it was a proper case for distress, or for suit, as suggested by the Company's manager, was a matter over which these defendants had no control whatever.

MARTIN, J.: With respect to the point of the length of notice of sale, I am of the opinion that it was insufficient, mainly on the authority of *In re North: Ex parte Hasluck* (1895), 2 Q.B. 264, cited by me in *Rae* v. *Gifford* (1901), 8 B.C. 273 at p. 274 affirmed (1902), 9 B.C. 192. It is clearly to the benefit of the "person primarily interested" so to view the matter.

Then as to damages. I agree with the learned judge that on the correspondence it may be assumed the taxes were due, and the evidence was taken for the purpose of determining the point as to whether or no the plaintiff was entitled to exemplary damages over and above the amount he paid to recover the goods, $905, which were bought in under a friendly arrangement. As the learned judge said:

"I had better hear the evidence. I am rather disposed to think that the acts of the Government were high-handed, and, that being the case, that something ought to be done to mark the disapproval of (this) tribunal in regard to the transaction."

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After the evidence was taken, the learned judge decided as follows:

"I have come to the conclusion in this case that I will give judgment for $1,500. I quite appreciate what Mr. *Cane* says with regard to Mr. Fagan, that he was acting under instructions, but the amount I award over and above what the Company paid for the goods is done to mark my disapproval of the course which was taken by the taxing officials of the Provincial Government which in my judgment was a high-handed and arbitrary action utterly inexcusable. I think it exceedingly lucky that these people haven't had a jury to meet. . . . ."

I cite these passages to shew clearly that the sum of $595, being the difference between what was paid for the goods, and the amount awarded as damages, was for exemplary damages

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based upon the fact that instead of suing the Company the Collector has distrained.

It is, I feel, an unfortunate thing that when the defendants' counsel was asked to explain why the Crown had not sued instead of distraining, he did not cite section 87 of the Act which shews that the primary manner contemplated by the statute to collect taxes is to "levy the same with costs, by distress of the goods and chattels of the person who ought to pay the same," etc.; and also section 121, which does not authorize the Crown to sue for them as a debt unless they "cannot be recovered in any special manner provided by this Act."

"Had these provisions been brought to the attention of his Lordship, I do not think he would have thought any more than I do that the case was one which rendered it desirable that exemplary damages should be awarded. And even assuming that the plaintiffs were willing to be sued before distress I do not think the Crown should be asked or expected to depart from the ordinary course of collection; to do so indeed, in any particular case, might establish an awkward precedent, give opportunity for a suspicion of favouritism, and generally render more embarrassing the discharge of a duty already sufficiently difficult, aud sometimes even unpleasant. I am therefore of the opinion that the exemplary damages should be disallowed.

MARTIN, J.

On the other hand, though with some reluctance, I cannot accede to the contention that the distress must be regarded other than as a trespass *ab initio*, and therefore the damage is the value of goods, here, as found by the the trial judge—$905: *Attack* v. *Bramwell* (1863) 3 B. & S. 520; *Edmondson* v. *Nuttall* (1864), 17 C.B.N.S. 280, and there should also be a reasonable allowance for the actual trespass itself. The fact that the goods were bought in does not entitle the defendants to take advantage of it, other than as an evidence of value, nor can they deduct the amount of the taxes. It might be otherwise if it could be held that the result of section 87 was to give a lien upon the goods such as the preferential charge upon lands by virtue of section 80, but in my opinion the language does not warrant that construction. This point as to the defendant

having a lien or limited interest in the goods is mentioned by Mr. Justice Willes in *Edmondson* v. *Nuttall*, *supra*. It is truly said in 1 Smith's Leading Cases (1903), 137, that "as it was found that the doctrine of trespass *ab initio* bore extremely hard on landlords, the Distress for Rent Act, 1737, ss. 19 & 20, provided for their relief . . . ," etc.

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Section 87 does not create the relationship of landlord and tenant between the parties, and therefore the defendants cannot rely on such cases as *Biggins* v. *Goode* (1832), 2 C. & J. 363.

Though what was done here amounted to a technical abuse of authority, yet it was a very pardonable one, for the computation of time is a difficult matter, and as Mr. Justice Chitty said in *In re Railway Sleepers Supply Company* (1885), 29 Ch. D. 204 at p. 208:

"It is no wonder to my mind that persons who do not read statutes with care and have not legal knowledge at their finger's ends, should make a mistake in such a matter as this, but it is better in these cases to adhere to settled rules, and I consider that the rule now is settled, and that I am not at liberty to depart from what has been already laid down."

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The result is that the appeal should be allowed and the case must go back for a new trial on the question of what moderate, I had almost said nominal, damages should be allowed for the bare trespass in addition to the value of the goods.

MORRISON, J.: The notice was clearly insufficient and bad. The authorities distinguish the creation of a term, which is regarded as including the day when the same is created, and the limitation of a certain time for the doing of a prescribed act.

The words "ten days at least" mean ten clear days. This appears to be settled by a line of decisions extending from *The King* v. *The Justices of Herefordshire* (1830), 3 B. & Ald. 581; *Zouch* v. *Empsey* (1821), 4 B. & Ald. 522; *Young* v. *Higgon* (1840), 6 M. & W. 48, down to the comparatively recent case of *In re North: Ex parte Hasluck* (1895), 2 Q. B. 264. In *Zouch* v. *Empsey*, "fourteen days at least" was held to mean fourteen clear days.

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The notice being bad, the defendant is a trespasser *ab initio*.

Then as to damages. Having regard to the facts of the case shewing clearly the tendency to affect injuriously the financial

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status of the plaintiffs by the acts of the defendants, I do not consider the learned trial judge erred either in giving exemplary damages, or in the amount awarded.

I would dismiss the appeal.

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New trial ordered as to damages, Morrison, J., dissenting.

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Water record—Grants of water rights to power company and municipality, conflict of—Riparian rights, doctrine of—Whether in force in British Columbia—Apprehended damage—Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190—B.C. Stats. 1899, Cap. 77, Sec. 2, and 1900, Cap. 44—Damages.

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Having regard to Lord Blackburn's examination of *Bickett* v. *Morris* in *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839 at p. 852 *et seq.*, and the remarks of Fitzgibbon and Barry, L.JJ., in *Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560, the law is not that any sensible interference with the bed of a stream is *per se* actionable, but that there must be either actual damage, or a reasonable possibility of damage, to give a good cause of action; and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the case.

Held, further, that in this particular case the defendants had discharged the onus, having regard to the evidence taken since the trial by leave of the Full Court.

APPEAL from the judgment of IRVING, J., in a trial had before him at Nelson, August 8th, 1905.

The facts, and the holding at the trial, which are very fully set out in the judgment of the learned trial judge, may be concisely stated as follows:

Statement

Plaintiffs are a power company with certain rights on the Kootenay river. Defendants are a municipality, and are con-

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structing above the plaintiffs' canal an electric plant to supply electricity to the City of Nelson. The plan of their operations includes the excavation of a quantity of rock. So much of this rock as they did not require for building purposes they proposed to dump into a pool immediately below, while a portion of the rock would, of necessity, through blasting, be thrown into the river both above and below the falls. This undertaking was authorized by an order in council passed under the provisions of Cap. 44 of the statutes of 1900.

The plaintiffs alleged that the dumping of the rock would be injurious to them by damming up the river and reducing their head of water; that at high water a large quantity of rock will be carried down to the plant at the lower falls, thereby filling up the canal, injuring the machinery and lessening the supply of water there, and that their power site at the lower falls would be damaged by the deposit of rock and other material brought down at high water.

The evidence established that the defendants were throwing the rock and other material excavated on the bank of the river in such a way that the toe of the embankment would be under high water, and they intended, unless restrained, to deposit the bulk of the waste in the river bed in the pool just under the upper falls.

Statement

It was held by IRVING, J., on the evidence before him, and following *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47, that if there is reasonable prospect that the undertaking of the defendant corporation will produce any damage to the lower riparian owner, then there is a right of action, although no actual injury is shewn to have resulted from it.

A. H. MacNeill, K.C., and *Lennie*, for plaintiff Company.
Bodwell, K.C., and *P. E. Wilson*, for defendant Corporation.

IRVING, J.: The plaintiffs are a power company incorporated by Cap. 63 of 1897, and own all the land on the north bank of that portion of the Kootenay river now under discussion.

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By Cap. 77, B.C. Stat. 1899, certain grants of water assigned to the plaintiffs were confirmed to them, and they were given all the rights and privileges which they would have been entitled

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to if they had been incorporated under Part IV. of the Water Clauses Consolidation Act, 1897.

They have now in operation at the lower Bonnington falls an hydro-electric power plant consisting of a canal 25 feet wide, 15 feet deep, and 600 feet long, leading from the Kootenay river above the falls to a concrete dam situate below the falls, through which dam are placed chutes for the purpose of conveying water to three turbine wheels by which the electricity, some 5,000 horse power, is at present being generated.

They are now constructing a more extensive hydro-electric power plant on the north side of the river at the upper Bonnington falls. They are also the owners of a power site on the south side of the river at the lower Bonnington falls.

The defendants, the City of Nelson, is constructing on the south side of the river, at the upper Bonnington falls, some 3,000 feet above the plaintiffs' canal, an hydro-electric plant for the supply of electricity to the City of Nelson. The plan of their operations includes the excavation of 17,000 yards of rock. This rock, or rather so much of it as they do not require for building purposes, they propose to dispose of by dumping into the Kootenay river in a pool situate below the upper falls. Some of the rock will of necessity be thrown in the blasting operations, into the river as well above as below the upper falls.

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The defendants' undertaking is authorized by an order in council (B. C. Gazette, 6th April, 1905, p. 634) made by the Lieutenant-Governor in Council under the provisions of Part IV. of the Water Clauses Consolidation Act as amended in 1900, Cap. 44. A slight alteration has since been made in the plan by substituting vertical setting for the wheels in lieu of a horizontal setting intended.

The plaintiffs allege that the dumping of rock will be injurious to them in some of the following three ways: First, that the rock will dam up the river at a point called the rapids, thereby reducing the head which they, the plaintiffs, would otherwise obtain at their new works at the upper falls. Second, that at high water a large quantity of rock and sand will be carried down by the current to the plant at the lower Bonnington falls, and will cause the canal there to be filled with rock

and sand, and thereby injure the machinery and lessen the supply of water at that place, or the rock will lodge in the narrow channel, and that the supply of water at the lower falls will be materially lessened. And third, that their power site on the south side of the river at the lower falls will be damaged by the deposit there of rock and other material which will be brought down at high water.

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The defendants' authority, derived by order in council, does not touch the question of the disposal of this rock, permission to throw their waste into the river is not given, nor is the order in council to be read as authorizing the work sanctioned, to be done negligently or in such a way as unnecessarily to cause damage to plaintiffs. The permission however, does not contemplate a substantial dealing with the bed of the river above the falls, *i. e.*, by constructing a canal to be formed partly in the river bed with a masonry retaining wall. That part of the work is not now in question. The complaint is limited to the disposition of the waste rock.

The contentions raised by the plaintiffs depend to a great extent upon the transporting capacity of the river at high water with reference to rocks and waste material placed in it.

The plaintiffs say that in the years 1898 and 1899 little or no material was found in their canal, but that in the following years, when a railway contractor in making improvements on the line of railway caused large quantities of rock to be dumped into the river, the quantity of material found in their canal after each high water was very much increased. The figures after the high water of 1901 shew that they took out 1,000 yards; after 1902, 300 yards; after 1903, 2,000 yards, and after 1904, 2,200 yards, and now, after the high water of 1905—I take it the high water is now over—something like two feet of *detritus* is to be found in their canal in front of their racks.

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They called seven witnesses who deposed to the above, and, in the main, agreed with them that the dumping of rock would increase the tail water in the first pool and so spoil the head of water for their new works at the upper falls, or the rocks and other material would at high water go down the river and enter their canal at the lower falls, and that some had already lodged

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in such a position as to injure their property on the south side of the river.

With reference to these annual accumulations in the canal the plaintiffs must remember that it is to be expected that a deposit of silt, sand, stones and gravel will be made naturally by the river. What the extent is of this natural deposit they have not informed me. They refuse to say what proportion of the material found in the canal was large rock and what was not. I do not think they are quite frank with me in that respect. I think the plaintiffs, perhaps unconsciously, are mistaken as to the amount of material actually taken out. Where the large piece of rock which was found in their canal came from I cannot say. It may have been a relic of the roughly finished work at the intake, or was never taken out, although I am quite prepared to believe that it rolled in from the bank. I am not satisfied that the banks and sides of the canal have been cleaned off as thoroughly as Mr. Campbell would have me believe. The tremendous size of this rock would satisfy the ordinary labouring man, or even the conscientious foreman, that it could be safely left on the bank. Although I recognize the tremendous power of water, I can hardly believe that this huge piece of rock rolled down the bottom of the river and from a point some distance above the intake, and mounted up over the precipice left by Gallagher, and so reached the canal.

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The difficulty I have in dealing with the case is that so much is left to conjecture. No measurements of the depth of water in either of the pools below the falls, or in the rapids, have been taken. Nor have I evidence as to the direction of the sub-surface current. Nor have I definite evidence as to the rate of the current, during high water, below the first falls, nor as to the character of the bottom of the river between the two falls. These factors seem to me to be the most important in determining the transporting capacity of the river and therefore the question whether or not there will be injury to the plaintiffs.

That a rapid stream such as the Kootenay, will transport large quantities of silt, sand and gravel and shingle, and even pebbles, in suspension, and large stones by rolling along the bed of the channel, cannot be disputed. The rate of progress of any

particular rock is quite uncertain; that would depend on its shape, weight, the character of the bottom, and the velocity of the stream. These four factors would themselves vary from time to time, as the shape becomes more rounded; the weight decreases as the rock becomes smaller, so the retarding forces diminish, but the tendency of the river to clear its course by shoving all material down stream remains constant. What will take place after a rock is thrown into the river is all surmise. What the effect will be of depositing this large quantity of rock on the bed of the stream there are no data to enable me to form a definite opinion.

The witnesses for the plaintiffs, as well as the witnesses for the defendants, were either employees of the parties to the action, or were expert witnesses, and in that way are liable to be biassed. The experts do not appear to have more bias than that which experience shews us always operates on the minds of professional or scientific persons when called upon to give expert evidence as to matters relating to subjects in which they are skilled.

The evidence establishes that the defendants are throwing rock and other material excavated on the bank of the river in such a way that the toe of the embankment will be under high water, and they intend unless restrained to deposit the bulk of the waste in the river bed in the pool just under the first falls.

Their experts say that this embankment will remain there, that embankments always remain unless put on a sand bottom; that the rocks deposited in the pool will not be washed out. They are of opinion that if any rocks could by any possibility be washed out of the pool they would not lodge in the rapids but would be carried down. As they know nothing of the depth of the pool or of the nature of the bottom of the river between the two falls, and as the velocity of the river below the falls is admittedly eight or ten feet per second (that is three times the velocity required to move shingle) their evidence does not convince me that no injury will result to the plaintiffs.

On the contrary it seems clear that if they deposit this waste in the river bed as they propose, a certain amount of gravel,

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etc., is bound to be carried down, and it cannot be positively asserted that small pieces of rock will not go down.

If carried down, it is not possible to say that it will all pass clear of the plaintiffs' canal. The sudden drop which Gallagher says exists at the mouth of the canal will protect the canal to a certain extent, but what will happen in the course of time is impossible to conjecture.

In this state of uncertainty the question of onus of proof is of importance. In my opinion the onus is on the defendants. The plaintiffs' certainty or high probability of a lasting source of water is not to be interfered with unless directly taken away by legislative authority. It is for the defendants to shew that the deposit of some 10,000 yards of material in the bed of the river will not prejudically affect the plaintiffs' works.

The case of *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47, decides that whatever sensibly interferes with the channel of the river is actionable, unless the court is satisfied that there will not be any injury resulting from it, either now or hereafter.

If there is a reasonable prospect that it will produce any damage to the opposite or lower riparian owner, then that gives a right of action, although no actual injury is shewn to have resulted from it.

The plaintiffs have not satisfied me that they have received any injury, but the defendants have not satisfied me that there are no reasonable grounds for apprehending injury. On the contrary, I feel that the consequence of the defendants dumping their waste into the river will be to aggravate the trouble the plaintiffs now experience in dealing with gravel and stones which are being swept into their canal by the current, and that there is a reasonable prospect of injury resulting.

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It was pressed upon me in argument that it was of public importance that the City of Nelson should be allowed to proceed with their work and that the plaintiffs should be left to sue for damages when they are able to prove that they have received any. It is of far more importance to the public that the sacred character which the law attaches to private property should be respected. Blackstone says:

"So great is the regard of the law for private property that it will not

authorize the least violation of it; not even for the general good of the whole community.

". . . . The public good is in nothing more essentially interested than in the protection of every individual's private rights, as modelled by the municipal law."

In connection with this last point I would call attention to the following remark made by the Lords of the Privy Council in the case of *Trinidad Asphalt Company* v. *Ambard* (1899), A.C. 594 at pp. 602-3:

"One argument was addressed to their Lordships which, perhaps, ought to be noticed. It was said that digging for pitch was the common industry of La Brea, and that if an injunction were granted the industry would be stopped altogether. In the first place there is no evidence that that would be the result. Whatever the result may be, rights of property must be respected, even when they conflict, or seem to conflict, with the interests of the community. If private property is to be sacrificed for the benefit of the public, it must be done under the sanction of the Legislature, which can, and generally does, provide compensation. If the inhabitants of La Brea cannot dig their own pitch without invading their neighbours' rights, it is quite possible that the hope of reciprocal advantage and the apprehension of mutual liability may lead to some arrangement for their common benefit, or the difficulties of the case may induce the Legislature to step in and regulate the digging of pitch and the management of the pitch lands."

The injunction will be continued, and the plaintiffs will recover their costs of this action.

The defendant Corporation applied to the Full Court, consisting of MARTIN, DUFF and MORRISON, JJ., for leave to submit fresh evidence as to depths and the force and velocity of the current, which was not before the trial judge, and leave was given, MARTIN, J., dissenting.

The appeal was argued at Victoria before HUNTER, C. J., MARTIN and MORRISON, JJ., on the 10th and 12th of January, 1906.

Bodwell, K.C., for the appellants: This appeal is based upon three grounds: (1.) The respondents have not proved any actual damage to their property, nor have they shewn that there is any reasonable apprehension of damage occurring to them; (2.) The works which the appellants are carrying on are for the benefit of the inhabitants of the municipality of Nelson, and even if it

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is assumed that some damage may be suffered in the future by the respondents, in consequence of the construction of the appellants' works, this case is not one for an injunction. The respondents should be left to their action at law, since damages would be an adequate remedy; (3.) The learned judge below was not satisfied that any damage would occur to the respondents, nevertheless he considered under the authority of *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47, that they had a right to prevent the bed of the stream being obstructed. *Bickett* v. *Morris*, however, is based on the common law doctrine of riparian rights, which does not prevail in British Columbia, and the appellants therefore contend that actual damage, or a reasonable apprehension of damage to come, must be proved. The fact of the plaintiffs' canal filling up, and having to be cleaned out from year to year, is the result of defective work on their part rather than any act of the appellants. The appellants challenge the *bona fides* of the action, as by the construction of these works the respondents will lose a customer worth $10,000 to $12,000 per annum, and the City will obtain an independent lighting system of their own. Only a portion of the 17,000 yards of rock proposed to be excavated by the City will find its way, by blasting, into the river, whereas for years the work of railway construction has been going on and thousands of yards of rock have been thrown into the river. The

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contention of the plaintiffs that large pieces of rock from our works were carried down the river in suspension was so untenable that it was abandoned at the trial. It is unreasonable to suppose that pieces of jagged rock from blasting operations can be moved along the bed of the river; boulders may possibly be moved along a clear surface. There are no boulders in plaintiffs' canal or intake, but there are large pieces of rock, and it is evident that these came from the plaintiffs' own works.

The respondents claim that large masses of rock are carried by the force of the current a mile or so down the bed of the river, across the deep channel and the current of the river, and are carried up a steeply sloping bank into the canal. This suggestion is opposed to all the rules of natural law.

The effect of *Bickett* v. *Morris, supra,* was very fully dis-

cussed in *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839 at pp. 854, 860 and 861. He also referred to *McCartney* v. *Londonderry and Lough Swilly Railway* (1904), A.C. 301 at p. 304, where the case of *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company* (1875), L.R. 7 H. L. 697 at p. 705 is discussed; *Embrey* v. *Owen* (1851), 6 Exch. 353 at p. 368; *Miner* v. *Gilmour* (1858), 12 Moore, P.C. 156; *Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560 at pp. 565, 576 and 579; *Withers* v. *Purchase* (1889), 60 L.T.N.S. 819; *Lux* v. *Haggin* (1886), 10 Pac. 674 at pp. 753-763, where the leading English and American cases are cited; *Sampson* v. *Hoddinott* (1857), 26 L.J., C.P. 148.

The respondents in this case have not shewn any real danger to their works arising from the acts of the appellants. Their case is one of speculation based upon an erroneous application of certain scientific laws relating to the power of water to move heavy bodies.

Bickett v. *Morris* was also discussed in *Palmer* v. *Persse* (1877), Ir. R. 11 Eq. 616. In all these cases it is shewn that *Bickett* v. *Morris* was decided on the common law doctrine of riparian rights.

The case of *Doe Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82 at p. 84, deals with the subject of the introduction of English law into a colony. The early settlers of British Columbia had the idea, and put it into operation, that any person, whether land owner or miner, might divert water from a running stream and apply such water to a beneficial purpose, and streams were being constantly diverted and applied to mining purposes: see *Martley* v. *Carson* (1889), 20 S.C.R. 634 at p. 658. It was sanctioned in the beginning of legislation in this country, and the right to divert water for mining and agricultural purposes to lands away from the stream was always recognized. He referred to the Proclamations of the 14th of February, 1859, and January, 1860; Land Ordinances of 1865 and 1870; Cap. 70 R.L. 1871; Cap. 144, R.L. 1871; the Water Privileges Act, 1892, Sec. 2, and the Water Clauses Consolidation Act, 1897, Sec. 2.

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In this case no proprietary interest of the respondents is

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invaded. The appellants are performing a lawful act upon their own land. The respondents cannot be injured unless their right of access is disturbed, or their power to use the water for ordinary purposes is destroyed. They must shew by clear and satisfactory proof that the appellants are performing their work in a negligent manner, and that some sensible, appreciable damage is occasioned to the respondents by the methods employed. Such a condition will not be presumed. The injury must be a real injury and the fact must be clearly proved by the respondents, upon whom the onus of establishing the case now rests. They must further satisfy the court that the injury is of a character which cannot be compensated in damages.

W. A. Macdonald, K.C., on the same side, cited *Edleston* v. *Crossley and Sons, Limited* (1868), 18 L.T.N.S. 15, on the application of *Bickett* v. *Morris, supra.* An injunction should not have been granted on apprehended damage in circumstances such as are present here. The question of riparian rights is settled by the statute; the Government could, under the provisions of the statute, divert the whole of this stream.

[MARTIN, J., referred to *Dixson et al.* v. *Snetsinger* (1873), 23 U.C.C.P. 235].

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As to the limits of the land granted to the respondents, he cited *Coleman* v. *Robertson* (1880), 30 U.C.C.P. 609 at p. 621. In the case at bar, the Crown by its grant has defined the line of the land granted, and we submit that, according to this grant, the Crown owns the bed of the river. The respondents have not got any more land than is shewn in the grant: see *Barthel* v. *Scotten* (1895), 24 S.C.R. 367.

[HUNTER, C.J.: The question at issue is not so much as to riparian rights, but whether the river is being made the vehicle of possible damage to the plaintiffs by the operations of the defendants, which is entirely independent of the question of riparian rights.]

A. H. MacNeill, K.C., for the respondents: As to the question of *bona fides*, or *mala fides*, in bringing this action, the plaintiffs have invested some $1,800,000 in their enterprise, and it should not be imperilled by the works of the defendants or

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by any other similar undertakings. On this point he referred to *Goodson* v. *Richardson* (1874), 9 Chy. App. 221; *Cowper* v. *Laidler* (1903), 2 Ch. 337. A power plant, supplying power for commercial purposes, which once becomes subject to interruptions is bound to suffer in reputation, and consequent loss of business. At a trifling extra cost per yard appellants could safely dispose of the rock complained of.

[*Per curiam*: It is not necessary for you to shew the cost, whether great or small, of disposing of this rock. If you are certain to be damaged by the appellants' works, you are safe within the doctrine of *Bickett* v. *Morris*].

Bickett v. *Morris* is the *Magna Charta* of our rights in this action. The doctrine in *Bickett* v. *Morris* depends on the right to the use of the land and not the water: see the language of the Lord Chancellor at p. 53. It is the encroachment affecting the natural flow of the water which is the *injuria*. He referred to *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839.

[HUNTER, C.J.: Lord Blackburn's remarks in that case tend to shew that it is not *ipso facto* illegal to place an obstruction in the stream].

No; it is *ipso facto* illegal, unless the party erecting it can shew that there is no possibility of damage. *Palmer* v. *Persse*, *supra*, and the cases cited by Mr. *Bodwell*, are all cases dealing with the use of the water; *Bickett* v. *Morris* is as to the use of the land; it is a case decided by English judges, and the English cases re-affirm *Bickett* v. *Morris*: see *Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560 at p. 579; in *Attorney-General* v. *Terry* (1874), 9 Chy. App. 423, the obstruction complained of extended three feet into a stream sixty feet wide, whereas here it is proposed to go forty-five feet out into a pool seventy-five feet wide.

Argument

[HUNTER, C.J.: That was an interference with a navigable stream; this is a deep hole below a cataract in a mountain river].

Withers v. *Purchase* (1889), 60 L.T.N.S. 819, was cited by appellants. In that case defendants wanted to take away; here they want to add to the bed of the stream. He

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also referred to *Kensit* v. *Great Eastern Railway Co.* (1884), 27 Ch. D. 122; *Menzies* v. *Breadalbane* (1828), 32 R.R. 103 at p. 106.

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As to the ownership of the bed of the stream, see *Lord* v. *The Commissioners for the City of Sydney* (1859), 12 Moore, P.C. 473, shewing that, unless the bed of the stream is specifically excluded, it goes with the grant; also *The Queen* v. *Robertson* (1882), 6 S.C.R. 52 at p. 79.

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Even admitting appellants' statement that the blasted rock complained of will remain where it is now being put, then they are infringing the rule in *Bickett* v. *Morris* by interfering with the stream. The rock may jam at the narrows and cause an obstruction there, and the filling up of these pools or pot-holes will have the effect of reducing our head of water and thus interfere with our works.

Argument

As to damages, he cited *Shelfer* v. *City of London Electric Lighting Company* (1895), 1 Ch. 287; *Martin* v. *Price* (1894), 1 Ch. 276; *Dreyfus* v. *Peruvian Guano Company* (1889), 43 Ch. D. 316; *Roberts* v. *Gwyrfai District Council* (1899), 2 Ch. 608; *Hill* v. *Smith* (1865), 27 Cal. 476 at p. 482, affirmed in (1867), 32 Cal. 166; *Canadian Pacific Railway* v. *Parke* (1899), A.C. 535.

Appellants are not constructing the works they were authorized to construct.

Bodwell, in reply, cited *Ormerod* v. *Todmorden Mill Co.* (1883,) 11 Q.B.D. 155.

Cur. adv. vult.

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HUNTER, C.J.: The facts as they appeared at the trial are stated in the judgment of the learned trial judge, and there is no need to repeat them.

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The appeal coming on to be heard, the defendants applied for leave to bring further evidence which could not have been obtained for the trial owing to the river being too high to make it possible to take any soundings. The motion was granted, with the result that, in my opinion, they are now entitled to judgment.

The action is for apprehended damage simply, and not for

actual damage proved to have been done to the plaintiffs' property by reason of the operations of the defendants.

There is no doubt that the learned judge was quite right in his view that the nature and depth of the bottom of the river between the two falls was an important factor to be taken into account in coming to a conclusion as to the possibility of rock being delivered at the plaintiffs' intake or jamming the river at the first rapids, and so reducing the head of the upper falls. No accurate evidence was before him as to the depth of the pools or the rapids, but the evidence taken since the trial is clear to the effect that the upper pool opposite the defendants' works is of sufficient depth and size to make it impossible, unless by a convulsion of nature, for any rock which falls into it by reason of the defendants' projected operations to reach the plaintiffs' intake.

It is a pool, roughly speaking, 400 feet in diameter at low water, and varies in depth from ten or twelve feet to fifty feet or more, being deepest near the south shore on which side the defendants' works are being constructed. The plaintiffs are now forced to contend that angular pieces of rock which may get into this pool either by slipping away from the embankment, or by being deposited by the defendants on the shore of the river, or by being discharged into it by blasting, and which, having regard to the quantity which the defendants propose to blast, cannot by any possibility raise the floor of the pool more than a foot or two, will climb up out of the pool onto the floor of the first rapids below, which is not more than half the depth of the pool, and will either jam there or go on down and visit the plaintiffs' intake. Before the rock reaches the intake, however, it will first of all have to go down into a deeper and longer pool than the upper one; it will then have to mount another rapids, the floor of which is about twelve or fifteen feet higher than the bottom of that pool; it will then have to descend into another pool which is about 40 feet deep in the centre and about 1,200 or 1,300 feet long, then strike across the current and go up hill into the plaintiffs' intake.

There is no evidence to shew that the rocks through which the Kootenay rolls are less liable to the laws of gravitation than

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other rocks except that of the witness who talks of "rocks four feet under water travelling down and not touching anything," and therefore I must conclude that there is no appreciable danger that they will steeple-chase down the river in the alarming manner suggested by the plaintiffs.

As to jamming up the rapids and so reducing the head, it will be time enough to complain of that when the defendants' operations are conducted on so gigantic a scale as to threaten to raise the bottom of the pool to the level of the floor of the rapids.

No doubt a river like the Kootenay carries, and will inevitably carry down a large amount of *detritus* from different sources during the year, and especially at high water, and the plaintiffs will always have to make provision against it, but the quantity of matter that will be contributed by reason of the defendants' operations as explained to us will be so minute in amount as to make it easy to apply the maxim *de minimis*.

I notice that the case is overloaded with the opinions of experts, but in view of the evidence which was not before the learned trial judge, I am glad to think they need now have no terrors for us if we but resort to the knowledge which is common to us all.

I may say I am not favourably impressed with the *raison d'etre* of this suit, and having regard to the fact that the establishment of the defendants' undertaking means the loss of one of the plaintiffs' largest customers, and that the plaintiffs were baffled in their attempts, under colour of the Mineral Act, to occupy the *situs* of the defendants' plant in order to obtain a monopoly of the power of the river, this last attempt to harrass the defendants should not receive any encouragement from this Court by a strained application of the rule laid down in *Bickett* v. *Morris*. Taking the Lord Chancellor's opinion as the ruling opinion, no doubt the Lords in that case laid down the rule that any interference with the bed of the stream may give a cause of action to any other riparian proprietor who is likely to be injured thereby, and that upon such proprietor complaining of the interference, the onus is on the other party to shew that there is no real ground for apprehension. But like all decisions which lay down a general principle, the language of the judges

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must be taken *sub modo*, and regard must be had to the circumstances of the particular case. It is obvious that an erection which would create a serious obstruction in a creek like the Kilmarnock (which the official report says was not more than two feet deep in that part of its course under discussion, and the report in 14 L.T.N.S. says was 58 feet wide) would not be seriously considered in the case of a river like the Columbia or the Fraser except under the most peculiar conditions. A large boulder, which would be lost in one of the abysses of the Kootenay, if thrown into the Kilmarnock at the spot dealt with in the decision, would split up the current with every probability that one or other bank would be eroded to the damage of the riparian owner. It is plain, therefore, that care should be taken in applying a decision which sprang out of litigation over a shallow creek to a river of the dimensions of the Kootenay, and in this case I think it is clear that the plaintiffs cannot reasonably apprehend any injury from the operations as at present conducted by the defendants.

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But Mr. *MacNeill*, relying on certain language to be found in the speeches of Lords Cranworth and Westbury, contended that *Bickett* v. *Morris* in effect decided that he was only called upon to shew that the defendants had sensibly interfered with the bed of the river, and that such interference was *ipso facto* actionable. But having regard to Lord Blackburn's examination of that case in *Orr Ewing v. Colquhoun* (1877), 2 App. Cas. 839 at p. 852 *et seq.*; and the remarks of Fitzgibbon and Barry, L.JJ., in *The Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560, I think the contention cannot be maintained and that the law is not that any sensible interference is *per se* actionable, but that there must be either actual damage or a reasonable possibility of damage to give a good cause of action, and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the particular case. In this case, as I have already said, the additional evidence has made it perfectly clear that the plaintiffs cannot reasonably apprehend any damage from the proposed operations, and the extra amount of silt which may be brought down the river as the result is so small that it may be neglected.

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It was contended by Mr. *Bodwell* that the common law in relation to riparian rights was not introduced into this Province, and that in any event, having regard to the true construction of their grants, the plaintiffs were not riparian proprietors within the scope of the Lords' decision. It is, however, unnecessary for me to consider just now how far, if at all, these contentions are sound, as I am prepared to decide this case on the assumption that the common law as to the rights of riparian proprietors obtains in this Province except so far as altered by statute, and that the plaintiffs are riparian proprietors within the scope of *Bickett* v. *Morris*, and giving that decision, as I understand it, full force and effect.

In my opinion, the appeal should be allowed, and the action dismissed without prejudice to any future action by the plaintiffs.

MARTIN, J.: In the first place, it is necessary to determine whether or no the English law respecting the rights of riparian owners is or was "from local circumstances" inapplicable within the meaning of the English Law Ordinance, 1867, R.L. B.C. (1871), Cap. 70, or rather of the original Proclamation of November 19, 1858. That Proclamation is as follows:

"It is therefore hereby enacted and proclaimed by the Governor of British Columbia that the Civil and Criminal Laws of England, as the same existed at the date of the said Proclamation of the said Act, and so far as they are not, from local circumstances, inapplicable to the colony of British Columbia, are and will remain in full force within the said Colony, till such times as they shall be altered by Her said Majesty in Her Privy Council, or by me, the said Governor, or by such other Legislative Authority as may hereafter be legally constituted in the said Colony; and that such Laws shall be administered and enforced by all proper Authorities against all persons infringing and in favour of all persons claiming protection of the same Laws."

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It was made at Fort Langley on the same day that the Governor, the judge (Mr. Justice BEGBIE), and other high officials took the oaths of office at that Fort, when the new Colony of British Columbia was formally established. It should be remembered that the adjoining colony of Vancouver Island had a Governor since 1849 (Blanshard) and that his Court was established on 2nd December, 1853: see *Attorney-General* v. *E.*

& N. Ry. Co. (1900), 7 B.C. 221 at pp. 233-4. The Colony of Vancouver Island was founded in 1843 by the Hudson's Bay Company, with the erection of the Fort at Victoria, but long before that time the same company had many permanent establishments west of the Rocky Mountains in what is now the mainland of this Province; a list of them may conveniently be seen in the San Juan Boundary Arbitration Case, submitted to the German Emperor—British Case (1873), 2nd Statement, p. xxv. Fort Langley itself, the first seat of Government of the new Colony of British Columbia was founded in 1827, and the dates of the founding of many other forts will be found in the British Columbia Year Book, 1897, p. 73. I mention these facts to shew that the question does not depend, as was suggested, upon the habits or customs of miners, for English law was brought here by the early settlers long before the discovery of the precious metals, for the various dates of which see 1 M.M.C., Historical Preface, p.v.

In the reference above given in the San Juan Boundary Case, at p. xxii., there is a note on the former jurisdiction of the Court of Upper Canada to the Pacific, and in a series of articles on the rise of law in Rupert's Land in Vol. 1 of Western Law Times (1890), pp. 49, 73 and 93 (referred to in Clement's Canadian Constitution, 2nd Ed., 366) I have dealt at length with the same subject, and at p. 93, cite the case of La Pierre, who was transmitted from this side of the Rocky Mountains to Canada for trial under the Canada Jurisdiction Act, 1803, charged with cannibalism and murder committed near the source of the Columbia river. Later, further and more complete jurisdiction was conferred on July 2nd, 1821, by the "Act for regulating the fur trade and establishing a criminal and civil jurisdiction in certain parts of North America": 1 & 2 Geo. IV., Cap. 68.

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This question of the introduction and application of English law was considered at length by Mr. Justice Killam in *Sinclair* v. *Mulligan* (1886), 3 Man. L.R. 481, affirmed on appeal (1888), 5 Man. L.R. 17, and applying it and, *inter alia*, the cases of *Doe Anderson* v. *Todd* (1845), 2 U.C.Q.B. 82; and *Jex* v. *McKinney* (1889), 14 App. Cas. 77, to the hereinbefore mentioned circumstances, I am of the opinion that the English law respecting the

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rights of riparian owners was applicable to this country. It is interesting to note that the California case cited by Mr. *MacNeill, Hill* v. *Smith* (1865), 27 Cal. 476, shews that the Supreme Court of that State reached a similar conclusion in 1865.

Then as to the right to the bed of the stream derived by the plaintiff from its Crown grant. The appellant contends that the grant should be construed as though the boundary was defined by metes and bounds to stop at the water's edge with nothing beyond. After an examination of the cases cited, I am of the opinion that it was not the intention here to so restrict the grant, but that the conveyance, according to the small plans thereto attached, meant that the land was to extend generally to river bank, in the customary manner in the case of non-navigable streams, and that therefore the grantees should take to the middle of the stream, on the principle laid down in *Lord* v. *The Commissioners for the City of Sydney* (1859), 12 Moore, P.C. 473 and *The Queen* v. *Robertson* (1882), 6 S.C.R. 52, 2 Cartw. 65, particularly at pp. 102-6 in the judgment of Mr. Justice Strong. The nature of the Kootenay river at the points in question is even more in accord with this view than was the Miramichi in the latter case as described by the Chief Justice at p. 86, and yet the Supreme Court experienced no difficulty in applying to it the English common law rule. This case comes within the general principles stated by Chief Justice Wilson in *Coleman* v. *Robertson* (1880), 30 U. C. C. P. 609 at p. 620:

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> "A grant of land to the river, or margin or edge of it, or to the bank, or along the river, will *prima facie* carry the grant to the *medium filum aquæ*."

Coming then to the main branch of the case. The plaintiff relies on *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47; 14 L.T. N.S. 835; but the defendant contends that this case is not within that decision and alternatively that the effect of the Water Clauses Consolidation Act is to deprive it of any force in the circumstances. Also, it is urged, that subsequent cases have explained that decision so that we must apply it in a more restricted sense than would appear from an unaided perusal of

it. Several cases were cited and I have examined them all and must confess I find it difficult to say what is the precise effect of them, so much do they vary in circumstances as well as in expression. In *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839, there is no doubt that some of the language used by Lord Blackburn would materially limit the effect of *Bickett* v. *Morris*; but one member of any court could not in the guise of explaining a binding decision refine it away or narrow its scope. And in any event he is not by any means fully supported in his views by Lords Hatherley and Gordon, the former of whom says "that case itself was of a totally different character from the case raised here" (p. 845), and the latter at p. 853, says:

"And I understand the principle of *Bickett* v. *Morris* to be that where an erection is a present sensible *injuria* to the proprietary right of the owner of the other part of the *alveus*, or of the opposite bank of a running stream, he may have it removed on the ground that there is a present injury to the right of property, if it is impossible to predicate that it may not produce serious damage in future, though the complaining party is not yet in a position to qualify present damage."

This definition of an injury, without present damage, to a right of property is in favour of the plaintiff. The case of *Palmer* v. *Persse* (1877), Ir. R. 11 Eq. 616, afterwards considered in *Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560, places a construction upon *Bickett* v. *Morris* which is also in favour of the present plaintiff (p. 623), but it may be said that it does not consider what the effect of *Orr Ewing* v. *Colquhoun* may have been. *Edleston* v. *Crossley and Sons, Limited* (1868), 18 L.T.N.S. 15, is of no assistance because it does not state what Vice-Chancellor Wood thought the general principle was, and it was distinguished on the facts. In *Withers* v. *Purchase* (1889), 60 L.T.N.S. 819 at p. 821, Mr. Justice Kekewich said that *Bickett* v. *Morris*

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"recognizes the *de minimis* rule while establishing the principle (see judgment of Lord Westbury) that it is not necessary to prove that damage has been sustained, or is likely to be sustained. The real question here, as in every such case, is, whether, having regard to all the circumstances, the acts complained of may reasonably be considered to import injury present or prospective to the party complaining. There is no occasion for this purpose minutely to investigate the acts of the defendants."

Perhaps the case most in favour of the appellants' contention is

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Belfast Ropeworks Co. v. *Boyd, supra*; but in my opinion uncertainty is introduced into the whole decision because of the remark of Lord Justice Fitzgibbon (p. 580), who, after stating his opinion on the real decision, excepts it "at least in any other case than that of *ex adverso* or immediately adjacent proprietors." Now, in the case at bar the plaintiff is proprietor in both these senses, and the ground affected by the alleged wrongful acts is building land of a peculiar and exceptional value, being the site of a very extensive and costly power plant. I mention this fact because some language in certain of the cases seems inferentially to lay stress on a building value as being important in certain circumstances. My own view of *Bickett* v. *Morris* is more in accord with that of Vice-Chancellor Chatterton as expressed in *Palmer* v. *Persse, supra*, but I quite realize that the point is so far from clear that Mr. *Bodwell* may very plausibly, at least, argue the contrary, and I should be glad if a question of this importance and difficulty should be set at rest by a higher tribunal. To read that case alone, it seems to be clear what the court intended to hold as a general principle. Lord Westbury says, p. 838:

> "My Lords, this is a case of very considerable importance, because, as far as I know, it will be the first decision establishing the important principle that a material encroachment upon the *alveus* of a running stream may be complained of by an adjacent or an *ex adverso* proprietor without the necessity of proving either that damage has been sustained, or that it is likely to be sustained from that cause."

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And later on:

> "It is wise, therefore, in a matter of that description, to lay down the general rule that, even though immediate damage cannot be alleged, even though the actual loss cannot be predicted, yet if an obstruction be made to the current of the stream, that obstruction is one which constitutes an injury in the sense that it is a matter the court will take notice of as an encroachment which adjacent proprietors have a right to have removed."

Some of Lord Cranworth's language is peculiarly applicable to the present case:

> "Rivers are liable at times to swell enormously from sudden floods and rain, and in these cases there is danger to those who have buildings near the edge of the bank, and indeed to the owners of the banks generally, that serious damage may be occasioned to them. It is impossible to calculate or ascertain beforehand what may be the effect of erecting any building in the stream so as to divert or obstruct its natural course."

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And again:

"Lord Benholme says truly that what may be the result of any building in the *alveus* no human being knows with certainty. The owners of the land on the banks are not bound to obtain or to be guided by the opinions of engineers or other scientific persons as to what is likely to be the consequence of any obstruction set up in waters in which they all have a common interest. There is in this case, as in all such cases there ever must be, a conflict of evidence as to the probable result of what is done. The law does not impose on riparian proprietors the duty of scanning the accuracy or appreciating the weight of such testimony. They are allowed to say 'We have all a common interest in the unrestricted flow of the water, and we forbid any interference with it.' This is a plain, intelligible rule, easily understood and easily followed, and from which I think your Lordships ought not to allow any departure."

He goes on to say that the court would not "speculate on an infinitesimal obstruction," or as the Lord Chancellor puts it:

"If the encroachment is not of a slight and trivial but of a substantial description, it must always involve some risk of injury."

And again:

"But any operation extending into the stream itself is an interference with the common interest of the opposite riparian proprietor, and therefore the act being *prima facie* an encroachment, the onus seems properly to be cast upon the party doing it to show that it is not an injurious obstruction."

Herein the obstruction extended somewhat, and would, if it had not been prevented by an injunction, have extended further into the stream itself, and admittedly upon what is the *alveus* thereof. It is impossible to say what the effect of the obstruction would have been upon such a stream as the Kootenay. It is not what is to be expected at low water, but what may happen at ordinary high water that has to be taken into account, and one witness stated that he estimated the maximum flow as being thirty times greater than the minimum. Nor should I be at all surprised if this were the case, though I wish more evidence was before us on this most important point. It is hard to conceive what would be the effect of such a terrific force and body of water.

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Applying the foregoing rule to the circumstances, I am unable on all the facts now before us, as well as those before the learned trial judge, to hold that there is not a reasonable apprehension of danger resulting from the defendant's operations. Nor can I see that this view of the plaintiff's rights is altered by the

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sections of the Water Clauses Consolidation Act to which we are referred. In my opinion this appeal really turns upon the question of onus. If *Bickett* v. *Morris* means that such is cast upon the defendant, then the plaintiff is entitled to succeed; but otherwise judgment should be in favour of the defendant.

MORRISON, J.: The plaintiffs were incorporated on the 8th of May, 1897, by chapter 63 of the statutes of that year.

Water grants had been made in 1897 to certain persons named McArthur at points known as Bonnington falls, nearly midway between the Kootenay and Arrow lakes on the Kootenay river. These grants were assigned to the plaintiffs and were confirmed to them in 1899 by chapter 77 of the Acts of that year and the plaintiffs now hold them as if they had been incorporated under Part IV. of the Water Clauses Consolidation Act, 1897.

Pursuant to their corporate powers the plaintiffs acquired land along the banks of the Kootenay river between the upper and lower Bonnington falls in 1900, and at present are operating a power plant erected at the lower falls and are constructing an additional plant at the upper falls on lot 1,396 on the north bank, some 3,000 feet distant from the lower falls.

On lot 5,282 on the south bank opposite to and about 650 feet distant from the said lot 1,396, the defendant, the City of Nelson, a patron of the plaintiffs, is erecting a power plant of its own pursuant to powers in that behalf conferred upon it by the Legislature. In the construction of this plant the plaintiffs allege that the defendants are proceeding so negligently and illegally as to create a menace to their works, and as their counsel stated in argument they are depending in their action against the defendants not upon their right to the flow of water but rather upon their rights as riparian owners to the soil or their portion of the *alveus* of the river. And applying, as they understand it, the principle in *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47, they contend that the onus is upon the defendants to shew there is no *injuria* or no reasonable apprehension of damage.

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It seems to me, having regard to the situation and conditions

prevailing here and to the scope of the legislation respecting the powers of the plaintiff Corporation, that the case of *Bickett* v. *Morris, supra*, does not apply and is readily seen to be distinguishable. It may be well to recall in considering that case what the Earl of Halsbury, Lord Chancellor, said in the course of his judgment in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506, that "a case is only an authority for what it actually decides." In *Bickett* v. *Morris, supra*, there was not nor could there be any question as to the title to the bed of the stream, which, by the way, being only two feet deep, was susceptible of being wholly diverted. In the present case the title to the bed of the river is in question. The grants of land along the river bank to the plaintiff Company were given by the government for the purposes of their corporate powers, and the Company by its Act of incorporation in dealing with realty is restricted to the acquisition of such lands as may be used for the purposes contemplated by the Legislature.

"The presumption that, by a conveyance describing the land thereby conveyed as bounded by a river, it is intended that the bed of the river *usque ad medium filum* should pass, may be rebutted by proof of surrounding circumstances in relation to the property in question which negative the possibility of such having been the intention": *Duke of Devonshire* v. *Pattinson* (1887), 20 Q.B.D. 263.

This is an established doctrine not only in England but in the United States of America also: *The Queen* v. *Robertson* (1882), 6 S.C.R. 53 at p. 94, *per* Gwynne, J.

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What are the conditions here? The Kootenay river, particularly at the *locus in quo* is a turbulent, powerful stream (and practically incapable of being wholly or substantially diverted owing to the topography of the country through which it flows and the character of the soil as well as the great volume of water), connecting the large river expansions known as the Kootenay and Arrow lakes in the mountainous portion of British Columbia. The Kootenay lake serves as a natural reservoir for the waters of the Kootenay river which finds its way down through gorges and canyons, and over falls and rapids to the lower waters of Arrow lake, a distance of some thirty miles. The general character of the banks of the river, particularly at the points in

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question herein, which are about midway between the Kootenay and Arrow lakes, is precipitous and rocky, and the channel studded with projecting rocks. From the soundings made after the case had come to appeal, the river bed appears to be extremely irregular, some portions being of a depth of more than 60 feet. Owing to the turbid, inaccessible nature of the pools, as they are called, at the foot of the falls, the soundings could not be completed. The width of the river here varies from 800 feet to 75 feet. I gather from the evidence and statement of counsel that up to 1897 the water of the Kootenay at this point was unrecorded and the lands were Crown lands.

Now the physical conditions existing in that locality preclude the idea that this river or those lands can be used for any purpose other than one over which the Legislature has primary and exclusive control, and for the acquisition or exercise of any right or title thereto, the restricted leave, licence or grant of the Legislature must first be obtained.

The plaintiffs were created for the purpose of developing water power at those points on the river and disposing thereof, and incidentally they are granted certain lands on the banks of and adjacent to the river. In granting such lands in my opinion it was not necessary to express in terms that the grant does not cover the bed of the river. There is clearly an implied reservation, based upon the situation and condition of the land as well as the purpose for which it was granted: *The Queen* v. *Robertson*, *supra*, at p. 94.

MORRISON, J.

There was no evidence before the learned trial judge herein as to the depth of water in the pools below the falls or in the rapids, nor as to the character of the bottom of the river between the falls, *i. e.*, between the operations of the defendants complained of and the works of the plaintiffs at the lower falls, and in the absence of this evidence he could not find that there was likely to be any injury to the plaintiffs. This additional evidence which was ordered to be taken when the case was before us first on appeal, and which was not before the trial judge, is now taken into consideration, and it satisfies me that the contention of the plaintiffs cannot prevail as to the likelihood of damage to them arising from the deposit of even the

maximum quantity of rock into those deep pools by the defendants. But it is admitted by Campbell, the plaintiffs' superintendent, that now the defendants are depositing their rock along the bank of the river above low water mark, and then he speculates as to what may become of it in the event of high water.

The soundings in the body of the upper pool range from 14 feet to 50 feet, and near the defendants' works, opposite their dump, soundings could not be taken owing to the depth of water and other adverse conditions. At the outlet from this is a narrow rapid in which soundings could not be taken, and at the foot of the rapids the soundings ranged from 26 to over 60 feet. The river here has a very irregular bottom, shewing depths of over 60 feet and 26, 50, 40, 27, 37, 35, 25, 37, 23, 40 feet, and on the next rapid a little over three feet. At the foot of this second rapid the depths appear to be equally irregular, ranging from 7, 9, 23, 23, 15 to 40, 45 feet in the centre and then rising to 20, 28 feet, and just by the rapids to 20 and 23 feet and opposite the intake of the plaintiffs' canal which is up against the north bank of the stream and is away from the thread of the stream or current which it overcomes, to 4, 6, 8, 15 feet, getting deeper towards the centre of the rapids and away from the intake. The current, opposite and running by the intake with a depth of 23 feet is at the rate of 2.3 miles per hour. Even assuming that the current would be sufficiently strong to carry the large, heavy, jagged rocks which might be dumped into the upper pool along the stream's serrated bottom, yet it would be asking us to ignore every law of natural philosophy to hold that when those rocks are opposite the plaintiffs' works the current would relax its grasp and would permit them to glide to one side into plaintiffs' intake.

The learned trial judge did not find that the plaintiffs had received any injury from the defendants' operations. There is no evidence to satisfy me of negligence on the part of the defendants. The acts complained of are the necessary result of the works authorized by the statute, and the possibility or improbability of injury is extreme and remote.

The court puts forth its power only when substantial injury

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or reasonable expectation of injury arises: *Behrens* v. *Richards* (1905), 2 Ch. 614, and the onus in this case is on the plaintiff to shew that either exists.

I would allow the appeal.

Appeal allowed, Martin, J., dissenting.

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LEVY v. LEVY.

LEVY v. LEVY

Divorce — Practice — Affidavit of documents — Discovery tending to shew adultery.

In a petition for dissolution of marriage, the respondent applied for an affidavit of documents:—

Held, on the respondent filing an affidavit shewing that discovery is not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, that discovery ought to be ordered.

Statement

SUMMONS for an order for discovery in a petition for dissolution of marriage, argued before IRVING, J., in Chambers, at Victoria, on the 20th of March, 1906.

Walls, for petitioner.
Helmcken, K.C., for respondent.

Judgment

IRVING, J.: Having regard to the language used by Lindley and Bowen, L. JJ., in giving judgment in *Redfern* v. *Redfern* (1891), P. 139, I am of opinion that discovery both by affidavit of documents and interrogatories may be ordered. But discovery will not be required of a party to divorce proceedings when it is sought for no other purpose than to prove such party guilty of adultery.

In the present case the petitioner charges the wife with adultery. She in her answer sets up desertion and adultery by

him. She now applies for an affidavit of documents, but files no affidavit in support of her summons.

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Under the circumstances I shall direct the application to stand over in order that I may be satisfied by affidavit (1.) that there is reason to believe that the petitioner has in his possession or control documents relating to the matters in question in the cause, other than his adultery, and (2.) that the affidavit of documents is required for the purpose of discovering such documents, and not for the purpose of tending to prove his adultery. I think that unless an affidavit of this kind is filed by the applicant an order for discovery would be regarded, by Lindley, L.J., as "oppressive and unjust."

Note:—The affidavit having been filed, the order for discovery issued.

MACLEAN v. THE CORPORATION OF THE CITY OF FERNIE.

IRVING, J.

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MACLEAN v. FERNIE

Municipal law—Section 79 Municipal Clauses Act, R.S.B.C. 1897, Cap. 144 —By-law—Majority of three-fifths of votes polled for—Section 88—Persons entitled to appear on proceedings to quash.

Certain persons not qualified, and others, not authorized, having voted on a City by-law granting electric lighting and water franchises:—

Held, that the by-law was defective and must be quashed.

Held, further, that only the applicant to quash and the Corporation, have a status before the court on proceedings to quash.

MOTION to quash a by-law of the City of Fernie, argued before IRVING, J., at Victoria, on the 14th of March, 1906.

Statement

The municipal council of the City of Fernie passed a by-law granting to the Crow's Nest Pass Electric Light Company a franchise to instal a system of electric light in the said City, and provide a supply of water for the inhabitants thereof, the City on its part agreeing to grant to the Company, for a period of

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ten years, such rights exclusively even as against the Corporation.

J. H. Lawson, appeared on behalf of the Company, and

J. A. Macdonald, K.C., for the motion to quash, took the preliminary objection that, under section 88 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, as enacted by section 24, Cap. 52 of the Statutes of 1902, no person except the applicant and the Corporation had any status before the court on proceedings to quash a municipal by-law.

IRVING, J., sustained the objection.

Macdonald, on the merits, submitted that the by-law should be quashed on the ground that it had not received a majority of three-fifths of the vote polled, as required by section 79 of the Municipal Clauses Act; that some twelve or more persons who voted on the by-law were not qualified to vote, their names not being on the assessment roll, and that G. G. S. Lindsay and W. Barclay, who voted on the by-law, claiming to so vote as the representatives of their respective companies, were not thereunto authorized as required by the Act.

Argument

A. E. McPhillips, K.C., for the Corporation.

IRVING, J., *held* that, on the material submitted to him, the by-law required a majority of three-fifths of the votes polled to support it, and that it had not received that number; that Lindsay and Barclay, not having been duly authorized to vote, their votes were disqualified; that at least eight persons voted whose names were not on the assessment roll and were not duly qualified electors. So that, even if a bare majority would support the by-law, rejecting those who were not qualified electors, there was not such a bare majority in this case, and the by-law would therefore be quashed with costs against the Corporation.

Judgment

By-law quashed.

CIZOWSKI *ET AL.* v. WEST KOOTENAY POWER AND LIGHT COMPANY, LIMITED.

HUNTER, C.J. (In Chambers)

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CIZOWSKI *v.* WEST KOOTENAY

Practice—Rule 34 of Workmen's Compensation Rules, 1904, object of—Security for costs.

The object of rule 34 of the Workmen's Compensation Rules, 1904, is to make the proceedings under it subject to the same rules as an action.

APPLICATION by respondents in proceedings under the Workmen's Compensation Act, 1902, for security for costs of such proceedings, heard at Vancouver before HUNTER, C.J., in Chambers, on the 23rd of April, 1906.

Statement

A request for arbitration, with particulars annexed, had been duly filed with the District Registrar of the Supreme Court at Nelson on behalf of Marcin Cizowski and Parascievia Cizowski, the father and mother of the deceased workman. The applicants, as appeared by the particulars, both resided in Austria, out of the jurisdiction.

W. S. Deacon, for the respondents: By rule 34 of the Workmen's Compensation Rules, 1904, the proceedings are to be deemed an action. The court has jurisdiction to order security for costs if there is an appeal: *Hall* v. *Snowdon, Hubbard and Co.* (1899), 68 L.J., Q.B. 363; and also, it is submitted, for costs of the proceedings when the applicants are out of the jurisdiction.

Argument

S. S. Taylor, K.C., for the plaintiffs: The court has no jurisdiction to deal with costs of arbitration proceedings under the Workmen's Compensation Act; its jurisdiction is confined to nominating the arbitrator, who disposes of all questions of costs. While the Supreme Court Rules are made to apply to this procedure, they only refer to the conduct of the proceedings by the arbitrator. The English cases directing security in appeals are explained by the fact that when the cases go to appeal, they are

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then in the court and subject to its usual procedure. There is no reported English case where security prior to appeal has been ordered.

HUNTER, C.J.: The object of rule 34 is to make the proceedings subject to the same rules as an action in this regard. The respondents are entitled to security. The amount will be $100.

Application allowed.

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MUNICIPALITY OF SOUTH VANCOUVER v. RAE.

Reeve, authority of to bring action in name of municipality—Resolution of Council—Substantial compliance with.

SOUTH VANCOUVER v. RAE

A municipal council having resolved to join in an action already launched against defendant, the reeve, after consultation with the solicitor, gave instructions to commence an independent action on behalf of the municipality.

Held, that as the municipal council had shewn an intention to sue defendant, the action of the reeve was a substantial if not a strict compliance with that intention.

APPLICATION by defendant to set aside a writ of summons on the ground that plaintiffs' solicitor had not been instructed to bring the action, argued before MORRISON, J., at Vancouver, on the 23rd of March, 1906.

Statement

An action had been commenced by one Joyce against defendant to recover certain moneys alleged to have been illegally paid to him, while reeve of the plaintiff Municipality, for the Municipality, and for penalties.

The municipal council passed a resolution authorizing the joining of the Municipality in the suit with Joyce. The reeve, in consultation with the solicitor on the record, decided to dis-

continue the action by Joyce, and bring a fresh action in the name of the Municipality, which is this action.

Brydone-Jack, for defendant: There was no authority except that given in the resolution, and joining in an action with Joyce was very different from commencing a fresh action, in which the municipality alone would be responsible for costs.

Reid, for plaintiff Municipality: The reeve had general authority, and could instruct the solicitor, and, further, the question of authority being one between solicitor and client, could not be raised by defendant.

MORRISON, J.: The intention of the Municipality to bring an action against Rae appeared from the resolution, and although what was done was not a strict compliance with the resolution, yet its intention was substantially carried out.

Judgment

Application dismissed.

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STONE v. ROSSLAND ICE AND FUEL COMPANY *ET AL.*

Appeal—Ground not distinctly raised at trial—Question of fact—Promissory notes—Extension of time for payment—Release of co-maker—Surety—Collateral security—Credit for sums realized.

D., who was with others jointly indebted to the plaintiff on certain promissory notes in relation to the transfer of a business as a going concern, did not in his pleadings, nor at the trial, until the close of the evidence in the case for both sides, raise the point that he claimed a lien on certain merchandise in stock, which was sold by the plaintiff, the proceeds of which ought to have been, but were not, applied in reduction of the debt:—

Held, that where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first time unless the court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such, for instance, as the construction of a statute, it may be raised for the first time on appeal subject to such terms, if any, as the court may see fit to impose.

D. on being sued on certain promissory notes to which he was a party, defended the action, setting up an arrangement between himself and the Fuel Company that he was to be a surety merely for them to the plaintiff; and that as the plaintiff was aware of this at the time he accepted the notes, he, D., was relieved by the plaintiff giving the Fuel Company an extension of time.

Held, on the facts at the trial (affirmed on appeal) that, in order that D. escape his liability on this ground he must shew that there was a binding agreement arrived at between his creditor and himself for valuable consideration, and that in the circumstances there was here no such agreement.

Decision of IRVING, J., affirmed.

STONE v. ROSSLAND ICE AND FUEL CO.

APPEAL from a judgment of IRVING, J., delivered on the 19th of December, 1904, in an action tried by him at Nelson on the 11th of October, 1904.

Statement

The defendant Dolan, who carried on a wood yard, being, in the January of 1904, indebted to the plaintiff in the sum of $3,806.16, arranged to transfer the wood yard and its business to the defendant Fuel Company.

As soon as the plaintiff heard of this sale, he went to Dolan

who informed him fully what he was about to do, *viz.*: that he was about to transfer the business to the Fuel Company, who would assume his liability to the plaintiff. The plaintiff refused to accept these people as his debtors in the place of Dolan, but he agreed to take, and did take from the defendant and the Fuel Company three joint and several notes for $1,156.63 each, payable respectively in February, March and April. Dolan was unwilling to be a party to the notes, either as maker or indorser, but the plaintiff insisted upon his signing as a joint maker. The February note was met in due course, but when the other two notes fell due, the Bank of B. N. A., who held them for collection, received from the Fuel Company renewals for 90 days, giving notice to the defendant of the non-payment of the original notes.

During the 90 days' extension, the Fuel Company made an assignment for the benefit of its creditors.

The plaintiff recovered judgment by default against the Fuel Company and the other defendants. The defendant Dolan, who defended the action, contended that as the arrangement made between him and the Fuel Company was that he was to be a surety merely for them to the plaintiff, and that as the plaintiff was aware of this at the time he accepted the notes, he, Dolan, was relieved by the plaintiff giving the Fuel Company an extension of time.

Statement

A. H. MacNeill, K.C., for plaintiff.
Hamilton, for defendant Dolan.

IRVING, J. [after stating the facts]: The argument on behalf of the defendant Dolan is based on *Pooley* v. *Harradine* (1857), 7 El. & Bl. 431; and *Greenough* v. *McClelland* (1860), 2 El. & Bl. 424. In those cases, the defendants, who escaped on the ground that they were sureties, had received from the plaintiff no value or consideration whatever. In the present case Dolan was originally the sole debtor; the notes were given for his debt. The plaintiff, when it was proposed to him that he should accept the Fuel Company as his debtor in substitution for the defendant Dolan, refused to do so. He also refused to accept

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from Dolan a note made by the Fuel Company indorsed by Dolan.

In *Oakeley* v. *Pasheller* (1836), 4 Cl. & F. 207; 10 Bligh, N.S. 548, Lord Lyndhurst at p. 589, said in a case where the joint and several makers of a bond given to secure a debt were both principal debtors:

"After some considerable time an arrangement was made between Sir Charles Oakeley and Kynaston, without any communication with the representatives of Sherard, to extend the time of payment for a period of three years; the time was accordingly extended, and the question is, what was the effect of the extension of that time, whether it discharged the representatives of Sherard from their liability? Now, in consequence of an arrangement which took place between the representatives and the new partnership, they stood in the character of sureties, and the principle of law is this, that where a creditor gives time to the principal, there being a surety, without any communication with the surety, and without the consent of the surety, it discharges him from liability, because it places him in a new situation, and exposes him to risk and contingencies which he would not otherwise be liable to."

That decision has been discussed again and again. In *Swire* v. *Redman* (1876), 1 Q.B.D. 536, Blackburn, J., spoke of the doctrine laid down as consistent neither with justice nor with common sense; but the case of *Rouse* v. *Bradford Banking Company* (1894), A.C. 586, re-affirmed the doctrine of *Oakeley* v. *Pasheller*. In Canada, also, the question has been much debated. In *Bailey et al.* v. *Griffith* (1877), 40 U.C.Q.B. 418 and again in *Birkett et al.* v. *McGuire et al.* (1881), 31 U.C.C.P. 430; in appeal, 7 A.R. 53; the judges differed among themselves as to the fairness of the principle involved in Lord Lyndhurst's decision. In Manitoba the court was also divided: see *Munroe* v. *O'Neil* (1884), 1 Man. L.R. 245. But the principle seems well-settled to-day that when two or more persons, bound as full debtors, arrange either at the time when the debt was contracted, or afterwards, that as between themselves one of them only shall be liable as a surety, the creditor, after he has notice of the arrangement, must do nothing to prejudice the interests of the surety in any question with his co-debtors. The principle upon which that doctrine is founded does not depend upon a contract, but upon its being inequitable in the creditor knowingly to prejudice the rights of the surety against the principal.

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The defendant to escape on this ground must shew that there was a binding agreement arrived at between his creditor and the principal debtor for valuable consideration.

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I am not satisfied that there was a binding agreement on the plaintiff to give time to the Fuel Company, for this reason: the renewal notes, or what are alleged to be the renewal notes, were taken by the Bank from the Fuel Company on the understanding that they would be signed by the defendant Dolan, to whom the bank had given notice of the non-payment of the original notes; and further, the bank continued to hold the original notes. Under these circumstances, can it be said the plaintiff had bound himself to give the Fuel Company time so as to prevent Dolan proceeding against the Fuel Company had he wished to do so? The retention by the plaintiff of the original notes goes to negative the idea that the new notes were finally accepted as a binding agreement. Furthermore, I am not at all sure, owing to the fact that the defendant Dolan had his covenant or promise of indemnity from the Fuel Company, that his rights could have been in any way prejudiced. But as to this the evidence is very meagre. Judgment will therefore go for the plaintiff.

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The appeal was argued at Vancouver on the 9th of November, 1905, before HUNTER, C.J., MARTIN and DUFF, JJ.

Hamilton, K.C., for appellant (defendant Dolan).

A. H. MacNeill, K.C., for respondent (plaintiff).

Cur. adv. vult.

25th January, 1906.

DUFF, J.: In this appeal I have to deliver the judgment of the Chief Justice and myself.

The appellant advances two contentions in support of his appeal.

He says, first, that he is relieved from the liability to be sued upon the promissory notes which are the subject of this action, because of the fact that (he the appellant standing in the relation to the plaintiff of a surety only for the debt of the defendants Craddock and Leard upon these notes), the plaintiff by an

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agreement with the principal debtors bound himself to give time to them for the payment of the debt without the consent of, and without reserving his rights against, the appellant; and second, that the plaintiff holding a charge on certain cordwood the property of the principal debtors, as security for the debt in question, realized certain sums from the sale of the cordwood, which ought to have been applied (and were not) in reduction of the debt, and that the judgment ought therefore to be varied by directing an account of these moneys.

As to the first of these propositions, we agree with our brother Irving, that the facts in evidence do not support the inference that such an agreement was entered into.

As to the second, we are not prepared to say that fragments of the evidence as it now stands might not be so pieced together as to frame for their defence a seeming support; but in our opinion it is not now available to the defendant. It is not pleaded, and the defendant cannot therefore have the benefit of it unless the issue raised by it was, in fact, threshed out at the trial, and the pleadings treated as amended for that purpose; or unless it is a contention which we can properly allow the appellant to raise for the first time on appeal.

DUFF, J.

It was only at the close of the argument, after the evidence adduced by both sides had been given, that the point was brought to the attention of the trial judge, who, up to that moment, was not aware that such a point was relied on; and notwithstanding the fact that some evidence may be said to have been admitted which seems relevant only for the purpose of establishing the contention, it is clear that it was never until that moment distinctly propounded; and that the plaintiff's case was not shaped to meet it. There is, therefore, no ground for saying that the issue raised by this defence was, at the trial, treated as one of the issues involved in the litigation, or that the course of the trial was directed towards its determination.

Nor is it a defence which can be set up by this defendant for the first time in the Court of Appeal.

We think the net result of the authorities may be stated to the effect that where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first

time unless the court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but that where the point is wholly one of law, such as, for instance, the construction of a statute, or amounts only to an additional argument, it may be raised for the first time in appeal subject to such terms, if any, as the court may see fit to impose. As examples of decisions of the first class we may refer to *Connecticut Fire Insurance Company* v. *Kavanagh* (1892), A.C. 473 at p. 480; *The Tasmania* (1890), 15 App. Cas. 223 at p. 225; *Ex parte Firth* (1882), 19 Ch. D. 419 at p. 429; *Karunaratne* v. *Ferdinandus* (1902), A.C. 405 at p. 409; *Loosemore* v. *Tiverton and North Devon Railway Co.* (1882), 22 Ch. D. 25 at p. 46; *Page* v. *Bowdler* (1894), 10 T.L.R. 423; *Borrowman, Phillips and Company* v. *Free* (1878), 48 L.J., Q.B. 65 at p. 68. And for examples of the second class, see *Bayley* v. *Fitzmaurice* (1857), 8 El. & Bl. 664 at p. 679; *Cooper* v. *Cooper* (1888), 13 App. Cas. 88; *Misa* v. *Currie* (1876), 1 App. Cas. 554 at p. 559, and the cases referred to in the argument in the last mentioned case.

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We also think that in this case the appellant has brought himself under the operation of the principle laid down by Lord Halsbury in *Browne* v. *Dunn* (1894), 6 R. 67 at p. 76, that is to say, having the point present to his mind, he deliberately refrained from bringing it clearly forward, and must therefore be taken to have elected to stand or fall on the other ground.

In our opinion, therefore, the appeal should be dismissed with costs.

MARTIN, J.: So far as concerns the first point argued, I am of the opinion that the decision of the learned trial judge should stand.

MARTIN, J.

The second point is not considered in the judgment, and some discussion arose as to whether it had been raised at the trial; the appellant's counsel assured us it had been, and I find on referring to the learned judge that he had a note of it, but that the respondent's counsel did not, so far as his notes shewed, deal with it, which doubtless led to its being overlooked. Certain portions of the evidence given at the trial without objection

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could only have been adduced in support of such a contention, and therefore we should, I think, consider the point as fairly open to the appellant. The effect of that evidence is that the appellant Dolan legally and equitably should have been credited with the value of three hundred cords of wood at $4.25 a cord—$1,275.

The appeal, consequently, should be allowed.

Appeal dismissed, Martin, J., dissenting.

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YOUDALL v. THE TORONTO AND B. C. LUMBER CO.

YOUDALL v. THE TORONTO AND BRITISH COLUMBIA LUMBER COMPANY, LIMITED.

Practice—Writ issued against extra-provincial, unlicensed company, under Part VII. of the Companies Act, R.S.B.C. 1897, Cap. 44—Computation of time for entering appearance—Application for leave to serve ex juris—Rules of Court, application of to proceedings under Part VII.

Section 146 of the Companies Act, R.S.B.C. 1897, Cap. 44, defines an unlicensed and unregistered extra-provincial company. Section 147 provides that any writ or summons . . . . may be served as against the company by delivering the same at Victoria to the Registrar of the Supreme Court. Section 148 enacts that it shall be the duty of such Registrar to cause to be inserted in four regular issues of the British Columbia Gazette, consecutively following the delivery of such writ or summons to him, a notice of such writ or summons with a memorandum of the date of delivery, stating generally the nature of the relief sought, the time limited and the place mentioned for entering an appearance. Section 149 enacts that after such four issues the delivery of such process to the Registrar as aforesaid shall be deemed, as against the defendant company, to be good and valid service of such writ or summons:—

Held, in the case of an issue of an ordinary eight-day writ under Part VII., that it is the duty of the Registrar to notify the defendant in the publication in the Gazette that the time for appearance is eight days after the fourth publication.

Per IRVING, J.: As the writ is a writ for service on a foreign corporation,

without the jurisdiction, application to a judge for leave to issue the writ and proceed under the Act is necessary before any writ is issued. The judge in giving leave would limit the time within which appearance should be entered.

Decision of MORRISON, J., reversed.

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APPEAL from the judgment of MORRISON, J., on an application argued before him in Chambers at Vancouver, on the 22nd of February, 1906, to set aside and vacate a certain judgment obtained in default of appearance on the 9th of October, 1905.

Defendant Company have their head office in Toronto, Ontario, and at the time of the proceedings in question were not registered or licensed under the Companies Act of British Columbia; nor had they any authorized agent to represent them in this Province.

Plaintiff issued the usual eight-day writ against them for $10,000 for commission in respect of the sale of certain of their timber limits in British Columbia. This writ was delivered to the Registrar of the Supreme Court, who, pursuant to sections 147 and 148 of the Companies Act, 1897 (Cap. 44, R.S.B.C. 1897), inserted the following notice in four issues of the British Columbia Gazette, commencing on the 27th of July, 1905:

Statement

"'The Companies Act, 1897.'

"In the Supreme Court of British Columbia.

"Between

"Hugh Youdall, plaintiff; and The Toronto and British Columbia Lumber Company, Limited, Defendant.

"To The Toronto & British Columbia Lumber Company, Limited (an unlicensed and unregistered extra-Provincial Company).

"Take notice that the above named plaintiff has commenced an action against you in this honourable Court in which he claims to recover a judgment against you for the sum of $10,000 commission for the sale of certain timber limits in Clayoquot and Barclay districts, British Columbia.

"An appearance to the writ may be entered on or before the 28th day of July, 1905, at the office of the District Registrar, Vancouver, B. C.

"Service of the above process was made against you on the 21st day of July, 1905.

"Dated this 21st day of July, A.D. 1905.

"B. H. TYRWHITT DRAKE,

"Registrar Supreme Court."

On the 6th of September, 1905, an affidavit of non-appearance was filed. On the 14th of September, DUFF, J., made an order

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that the plaintiff be at liberty to prove the amount of the debt claimed by him before the District Registrar at Vancouver, and that upon such proof the plaintiff be at liberty to sign final judgment for the amount as found by the Registrar, and costs to be taxed.

On the 5th of October, 1905, the Registrar certified the amount due to the plaintiff to be $10,000. On the 9th of October, upon further order, final judgment was signed and execution thereon followed on the 14th of November, 1905, and on the 15th of November the defendant moved to set aside this judgment.

Senkler, K.C., in support of the application.
David Grant, contra.

MORRISON, J. [after reciting the facts]: From the material before me it appears that the defendant Company was on the 5th of April, 1903, granted a charter by Cap. 119 of the Revised Statutes of Canada, being the Companies Act, under the name of The Toronto and British Columbia Lumber Company, Limited, capitalized at one million dollars, with power to purchase, acquire, hold and sell timber lands and limits, and to cut and remove same, and generally to carry on the business of lumberers, timber merchants, and manufacturers of timber and lumber in all its branches. Clause (*d.*) empowers the Company to carry on at the town of Sidney and the City of Victoria, B.C., the business of milling and grinding flour and dealing in grain and flour. The chief place of business within Canada is the City of Toronto, Ontario.

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One member of the board of directors resides in Victoria, B.C.; another, White, made prolonged visits to British Columbia in the interests of the Company. The Company was not licensed or registered in British Columbia.

The defendants acquired large tracts of timber lands in British Columbia, and had negotiations for the disposal of them from time to time with the plaintiff on a basis of 10 per cent. commission on sales effected through his instrumentality. A sale was made by the defendants of certain limits situate in British Columbia for which the plaintiff claims his commission

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of 10 per cent. as indorsed on the writ, which was issued and served as above. The defendants acquired timber limits, erected mills and employed workmen, solicitors and agents in British Columbia in connection with their interests here.

Defendants' counsel in moving to set aside the judgment herein based his application mainly on the contention that the writ was not properly issued, leave not having been first granted, and that substituted service will not be allowed where the writ cannot be personally served as a matter of law, and he cited a number of cases which in view of Part VII. of the Provincial Companies Act have in my opinion no applicability except in support of what was done in this case.

The writ was duly and properly issued. A writ may be issued without leave, but then there cannot be substituted service, in the absence of some statutory provision regulating service of process: *Fry* v. *Moore* (1889), 23 Q.B.D. 395 at p. 379 *et seq.*; *Haggin* v. *Comptoir D'Escompte de Paris* (1889), *ib.* 519. But here there is such a statutory provision, *viz.*, 61 Vict., Cap. 44, Part VII., regulating not the *issue* but the *service* of process.

The defendants respecting certain properties within the jurisdiction had dealings with the plaintiff, who resides within the jurisdiction, whereby the plaintiff earned a commission within the jurisdiction, giving him a right of action here: *Hoerler* v. *Hanover Caoutchouc, Gutta Percha, and Telegraph Works* (1893), 10 T.L.R. 22.

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The obvious intention of the Legislature, it appears to me, was to facilitate the pursuit of an unlicensed and unregistered extra-provincial company "which has done, entered into or made any act, matter, contract, or disposition giving to any person . . . right of action in any court in this Province": section 146.

It is also contended that the time within which appearance was to be entered was limited in the writ to eight days from the 21st of July, and that the notice in the Gazette did not appear there published until the 27th of July, the appearance to the writ as it is claimed falling due on the 28th of July. But the service provided by the Companies Act is not effective until

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the notices have all appeared in four issues of the Gazette, in this case the 17th of August.

Section 147 of the Act enacts that service may be made by delivering the process at Victoria to the Registrar of the Supreme Court, and after the advertisement of this fact appears in four issues of the Gazette then such service shall be valid. The real time limited for appearance is the expiration of the four weeks required for advertising in the Gazette.

I find nothing in the sections of the Act referred to which says that the time limited in the writ for appearance must synchronize with the date of the expiration of the four weeks' insertion of the notice in the Gazette.

The service in this case is substituted service, it may be of an extraordinary kind, but yet sanctioned by the Legislature to meet the condition created by the risk the defendants took in not availing themselves of the requirements of the Companies Act before commencing their operations in British Columbia.

I am satisfied the defendants had knowledge of the plaintiff's claim and of his intention to invoke the aid of the courts here to realize it, and having regard to the intention of the Legislature, as evidenced by the scope of the Act, I dismiss the application with costs.

The appeal was argued at Vancouver on the 26th of April, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Wilson, K.C., and *Bloomfield*, for appellants (defendants): There should have been an application to a judge for leave to issue a writ out of the jurisdiction, or for substituted service. There was no such application made. Although the Companies Act provides for substituted service, yet it does not abrogate the Rules of Court; and the notice given should have contained a proper limitation of time to enable defendants to appear.

Argument

He was stopped.

Sir C. H. Tupper, K.C. (*David Grant*, with him), for respondent (plaintiff), called upon as to notice: We are bound to follow the statute literally. If we had proceeded in any other way than we did, it could have been said that we had not followed the statute.

[HUNTER, C.J.: The statute evidently intended that the time should commence after the expiry of the notice which constitutes the service; that is within "eight days from the time of service of this writ," he may appear.]

Under the section (147) an eight day writ can issue and is deemed served as against the Company by being delivered to the Registrar of the Court at Victoria. Then compliance by the Registrar with the provisions of sections 148 and 149 is deemed to be good and valid service.

[HUNTER, C.J.: Then the effect of your argument is that after the expiry of eight days, the Company has no right to enter an appearance?]

No right. That is one of the penalties they must pay for not complying with the law by appointing an agent here and registering under our Act. They did not do so, therefore the Legislature says we will constitute the Registrar your agent for the purposes of service. There is no necessity to apply to a judge for leave to issue a writ against such a company. It is true that the plaintiff cannot do anything towards expediting judgment on the writ until the four issues of the Gazette have run, but during that time the defendant would have the right to go before a judge and ask to be let in.

[*Per curiam*: It should not be a matter of leave or grace that a man may come in and defend an action against him.]

That extra time, those four issues of the Gazette, is allowed after default, so to speak, so as to give the defendant an opportunity to come in.

[IRVING, J.: I think this is a case for an application for an *ex juris* writ.]

Section 147 and the others should be read together; "any writ" would include that which we have issued; and if an eight-day writ can issue under that section, the whole question is solved.

Wilson, in reply: This is a case for substituted service on a foreign corporation. He cited *Fry* v. *Moore* (1889), 23 Q.B.D. 359; *Wilding* v. *Bean* (1891), 1 Q.B. 100; *Jay* v. *Budd* (1898), 1 Q.B. 12; *Western Suburban and Notting Hill Permanent Benefit Building Society* v. *Rucklidge* (1905), 2 Ch. 472.

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HUNTER, C.J.: Speaking for myself, I think that all the proceedings subsequent to the issue of the writ itself must be set aside on the third ground taken in the notice of appeal:

> That the notice of said writ of summons published in the B. C. Gazette of the 27th of July and the three following issues of the said Gazette, is defective in that it limits the time for appearance to the 28th day of July, 1905, contrary to said sections 148, 149 and 150, Chapter 44 Revised Statutes of British Columbia, 1897.

It was very strenuously urged before us by Sir Charles that the effect is that the ordinary writ is issued, which prescribes the ordinary time for service; that the service is complete by delivering the document; that the actual time for entering appearance is limited to eight days; and while it is true that the plaintiff cannot take any proceedings until the four issues of the Gazette have been published, still the defendant has no right to enter an appearance after the eight days except by leave of the Court. The net result of that would be that the Legislature has commanded the publication of a process for three times for no purpose that can be effectual except to communicate to the defendant that the time within which he was allowed to appear has expired. The service of the process is only inchoate when the writ is served and does not become consummate or effectual, under section 149, until after the publication of the process in the four issues of the Gazette. That being the case it is the duty of the Registrar to notify the defendant in the publication in the Gazette that the time for appearance is eight days after the fourth publication of the process in order to notify the defendant clearly and distinctly as to the time within which he should enter his appearance. That not having been in the notice in question, there was therefore no compulsion on these people to come in, and there was consequently no valid process on which to proceed to judgment.

IRVING, J.: I agree with the Chief Justice that the provisions of the Act have not been carried out.

In my opinion, as the writ in a case of this kind is a writ for service on a foreign corporation without the jurisdiction, application to a judge for leave to issue the writ and proceed under this Act is necessary before any writ is issued. The judge in

giving leave would limit the time within which appearance should be entered.

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DUFF, J.: I agree. I have only to add that we cannot give effect to the contention of the plaintiff as to the construction of these sections without concluding that the Legislature intended by these provisions to direct that a notice should be issued under section 148 requiring an appearance to a writ of summons before the service of it is complete, and before the defendant could possibly know whether it was intended validly and legally to effect service upon him. To my mind that is a construction which gives an effect to the Act which it is not to be supposed the Legislature intended, and is not the necessary result of the language employed. If the rules do not permit the issue of a writ in which the time limited for appearance is longer than eight days, then these sections may, and in my opinion ought to be, read as impliedly conferring that authority in cases in which it may be necessary in order to follow the procedure prescribed by the Act.

DUFF, J.

Appeal allowed.

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Company law — Control of company — Purchase of mineral claim by directors for illegal object—Fraudulent scheme—Knowledge of by vendor —Duty of directors—Illegal conduct of—Meetings of directors—Quorum.

As fiduciary donees of their powers, the directors of a company are bound to exercise them *bona fide* for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the court.

A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by shewing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions.

Decision of IRVING, J., affirmed.

APPEALS from the judgment of IRVING, J., who by arrangement of counsel tried five actions at Nelson in July, 1905.

All five actions were between persons connected with a mine known as the Providence mine situate near Greenwood, at which town resided Law, McIntosh, Caulfield, Fuller and Macey, the three first named being directors of the Providence Mining Company. The following, *viz.:* Madden, Fitzgerald, Rudolph, Scully and Heney, were shareholders in the Company, and resided at Chicago.

Statement

The contest was between the Chicago shareholders on the one hand, and the Greenwood shareholders on the other, for the control of the mine.

In the first action tried, *viz.: Madden* v. *Law*, the following facts were proved: that Caulfield, one of the directors, went to Chicago in October on business of his own; that his expenses amounted to $294.65; that in order to recoup him for this outlay his two co-directors, Law and McIntosh, who were also co-partners with him in a general store, paid him out of the

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Company's funds, and put through two entries in the Company's books by which the fact that the payment had been made by the Company was concealed. Judgment was given that the Company should recover the sum of $294.65 so improperly paid. No appeal was taken from that decision.

The case of *Madden* v. *Dimond*, now under appeal, was the second in the series.

The action was commenced on the 5th of October, 1904, by Madden on behalf of himself and all other shareholders of the Providence Mining Company, other than the defendants, against the Providence Mining Company and certain other individuals, to set aside a purchase of a mine called the Dimond fraction, made on the 27th of September, 1904, by four directors, *viz.*: Caulfield, Peet, Macey and Law, at a meeting held on the 26th of September, 1904. At the time of the purchase the Dimond Fraction was un-Crown granted, and, as found by the trial judge, appears to have been comparatively worthless. The purchase was made from the defendant Dimond for 1,600 shares in the defendants' Company, the par value of which would be $8,000. These shares were issued on the 30th of September, as follow: Dimond 1,450; Gaunce, 50; Wickwire, 50, and Brown, 50. The defendants are (in addition to the Company), Dimond, the vendor of the Dimond fraction; Gaunce, who acted as agent for the vendor in the sale; Brown, the solicitor who acted for the Company; and Wickwire, who was in partnership with Gaunce.

Statement

On the 20th of September, 1904, Madden, whose party then had the control of the Company by a majority of between 500 and 600 shares, filed with the secretary of the Company a requisition addressed to the directors, demanding that an extraordinary general meeting of the Company be called to consider and condemn the action of Law and McIntosh, as directors of the Company, in falsifying the payrolls of the Company, in the manner mentioned in the statement of facts in the case of *Madden* v. *Law*, and for the removal of Law, McIntosh and Caulfield from their position as directors. Immediately after that notice had been filed, namely, on the 23rd, Law, the secretary, sent out notices to the directors that a directors' meeting would be held on the 26th of September at Greenwood to con-

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sider the purchase of the Dimond Fraction mine. A number of protests from the Chicago directors, protesting against the shortness of the notice, were sent to and received by the secretary in sufficient time to prevent the meeting proceeding with the purchase.

In this connection the learned trial judge, in giving judgment, called attention to the decision of the case of *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669, where it was held that, although the court will not interfere with the powers and duties of directors in their management of the internal affairs of the company, directors will be restrained from fixing a particular date for holding the annual general meeting of the company for the purpose of preventing shareholders from exercising their voting powers.

On the 26th of September the directors' meeting was held and the resolution for the purchase of the Dimond Fraction was carried, there being present only Caulfield, Peet, Macey and Law. The protests from the Chicago directors were read, and the form of asking Mr. Gaunce to give an extension of time was gone through with. On the 27th the bill of sale was executed by Dimond to the Company, and on the same day, Dimond signed a proxy under which Caulfield was authorized to act as his proxy at all meetings of the Company for the ensuing twelve month. This proxy, taken on the 27th, was dated the 30th, but at the time of its execution the shares had not been issued. They were being held back until the 30th of September in order that the solicitor for the Company might register the agreement required by the Companies Act. On the 30th of September, he having received a telegram from the Registrar of Joint Stock Companies advising him of the registration of the agreement, the shares were issued and immediately thereafter a pooling agreement was signed.

Statement

By this document it was agreed that all share certificates (including the 1,600 just issued to Dimond and his nominees) should be deposited in a pool to be held until a majority of three-fifths of the shares pooled should decide whether the pool should be broken; that so long as the pool lasted, no individual could sell his shares, and no proxies were to be given except to

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certain persons, all of the Greenwood faction. It was also agreed that if anyone should give a proxy to anyone other than the persons named, then *ipso facto* the shares of such person were absolutely forfeited to the remaining members, and Caulfield was given a power of attorney to transfer the forfeited shares to the remaining members.

Although Dimond owned the shares, yet, owing to the pooling arrangement they were practically beyond his control, and the right to vote in respect of them was committed to Caulfield, Peet, Macey and Law, the minority on the board of directors. This issue of shares deprived Madden and his associates of the majority of votes in the Company. The Greenwood faction having secured the majority of votes, the directors determined to convene the extraordinary general meeting as requested in the requisition of the 20th of September, to consider not only the matters referred to in that requisition, but also the following: (a) ratification of the action of the Greenwood directors in paying Caulfield $294.65; (b) ratification of the action of the Greenwood directors in purchasing the Dimond Fraction and in issuing 1,600 shares in payment of the same. On the 5th of October this action was commenced to set aside the purchase of the Dimond Fraction, and the delivery up and cancellation of the 1,600 shares, and to restrain Dimond and his nominees from voting on the said shares, and on the 24th of October an injunction was obtained from the Chief Justice.

Statement

The learned trial judge having found the following facts: That the purchase was made by Caulfield, Peet, Macey and Law with a view to keeping out of power the Madden party; that Gaunce and Dimond knew that this was the object of the purchase of the mine; that the sale would not have taken place unless Dimond made the proxy so as to control his vote; his Lordship continued:

"It seems to me that there was a conspiracy between those four Greenwood directors and Dimond, Gaunce *et al.* to get the control of the votes in the Company for the very purpose of baulking the enquiry into this criminal charge, and that in these circumstances this Court is justified in dealing with the matter: *Burland* v. *Earle* (1902), A.C. 83, is an authority for

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this. I call attention to the case of *Fraser* v. *Whalley* (1864), 2 H. & M. 10, where it is laid down that the directors are not justified in creating shares when they are likely to be removed. As the expressions used in that case are so peculiarly appropriate I apply them to this case. I say that this meeting was a clandestine meeting, held with indecent haste and was a fraud on the Company."

On the 25th and 26th of October, the annual general meeting of the Company was held and the Chicago faction appointed a majority of the new directorate.

On the 25th of May, 1905, at a directors' meeting, there being present Madden, Fitzgerald, Scully and Heney of the Chicago faction; Macey, Peet and Fuller of the Greenwood faction, a resolution was passed authorizing the sale and issue of 2,000 shares of the capital stock for the purpose of raising money to be expended in the purchase of machinery, such shares to be issued to the present shareholders (other than the holders of the 1,600 Dimond shares). It was also resolved that steps should be taken to set aside the purchase of the Dimond Fraction.

Immediately after the four Chicago directors had left Greenwood for Chicago, Fuller called a meeting of the directors, giving no notice whatever to the Chicago directors. This meeting was held on the 12th of June, and there were present: Macey, Peet and Fuller. Notwithstanding protests from the absent directors, who had heard of the intention to hold the meeting, this meeting of four directors proceeded to undo all that had been done at the meeting of nine directors of the 25th of May.

Statement

Thereupon the third case of the series, *Rudolph* v. *Macey*, was commenced on the 16th of June, 1905, by Rudolph, Madden, Fitzgerald, Scully and Heney, of the Chicago faction, suing on behalf of themselves and other shareholders of the plaintiff Company other than the defendants, and the Company being plaintiffs against the four directors, Peet, Fuller, Macey and Law, of the Greenwood party, to set aside certain resolutions passed at a meeting held on the 12th of June, 1905; and on the 23rd of June an injunction was granted.

On the same day, Law obtained *ex parte* an injunction restraining the Board from acting on the resolutions of the 25th of May.

At the trial of the case of *Rudolph* v *Macey*, the learned trial judge found that the object of the issue of 2,000 shares authorized to be issued by the resolution of the 25th of May, was to raise money to purchase machinery, and that it was not a mere device for increasing the voting power of the Chicago faction; that the meeting of the 25th of May had been called after a ten days' notice and that the resolution had been assented to by seven directors personally present at the meeting.

He also found that the meeting of the 12th of June had been called on a three days' notice only, and that only three directors were present thereat, *viz.:* Peet, Fuller and Macey, and that it was impossible, owing to the short interval between calling the meeting and holding it, for the Chicago directors to be present at the meeting. He came to the conclusion that the holding of the meeting of the 12th of June at which the directors present thereat had rescinded the resolution ordering an investigation into the charge made against two of themselves in connection with the purchase of the Dimond Fraction, was an abuse of the powers of the directors.

It is unnecessary to state the facts of the other actions.

Davis, K.C., and *W. A. Macdonald, K.C.*, for plaintiffs.

Martin, K. C., and *J. P. McLeod*, for defendants other than the defendant Company.

R. W. Hannington, for defendant Company.

The appeal in *Madden* v. *Dimond* was argued at Vancouver on the 14th of November, 1905, before MARTIN, DUFF and MORRISON, JJ.

Martin, K.C., for appellant: There is no dispute as to the finding of facts, but most of these facts were not before the trial judge, and although ordered by the trial judge to be included in the appeal book, it does not follow that the Appeal Court will consider those additional facts. Paragraph 9 of the statement of claim alleges a fraudulent scheme on the part of

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Dimond, in conjunction with Law, McIntosh and Caulfield. If a case of that kind is shewn, the law is quite clear; but the evidence is all the other way, and is in the direction of shewing Dimond simply in the capacity of a shareholder, with none of the responsibilities of a director. All that is alleged against him is that he is a partizan of the Greenwood combination; but there is no evidence even of that. There was only a pooling agreement between these parties; nothing wrong or conspiritous about that. It is a common thing in mining companies to arrange for the retention of a certain management. The effect of the judgment in the trial is that if there is a quarrel over the affairs of a company, a shareholder must not take sides, which is a very far-reaching decision. It makes no difference to a company who are the shareholders, and if the directors, acting in the interests of the company, incidentally obtain some advantage for themselves, there is nothing wrong. He cited *Greenwell* v. *Porter* (1902), 1 Ch. 530 at p. 535; *Percival* v. *Wright* (1902), 2 Ch. 421. There had been an action on the title to the Dimond Fraction but the title was decided on as good. Supposing the converse of the present state of affairs existed, would not an intending purchaser have a right to inquire into the merits of the dispute? He cited *Burland* v. *Earle* (1902), A.C. 83 at p. 93, where he submitted that Lord Davey states the law on the point. The cases *Fraser* v. *Whalley* and *Gartside* v. *Whalley* (1864), 2 H. & M. 10, are distinguishable. *Menier* v. *Hooper's Telegraph Works* (1874), 9 Chy. App. 350 at p. 354, states what class of actions the court will deal with. He also referred to *North-West Transportation Company* v. *Beatty* (1887), 12 App. Cas. 589. The court is not to determine the mere morals of a shareholder in the use he makes of his shares; the case is different with a director. He cited *Featherstone* v. *Cooke* (1873), L.R. 16 Eq. 298 at p. 305.

Argument

Davis, K.C., *W. A. Macdonald, K.C.*, and *Whealler*, for respondents: The case of *Menier* v. *Hooper's Telegraph Works*, *supra*, is one of general principles only. Here we are dealing with the actions of directors and not of shareholders. Dimond, knowing the intentions of the directors, conspired with them for the purpose of doing something which they had no right to do,

and that being so, he can take no advantage of the sale in the circumstances. The duties of directors are laid down in *The York and North Midland Railway Company* v. *Hudson* (1853), 16 Beav. 485 at pp. 491 and 496, and *In re Cameron's Coalbrook, &c., Railway Company, Ex parte Bennett* (1854), 18 Beav. 339. Any advantage derived by a director need not be limited to a question of money, but what will be considered is whether the act complained of will prevent him from standing as a clear representative of the shareholders. Very often the voting power of shares is more valuable than their actual money worth; it was so with the shares in question here, and these men deliberately took to themselves that advantage.

As to the facts, there is practically no dispute. The value of the Dimond Fraction was as doubtful as that of most mineral prospects; the trial judge finds it is comparatively worthless. The shares which were paid for it were not turned over to Dimond until the pooling agreement was signed; he never held or voted the shares.

Argument

Martin, in reply.

Cur. adv. vult.

26th January, 1906.

MARTIN, J.: Though I am not at all prepared to hold that a director may not adopt a certain course simply because an incidental advantage may accrue to him, yet on the other hand, if he act in a certain way with the primary object of deriving an improper personal advantage, financial or otherwise, he cannot save himself by shewing that it was also of benefit to the Company. If the circumstances are such that his action is equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions. The authorities herein, and in *Rudolph* v. *Macey*, amply support this view. Applying it, then, to the present case, and even admitting that the purchase of the fractional mineral claim in question (which I do not think should be regarded as a worthless one) may have been desirable, yet the manner in which the bargain was carried out, and all the suspicious surrounding circum-

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stances satisfy me that the learned trial judge was right in deeming it to be a fraudulent scheme on the part of these directors to keep themselves in office by the issue of additional shares to be controlled by themselves or confederates.

The only point on which I have entertained any doubt is the extent of the knowledge of Dimond. The finding of the learned trial judge therein is perhaps hardly as precise as I should wish, but I cannot say that the respondent's counsel is wrong in contending that his intention was to find that he knew these directors intended to derive an undue personal advantage from the peculiar arrangement with him. To test the matter I have considered whether or no there is some evidence at least to go to a jury on that point, and I have reached an affirmative conclusion. Such being the case, the worst, in my opinion, should be inferred against Dimond because he is a man on whose testimony it is impossible to place any reliance whatever: it is difficult to avoid the belief that he is a wilful perjurer, as charged by counsel. Such being the case, the judgment should be affirmed and the appeal dismissed.

MARTIN, J.

DUFF, J.: The learned trial judge has in effect found that the object of the transaction with Dimond was to vest securely in the hands of the directors concerned and their associates the control of the Company. Moreover, his judgment, rightly read, makes it, I think, sufficiently clear that he is proceeding on the view that Dimond was from the outset a party to this design. There being evidence to support his conclusions of fact, we cannot, especially in a case involving questions of fair dealing where he had the persons implicated before him, refuse to act on these conclusions, unless from the evidence as a whole, it is demonstrated that they are erroneous.

DUFF, J.

This onus the appellants have not, to my thinking, satisfied.

It follows from these findings that the plaintiff must succeed. The principles enunciated in the cases referred to in the judgment in *Rudolph* v. *Macey* apply in their full scope to this case; but here there is an additional element. The directors owed a duty to the shareholders as a whole to exercise their power to issue shares in the interest of the Company; in this transaction

they permitted another interest to intervene and to guide their action—the individual interest of themselves and their associates as shareholders to secure to themselves the control of the Company. In other words, they placed themselves in a position in which their interest and their duty plainly conflicted. What they did was, in these circumstances, a breach of trust on their part—a misfeasance; and Dimond being concerned in it is involved in the consequences of it.

The transaction was, therefore, properly set aside.

The appeal should be dismissed with costs.

MORRISON, J.: I associate myself entirely with the learned trial judge in his characterization of the transaction with Dimond, and the extent of Dimond's knowledge thereof; as well as with my brother Duff when he says so tritely that the parties placed themselves in a position in which their interest and their duty clearly conflicted.

MORRISON, J.

Conduct of that sort strikes at the very root of that degree of honesty and confidence so essential to the maintenance of business integrity, which is such a safeguard to the public.

It is satisfactory to have such unanimity in expressing disapproval of the methods disclosed in this case, and that of *Rudolph* v. *Macey*, dealing with the trust reposed by shareholders in directors, particularly in our mining communities.

I would dismiss the appeal.

Appeal dismissed.

The second appeal, *Rudolph* v. *Macey*, was argued at the same sittings, before the same Bench, by the same counsel.

MARTIN, J.: In my opinion the learned trial judge has, on the facts and authorities cited, reached a proper conclusion in this case. Though the three directors had, strictly speaking, the power to do what they did, yet nevertheless it was in all the circumstances an abuse of their powers to so act, within the general principle laid down in *Burland* v. *Earle* (1902), A.C. 83 at p. 97. The language there used "or otherwise abusing the powers vested in them for the management of the company's business" covers this case. I am satisfied the machinery was needed for the proper working of the mine.

MARTIN, J.

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The court has, doubtless, a disinclination to interfere with the proceedings of directors when conducted within the letter of the law, yet as was said by Vice-Chancellor Malins, in *Trade Auxiliary Company* v. *Vickers* (1873), L.R. 16 Eq. 303 at p. 305:

"Where there are such dissensions in the governing body that it is impossible to carry on the business with advantage to the parties interested, in such a case the court will interfere, but only for a limited time, and to as small an extent as possible."

Where directors possess such exceptional powers as are conferred on a quorum of two, as here, without giving notice to directors resident outside the Province, they should be careful to conduct themselves in a manner so as to inspire confidence in their honesty of purpose at least. To give such a misleading and inadequate notice as was given here, indicates to my mind a contrary intention and is something which has considerable weight with me in judging their subsequent conduct. If they saw fit to give notice at all, then it ought to be straightforward and reasonably sufficient to let all concerned know what was in contemplation: see generally on notice *Waddell* v. *Ontario Canning Co.* (1889), 18 Ont. 41 at p. 51; *In re Homer District Consolidated Gold Mines* (1888), 39 Ch. D. 547; *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669.

With respect to the duty of directors I draw attention to the following remarks of Lord Justice Cotton in *In re Cawley & Co.* (1889), 42 Ch. D. 209 at p. 233:

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"In my opinion the proper rule is that a director is so far in a fiduciary position towards the company that he cannot exercise or refuse to exercise the powers vested in him as director against the interests of the company, and that he must exercise his powers for the general interests of the company."

In *Percival* v. *Wright* (1902), 2 Ch. 421, Mr. Justice Swinfen Eady puts the matter very succinctly, saying, at p. 425, "they must act *bona fide* for the interests of the company." The Master of the Rolls, Sir John Romilly, in *The York and North Midland Railway Company* v. *Hudson* (1853), 16 Beav. 485 at p. 496, uses the following language:

"On no principle could they (directors) derive to themselves directly or indirectly any personal or pecuniary advantage from the mode in which they might dispose of these shares,"

And again at p. 491:

"The directors are persons selected to manage the affairs of the company, for the benefit of the shareholders; it is an office of trust, which, if they undertake, it is their duty to perform fully and entirely."

And see in *Bennett's Case* (1854), 5 De G.M. & G. 284 at p. 298, the remarks of Lord Justice Turner on the "illegal exercise of a legal power."

The appeal should be dismissed.

DUFF, J.: As fiduciary donees of their powers, directors are bound to exercise them *bona fide* for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled in the case of a breach of it to invoke the remedial action of this Court.

Herein the court but exerts its powers of control over trustees and other persons sustaining a fiduciary relation which it inherited from the Court of Chancery; and hence is not within the operation of the rule which proscribes its interference in purely domestic disputes among the members of such bodies: *Sykes' Case* (1872), L.R. 13 Eq. 255 at p. 259; *In re Faure Electric Accumulator Company* (1888), 40 Ch. D. 141 at pp. 150, 151 and 152; *Gilbert's Case* (1879), 5 Chy. App. 559 at p. 566; *In re Cawley & Co.* (1889), 42 Ch. D. 209 at p. 233; *Cannon* v. *Trask* (1875), L.R. 20 Eq. 669 at p. 675; *The Exeter and Creditor Railway Company* v. *Buller* (1847), 16 L.J., Ch. 449; *Alexander* v. *Automatic Telephone Company* (1900), 2 Ch. 56. Among the resolutions passed at the meeting of the 12th of June, some were palpably conceived in the personal interests of the directors who passed them; and after a most careful examination of the evidence, I think it fully supports the conclusion that in calling that meeting, and in passing the resolution impeached in this action, the directors concerned were not acting in an honest exercise of their discretion as directors.

One minor alteration ought, I think, to be made in the formal judgment. The injunction should be confined to restraining the defendant directors from calling or holding any meeting of the directors for the purpose of preventing the execution of the

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resolution of the 25th of May without notice to the whole directorate.

The appeal should be dismissed with costs.

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MORRISON, J.: It would indeed be a long leap for us to take to reach the point urged by appellant's counsel that the directors acted in a *bona fide* and disinterested manner in the circumstances surrounding the calling of the meeting and passing the resolution in question.

In this case there was a clear abuse of their powers by the three directors by which they designed to advantage themselves and violated the duties of directors in a manner which has met with disapprobation repeatedly as disclosed by the numerous authorities extant dealing with the relation of directors to each other, and to their companies.

I would dismiss the appeal.

Appeal dismissed.

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CANADIAN BIRKBECK INVESTMENT AND SAVINGS COMPANY v. RYDER.

CANADIAN
BIRKBECK
v.
RYDER

Lands, registration of—Land Registry Act—R.S.B.C. 1897, Cap. 111—Mortgage—Mortgaged premises built partly on one lot not included in mortgage deed—Rights of mortgagee—Purchaser for value—Notice—Registered title.

Plaintiff owned lot 19, and defendant owned lot 20 of a certain subdivision in the City of Vancouver. Lots 19 and 20 were at one time owned by the same person, who built a house partly on both lots. The plaintiff Company brought an action for a declaration that the house belonged to it, and based its action on the fact that the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots, the plaintiff Company was entitled to the whole building, claiming that the defendant, who is now the owner of lot 20, had constructive notice of the claim of the plaintiff Company:—

Held, that, under sub-sections 3 and 4 of section 43 of the Land Registry Act the defendant, being a purchaser for valuable consideration and claiming under the registered owner of lot 20, was not in any way affected by any relation that might exist between the original owner of lots 19 and 20 and the plaintiff Company in connection with said building having been erected with the proceeds of a loan obtained by the said original owner from the plaintiff Company.

On the 19th of January, 1899, one Johnston, being then the owner of lot 20, block 239, sub-division 526 in the City of Vancouver, applied in writing to the plaintiffs for a loan of $1,000 upon the security of this lot. The application stated that the money was required to assist in building two houses upon the lot. It also contained a description of the houses so to be built, and the estimated cost. The application also stated the way in which the borrower required the mortgage moneys to be advanced. Johnston at this time was the equitable owner of the adjoining lot number 19, under an agreement for sale entered into by him with the legal owners. Johnston's application for the loan above mentioned was accepted by the plaintiffs, and a mortgage of lot 20, dated the 28th of February, 1899, was executed by Johnston. He proceeded with the erection of the two houses, and on the 7th of March, 1899, received $600 on account of the mortgage moneys. Subsequently a further payment of $200 was made, and on the 24th of June, 1899, plaintiffs paid over the remaining $200 on the report of their valuator that both buildings were completed.

Statement

At the same time Johnston made a statutory declaration stating, *inter alia* "(1.) That the buildings on the property described in the above mortgage are wholly completed in accordance with the terms of the application for the above loan. (2.) That the said buildings are wholly situated upon the property described in the said mortgage."

One of the houses was not situated wholly upon lot 20, but partly upon lot 20 and partly upon lot 19. On 28th July, 1899, Johnston paid the balance of the purchase money due under his agreement, and obtained a conveyance of lot 19, which conveyance was duly registered. On the same date, *viz.*, 28th of July, 1899, Johnston executed a mortgage of lot 19 to the Globe Savings and Loan Co., which was duly registered, and on

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the 4th of March, 1901, default having been made, the Globe Savings and Loan Company, under the powers of their mortgage, conveyed lot 19 to one Condell, which conveyance was duly registered. Disputes arose between Condell and plaintiffs as to the ownership of the house situate partly on lot 20 and partly on lot 19. Johnston having also made default under his mortgage to plaintiffs, they took possession of lot 20 under their mortgage, including the house in question, and on the 25th of April, 1904, were in possession of the house in question by their tenant. On that date defendant Annie Ryder, with notice of the dispute between Condell and plaintiffs as to the ownership of that portion of the house which encroached upon lot 19, and of the fact that plaintiffs were in possession of it as aforesaid, entered into an agreement for purchase of lot 19 with the representatives of Condell (he having died). She had, however, searched in the land registry office and found the title to lot 19 clear of any incumbrances, and that no easements or applications to register any easements or other documents affecting the title to lot 19 were on file. Plaintiffs continued in possession of the entire house and received the rents thereof until the 27th of July, 1904, when their tenant having vacated the house, defendant Annie Ryder entered into possession without the knowledge or consent of plaintiffs.

Plaintiffs brought this action to recover possession of the dwelling house, and mesne profits, and for an injunction restraining defendants from trespassing upon plaintiffs' mortgaged premises. The defendant Cory S. Ryder was the husband, and the defendant Walsworth was the tenant, of Annie Ryder, the latter being in occupation of the house in question at the time of commencement of the action.

Wade, K.C., and *W. S. Deacon*, for plaintiffs.
Martin, K.C., and *Rowland*, for defendants.

Judgment

DUFF, J.: I have no doubt about this case. Assuming that the mortgage upon which the action is founded has the effect which Mr. *Wade* contends it has, namely, that by force of the Act respecting Short Forms of Mortgage, it did as between the parties to it vest in the mortgagee as security for the loan

referred to some rights of occupation of lot 19, still it is quite plain to me that in respect of such rights, assuming such to have been created, plaintiffs never acquired any registered title.

It is contended by Mr. *Wade* that, because the mortgage was registered as a charge upon lot 20, plaintiffs acquired a registered title to all interests which between the parties were actually vested in plaintiffs by virtue of that instrument. I cannot agree with this contention. It is based upon the misconception that the Land Registry Act of British Columbia established, as the Registry Act of Ontario did, a system of registration of documents affecting title. The Land Registry Act of this Province is intended to provide, not a system of registration of documents, but a system of registration of titles. A person desiring to obtain a registered charge upon real estate in this Province has to pursue a course which is pointed out in the plainest way by the statute. Under section 24 such person, subject to the exceptions therein mentioned, which are nothing to the purpose here, "may apply to the registrar for registration thereof in the form marked 'D' in the said schedule, and the registrar shall, upon being satisfied, after examination of the title deeds produced, that a *prima facie* title has been established by the applicant, register the title of such applicant in a book to be called the 'Register of Charges' in the form marked 'E' in the said schedule." The form "D" referred to in that section reads as follows:

"I, of declare that I am entitled to a mortgage over the real estate hereunder described, and I claim registration of a charge accordingly."

Then follows a space conveniently marked for the description of real estate. The form "E" referred to in that section provides spaces for the entry of the number of the charge, for the number of the volume and folio of the absolute fees book, where the title to the fee in the property charged is entered, and for the description of the parcels charged.

It is perfectly obvious that the registration of a charge can under the Act be procured only by pursuing the course pointed out by the Act. For example, A may hold a mortgage executed by B mortgaging to A a number of different parcels as security for the mortgage debt. A may desire to register the mortgage

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as a charge on one of those parcels only. Pursuant to that purpose he applies under the Act for the registration of his mortgage as a charge on that parcel. The application is made in form "D," as required by the Act; the mortgage as being one of the title deeds is furnished to the registrar in proof of the ownership of the charge by A. It would seem to be apparent that the registrar would not be justified on that application in registering the mortgage as a charge upon the other parcels; there is under the Act no warrant for taking such a course; in other words, an application under section 24 is, I apprehend, a condition precedent to the right to obtain the registration of a charge; an application, that is to say, containing a description of the property to which the charge applies and respecting which it is to stand as a registered charge. If there were really any doubt about that, it is made clear by section 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."

The application is all important, therefore, for the purpose of determining the question of priority between charges.

What is the fact here? Plaintiffs did not apply for the registration of the charge as a charge upon lot 19, the property against which it is sought to enforce the charge in this action; moreover, plaintiffs did not in fact obtain a registration of the charge as a charge upon lot 19. There is no entry in the books of the office shewing that lot 19 is affected by this mortgage. Plaintiffs have a charge against lot 20 only; and unless one uses words in a sense opposed to the sense which the words have in their ordinary use, it is impossible to understand how it can be said that plaintiffs have or ever had a registered charge against lot 19, or any registered title or interest in lot 19. Therefore, assuming that as between the parties, by reason of the provisions of the Act respecting Short Forms of Mortgage, or by reason of the conduct of Johnston, or by reason of the statements made in the statutory declarations, and in the application —assuming that as between the parties by reason of these things the plaintiff did acquire some title to or some interest in lot 19, that title or interest is in my judgment an unregistered

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title or interest within the meaning of the Land Registry Act.

Then section 43, sub-section 4:

"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."

Plaintiffs are claiming to own a charge upon lot 19. But in respect of lot 19 plaintiffs claim under an unregistered title, or an unregistered interest or an unregistered disposition. That being the case, as against these defendants, who are purchasers for valuable consideration, that title, interest, or disposition is deemed to be utterly void and of no effect under the statute. The result is that plaintiffs fail in the action, and the action is dismissed with costs.

Judgment

Action dismissed.

IN RE ESTATE OF ELIZABETH WATKINS, DECEASED.

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Will, construction of—Fund created for payment of "funeral, testamentary expenses and debts"—Taxes—Succession duty—Succession Duty Act, R.S.B.C. 1897, Cap. 175—Locke King's Act, 17 & 18 Vict., Cap. 113.

The testatrix made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and Provincial taxes had accumulated on the devised lands. The parties taking the lands under the will claimed the right to have the taxes paid out of moneys which had been realized by the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral, testamentary expenses and debts.

On this state of facts the following questions were submitted:

(1.) Do the succession duties payable under the Succession Duty Act in respect of the real estate of the said deceased form part of the testamentary expenses of the deceased and become payable out of the

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residuary estate, or are they to be charged against the different properties devised under the will?

(2.) Are the taxes payable to the City of Victoria and the Provincial Government debts of the deceased and payable out of the residuary estate, or are they to be charged against the different properties in respect of which the said taxes have been assessed?

Held (1.) That the succession duty payable under the Succession Duty Act (R.S.B.C. 1897, Cap. 175), in respect of the real estate of a deceased person, does not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will.

(2.) The taxes due by deceased are payable out of the residuary estate, and not chargeable against the different properties in respect of which said taxes have been imposed.

(3.) To allow taxes to fall into arrear does not charge land by way of mortgage so as to bring it within the operation of Locke King's Act (17 & 18 Vict., Cap. 113).

Decision of IRVING, J., affirmed.

APPEAL from the decision of IRVING, J., on a petition argued before him at Victoria on the 3rd of June, 1905.

Fell, for the trustees and executors.

R. T. Elliott, for the residuary legatees.

IRVING, J.: The points in dispute have been raised by a petition filed by the trustees and executors of the last will and testament of Elizabeth Watkins, who died on the 3rd of November, 1900. Probate of the will, which was dated the 10th of February, 1896, was granted to the petitioners on the 29th of November, 1900.

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By her will the deceased (1.) directed that all her just debts, funeral and testamentary expenses should be paid, and subject thereto, she bequeathed to her sister, Mrs. Caroline Humphreys, certain specified chattels, with which we are not now concerned. (2.) She then devised to her said sister certain lots in the City of Victoria and also certain land in Esquimalt district. (3.) She also devised to trustees a certain parcel of land called the Yates Street property to be held by them upon certain trusts. The will then proceeded as follows:

"I devise and bequeath all my real and personal estate not hereby otherwise disposed of unto my trustees" (the petitioners) "upon trust to sell, call in and convert into money the same or such part thereof as shall

not consist of money, and with and out of the moneys produced by such sale, calling in and conversion, and with and out of my ready money, to pay my funeral and testamentary expenses and debts, and I declare that my said trustees shall stand possessed of the said residuary trust money in trust," etc.

The contention of Mr. *Fell*, who appeared for the petitioners, was that the succession duty payable under the Succession Duty Act in respect of the real estate granted to Mrs. Caroline Humphreys was one of the "testamentary expenses" mentioned in the paragraph quoted, and was therefore payable out of the residuary estate. The beneficiaries under the will (other than the petitioners) claimed that the real estate should bear its own burden; that is to say, that the succession duty levied in respect of the real estate devised to Mrs. Caroline Humphreys and other specific devisees should be paid by her and them.

Upon examining the Succession Duty Acts, Cap. 175, R.S.B.C. 1897, as amended in 1899, Cap. 68, and in 1900, Cap. 35, it will be found (section 4*a*.) that all property situate within the Province and any interest therein passing by will or intestacy is subject to succession duty.

By sub-section 5 the executor is required before the issue of probate to him, or within such time as may be limited for that purpose, to make and file a true and correct statement under oath shewing (a) a full, itemized inventory of all the property of the deceased person and the market value thereof; (b) the names of the persons to whom the same will pass, and the degree of relationship in which they stand to the deceased. The Act goes on to provide that before the probate issues, the executor shall deliver a bond, in a penal sum equal to 10 per cent. of the sworn value of the property liable to succession duty, conditioned for the due payment to the Crown of any duty to which the property coming to the hands of the executor may be found liable. The Act then provides the rate payable, which rate varies with the amount of the aggregate value of the property of the deceased, and the degree of relationship in which the beneficiaries stand to the deceased. It then makes this provision, which, having regard to the points in dispute, is of the utmost importance:

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"The duties hereby imposed shall be deducted from the share of each

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person entitled to share in the estate, according to the rate applicable as above to such person's share."

I think that proviso determines the first point in dispute. *Re Holland* (1902), 3 O.L.R. 406, is an authority for the proposition that the words "testamentary expenses" do not include succession duty.

I, therefore, as to the first question, decide that the succession duty payable under the Succession Duty Act in respect of the real estate of the deceased, did not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will.

As to the second point: At the time of Miss Watkins' death, taxes were owing to the City of Victoria on the real property devised to Mrs. Caroline Humphreys amounting to the sum of $1,519.74, and on the Yates Street property the sum of $765, and on certain of the property forming part of the residuary estate, $866.05 to the City and $72 to the Province. The question submitted in respect of the taxes is as follows: Are the taxes payable to the City of Victoria and the Provincial Government debts of the deceased, and payable out of the residuary estate, or are they to be charged against the different properties in respect of which the said taxes have been assessed?

In regard to the Provincial taxes, Cap. 179, Sec. 80, provides that the person liable to pay taxes imposed by this Act shall be personally liable for the amount thereof. By section 87 a right of distress is given against the goods and chattels of the person who ought to pay the taxes; and by section 121 it is enacted that if the taxes payable by any person cannot be recovered in any special manner provided by the Act, they may be recovered with interest and costs as a debt due to the Crown. I think these sections clearly establish that the Provincial taxes were debts due by her, and therefore payable out of the residuary estate.

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With regard to the taxes due to the City, I have arrived at the same conclusion.

By section 155 of the Municipal Clauses Act it is enacted that personal licences, taxes on real estate, and rates payable by any person may be recovered by the Corporation with interest and

costs as a debt due to the municipality. I think the provisions of this section entirely dispose of Mr. *Elliott's* argument that the City has no remedy against the executors.

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As to his contention that this imposition of taxes was a charge within the meaning of Locke King's Act, I am unable to agree.

The second question will therefore be answered in this way: Taxes payable to the City of Victoria and Provincial Government were debts of the deceased, and are payable out of the residuary estate, and are not to be charged against the different properties in respect of which said taxes have been imposed.

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The costs, as between solicitor and client, of all parties will be out of the estate.

The appeal was argued at Victoria on the 23rd of January, 1906, before HUNTER, C.J., DUFF and MORRISON, JJ.

R. T. Elliott, for the residuary legatees.

Fell, for the trustees and executors.

Cur. adv. vult.

20th April, 1906.

HUNTER, C.J.: I think the judgment of my brother IRVING should be affirmed.

The main point taken by Mr. *Elliott* in a close argument was that the municipal taxes were not debts within the meaning of that word as used in the clause of the will which makes the residuary estate a fund for the payment of "funeral and testamentary expenses and debts." Section 155 of the Municipal Clauses Act enacts that:

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"Notwithstanding anything contained in this Act, the licence, taxes, rates, or rents payable by any person to any municipality may be recovered, with interest and costs, as a debt due to the municipality, in which case the production of a copy of so much of the Collector's roll as relates to the licence, taxes, rates, or rents payable by such person, purporting to be certified as a true copy by the Clerk of the Municipal Council, shall be *prima facie* evidence of the debt, and any judgment," etc.

Mr. *Elliott* contended that the effect of this language is not to make the taxes a debt, but to enable them to be recovered in the same way as a debt. I think, however, that while no doubt the intention could have been more clearly expressed, yet

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the phrase "shall be *prima facie* evidence of the debt" is sufficiently conclusive to shew that they are made debts, and that under the old system of pleading, they would found a good action of debt.

As to the other point, I fail to see the applicability of Locke King's Act. In the first place, that Act applies in terms only to land "charged by way of mortgage." I do not understand how to allow taxes to fall into arrear is to charge land by way of mortgage, but even if it were possible to do so, the decisions on that Act shew that "a contrary or other intention" is evinced by the creation of a fund out of which to pay debts: see *Eno* v. *Tatam* (1863), 32 L.J., Ch. 311; *Moore* v. *Moore*, *ib.*, 605.

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DUFF, J. DUFF, J., concurred in the reasons for judgment of HUNTER, C.J.

MORRISON, J. MORRISON, J.: I would dismiss the appeal.

Appeal dismissed.

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SAYERS v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Railway—Injury to passenger—Action—Limitation clause in Incorporation Act—"By reason of the railway"—"Works or operations of the Company"—Section 42 British Columbia Railway Act (R.S.B.C. 1897, Cap. 163)—Consolidated Railway Company's Act, 1896, Cap. 55, Secs. 53 and 60.

Plaintiff, on the 26th of December, 1903, was injured on defendants' tramway in Vancouver, in stepping off a movable platform provided by defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily

observable by passengers leaving the car, a large hole, into which plaintiff stepped, severely injuring her knee. On the 24th of December, 1904, she brought an action to recover damages for her injuries.

Defendant Company set up, *inter alia*, section 60 of their Act of incorporation, Cap. 55 of the Statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage was sustained."

Held (affirming the decision of DUFF, J.), that the words "by reason of the tramway or railway or the works or operations of the Company," should be read *separatim*, as describing different branches of the Company's undertaking, and that the section does not apply to a case like that at bar, which was based on the defendant Company's duty to carry the plaintiff safely.

APPEAL from the judgment of DUFF, J., in an action tried before him and a special jury at Vancouver on the 29th and 30th of June, 1905. Statement

Macdonell and *W. C. Brown*, for plaintiff.
Martin, K.C., for defendant Company.

DUFF, J., in his charge to the jury, said, in part: I will now give my opinion upon the defence pleaded in paragraph 13 of the statement of defence. The defendants rely upon section 60 of their incorporation Act, Cap. 55 of the statutes of 1896, which is as follows:

"All actions or suits for indemnity for any *damage* or *injury* sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage is sustained, or if there is a continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendants may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon, and may prove that the same was done in pursuance thereof and by authority of this Act."

DUFF, J.

It is contended that the effect of this section is to impose upon any person having a complaint against defendants for damages caused by reason of the failure of the Company to perform its contractual obligations to exercise due care in the carriage of passengers, a prescription of six months in respect of such complaint. Apart from the phrase "works or operations of the

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Company," the section (except as to the duration of the prescription) is identical with section 42 of the British Columbia Railway Act, and with the section providing the corresponding limitation in the Railway Act of Canada as it existed prior to the recent consolidation.

Now, the last mentioned section has not infrequently been the subject of judicial consideration; and one rule for the construction of that section has been laid down in Ontario which, I think, is a sound rule. It was enunciated by the Common Pleas Division in *Anderson* v. *Canadian Pacific R. W. Co.* (1889), 17 Ont. 747 at p. 756, in the following terms:

> "In the present case the defendants had entered into a contract with the plaintiff to carry her baggage safely as common carriers, and it was their duty to see that the railway was in a proper state. In the case cited the defendants were under no obligation to the plaintiff, apart from the public generally; and the clause in question has reference only to such an obligation, not to any special contract."

The case went to the Ontario Court of Appeal, and two of the members of that court (17 A.R. 480) expressed concurrence with the view taken by the Common Pleas Division, the other two members of that court holding the opinion that the section in question was *ultra vires* of the Dominion Parliament, and therefore of course not enforceable as against the plaintiff; but, so far as I can see from the report, no dissent was expressed from the view embodied in the language I have quoted.

DUFF, J.

Now, does that case supply the rule of construction to be applied here, notwithstanding the presence of the phrase "works and operations of the Company" in the clause we are considering? In my opinion it does. Of course, that is a comprehensive phrase, and it is capable of being read as comprehending any act of the Company giving rise to a cause of action for damages; but when one considers the very large powers which the Legislature has conferred upon the Company, it becomes apparent that some restriction must be placed upon it. I pass without observation the fact that no territorial limitation, except the boundaries of the Province, is placed upon the power of the Company to construct and operate electric railways and tramways, and to generate and distribute light, heat and power by means of electricity. The Company by section 37 have power to make

traffic agreements with other carriers for the carriage of freight and passengers; to enter into agreements with municipalities for the construction and repair of highways; and to act as guarantors for other companies having powers similar to their own. They have power to enter into agreements with other companies for leasing or selling to them any of the property of the consolidated company and for granting running powers over the Company's lines; and to enter into contracts to build and equip railways and to light streets in any municipality; and to supply power and heat in the Province generally.

If this section is to receive the construction which defendants put forward—then consider the consequences as they affect the classes of persons with which, under these powers, the Company may deal. Take, for example, the case of a stage line, or an express company, having traffic arrangements with this Company. The contention of the defendants is that the carrying out of such traffic arrangements would be an operation of the Company within the meaning of the section. Is it to be supposed that the Legislature intended to place this prescription upon a cause of action arising under an agreement of that kind by reason of the failure of the consolidated company to exercise due care in carrying out the agreement?

Again, take the case of an agreement with a municipality with regard to the grading of streets; an arrangement with a municipality to lease the plant and rolling stock of a municipal tramway and operate it for a period of years; and damage arising from the careless operation or repair of the tramway such as would give the municipality a right of action—is it reasonable to suppose that the Legislature intended this Company in such cases to have the protection of this limitation? Or take a case arising from the exercise of the power conferred by section 53, which reads as follows:

"The Company shall have power to enter into contracts with any person or persons, corporation or corporations, and with any municipality in the said Province, for building and equipping street railways and for lighting the streets of any municipality and supplying it or them with power and heat, and any such contract shall be valid and binding for the term of years thereby agreed upon on the Company and any such person or persons, or any municipality, corporation or corporations, so contracted with."

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Or the ordinary case of an agreement with a theatre proprietor to supply electric light, or with a manufacturer to supply power; and injury to the plant of the theatre or manufactory owing to the Company's negligence at some critical time—does it seem reasonable that the Legislature intended in any of these cases that this Company should be exempted from the usual forensic rules which apply to all other subjects invoking the aid of the courts of this Province.

I think that the method of interpretation which one ought to apply to a statute of this kind is supplied by the canon of construction which was laid down by the Chief Justice of Canada in the case of *St. Hyacinthe Gas Co.* v. *St. Hyacinthe Hydraulic Power Co.* (1895), 25 S.C.R. 168 at pp. 173-4. The Chief Justice there said:

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

DUFF, J.

The language that I have quoted points to this, that you are to look to the class of persons whose interests were before the Legislature at the time it was considering the statute, and you are not to extend the enactments so as to make them apply to interests which were not then in the eye of the Legislature.

Now, it is obvious enough that the interests of any individual who, as a member of the public generally, would be prejudicially affected by the wrongful acts of this Company, were within the contemplation of the Legislature; but I apprehend that on examination of the statute as a whole there is nothing in its provisions inconsistent with the view that persons having contractual relations with the Company—who are dealing with the Company in the ordinary way of business, whether buying power or electric light, or transmitting freight, or taking passage on the Company's trams or trains—were not within the contemplation of the Legislature.

Lord Field, in delivering the opinion of the Judicial Committee in *Railton* v. *Wood* (1890), 15 App. Cas. 363 at p. 366, quotes from Lord Selborne's judgment in *Hill* v. *East and West India Dock Co.* (1882), 22 Ch. D. 23, thus:

"'On principle, it is certainly desirable in construing a statute, if it be possible, to avoid extending it to collateral effects and consequences beyond the scope and the general object and policy of the statute itself, and injurious to third parties with whose interests the statute need not, and does not profess to, directly deal.'"

There is another view of the section. I doubt whether the phrase "operations of the Company" extends to the operation of the tramway. The Act recites the incorporation of the Company; the acquisition by the defendant Company of certain undertakings authorized by the Legislature, and the powers and privileges exerciseable in connection with those undertakings; and the intention of the Legislature to amalgamate all these undertakings and vest them in the defendant Company, together with the powers and privileges connected with them. One of these undertakings was the Westminster and Vancouver Tramway Company, which had already, before the passing of the Act, been held to be a railway within the general Railway Act of British Columbia, and the view given effect to by that decision is recognized not only in the section I am discussing, but in section 5 of the Act as well. In respect of the limitation of actions, this undertaking was governed by the provisions of section 42 of that Act. That section, for the reasons I have mentioned, had no application to a cause of action for injuries suffered by a passenger on the trams or trains of the Company by reason of the Company's failure to take due care. The argument for the defendant Company therefore involves this: that the claim for a passenger on the Company's line between Vancouver and New Westminster (which, as I have said, has been held to be a railway, and in respect of which the Company would, apart from section 60, be governed by section 42 of the Railway Act), who suffers by reason of such negligence, is subject to a limitation of six months; a limitation which, I believe, applies to no other railway in the Province constructed under the authority of the Provincial Legislature. Now, it seems to me that the members of the phrase "tramway or railway or works or

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operations of the Company" may be read *separatim* as describing different branches of the Company's undertaking. So reading it, "works and operations" would properly apply to those branches of the undertaking not exclusively connected with the tramway or railway. Conceive an objection in committee to the comprehensive nature of the phrase "works or operations of the Company," as extending the effect of section 42 of the Railway Act; the explanation doubtless would have been—this phrase applies not to the tramway or railway but to the other branches of the undertaking. That, I apprehend, is a view of this language not unreasonable; and I apprehend also that the considerations I have referred to bring the sections within the second branch of Lord Wensleydale's golden rule; that is to say, that if the ordinary meaning of the words in question is that which the defendant contends for, then, taking the whole statute together, construing it together, these words so applied produce an inconsistency, absurdity, and inconvenience so great as properly to convince the court whose duty it is to construe and apply them, that the intention could not have been to use them in their ordinary signification, and to justify the court in putting on them another signification which, in the opinion of the court, they will bear: *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743, *per* Lord Blackburn, at p. 764. In aid of this view of the section, also, one may apply the canon of construction stated by Sir Henry Strong, which I have already quoted at length.

DUFF, J.

The appeal was heard at Vancouver on the 22nd of November, 1905, before IRVING, MARTIN and MORRISON, JJ.

Argument

Martin, K. C., for the appellants (defendant Company): The cases referred to by DUFF, J., are actions on contract, and there is no breach of contract alleged here. He cited *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1895), 1 Q.B. 134; *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1 at p. 21.

L. G. McPhillips, K. C., on the same side: When does the contract of carriage commence and end? Here the Company carries on business on a public street over which it has no con-

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trol, and with which it may not interfere. The contract really means that the Company will carry the passenger safely from the time he gets on the car until he gets off the car. The step on the ground is no part of the car. He cited *Dudley* v. *Smith* (1808), 10 R.R. 561; *Brien* v. *Bennett* (1839), 8 Car. & P. 724; Fetter's Carriage of Passengers, Vol. 1, p. 233; *Creamer* v. *West End St. Ry. Co.* (1892), 31 N.E. 391; *Donovan* v. *Hartford St. Ry. Co.* (1894), 32 Atl. 350.

[IRVING, J.: We take it, of course, that those American cases form part of your argument, and are not cited as authorities.]

It cannot be contended that our contract covers the condition of the roadway.

Macdonell, for respondent (plaintiff): This is an action of contract pure and simple. The defendant Company contracted to carry the plaintiff from one place to another; there was a hiatus on the journey, and they contracted to have a proper and safe landing place from one car to another. They did not provide a safe transfer.

Argument

Cur. adv. vult.

25th January, 1906.

IRVING, J.: I agree with the learned trial judge that the words "by reason of the tramway, or railway, or the works or operations of the Company" in section 60 of the defendants' Act of Incorporation, Cap. 55 of 1896, should be read *separatim* as describing different branches of the Company's undertaking, and that the section does not apply to a case like the present, which is based on the defendants' duty to carry the plaintiff safely.

IRVING, J.

The judgment of the Court of Appeal for Ontario in *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* reported in (1905), 10 O. L. R. 419, beginning at p. 426, deals so fully with the question argued before us that it seems to me unnecessary to do more than say that I adopt the reasons there given.

I would dismiss the appeal.

MARTIN, J.: In my opinion the conclusion of the learned trial judge regarding the additional words "works or operations" should be affirmed; to my mind, if they have any

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effect, it is to limit the scope of the preceding sweeping expression "by reason of the tramway or railway." It may be that in the Railway Act, 1903, Sec. 242, the word "construction" has a special effect, but it is unnecessary to consider it here.

Then it is said that this is essentially an action of tort and not of contract. Now, as Lord Justice Lindley said in *Taylor* v. *Manchester, Sheffield and Lincolnshire Railway Co.* (1895), 1 Q.B. 134 at p. 138:

"Every one who has studied the English law will know perfectly well that there is debateable ground between torts and contracts. There are what are called quasi-contracts and quasi-torts; and it is sometimes not easy to say whether a cause is founded on contract or on tort. Very often a cause of action may be treated either as a breach of contract or as a tort. But here we are compelled to draw the line hard and fast and put every one of the actions into one class or the other."

Then he goes on to consider the peculiar effect of the County Courts Act. That case was explained in *Kelly* v. *Metropolitan Railway Co., ib.*, 944. The Master of the Rolls says at p. 946:

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"In old times the question of injury to a passenger through something done by the servants of a railway company gave rise to a dispute whether such an action was an action of contract or one of tort, and it was ultimately settled that the plaintiff might maintain an action either in contract or in tort. In the former case he might allege a contract by the railway company to carry him with reasonable care and skill, and a breach of that contract; and on the other hand, he might allege that he was being carried by the railway company to the knowledge of their servants, who were bound not to injure him by any negligence on their part, and if they were negligent that was a matter on which an action of tort could be brought. At the present time a plaintiff may frame his claim in either way, but he is not bound by the pleadings, and if he puts his claim on one ground and proves it on another he is not now embarrassed by any rules as to departure. The question to be tried is the same in either case. The plaintiff must rely on and prove negligence, and whether that negligence is active or passive seems to me to be immaterial."

This case also was on the construction to be given to a section of the County Courts Act, and therefore much of the language has no general application and must be read as applicable to the particular facts. Nevertheless, the remarks of Lord Justice Lindley and Lord Esher shew the two courses open to a passenger for reward. In the case at bar, according to the pleadings, which are all we have before us, there being no evidence in the appeal book, a contract to carry safely and securely a passenger

for reward is set up, and breach alleged in neglecting to use ordinary care in providing a safe place to transfer passengers from one car to another during a continuous journey from one part of the City of Vancouver to another on the same line of street railway. The journey being a continuous one, we are not embarrassed by the question of the exact termination of the contract on alighting from the car which was, *inter alia*, considered in *Bell* v. *Winnipeg Electric Street R. W. Co.* (1905), 1 W.L.R. 405.

We were referred to *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, but I must confess that I find some difficulty in obtaining any real assistance therefrom as regards this case, because the learned judges while arriving at the same result, differed in their reasons. As Lord Justice Romer says, p. 20:

"It is the case of an action against a public authority founded directly and not indirectly on an alleged neglect or default in the execution of a public duty or authority."

While I am of the opinion that this action is not "within the limitation," yet the question is not at all free from doubt, and it is desirable in the public interest that it should be set at rest, either by the Legislature or the court of last resort.

MORRISON, J., concurred with the reasons for judgment of IRVING, J.

Appeal dismissed.

LAMPMAN, CO. J.

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June 1.

CORPORATION OF VICTORIA v. BELYEA

THE CORPORATION OF THE CITY OF VICTORIA v. BELYEA.

Municipal law—Tax-imposing powers of Council—"Profession," whether including barrister—"Practising," what acts will constitute—Penalty.

The profession of a barrister is included in the term "profession" in clause 26 of section 171 of the Municipal Clauses Act, as amended in 1902, Cap. 52, and section 173 as amended in 1903, Cap. 42.

Semble, one appearance in the town where the barrister has his office, in court as counsel for a client, is sufficient to constitute an offence under the statute, although, following *Apothecaries Co.* v. *Jones* (1893), 1 Q.B. 89, acting in several instances would constitute only one offence in respect of which only one penalty could be imposed.

It is not necessary that the tax-imposing by-law should fix a penalty; Section 175 of the statute does that, and provides the manner in which it may be recovered.

APPEAL by the Corporation of the City of Victoria, from an order made by two Justices of the Peace dismissing an information against Mr. A. L. Belyea, K.C., charging him with practising as a barrister in the City of Victoria without having taken out the licence required by Revenue By-laws numbered 321 and 393.

Section 171 of the Municipal Clauses Act (R.S.B.C. 1897, Cap. 144) confers power to issue licenses and levy and collect, *inter alia*:

Statement

(21) From each person practising as a barrister or solicitor, twelve dollars and fifty cents for every six months.

(22) From every person, other than a barrister or solicitor, who has taken out a licence to practise as such, following the occupation of a conveyancer or land agent or both, twelve dollars and fifty cents for every six months.

(26) From every person following, within the municipality, any trade, occupation or calling, not hereinbefore enumerated, or who enters into, or carries on, any contract or agreement to perform any work, or furnish any material, not exceeding five dollars for every six months. Provided always, that no person employed as a journeyman, or for wages only, and not employing any other person or persons, or not having a regular place of business, shall be subject to the provisions of this sub-section."

In 1902, by Cap. 52, Sec. 42, clauses 21 and 22 of said section 171 were repealed, and clause 26 was amended by insert-

ing the word "profession" after the word "any" in the first line.

Section 173 as amended in 1903 (Cap. 42, Sec. 23) provides that every person following within the municipality any profession included in section 171, shall take out a periodical licence therefor, and shall pay to the assessor or collector the fee imposed; and section 175 provides that no person shall use, practise, carry on or exercise any trade or profession described or named in section 171 without having taken out a licence in that behalf, under a penalty, upon summary conviction, not exceeding $250 for every such violation.

Said by-laws 321 and 393 enact that every person using or following within the City any of the trades, occupations or professions particularly described, and mentioned in Schedule A thereto, shall take out a licence and shall pay therefor such sum as is specified in the said schedule, and clause 27 of the schedule is as follows:

"For every person following, within the Municipality, any profession, trade, occupation or calling, not hereinbefore enumerated, or who enters into or carries on any contract or agreement to perform any work or furnish any materials, $5 for every six months. Provided, always, that no person employed as clerk or assistant or as a journeyman, or for wages only, and not employing any other person or persons, shall be subject to the provisions of this section."

This clause is in practically the same words as clause 26 of section 171 of the Act.

Statement

By the by-law, the licences to be granted under it terminate on the 15th of July and the 15th of January in each year. Mr. Belyea, who is a barrister, did not pay the licence for the six months ending the 15th of January, 1906; the information was laid against him on the 2nd of January, and on the hearing it was dismissed on the ground that it was not proved that Mr. Belyea had practised.

Eberts, K.C. (*Mason*, with him), for the Corporation.

Belyea, K.C., in person, *contra*.

1st June, 1906.

Judgment

LAMPMAN, Co. J. [After reciting the facts as above set out]: On the trial before me it was shewn that Mr. Belyea was a barrister, and that he had taken out his annual certificate from the

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Law Society entitling him to practise throughout the Province; that he had an office in the Board of Trade building with notice boards leading to it, having on them the words "A. L. Belyea, Barrister"; and that on the 3rd of October, 1905, at the Supreme Court civil sittings here, he acted as counsel for the respondent in an action. The above facts were proved by Mr. Drake, the Registrar of the Supreme Court, Mr. Bass, Secretary of the Law Society, and Mr. Winsby, Assistant City Collector.

Whatever doubt I might have had as to whether the evidence of the witnesses named disclosed sufficient facts to constitute practising, is removed by the evidence of the respondent himself. If he had not been practising during the time in question he would have said so in his evidence.

But apart from this, and notwithstanding *Regina* v. *Andrews* (1866), 25 U.C.Q.B. 196, and *The King* v. *Buckle* (1803), 4 East, 346, which were relied upon by the respondent, I am inclined to think that one appearance, in the town where a barrister has his office, in court as counsel for a party, is sufficient to constitute an offence under the statute, although acting in several instances would constitute only one offence in respect of which only one penalty could be imposed: see *Apothecaries Company* v. *Jones* (1893), 1 Q.B. 89.

The facts here are distinguishable from those in *In re Horton* (1881), 8 Q.B.D. 434, as there the solicitor did not have his office in the place in which he attended on the taxation of a bill of costs, and the court held that the legislation in question there was aimed not at the particular transaction, but at the general carrying on of business and practising.

Judgment

I do not think that there is any doubt that a barrister is included in the term "profession" in clause 26 of section 171 of the statute: that barrister is not named specifically in the schedule to the by-law is immaterial: the schedule simply follows the wording of the statute: *Ex parte Trask* (1877), 17 N.B. 277; and the authorities referred to in the memorandum of authorities submitted do not, so far as I can see, assist the respondent.

Mr. *Belyea* also urged that no penalty could be imposed as the by-law did not fix one. The short answer to that is that it

is not necessary that the by-law should fix a penalty; section 175 of the statute does that, and provides the manner in which it may be recovered. All that is necessary in the by-law is that the amount of the licence fee should be fixed, and any attempt at dealing with a penalty would be bad: see *Hayes* v. *Thompson* (1902), 9 B.C. 249.

Before the taking of evidence was commenced, Mr. *Belyea* argued that even if it were decided there should be a conviction the court was powerless to act, as the Summary Convictions Act gave no express power to impose a fine. He overlooked the amendment of 1901, which gives the court on an appeal the same powers that the justice whose decision is appealed from had, and the corresponding sections of the Criminal Code have been held by the Full Court of Nova Scotia to confer on the court appealed to fairly ample powers of enforcing its orders: see *The Queen* v. *Hawbolt* (1900), 4 C.C.C. 229.

Judgment

The result is that I find the respondent guilty, and the appeal is allowed. A fine of $6.00 (this includes the $5.00 licence fee) will, I think, meet the requirements of this case, and the respondent should pay the costs of the appeal. If the parties do not agree upon the costs, and if the costs and the fine are not paid before Friday next, I will, at the Chamber sitting on that day, fix the amount of costs, and also the terms of the formal order of conviction.

Appeal allowed.

DUFF, J.

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June 6.

McGREGOR v. CANADIAN CONSOLIDATED MINES

McGREGOR v. THE CANADIAN CONSOLIDATED MINES, LIMITED.

Statute, construction of—Penal statute—Inspection of Metalliferous Mines Act Amendment Act, 1901, Sec. 12, r. 21A—"Machinery hereinafter mentioned," meaning of.

In construing a penal statute, the rule to be followed is that by which that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature.

The paramount object in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention.

Semble, the phrase "machinery hereinafter mentioned" in r. 21A of section 25 of the Inspection of Metalliferous Mines Act, as enacted by Cap. 37 of 1901, means "any of the machinery hereinafter mentioned."

CASE stated by Mr. Nelson, Police Magistrate for Rossland. The facts and arguments are sufficiently set out in the opinion of DUFF, J.

R. M. Macdonald, for McGregor.

A. H. MacNeill, K.C., for the Company.

DUFF, J: The following questions are submitted:

(a.) Whether employment for wages to perform duties which are in violation of the provisions of Rule 21A of section 25 of the Inspection of Metalliferous Mines Act, 1901, constitutes an inducing or persuading within the meaning of Rule 21B of said amended Act.

(b.) Whether the words "preceding section" in the third line of said Rule 21B apply to the matters referred to in Rule 21A.

Judgment

(c.) Whether the provisions of said Rule 21A apply at all unless both a direct-acting, geared, or indirect-acting hoisting engine, exceeding fifty horse power and a stationary engine or electric motor (exceeding fifty horse power) are operated in the same mine.

The first two questions are answered in the affirmative, and I think it is not necessary to add anything to what was said during the argument on the points raised by them.

The rule referred to in the third question is as follows:

"21A. Every person who, after the first day of January, A.D. 1902, being employed in or about a metalliferous mine, in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four (1) operates any direct-acting, geared, or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse-power, and shall perform any such duties for more than eight hours in any twenty-four, shall be guilty of an offence under this Act."

The construction of this rule presents difficulties. The reading contended for by Mr. *MacNeill*, however, namely, that a constituent element in the offence created by the rule is that all the different kinds of machinery mentioned shall be in the mine in question, and be operated for more than twenty hours in any twenty-four, leads to a result which it is highly unlikely the Legislature contemplated; and, although a possible construction, is, I think, a less reasonable view of the meaning of the words than that contended for by Mr. *Macdonald*. It is difficult to believe, for example, without imputing to the Legislature the desire to be absurd, that it was intended that as a condition to the liability to prosecution under the rule, there must be at one and the same time, in one and the same mine, a direct-acting hoisting machine exceeding fifty horse power, a geared hoisting machine exceeding fifty horse power, and an indirect-acting hoisting machine exceeding fifty horse power. But Mr. *MacNeill's* view, if acted upon, inevitably conducts us to that conclusion.

Judgment

It is not necessary, in order to support Mr. *Macdonald's* contention, to introduce any words into the section. "Machinery hereinafter mentioned" may, I think, be quite naturally read as meaning the machinery described in the language hereinafter appearing; and with this paraphrase it becomes obvious that the words "hereinafter mentioned" import the distributive conjunction "or," as appearing in the latter words of the section, into the description of the classes of machinery with which the Legislature is dealing; in other words, that the phrase "machinery hereinafter mentioned" means any of the machinery hereinafter mentioned.

The rule of strict construction, as applied to penal statutes, has been much relaxed in recent years:

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"The rule of strict construction, however, whenever invoked, comes attended with qualifications and other rules no less important; and it is by the light which each contributes that the meaning must be determined. Among them is the rule that that sense of the words is to be adopted which best harmonizes with the context, and promotes in the fullest manner the policy and objects of the Legislature. The paramount object, in contsruing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. They are, indeed, frequently taken in the widest sense, sometimes even in a sense more wide than etymologically belongs or is popularly attached to them, in order to carry out effectually the legislative intent, or, to use Lord Coke's words, to suppress the mischief and advance the remedy":

Maxwell on Statutes, pp. 412, 413.

Applying these principles, I come to the conclusion that Mr. *MacNeill's* contention cannot be sustained. The third question will be answered in accordance with this opinion.

DUFF, J.

1906

June 12.

HILL v. GRANBY CONSOLIDATED MINES

HILL v. GRANBY CONSOLIDATED MINES

Master and servant—Compensation for injuries—"Serious and wilful misconduct"—"Serious neglect," meaning of—"Dependants"—Dependency on son's earnings—Workmen's Compensation Act, 1902, Cap. 74, Sec. 2, Sub-Sec. 2 (c).

Misconduct is not "serious" merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself.

Any neglect is "serious neglect" within the meaning of the Act which, in the view of reasonable persons in a position to judge, exposes anybody, including the person guilty of it, to the risk of serious injury. If the danger to be apprehended is a danger of serious injury, or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act.

THE deceased was a brakeman on the defendant Company's train of ore cars, which was being pushed into the tunnel of the

Nobhill mine at Phœnix; the rear end of the train entering first, with the engine at the outermost end. The train crew consisted of a front brakeman, whose duty it was to be on the car first entering the tunnel in order that he might attend to the opening of switches; a hindermost brakeman who was usually on the front end of the engine, and whose duty it was to close the switches after the engine had passed over them; and the engineer, who attended to the duties of his position. There were no bell cords for signalling, and no whistle on the engine.

The tunnel opening was fourteen inches above the top of the ore cars. Over the mouth of this tunnel was constructed a shed 55 feet in length. There were no rope or other signals placed across the track near the entrance to the tunnel. The head brakeman sat upon the narrow platform at the end of the car on entering the tunnel. At the time of the accident in question herein, there was a space of but six inches between the side of the car and the tunnel, on the right-hand side, and a foot or so on the left-hand side.

The deceased met his death by standing up on the front platform of the car, with the front part of his body facing the mouth of the tunnel and his head turned around in the direction of the engine, facing, or looking, outside. The position of his body meant necessarily that he would be instantly killed on reaching the mouth of the tunnel unless he sat down. Statement

It was suggested in the evidence that the back brakeman sometimes got off the train in this shed to fill his lamp with oil, or attend to some other similar duty, and that possibly the deceased was standing up to see whether or not the back brakeman had got off; and as a fact he had got off.

Plaintiffs (the father and mother of the deceased) brought an action against the defendant Company under the Employers' Liability Acts. The trial of this action commenced before DUFF, J., and a jury, but the learned judge took the case from the jury and non-suited the plaintiffs, who thereupon made the present application under the Workmen's Compensation Act, 1902, Sub-Sec. 4 of Sec. 2, which was heard in March, 1906.

S. S. Taylor, K.C., for plaintiffs: "Serious and wilful miscon- Argument

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duct," or "serious neglect," as provided in paragraph (*c.*), subsection 2 of section 2 of Chapter 74 of the statutes of 1902, is to an extent defined in the English cases dealing only with the words, "serious and wilful misconduct"; but they seem to deal more especially with the circumstances of each case without making any attempt to lay down any general rules to govern other cases.

The words being "serious *and* wilful misconduct," and not "serious *or* wilful misconduct," it would naturally follow that not only must "misconduct" occur, but that such in itself is not sufficient to dislodge the workman's claim; it seems that such misconduct must be both "wilful" and "serious." For a definition of the word "wilful" in this connection, see the language of Bowen, L.J., in *In re Young and Harston's Contract* (1885), 31 Ch.D. 168 at p. 175; and as to "wilful misconduct" see the remarks of Bramwell, L.J., in *Lewis* v. *Great Western Railway Co.* (1877), 3 Q.B.D. 195 at p. 206. Honest forgetfulness is not wilful misconduct. See Lopes, L.J., in *In re Mayor of London and Tubbs' Contract* (1894), 2 Ch. 524, 7 R. 265 at p. 271.

Hill in the case at bar, beyond question had his attention attracted by something, and did not realize the actual danger of his position: whether through forgetfulness of the near approach to the tunnel, or being intent upon the discharge of some other duty can never be ascertained, but as his default could only result in death to himself and no risk to any other person, it is impossible to conclude that he was guilty of more than remaining intent upon the discharge of some other duty: or of accidental forgetfulness of his great danger. Hence in view of the above definitions, in no sense can he be held to be guilty of "serious and wilful misconduct."

Argument

The Legislature in adding the words "or serious neglect," has made a new difficulty. It is submitted that as these words are the alternative of "serious and wilful misconduct," while they must have been intended to mean something different, still the neglect required is such as should rank with the offence of being guilty of "serious and wilful misconduct," namely, something at least quite as serious in the eyes of the law. "Serious neglect" connote by themselves, neglect with the addition of

weight or gravity. It certainly is intended, when used in the Workmen's Compensation Act to mean something more than mere contributory negligence; it means a conscious default of a grave nature, and being absolutely careless as to consequences to oneself or others. The rule of construction to be applied is that adopted in *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q.B.D. 1 at p. 5.

As instances of serious and wilful misconduct he cited *Rumboll* v. *Nunnery Colliery Company, Limited* (1899), 1 W.C.C. 28 and *Reeks* v. *Kynoch, Limited* (1901), 18 T.L.R. 34.

On the question of plaintiffs being dependent on deceased, he referred to *French* v. *Underwood* (1903), 5 W.C.C. 119; *Howells* v. *Vivian and Sons* (1901), 85 L.T.N.S. 529, 4 W.C.C. 106; *Main Colliery Company* v. *Davies* (1900), A.C. 358, 16 T.L.R. 460, 2 W.C.C. 108.

A. M. Whiteside, for defendants, submitted that the accident did not, on the evidence, arise out of and in the course of the employment of the deceased. The act of the deceased, which caused his death, was not done in connection with his work, and does not come within the scope of his employment: see *Smith* v. *The Lancashire and Yorkshire Railway Company* (1898), 1 W.C.C. 1, 15 T.L.R. 64. As to "serious and wilful misconduct" he referred to *In re Young and Harston's Contract* (1885), 31 Ch. D. 168 at p. 175; *Lewis* v. *Great Western Railway Co.* (1877), 3 Q.B.D. 195 at p. 206; *Hornsey Local Board* v. *Monarch Investment Building Society* (1889), 24 Q.B.D. 1 at p. 5; Beven on Employers' Liability and Workmen's Compensation; *John* v. *Albion Coal Company, Limited* (1901), 18 T.L.R. 27; *Jones* v. *London & Southwestern Railway Company* (1901), 3 W.C.C. 46 at p. 49. In order to disallow compensation under the Act, however, it is not necessary that the workman should have been guilty of "serious and wilful misconduct." If the facts shew "serious neglect" the respondents must succeed. This is an expression introduced into the British Columbia Act alone, and there are no authorities to assist in its interpretation. See, however, *Wilson* v. *Brett* (1843), 11 M. & W. 113.

Argument

As to dependants, see remarks of Halsbury, L.C., in *Main Colliery Company* v. *Davies*, *supra*.

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Whether a person is or is not dependent on a workman's earnings is a question of fact. The expression "dependent" means dependent for the ordinary necessaries of life. Deriving benefit from earnings is not necessarily being dependent upon them. *Simmons* v. *White Brothers* (1899), 1 W.C.C. 89, 15 T.L.R. 263.

Taylor in reply.

12th June, 1906.

DUFF, J.: I have come to the conclusion that the plaintiffs are not entitled to compensation under the Workmen's Compensation Act for the reason that the evidence shews the injury to the deceased to have been caused solely by his serious neglect.

The questions involved are, the meaning of the word "solely," and of the phrase "serious neglect" as employed in sub-section 2 (*c.*) of section 2 of the Workmen's Compensation Act, 1902, and the application of this language to the circumstances of the case.

"Serious neglect" means, I have no doubt, something more than contributory negligence—otherwise the use of the phrase is purposeless. Further, "neglect" points, I think, to the failure to do some specific act which, in the circumstances, ordinary prudence requires the injured person to do, or the doing of some specific thing which, in the circumstances, ordinary prudence requires the injured person to refrain from doing; and its sense is perhaps in that respect more restricted than the meaning which should, in the like circumstances, be attributed to the word "negligence."

Judgment

It is, of course, impossible to give any precise description of the meaning of the phrase "serious neglect." I cannot, however, agree with Mr. *Taylor's* argument that it necessarily imports the quality of deliberation. That quality does appear to be involved in the "wilful misconduct" to which the earlier member of the sentence relates; at least, that is the opinion of the present Lord Chancellor expressed in the last decision on the subject: *Johnson* v. *Marshall, Sons and Co., Limited* (1906), 22 T.L.R. 565. The omission of any adjective corresponding to "wilful" from the phrase we are considering would indicate that that quality is not necessarily involved in the conduct

described by it. On the other hand, it is quite settled that serious misconduct in the earlier member means misconduct which in itself is serious, and not serious only when looked at in the light of the actual consequences of it. In the case just mentioned, the Lord Chancellor says:

"Further, the Act says it must be 'serious'; meaning not that the actual consequences were serious, but that the misconduct itself was so."

And Lord James of Hereford says:

"I would also add that serious misconduct cannot be construed by the consequences of any act. A man may be told not to walk on the grass. He does so, slips up, and breaks his leg. The consequences are serious, but the misconduct is not so."

The like meaning must, I think, be given to the word "serious" in the phrase "serious neglect."

Without making any pretence to frame an exhaustive definition, it seems to me that any neglect is "serious neglect" within the meaning of the Act which, in the view of reasonable persons in a position to judge, exposes anybody (including the person guilty of it) to the risk of serious injury. Lord James of Hereford gives examples of such cases in the following passage:

"But the use of the word 'serious' shows that misconduct alone will not suffice to deprive the workman of compensation. The class of misconduct that would do so might well be represented by such instances as if a workman whilst working in a mine of certain seams of coal struck a match and lit his pipe, or if he walked into a gunpowder factory with nailed boots, refusing to use the list slippers provided for him. Of course these are but instances illustrating conditions of absolute disregard of the lives and safety of many. But, on the other hand, misconduct may well exist that is not 'serious' in its nature—and therefore does not destroy the right to compensation."

Judgment

The point of these illustrations is, I think, that the danger to be apprehended is a danger of serious injury. I do not say that the application of the words is necessarily confined to those cases in which the injury to be apprehended is injury to a person; but if the danger to be apprehended is of that class, and if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. It may very often happen, of course, that the doing of a negligent act involves consequences far more grave than any

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which an ordinarily prudent man would apprehend as the result of it.

An act, or omission, which may be described as negligent (and even actionable as such) because occurring in circumstances in which a reasonably prudent person would expect it to cause harm of a very trifling character, may lead actually to disastrous consequences. Such an act or omission would not, I think, fall within the words we are considering. The test is the apprehended, as distinguished from the actual, consequences.

In the present case, the deceased person was, in my opinion, clearly guilty of neglect in remaining standing on the frame of the truck after the train entered the shed projecting from the mouth of the tunnel. I conclude from the evidence that there was no duty which required him to remain in that position; he must have known that if he failed to judge correctly the moment when to avoid collision with the roof of the tunnel, it would become necessary to get down from his position, he ran the risk of being injured by such a collision, and that such an injury could hardly fail, in the circumstances, to be most serious, if not fatal. No prudent man, in my opinion, would deliberately take such a risk unnecessarily; and having regard to the character of the risk so assumed, I must, in my view of the meaning of the words "serious neglect" hold that his conduct comes within them.

Judgment

There remains the question: Is the injury solely attributable to the neglect of the deceased? It is not necessary to define the meaning of the word "solely" as here used. Obviously it cannot be read literally. The injury, for example, in this case was partly due to the fact that the train was, by the act of the engineer, driven into the tunnel, and nobody would contend that this circumstance brings the case within the language of the statute. It was admitted by Mr. *Taylor* that in the circumstances he could not succeed on this point if the employer succeeded in shewing that the injury was not in any way attributable to any breach of duty on his part. I think he has shewn that.

It was argued that there should have been some appliance placed outside the mouth of the tunnel to warn the brakeman

that the train was approaching it. In my judgment, the passing of the train into the shed (the door of which was fifty feet only outside the mouth of the tunnel) might reasonably be regarded by the defendant Company as sufficiently apprising a brakeman of his proximity to the point of danger; and the injury is not in any degree attributable to the absence of any other means of warning.

It was also argued that the defendant Company was guilty of failure of duty towards its employees in not elevating the roof of the tunnel to such a height as to make collisions such as occurred in this case impossible; but although the particular accident in question in this case would not have occurred had this been done, it does not follow that the failure to do it constitutes a breach of duty on the part of the defendant Company.

"It is not of course every omission to do something which would have avoided an accident which constitutes negligence in law. In order that a duty should be imposed upon a person the neglect of which constitutes an actionable wrong, it must be apparent that the want of care or attention is reasonably likely to endanger the safety of others. It is not sufficient that the omission did in fact cause an accident, if it was not to some extent obvious that such a consequence was likely to result from it": *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561, 30 S.C.R. 110 at pp. 112, 113. That language applies here. The defendant Company would not, in my opinion, reasonably anticipate that persons in the situation of the deceased would expose themselves to danger as the deceased did.

Application refused.

WILSON, CO. J. (In Chambers)

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RAFUSE v. HUNTER. MACDONALD v. HUNTER.

Mechanic's liens—Misdescription of land—Right to amend lien—Interest of timber licensee in land—Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132; Section 13, Cap. 20, 1900—Land Act, R.S.B.C. 1897, Cap. 113, Sec. 54.

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Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien.

Section 54 of the Land Act, which vests in the holder of a special timber licence all rights of property in all trees, timber and lumber cut within the limits of the licence during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act.

Statement

IN an action to enforce a mechanic's lien against defendant Hunter, as contractor, and against defendant Staples as a party having an interest in the land, judgment had already been obtained against defendant Hunter, and the plaintiffs on an application to WILSON, Co. J., in Chambers, on the 21st of February, 1906, at Cranbrook, sought to make defendant Staples liable under the provisions of the Mechanics' Lien Act.

Thompson and *Dunbar*, for plaintiffs.

Harvey, for defendant Staples.

Judgment

WILSON, Co. J.: Plaintiffs in this action were workmen employed by defendant Hunter, as contractor, in the construction of a logging railway trestle over certain land, for which defendant Staples held a timber licence, and by reason of the employment of defendant Hunter by Staples, plaintiffs now seek to attach Staples with liability under the Mechanics' Lien Act.

I am first asked by plaintiffs under section 13 of chapter 20 of the statutes of 1900, for leave to amend the lien affidavits filed and the plaint herein by changing the description of the land sought to be charged by lien from a part of lot 341, group 1, Kootenay, to a described piece of Crown land, not a part of

lot 341. The claim advanced by plaintiffs' counsel is that they have substantially complied with the Act and that defendant is not prejudiced, as the lien was for trestle work, and that, therefore, the amendment should be allowed. In my opinion this cannot be done. The statute provides a specific mode for creating a lien, but insofar as the land described in the amendment is concerned, there is no existing lien (no matter how imperfect) and this is the very land the defendants now seek to charge. In the circumstances it surely is not a case of amending a lien that does not comply with the requisites of section 12 of the Act, but is a creation of a new lien against land which up to the present has not been charged, and I think that the statute did not contemplate that the court should create a lien. I, therefore, will not allow the amendment.

As to the second point, namely: that Staples is not the owner as defined by the Mechanics' Lien Act. The interest that Staples holds is by way of a timber licence granted under section 54 of the Land Act, which provides that the special timber licence shall vest in the holder thereof all rights of property whatsoever in all trees, timber and lumber cut within the limits of the licence during the term thereof. That assuredly gives no estate, either legal or equitable, in the land itself, and so the action as to the defendant Staples must be dismissed with costs.

Judgment

Application refused.

HUNTER, C.J.

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March 30.

PROTESTANT ORPHANS' HOME *v.* DAYKIN

PROTESTANT ORPHANS' HOME *ET AL.* v. DAYKIN *ET AL.*

Practice—Writ issued in name of firm of solicitors instead of a member of the firm.

It is quite permissible to issue a writ in the name of a firm. The English practice followed.

ON the hearing of a motion for an injunction, *R. T. Elliott*, for defendants, took the objection that the writ in the action was issued in the name of McPhillips & Heisterman, solicitors for the plaintiffs, and not in the name of a member of the firm.

Argument

A. E. McPhillips, K. C., for plaintiffs: It is permissible to issue a writ in the name of the firm: see *Engleheart* v. *Eyre* (1833), 2 Dowl. P.C. 145 and *Pickman* v. *Collis* (1835), 3 Dowl. P.C. 429. This is the practice followed in England: An. Pr. 1906, Vol. 2, p. 763.

Judgment

HUNTER, C.J.: It is quite permissible to issue a writ in the name of a firm of solicitors.

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Mining law—Coal Mines Act, R.S.B.C. 1897, Cap. 137, Secs. 3, 9, 12—Prospecting licences—Leases—Issue of more than one licence for the same area—Powers of Chief Commissioner of Lands and Works—Minister of Crown and statutory officer—County Court, jurisdiction of under section 9—Prohibition.

The Legislature has not, by section 12 of the Coal Mines Act, authorized the establishment of any regulations, conditions or restrictions depriving a licence granted pursuant to sections 2 and 3 of its characteristic of exclusiveness over the area to which such licence applies. The Chief Commissioner cannot modify the conditions precedent prescribed by sections 2 and 3.

In performing their functions under the statute, the Chief Commissioner and the Assistant Commissioner do not act as agents of the Crown but as mandataries of the statute.

Section 12 does not contemplate the granting of licences by the Lieutenant-Governor in Council; it contemplates the application to and the granting of a licence by the Chief Commissioner under sections 2 and 3.

The powers of the Lieutenant-Governor in Council do not extend to the prohibition of the grant of licences over reserved lands. A grant of the power to regulate, or to impose conditions or restrictions does not import a grant of the power to prohibit.

Per IRVING, J.: Section 9 of the Coal Mines Act is limited to disputes between adverse claimants in respect of (1.) the right or title to a licence acquired or sought to be acquired; or (2.) in respect of right or title to any claim acquired or sought to be acquired under the Act.

Semble, the word "claim" stands for "area of land," and is equally applicable to the area of land included in a licence as it is to that included in a lease.

APPEAL by R. G. E. Leckie and others from orders made by MARTIN, J., at Victoria on the 3rd of June and the 31st of July, 1905, prohibiting the County Court Judge of the County of Kootenay and the appellants from further proceeding with the prosecution or consideration of certain petitions presented by the appellants severally to that court alleging that a dispute had arisen respecting the right or title to a prospecting licence over the several areas described in those petitions, and asking a

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determination under section 9 of the Coal Mines Act that the appellants were severally entitled to prospecting licences over those areas.

The petitioners, with a view of securing a licence to prospect for petroleum, complied with the statutory provisions in that behalf as required by the Coal Mines Act, and in due time made the necessary application therefor to the proper official, which was refused.

Watt *et al.*, applied for licences to prospect over the same lands and they also were refused.

On the 16th of June, 1904, subsequently to those applications, the Chief Commissioner of Lands and Works caused a notice to be published in the British Columbia Gazette that licences to prospect for coal and petroleum upon and under the lands in question would be issued to all persons who had made proper application under the Coal Mines Act, upon payment of $100.

The petitioner did not apply for this licence. Watt *et al.* did on the 18th of June, 1904, apply, and on the 3rd of August, 1904, licences were issued to them to prospect for petroleum over those lands.

The form of licence, which is as follows, was a special one, framed to meet the particular circumstances which had arisen:

Statement

"Owing to the number of applicants for licences to prospect for coal and petroleum, and the peculiar circumstances surrounding the application for and issuance of these licences, and the well known fact that the issuance has been unavoidably suspended for so many months, the Government of British Columbia finds it impossible to determine the equitable rights of the numerous applicants. Therefore, for the purpose of enabling all persons to go before the proper tribunal for the determination of their respective rights and priorities, this licence is issued and accepted subject to such prior rights of other persons as may exist by law, and the date of this licence is not to be taken or held as in any sense determining such priority, and further it shall not be taken or held to waive enquiry by the courts into the proper performance of all conditions precedent as between adverse claimants; and further, on the understanding that the Government shall not be held responsible for, or in connection with any conflict which may arise with other claimants of the same ground, and that under no circumstances will licence fees be refunded.

"And the holder hereby waives any claim or demand against the Government, and expressly agrees not to take any steps or proceedings, or present any petitions to enforce any alleged claim or demand against the

Government of the Province of British Columbia arising out of the issuance of this licence or of any other matter or thing appertaining thereto.

"The land being under reserve from pre-emption and sale, this licence does not include any right other than the right to prospect for coal and petroleum.

"The duration of this licence is for one year from the 3rd August, 1904."

On the 5th of November, 1904, the petitioner herein applied to his honour Judge Forin, County Court Judge at Nelson, for and obtained an order calling upon all persons who might be interested in the subject-matter of the petition which sought a settlement of the disputes arising over the matter of the licences granted and applications for licences over the ground in question, to appear before him and state their claims or grounds of objection to granting the relief asked.

Counter petitions were then filed and the learned County Court judge made an order restraining the Chief Commissioner of Lands and Works from issuing leases to Watt *et al.*, and ordering that the disputes raised by the several petitions be heard at Cranbrook in the County Court on the 5th of July, 1905.

An application was then made on behalf of Watt to MARTIN, J., who made an order prohibiting the County Court judge from further proceeding with the petitions.

Sir C. H. Tupper, K.C., for Baker *et al.*, and Leckie *et al.*
R. T. Elliott, for Smart and Watt.

MARTIN, J., on the application before him in the *Leckie* v. *Watt* matter, came to the conclusion that section 9 of the Coal Mines Act did not apply to the proceedings by the parties before the assistant or local Commissioner of Lands and Works under section 3 of the Act, and that it is for that official to determine only whether or no a "valid objection has been substantiated" against the application for a prospecting licence. The learned judge continued:

Nevertheless the petition is essentially one based upon and complaining of a refusal to grant a licence, as appears particularly by paragraph 3 and the prayer thereof, and the only relief that could be had thereunder, even admitting all the alle-

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gations to be true in fact, would be in the nature of a mandatory order to the official in question to grant a licence to the petitioner. Such being the case, it is clear on the authorities cited that the learned County Court judge had and has no jurisdiction in the premises, and the want of it is apparent on the face of the proceedings.

It follows that the order *nisi* for prohibition must be made absolute.

In the *Baker* v. *Smart* matter his lordship gave the following reasons in writing:

This application differs from that of *Leckie et al.*, in which I delivered judgment on June 3rd last, in that all the parties concerned already hold prospecting licences under the Coal Mines Act for the same area of land. At the outset it is to be remarked that though Baker and the five other petitioners whose petitions are identical with his, allege that five other licence holders, mentioned in paragraphs 3 and 8, including the present applicant, Smart, are applying for leases, yet it is not alleged that *Baker et al.*, are doing so or are in a position to do so. The petitioners ask that the opposing licences be declared void and no leases granted thereunder because of the non-observance of statutory formalities; and that their own licences be declared to be prior to the others.

MARTIN, J.

It seems necessary, I think, for a proper understanding of the subject, to decide the question raised as to whether or no the Chief Commissioner is given power by the statute to issue more than one licence for the same area. After a careful consideration I am of the opinion that he does not possess that power, and that the intention and effect of the Act is that a licence shall confer upon the holder thereof the exclusive right for the purposes of the Act, to the area covered thereby. This is shewn all through the relevant sections, but I particularly refer to the following expressions: "before entering into possession of the particular part of said coal lands he or they may wish to acquire and work for coal" followed by directions for location in section 1: "the plot of land over which privilege is sought." In section 3: "piece of land sought to be acquired" and its dimensions, in section 4: "lands held under his licence" and

"covered by prospecting licence," in section 5 the "new licence over the same lands" to a new applicant in section 6; the extension provided by section 7, and the right to "use the timber and stone on the land included in such licence for the purpose of his mining operations," and for the "erection of building on said land" under section 3.

Though it is not suggested that any department of Government can advance its powers beyond a statutory limitation (of *Peck* v. *Reginam* (1884), 1 B.C. (Pt. 2) 11, 1 M.M.C. 13 and cases cited in the supplemental notes thereon in 2 M.M.C. in additional notes) yet for reasons set out in the notice respecting Coal and Petroleum Lands in South East Kootenay published in the British Columbia Gazette for June 16th, 1904, a special form of licence was authorized and issued on the 3rd of August, 1904, to many persons representing conflicting interests in the same area, which it is stated by *Sir Charles Hibbert Tupper*, the petitioners' counsel, has led to the present difficulty, and he consequently contends that "a dispute as to the right or title to a prospecting licence" has arisen under section 9 which it is the duty of the County Court to determine summarily as thereby directed.

The situation so created is undoubtedly unforeseen and could not have been contemplated by the framers of the statute because on the principle that "the King can do no wrong," it must have been presumed that the powers of the Crown would not be exceeded; nevertheless if the language of the statute is wide enough, effect will have to be given to it.

The objection is taken that no relief can be granted the petitioners which does not in effect involve the granting of an appeal to the County Court from the action of the Chief Commissioner under section 3, or the Lieutenant-Governor in Council under section 5, and further, that because the Crown is not named in section 9 it cannot extend to it, but should be restricted to disputes between subjects.

Many cases were cited on both sides, but I find I am unable to derive much assistance from them because of the special provisions of this statute, and the peculiar and different proceed-

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ings under sections 3 and 5 that section 9 must be considered in relation to.

There is here a dispute between conflicting licence holders for the same area, and such being the case at first blush I might be disposed to hold that section 9 has application, even though the Crown is not directly mentioned, on the principle that, having regard to the other sections, it might be held to be included by implication. But a more careful consideration of the whole statute satisfies me that this cannot be, because both sections 3 and 5 presuppose that there is only one licence for such area and therefore the granting of the lease under section 5 is something which depends solely upon the question as to whether or not said exclusive licensee "produces satisfactory evidence" of his discovery to the Lieutenant-Governor in Council, who alone determines the sufficiency thereof. It would be, in my opinion, as impossible to substitute the County Court for the Lieutenant-Governor in Council, under this section, as for the Chief Commissioner under section 5, which I have already decided cannot be done. If that is not so then the licensee in case of being dissatisfied with the way in which the Lieutenant-Governor in Council had rejected his proffered proofs, might, though no one else was concerned except the Crown and himself, appeal from the Council by invoking the assistance of the County Court to get his lease on the ground that there was a "dispute" or

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"claim" under section 9, and not only this, but also after the lease was granted he could compel the Crown to sell the lands to him at the end of five years; in short, completely oust the Council and the Chief Commissioner as well, and wipe out all the exclusive or discretionary powers clearly conferred upon them by various provisoes—(a), (c) and (d) of section 5. And the same remarks apply to the subsequent proceeding under section 7.

While it is difficult from the looseness of the language, and also unnecessary, to endeavour to say exactly what disputes or claims section 9 can apply to, yet on the other hand it is not difficult to suggest some it may relate to, *e. g.*, questions of boundary, of title, as in the case of other lands, and of rights under section 8. But it is clear to me that, after giving due

effect to the peculiar provisions of sections 3 and 5, it has no relation to the special proceedings there authorized, and though the unforeseen issue of conflicting licences has brought about unexpected disputes, yet that does not alter the principle of statutory construction which I have already applied to the case of section 3 as hereinbefore stated. On the subject of attacking Crown leases generally I refer to *Canadian Company* v. *Grouse Creek Flume Co., Ltd.* (1867), 1 M.M.C. 3; *Hartley* v. *Matson* (1902), 32 S.C.R. 644, 2 M.M.C. 23 and *St. Laurent* v. *Mercier* (1903), 33 S.C.R. 34, 2 M.M.C. 46.

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As to the formal objection raised to the grouping of the petitions it is only necessary to say in the circumstances, and having regard to the form of the order of the County Court made at the request of the petitioners which directly compelled this application to be made, that I am unable to give effect to it.

The result is, therefore, that the County Court has, on the face of the petitions, no jurisdiction in the premises and the order *nisi* must be made absolute.

MARTIN, J.

The appeal was argued at Victoria on the 19th and 22nd of January, 1906, before IRVING, DUFF and MORRISON, JJ. The points raised in the argument material to the decision are sufficiently set out in the reasons for judgment.

Sir C. H. Tupper, K.C., for appellants.
R. T. Elliott, for respondents.

Cur. adv. vult.

20th April, 1906.

IRVING, J.: This is an appeal from MARTIN, J., who on the application of John Watt, issued an order prohibiting his honour John A. Forin, judge of the County Court of Kootenay, from proceeding further in certain petitions of Edward Leckie and others, purporting to be lodged under section 9 of the Coal Mines Act, R.S.B.C. 1897, Cap. 137.

IRVING, J.

By the Coal Mines Act provision is made for issuing licences good for one year over a definite area of land not exceeding 640 acres.

The essential preliminaries to the obtaining of a licence are staking, posting notices on the land, advertising and making

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application in writing to the Assistant Commissioner of the district. That officer reports on the application to the Chief Commissioner, who shall if no valid objection has been substantiated, grant the licence as aforesaid. "As aforesaid" I understand, means over the particular piece of land staked and applied for.

By the fifth section, provision is made for the granting of a lease to a licensee who shews that he has discovered coal on the land held by him under his licence.

Such lease shall be confined to the lands covered by his licence, and shall not be issued until after a survey has been made.

The licences are granted by the Chief Commissioner, the leases by the Lieutenant-Governor in Council. The Chief Commissioner and Assistant Commissioner are, in my opinion, acting as agents of the Crown.

The licences may be granted on unreserved Crown lands, leased Crown lands, and also on reserved lands on terms to be prescribed by the Lieutenant-Governor in Council.

Section 9 is as follows:

"In case of any dispute as to the right or title to a prospecting licence or to any claim under this Act, the same shall be decided by the County Court or a Judge thereof, upon petition, in a summary way, who shall have full power to order what shall be done in the premises, and as to the costs thereof."

IRVING, J.

Section 9, in my opinion, does not authorize the County Court or judge to give directions to the Assistant Commissioner, the Chief Commissioner or the Lieutenant-Governor in Council. One cannot suppose that the language in section 9 was intended to confer upon a judicial tribunal authority to control the Chief Commissioner in the administration of public lands. For an alteration so sweeping one would expect to find a specific enactment.

In my opinion, the section is limited to disputes between adverse claimants in respect of (1.) the right or title to a licence acquired or sought to be acquired; or (2.) in respect of the right or title to any claim acquired or sought to be acquired under the Act. The word "claim" stands, I think, for "area of land," and the expression "claim" is equally applicable to the area of

land included in a licence as it is to that included in a lease.

In the appeal now under consideration, Leckie, on the 15th of November, 1904, presented a petition to his honour Judge Forin in which, after stating that he had complied with all the requirements of the Act as to staking, etc., alleged that the Assistant Commissioner of Lands and Works refused his application (10th December, 1901) on the ground that the land had been granted to the B.C. Southern Railway. The petition then sets out various orders in council relating to the land in question, and complains that no authority statutory or otherwise exists whereby the lands in question were reserved or withdrawn from the operation of the Coal Mines Act insofar as prospecting licences for oil were concerned, and no valid objection was or could be substantiated to justify the Chief Commissioner of Lands and Works in refusing to grant his application.

Stopping there for a moment, it seems to me that this is an appeal from the Chief Commissioner and section 11 has conferred no jurisdiction in respect of this matter.

The petition then goes on (par. 11) as follows:

"It has been alleged by or on behalf of the Honourable the Chief Commissioner of Lands and Works that other persons than the applicant above-named have staked and applied for the ground staked and applied for by the applicant or portions of it and it is alleged by your applicant that the applications of such other persons are invalid and void by reason of non-compliance with the provisions of the Coal Mines Act in that behalf."

With respect to this part of the petition, there is a dispute within section 9, but the petition does not shew in Leckie any right to take part in it, as he refuses to take out the licence in the form in which the Chief Commissioner proposes to grant it. In a word, the petition is demurrable, as the petitioner has no *locus standi*.

Is this a ground for prohibition or appeal? It is not easy to say when a matter that can be corrected on appeal should be dealt with by prohibition. But as this case could have properly been the subject of prohibition prior to the passing of the Act of 1905, Cap. 14, I think the writ can still issue notwithstanding the provisions of section 116 (*e*). I would dismiss this appeal.

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With regard to the formal objection raised to the grouping of several petitions in one application, I agree with my brother Martin, that having regard to the form of the order made by the County Court judge at the request of the petitioners, this objection cannot be sustained.

DUFF, J.: The application as presented to Mr. Justice Martin was an application for an order prohibiting further proceedings in respect of any or all of these petitions, and the order was granted in that form.

In the view I take of the questions raised by the appeal, it is not necessary to deal with the point raised by *Sir Hibbert Tupper* that the practice does not warrant a consolidation of a number of proceedings instituted by distinct individuals and relating to distinct matters (though involving the same general questions) for the purpose of an application for prohibition. I shall, for convenience, take the petition of Leckie as typical of the petitions involved in this appeal, and make no further reference to the persons whose names are associated with his in the proceedings.

Leckie's petition alleges that after compliance with the provisions of sections 2 and 3 of the Coal Mines Act, he applied to the Assistant Commissioner of Lands and Works at Fort Steele for a prospecting licence over certain lands described in the petition, and situate in East Kootenay; and that, on the 10th of December, 1901, his application was refused for the reason stated in a letter of that date by the Chief Commissioner of Lands and Works to be that

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> "The Department of Lands and Works has decided that the application cannot be granted as the land embraced therein has been Crown granted to the British Columbia Southern Railway."

That the Legislature of British Columbia in the session of 1903 passed an Act confirming an order in council which had been previously passed by the Lieutenant-Governor in Council on the 18th of March, 1902, cancelling the grants referred to in the letter of the Assistant Commissioner, and declaring that these grants were void and of none effect. The petition further alleged that it was stated by or on behalf of the Chief Commissioner of Lands and Works that persons other than Leckie

had staked and applied for the area referred to, or portions of it, under the Coal Mines Act, and that on the 16th of June, 1904, there appeared a notice, signed by the Chief Commissioner of Lands and Works, in the British Columbia Gazette, to the effect that licences to prospect for coal and petroleum upon and under lands within block 4,593 South East Kootenay, which includes the area in question, would be issued in a form referred to in the petition. The petition concludes with the prayer that the Chief Commissioner of Lands and Works may be ordered and directed to grant the petitioner a prospecting licence over this area on the payment of the fee of $50, and that the petitioner may have such further relief as to the judge of the said court might seem fit. This petition was filed on the 5th of November, 1904.

On the 23rd of February, 1905, an order was made by the judge of the County Court of Kootenay directing that all persons having any objections to the prayer of Leckie's petition should file with the Registrar of that Court, at Cranbrook, a petition or statement setting forth his claim and the grounds of his objection; that notice should be given to all interested persons for four weeks in the British Columbia Gazette and in certain local newspapers; and that copies of the petition should be forwarded to any party interested on application being made for the same to the Registrar.

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On the 17th of April, 1905, a petition was filed on behalf of A. W. McVittie in the County Court of Kootenay at Cranbrook, asking that Leckie's petition be disallowed, and claiming a declaration that McVittie was a prior applicant for a prospecting licence. This last named petition alleged that McVittie had obtained a licence on the 3rd day of August, 1904, to prospect for petroleum on the lands in question for one year.

Counsel for the respondents maintained his right to prohibition on two grounds. It was contended, first, that the class of disputes over which by section 9 of the Coal Mines Act the County Court is given jurisdiction is limited to disputes respecting the right or title to a prospecting licence *in esse* or respecting an area defined by an existing prospecting licence; and second, that before the presentation of the appellants' petition,

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namely, on the 3rd day of August, 1904, the respondent Watt had acquired, under the Coal Mines Act, a prospecting licence over the area to which Leckie's petition relates; and that since the Coal Mines Act authorizes the granting of one prospecting licence in respect of a given area, the powers conferred by section 9 of the Act cannot be brought into play respecting the area in question except, at all events, for the purpose of deciding some dispute between the holders of prospecting licences which may be alleged to affect that area.

In substance, I think the questions to be determined upon the appeal are fairly presented by these two objections.

The Act provides that any person who has complied with the provisions of sections 2 and 3 shall be entitled, if no valid objection has been substantiated, to a grant of a prospecting licence under the Act. I entirely agree with the view expressed by Mr. Justice MARTIN, with which counsel for both the appellants and respondents concurred, that a given area cannot be subject at one and the same time to more than one valid licence under the Act; and that in that sense the licences which the Act authorizes are exclusive licences; and it is very essential, I think, to keep this in view in construing the provisions of the Act. Mr. Justice MARTIN held that the question whether a "valid objection has been substantiated" within the meaning of section 3 is exclusively a question for the Assistant Commissioner, and consequently that any dispute raised by such an objection is not a dispute within section 9 of the Act. I cannot agree with that view. The Act does not, I think, reserve to the Assistant Commissioner, or to the Chief Commissioner, any discretion respecting the granting of a prospecting licence. An applicant, who has complied with the provisions of the Act is, I think, subject to the existence of any prior right, entitled to a licence provided that the area in respect of which the application is made is one to which the provisions of the Act apply. The objections referred to in the phrase which I have quoted from section 3 must, I think, be confined to objections going to the rights of the applicant under the statute. There is nothing in this view of the Act which conflicts with the general design of the British Columbia legislation respecting the disposition of

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the public lands. The Legislature has, by the statutes relating to minerals other than coal, and by the statutes relating to Crown lands, speaking generally, thrown open all unoccupied and unreserved Crown lands of the Province to the acquisition of rights in them through the performance of statutory conditions. A person desiring to acquire a pre-emption under the Land Act is entitled to an entry of his pre-emption upon compliance with the provisions of that Act. A free miner likewise acquires such interests in the mineral lands of the Province as the statute in that behalf authorizes by compliance with the prescribed statutory conditions. The Mining Ordinance of 1869, which first authorized the granting of coal prospecting licences, provided that on satisfactory proof of compliance with the conditions leading to the grant of the licence, the applicant should be entitled to the grant, provided no valid opposition should be substantiated. That Ordinance (by section 29) committed to the Assistant Commissioner of Lands and Works the duty of hearing and determining all cases of dispute between adverse claimants to prospecting licences, and that the Assistant Commissioner was to determine these disputes judicially is shewn by the fact that he was entitled, and in certain cases required, to summon a jury to assist him in the decision of questions of fact.

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The Act of 1883, declared that the purpose of the Legislature in passing it was to encourage prospecting for coal, the same condition was imposed upon the right of the applicant to acquire a prospecting licence; and by section 11 of that Act, there was for the first time enacted the provision which appears in the present Act as section 9. The Legislature, in other words, by the Act of 1883, substituted for the Assistant Commissioner the County Court or a judge thereof, as the tribunal to determine the question whether the condition that no valid opposition had been substantiated had been complied with. By the Act of 1892, which mainly reproduced the provisions of the Act of 1883, "valid objection," the phrase which appears in the present Act, was substituted for "valid opposition." I see no reason for thinking that a dispute raised by such an objection, at all events when founded on some adverse right or claim, is

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not a dispute as to the right or title to a prospecting licence within the language of section 9. That language is certainly broad enough to embrace such a dispute, and there seems to be no ground for restricting its natural meaning.

Having regard to the history of the legislation, the operation of the section may, perhaps, be held to be limited to such disputes, *i. e.*, disputes between rival claimants to a given area, or a prospecting licence over a given area; but it is not necessary to the determination of the questions before us actually to decide the point.

The petitions referred to disclose a dispute between rival claimants under the Act which must, I think, first be decided before the appellant can effectually press his claim for the grant of a licence; and he has, I think, brought this dispute before the forum charged by the statute with its determination.

It is not necessary for the purposes of this appeal to decide the question whether the County Court judge has power to issue a mandatory order against the Assistant Commissioner or the Chief Commissioner. If the disputes committed to his jurisdiction are limited to those falling within the class I have mentioned it would seem that many questions might arise on an application for a licence which it would be beyond his jurisdiction to decide; and consequently that (exercising a limited jurisdiction) he would, in making such an order, be acting beyond the limits of his powers.

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It does not follow that the right to a prospecting licence under the statute is not a right enforceable by legal process.

In performing these functions under the statute, the Chief Commissioner and the Assistant Commissioner do not act as agents of the Crown, but as the mandataries of the statute; and, as such, it is a mere commonplace to say they are not beyond the control of the courts. Where there are disputed claims to a grant of a licence over a given area, there will always be the preliminary question whether the objection giving rise to the dispute can be sustained; and if the objection comes within the class I have mentioned, then that question must, before the powers of a court of general jurisdiction can be called into exercise, be first decided under the provisions of section 9.

It was hardly disputed that the second contention must fail, unless the respondent can make good his position as a licensee under section 12.

I do not think that the respondent has established the contention based upon section 12. That section, in my opinion, merely provides for the application of the preceding sections to lands held under reserve, subject, with respect to the licence itself, to such restrictions, conditions and regulations as the Lieutenant-Governor in Council may impose. The section does not contemplate the granting of the licences by the Lieutenant-Governor in Council; it contemplates the application to and the granting of the licence by the Chief Commissioner of Lands and Works under sections 2 and 3. The words, "it is lawful," therefore, must be read as extending the function of the Assistant Commissioner and Chief Commissioner, under those sections, to lands held under reserve. So read, they effect no abatement from the obligatory character of the duties of those officers as prescribed by these sections: *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214 at pp. 222, 223, 235.

As regards these duties, they are the creatures of the statute only: *Mott* v. *Lockhart* (1883), 8 App. Cas. 568. The functions of the Lieutenant-Governor in Council under the section, too, are limited. His powers do not extend to the prohibition of the grant of licences over such lands. A grant of the power to regulate or the power to impose conditions or restrictions does not import a grant of the power to prohibit: *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88; *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743; *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at p. 363. He cannot, as I read the section, modify the conditions precedent prescribed by sections 2 and 3; he is, I think, by the terms of section 12, empowered to act only upon the licence as granted; and the purpose of the section being apparently to secure the carrying out of the object of the reserve, one does not see the necessity of more enlarged powers.

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Nor do I think that section authorizes the imposition of such conditions as would deprive the licences to which they apply of

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their character as licences under the Act and actually tend to defeat the object of the Act. As I have pointed out, the Act plainly contemplates the granting of a licence which confers exclusive rights over the areas to which it applies. As the object of the Act of 1883, the parent of the present Act, was expressed to be the encouragement of the prospecting for coal, the necessity of this is apparent. Moreover, the term "prospecting licence" was, when the Act of 1883 was passed, a term in British Columbia legislation having a well-understood signification; it meant a licence conferring rights to prospect which excluded all other such rights under any other such licence from the area to which it applied, and the term as used in that Act and in the present Act must, I think, be so construed.

In my opinion, the Legislature has not, by section 12, authorized the establishment of any regulations, conditions or restrictions depriving the licences of this characteristic of exclusiveness. There is ample authority for limiting the scope of general words contained in a legislative enactment to prevent a construction which would defeat the object of the enactment as disclosed by an examination of its provisions as a whole: *Cox* v. *Hakes* (1890), 15 App. Cas. 506. Nothing, I apprehend, can be more clear than this: that the granting of a vast number of licences over the same area would defeat the object which, as I have said, the Act of 1883 declares to be the object of that legislation—to encourage the prospecting for coal.

DUFF, J.

If these views be correct, it follows that the respondent does not stand in the position of a licensee under the Act. His licence contains the following conditions: [as set out in statement].

This document is not and does not purport to be an exclusive licence; the right is reserved to the Chief Commissioner to issue other licences conferring the right to prospect over the same area. The right of the respondent has neither been determined nor considered by the Commissioner. The document is not, either in form or in substance, a licence under the statute, and the act of the Chief Commissioner in issuing it was not, in my opinion, an exercise of the power conferred by section 3. It follows, for the reasons I have given, that it must be treated as a document without statutory validity.

It follows, moreover, that if the appellant is entitled by reason of compliance with the statutory conditions to the grant of a licence under section 3, the Act of the Lieutenant-Governor in Council in assuming to impose the conditions referred to in the notice mentioned in the petition, which are the same as the conditions above set out, cannot afford a justification for the refusal by the Chief Commissioner to exercise his powers under section 3, and grant a licence of the character authorized by that section, subject to such conditions, restrictions and regulations as may be imposed by the Lieutenant-Governor in Council in the lawful exercise of his powers under section 12.

I am unable, therefore, to give effect to the contention that the notice referred to, or the granting of licences under it, in any way deprives the appellant of his rights under sections 2 and 3.

The appeal should be allowed, with costs.

MORRISON, J. [after reciting the facts]: By an order of this Court his honour Judge Forin was prohibited from further proceeding in the said petitions in the County Court, as were also the petitioners Leckie *et al.*

From this order the present appeal comes up, and I gather that the short point for determination now is, as to the construction of section 9 of the Coal Mines Act. Has an applicant for a prospecting licence upon compliance with the statutory requirements acquired a right to such licence in respect of which, if a dispute arises, it may be heard in the County Court?

MORRISON, J.

To aid in construing this section the state of the law before the Act was passed may be considered. The words of this section are sufficiently intractable to justify an historical investigation of the enactment: The *Queen* v. *Most* (1881), 7 Q.B.D. 244; *The Queen* v. *Bishop of London* (1889), 24 Q.B.D. 213 at p. 224.

Beginning with the Mineral Ordinance Act, 1869, I find the object of that legislation to be, as appears in the preamble, to develop the resources of the Colony by affording facilities for the effectual working of . . . coal, etc.

An applicant for a prospecting licence was obliged to furnish

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to the Assistant Commissioner proper plans with his application, which was to be in duplicate; one of those was filed as of record in the Commissioner's office. Upon compliance with the statutory requirements, the Commissioner was empowered and required to issue a licence to the applicant.

Section 15 provided that

"in case of any dispute the right or title to or in a prospecting licence and the possession of any claim or privilege under this Ordinance will be recognized according to the priority of record or registration with the Assistant Commissioner subject to any question which may be raised as to the validity of the record itself."

By section 3 the record, it seems, consisted of the application and plan filed.

Section 30 empowered the Assistant Commissioner to decide those disputes, etc., and he is given all powers, etc., possessed by the County Court judges in the Colony.

The next enactment is found in the statutes of 1888, Cap. 3, and from the preamble there it is declared to be "expedient to offer inducements for the discovering and opening up of coal mines." It contains the same provisions as the last Act for filing the application and plan as of record, but the manner of settling disputes is changed by section 11, which is similar to that of section 9 of the present Act. It may be fair to assume that at this time the County Courts had become more fully and adequately established, and that the departmental business had

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increased, thus necessitating a division of work and responsibility.

The Act of 1883 was included in the consolidation of 1888 and was amended in 1890 and 1892.

By the amendment of 1892 provision is made for making application in duplicate, but nothing is said about filing the duplicate as of record. The tribunal for the settlement of disputes remains the same as provided by the Act of 1883.

Then came the revision of 1897 and the amendments of 1903-4.

I refer to the Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 49, which enacts that the preamble of every Act shall be deemed a part thereof, intended to assist in explaining the purport and object of the Act.

Looking at these various enactments as disclosing the state of the law as it previously stood, it would seem that the object of the Legislature was to encourage the development of Provincial coal areas, and with that laudable end in view facilities were given the public to come forward and explore for minerals, creating a right to a prospecting licence in such applicants as complied with the easy conditions precedent referred to.

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In case of disputes under the Mineral Ordinance Act, 1869, rights or claims were decided according to priority of record, which presupposes that there would be different claimants for the same area. These disputes were then heard by the Assistant Commissioner.

In 1883, the Legislature changed this method, substituting therefor the County Court, but there was no change made as to the nature or class of disputes to be so referred.

MORRISON, J.

I am of opinion that there is here a dispute as to the right to a prospecting licence which should be heard by the County Court judge.

I would allow the appeal.

Appeal allowed, Irving, J., dissenting.

In the *Baker* v. *Smart* appeal, which differed from the preceding case only in that the parties herein had obtained the special licence referred to, the following decision was given:

IRVING, J.: This is an appeal from MARTIN, J., who, on the application of one Smart, issued an order prohibiting his honour John A. Forin, Judge of the County Court of Kootenay, from proceeding further in certain petitions purporting to be lodged under section 9 of the Coal Mines Act.

In these proceedings Smart represents certain persons who are seeking to obtain coal areas in Kootenay district; Baker represents the petitioners, who are adverse applicants for the same lands.

IRVING, J.

The petition, after setting out that Baker had complied with the statute relating to the staking of the land, etc., and had obtained a special licence to prospect a certain area, alleges that

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Smart and those associated with him had also obtained a licence under the same Act over the same area.

This seems to me a dispute within the meaning of section 9, that is to say, a dispute between rival applicants upon which the County Court judge has power to adjudicate. The County Court judge in giving judgment between these two parties will not in any way control the Chief Commissioner.

I would allow this appeal.

DUFF, J.: The views I have expressed in the *Leckie* appeal are sufficient for the determination of this appeal in favour of the appellant.

I would allow the appeal with costs.

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MORRISON, J.: I would allow the appeal.

Appeal allowed.

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FERNIE LUMBER COMPANY, LIMITED v. CROW'S NEST SOUTHERN RAILWAY COMPANY *ET AL.*

Trial—Change of venue—Special jury, right to—Jurors Act, R.S.B.C. 1897, Cap. 107—Jurors' Act, 1860—6 Geo. IV., Cap. 50.

Plaintiffs named Nelson as the place of trial, the action having been commenced in the Vancouver registry. The defendants applied to have the venue changed to Vancouver and for an order that the action be tried by a special jury if the plaintiffs desired a jury. No affidavit was filed alleging any ground for supposing that a fair trial could not be had at Nelson, but it was urged that there was no provision by which a special jury could be had:—

Held, by the Full Court, that the defendants could obtain a special jury at Nelson, and that in any event the application was rightly dismissed as no ground had been shewn for supposing that a fair trial could not be had.

Decision of MARTIN, J., affirmed.

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APPEAL from an order of MARTIN, J., refusing an application by the defendants for a change of venue from Nelson to Vancouver, the domicil of the action, and for a special jury, if the plaintiffs desired a jury.

The application was heard at Vancouver on the 26th of January, 1906.

Davis, K.C., for plaintiffs.
W. S. Deacon, for defendants.

The appeal was argued at Vancouver on the 11th of April, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

Bodwell, K.C., for appellants (defendants): The first consideration is a fair trial: *Roche* v. *Patrick* (1870), 5 Pr. 210 at p. 213. The practice of the court and the provisions of the Jurors Act recognize the right to a special jury. A party is not bound to take a common jury; and the court can change the jury from a common to a special jury if of opinion that a special jury trial is the proper kind of a trial for the particular case. This case cannot be tried in Kootenay because a special jury cannot be had in Kootenay; therefore it should be tried at a place where a special jury can be had. It is in the discretion of the court to make this change.

Argument

[HUNTER, C.J., referred to *Centre Star* v. *Rossland Miners' Union* (1904), 10 B.C. 306.]

It might be a matter of argument whether a man has an absolute right to a special jury, but if the court sees it as a case which should go before a special jury, it has the power to say it shall be so tried. The mode of selecting a special jury, so called, in Kootenay does not give a party to an action a special jury in the proper and strict sense.

Davis, K.C., for respondents: Dozens of orders for special jury trials have been made in Nelson. The material on which this application is based is merely to get a change of venue; there is no suggestion of a reason for a special jury.

[*Per curiam*: There is no reason necessary; it is his right.]

There are a great many witnesses in this case, and it would

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be highly inconvenient to bring them all down to the coast; and we have filed an affidavit that we will be seriously prejudiced if the venue is changed; but on general principles, plaintiff, in a case where there is a large number of witnesses, would be at the mercy of the defendant if he cannot have his trial at the place where his witnesses are. The provisions in the Jurors Act relating to special juries are limited to the four cities of the Province. Section 55 of the Jurors Act does not apply to Kootenay; and if the trial is to properly take place at Nelson, then a trial by special jury cannot be had. He referred to section 2.

Argument

Bodwell, in reply: Section 2 of the Jurors Act relates merely to the machinery for getting a jury. In fact the whole Act relates to machinery, and if a party desires to press his right, he can ask the court to use that machinery. In this case the defendant can get in one of the four cities only his right to trial by special jury, and the only way the court can assist him to that right is to change the venue to a place where he can.

Cur. adv. vult.

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HUNTER, C.J.: This is an appeal from the order of MARTIN, J., refusing an application by the defendants for a change of venue from Nelson to Vancouver, the domicil of the action, and for a special jury, if the plaintiffs desire a jury.

The only ground urged in support of the application and of this appeal is that as the defendants desire a special jury, and as there is no machinery by which a special jury can be obtained at Nelson, the venue ought to be changed. The defendants offer to pay the extra expense, but the plaintiffs object on the ground that to change the venue would seriously prejudice them in the prosecution of their case as Nelson is the nearest assize town to Fernie, the place where most of their witnesses reside, and where the events took place which are the subject-matter of the action; and it is also suggested that it may be expedient to have a view. No affidavit is filed by the defendants alleging that there is any ground for supposing that a fair trial cannot be had at Nelson.

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In 1860, Governor Douglas, by proclamation, enacted a law for the then colony of British Columbia known as the Jurors Act, by which after reciting the fact that there was great difficulty in securing a sufficient number of British subjects to sit in grand and petit juries, and that many of the provisions of the Imperial statutes relating to the summoning, qualification and disqualification of jurors could not be complied with, enacted that the Imperial provisions relating to the summoning, qualification, returning and challenging of jurors, except for favour, should be repealed, and that the sheriff, or acting sheriff, might summon others besides British subjects to serve on grand and petit juries without regard to any property qualification.

This law governed the whole Province until 1883, when the Legislature began withdrawing different portions from its operation, and providing a more elaborate jury system for the portions withdrawn, but Kootenay has always remained under the old law.

Now had the matter been *res integra* I should have thought it fairly clear that the proclamation had discarded the provisions of the Imperial statute with regard to special juries for the simple reason that owing to the then sparse population of the Province, it would be impracticable to work them out—a condition of things which obtains to this day at such points as Barkerville, Clinton, Golden, and other places.

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But the cases referred to in my brother Irving's judgment shew that it has all along been taken for granted that the right to a special jury was not taken away by the repealing clause in the proclamation, and numerous actions have been tried by special juries (so-called) at different points which are still governed by the proclamation. I should have thought it a matter of some difficulty to work out a special jury scheme under the proclamation, as the provisions of the Imperial Act relating to qualification are all repealed, and no distinction between special and common juries is provided for by the proclamation.

However, I do not think I am called upon to upset the existing condition of things, and any difficulty that may be created

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by the mode in which the sheriff carries out an order for a special jury will have to be dealt with when it arises.

I may add that, even if I were able to accede to the contention that there is no right to a special jury in Nelson, that would not be a ground of itself for changing the venue, as that of course would involve the transfer of every jury action at the instance of any party demanding a special jury from any point governed by the proclamation to one of the Coast cities, which would practically amount in many instances to a denial of the right to trial by jury where such right otherwise exists.

Therefore, whether there is or is not a right to a special jury at Nelson, it follows that the appeal must be dismissed.

IRVING, J.: Prior to the year 1883, the summoning of jurors was regulated by the proclamation issued by Sir James Douglas, known as the Jurors' Act, 1860.

That proclamation recognized the Imperial statute 6 Geo. IV., Cap. 50, as being in force in this Province, except so much thereof as related to the qualification, summoning and returning of jurymen, and the challenging of jurymen except for favour.

On 1st January, 1884, the Jurors' Act, 1883, was brought into force. It was applicable to the whole Province, excepting only Cassiar and Kootenay. As to these two districts, the laws in force prior to the passing of the Act of 1883 were to remain in force, that is to say, 6 Geo. IV., Cap. 50 as modified by the Jurors' Act, 1860: see section 86, Cap. 15, B.C. Stat. 1883; Consolidated Stats. 1883, Cap. 64, Sec. 4.

IRVING, J.

In the consolidation of 1897, these sections were amended, but the amendment was in form only. There was an amendment again in 1900, Sec. 2, Cap. 13, but it is perfectly clear that at all times in the district of Kootenay the proclamation of 1860 has been in force.

Now, prior to the passing of the Act of 1883, there were a great many special jury cases tried in the Province of British Columbia by virtue of section 30 of 6 Geo. IV., *e. g.*, *The Thrasher Case* in June, 1881, see 1 B.C. (Pt. 1) at p. 157; *Sea* v. *Anderson* (1884), 1 B.C. (Pt. 1) 67, would be under the Jurors' Act of 1883.

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In the District of Kootenay I am able to recall the fact that in 1898 I tried a special jury case, *Stamer* v. *Hall Mines*, and before that an order for a special jury had been made in *Hogg* v. *Farrell* (1896), 4 B.C. 534.

The following list, obtained from the Registrar at Nelson, of cases in which special jury trials were had, shews what the practice is: *Croasdaile* v. *Hall* (1895), 3 B.C. 384; *Hendryx* v. *Hennessy* (1894), (not reported); *Stamer* v. *Hall Mines* (1899), 6 B.C. 579; *Pender* v. *War Eagle* (1898), 7 B.C. 162; *Brackman & Ker* v. *Oppenheimer* (1902), 9 B.C. 343 at p. 350; *Fawcett* v. *Canadian Pacific Railway* (1901), 8 B.C. 219; *Peters* v. *Nelson Electric Tramway* (1901), (not reported); *Winter* v. *Kaslo & Slocan Ry.* (1902), (not reported); *Hosking* v. *Le Roi* (1903), 9 B.C. 551; *Greenwood Electric* v. *Waterous Engine Works* (not reported); *Nipon* v. *Nelson Electric Tramway Co.* (1905), (not reported); *Campbell* v. *East Kootenay Lumber Co.* (1905), (not reported).

IRVING, J.

In my opinion the same authority for the summoning of a special jury exists to-day in Kootenay that existed in Victoria for the summoning of a special jury prior to the year 1884.

I would dismiss the appeal.

DUFF, J., concurred.

DUFF, J.

Appeal dismissed.

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EMERSON v. SKINNER

EMERSON v. SKINNER.

Statute, construction of—When to be held retrospective—Timber Manufacture Act, 1906, Cap. 42—Timber cut on Crown lands—Prohibition as to export—Authority and status of Chief Commissioner of Lands and Works under the Act—Maxim, "the King can do no wrong."

Section 2 of the Timber Manufacture Act, 1906, provides that all timber cut on ungranted lands of the Crown, or on lands thereafter granted, shall be used or manufactured in the Province.

Section 4 gives to the Chief Commissioner of Lands and Works, his officers, servants and agents, power to do all things necessary to prevent a breach of section 2, including seizure and detention of all timber so cut until security shall be given to His Majesty that such timber will be used and manufactured as provided by section 2.

Plaintiff had in his possession, and was about to export, a quantity of logs, cut before the passing of the Act, which were seized by the Provincial Timber Inspector.

Held, by the Full Court, affirming the decision of HUNTER, C.J., that the rule requiring the courts not to construe Acts of the Legislature to the prejudice of existing proprietary rights, if the language bears another sensible meaning, excludes from the operation of this statute all timber cut before the passing of it.

The authority to seize, under section 4, is not conferred upon the Crown. The Chief Commissioner acts thereunder, not as the organ of the Crown, but as the grantee of legislative authority, and does not purport to act other than as a statutory officer. The timber in question, consequently, not being in the possession of the Crown, there was no seizure by the Crown.

The maxim, "the King can do no wrong," considered.

APPEAL from an order dated the 31st of May, 1906, made by HUNTER, C.J., at Vancouver, on an application to discharge an order of replevin obtained by the plaintiff from MORRISON, J., whereby certain logs, which had been seized by the defendant, who is the Provincial Government Timber Inspector, purporting to act under the authority of the Timber Manufacturing Act, 1906, had been taken out of the defendant's possession.

Statement

Sections 2 and 4 of the Act are as follow:

"All timber cut on ungranted lands of the Crown, or on lands of the Crown which shall hereafter be granted, shall be used in this Province, or

be manufactured in this Province into boards, deal, joists, lath, shingles, or other sawn lumber.

"The Chief Commissioner of Lands and Works, his officers, servants and agents, may do all things necessary to prevent a breach of the provisions of section 2 of this Act, and to secure compliance therewith, and may, for such purpose, take, seize, hold, and detain all timber so cut as aforesaid, and every steamboat which may be towing said timber, and which it is made to appear to the Chief Commissioner of Lands and Works it is not the intention of the lessee, licensee, owner, holder or person in possession of such timber to use in this Province or to manufacture or cause to be manufactured into sawn lumber in this Province as aforesaid, or to dispose of such timber to others who will use the same in this Province, or have the same so manufactured in this Province, until security shall be given to His Majesty, satisfactory to the Chief Commissioner of Lands and Works, that such timber will be used or manufactured in this Province as aforesaid, and in the event of refusal or failure to give such security within four weeks after notice of such seizure and demand of security by or on behalf of the Chief Commissioner of Lands and Works, then the Chief Commissioner of Lands and Works may sell or cause to be sold such timber, and every steamboat which may be towing same, by public auction, and the proceeds of such sale shall be the property of His Majesty and shall form part of the Consolidated Revenue of the Province.

"Whenever a seizure is made of timber under the provisions of this Act, the onus of showing that the timber seized is not subject to the provisions of this Act shall be upon the owner, holder, or person in possession thereof."

Statement

The logs which the defendant seized were admittedly cut before the passage of the Act, and the question to be decided was whether the Act applies to such timber; in other words, whether the Act was intended to be retrospective, it not being so in terms.

A. D. Taylor, for plaintiff.

L. G. McPhillips, K.C., and *Shaw*, for defendant.

HUNTER, C.J.: While the principle [of retrospective legislation] is expounded in many cases, it is nowhere better stated than by Lord Coke. He says that there is a rule and law of parliament that *nova constitutio futuris formam imponere debet, non præteritis*, which, notwithstanding some judicial *obiters* to the contrary, I take to be not a mere canon of construction adopted by the courts, but a rule of parliament itself, and indeed of all civilized law-making authorities resting on

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natural justice, and a rule which in the case of substantive laws, the court cannot hold to have been broken unless it is broken in terms, or unless it is plain beyond possibility of doubt from the nature of the enactment that it was meant to be broken.

Here, the Act is not retrospective in terms, and there is nothing in its nature to shew such intention on the part of the Legislature, as, while granting that it may be in the public interest that timber cut on Crown lands should be converted into lumber within the Province, it is even more in the public interest that there should be security and confidence in the making and fulfilling of contracts.

There is no provision by which persons in the position of the plaintiff are indemnified either against loss of profits or against any damages which they might have to pay for not carrying out their contracts; nor would they have any redress against the Crown. If sued for damages, they could not safely plead that they were prevented by the Act from carrying out their contracts, as the answer might be that they might have got their timber from other than Crown lands. It is impossible, then, in the absence of the clearest language, to hold that the Legislature intended to expose such persons to such losses and risks without any kind of compensation or any source of redress.

Reference was made to *The Queen* v. *Vine* (1875), L.R. 10 Q.B. 196. In that case the court held, Lush, J., dissenting, that a statute disqualifying persons "convicted of felony" from selling liquors by retail, applied to persons convicted both before and after the Act, the ground of the decision being that the Legislature intended to prohibit the granting of licences to persons of tainted character, and that a person who was convicted of felony before the Act was just as tainted as one convicted after the Act. The majority of the Court held, therefore, that it was clearly meant to be retrospective; but the case is at best anomalous, and of very doubtful authority in view of the remarks of Lopes and Davey, L.JJ., in *Bourke* v. *Nutt* (1894), 1 Q.B. 725, if indeed it is not to be treated as overruled by that decision.

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I must, therefore, hold that the Act does not apply to the timber in question. That being so, the defendant had no power to seize it, and the Crown, as represented by the Chief Commis-

sioner, had no power to authorize its seizure under the statute in question. Therefore, as the Crown can do no wrong, there was no Crown seizure at all, and the timber was not in the possession of the Crown when replevied from the defendant. Motion dismissed with costs.

The appeal was argued at Victoria, on the 19th of June, 1906, before IRVING, DUFF and MORRISON, JJ.

L. G. McPhillips, K.C. (*Shaw*, with him), for the appellant: Under the statute in question here, the Chief Commissioner is acting for the Crown.

[DUFF, J.: He is there a statutory officer; that does not make him a Crown officer.]

He is acting for His Majesty, because in this case security has to be given to His Majesty. Can it be the fact in a case like this, where a Crown officer is authorized by a statute to do an act for the Crown, that replevin will lie to take the property back from him? The Chief Justice answered that argument by the application of the doctrine that the Crown can do no wrong.

[DUFF, J.: The modern application of that is that the Crown can act only through an agent who is responsible. So far as these Crown agents are concerned, they can be sued like any ordinary individual.]

See Pollock & Maitland, Vol. 1, p. 515; Stephen's Commentaries, Vol. 3, p. 667; Blackstone's Commentaries (Lewis), Vol. 1, p. 245. It would be most inconvenient for the Crown if it were called upon to answer every time for its agent in an action for replevin. Crown officers of course can do wrong, but they are not liable; if there is no wrongful act, there can be no replevin. He referred to Chitty's Prerogatives of the Crown, p. 209; *Rex* v. *Oliver* (1717), Bunb. 14; ——— v. ——— (1793), 1 Anst. 205; *Scott* v. *McRae* (1861), 3 Pr. 16. The court has no right to take goods out of the possession of the Crown.

Argument

[DUFF, J.: Supposing the Chief Commissioner has taken goods, without authority, under that Act, do you not think we could deal with the Chief Commissioner as with any other wrongdoer? I am supposing we come to the conclusion that the Chief Commissioner had no authority to take these goods under

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the Act. The mere fact of his calling himself the Chief Commissioner does not take him out of the control of the law.]

If he uses the discretion which is given him under the Act, and he is warranted by the Act, then it is different.

[IRVING, J.: But the Chief Justice has held that the Act did not give him authority.]

No action will lie against a party in his official capacity: see *Raleigh* v. *Goschen* (1898), 1 Ch. 73, 67 L.J., Ch. 59. While an action may be brought against Mr. Skinner, yet as the Crown holds the goods in question here, there can be no action for replevin, because replevin would mean a remedy against the Crown: *The Queen* v. *The Lords Commissioners of the Treasury* (1872), 41 L.J., Q.B. 178.

Under this Act, Mr. Skinner, acting for and through the Chief Commissioner, had a right to take these goods. It is not necessary for the purpose of justifying the seizure to shew that the Act is retrospective. The object of the Act is to keep within British Columbia, for manufacturing purposes, all timber cut on certain lands in the Province. "All timber cut" is an adjective descriptive of the kind of timber; cut timber; whether cut before or after the passing of the statute: *The Queen* v. *Vine* (1875), L.R. 10 Q.B. 195; Hardcastle, 3rd Ed., 364. There is nothing being taken away from the plaintiff in this case, in one sense; he is simply being deprived of the right to take this timber out of British Columbia. He referred to *Bourke* v. *Nutt* (1894), 1 Q.B. 725; *The King* v. *The Inhabitants of Dursley* (1832), 3 B. & Ad. 465, at p. 469; *Attorney-General* v. *Pougett* (1816), 2 Price, 381.

Argument

A. D. Taylor, for respondent: There is no provision in the Act for a summary remedy. If the seizure was wrongful, we had to take replevin: *Nireaha Tamaki* v. *Baker* (1901), A.C. 561. If the seizure was wrongful, a tort had been committed, and there was no remedy by petition of right. He referred to *Baker* v. *Ranney* (1866), 12 Gr. 228; *Musgrave* v. *Pulido* (1879), 5 App. Cas. 102. Unless the court are compelled by the language of the Act to hold that it is retrospective, they will not do so, particulary if it interferes with vested rights: *Midland Railway Co.* v. *Pye* (1861), 10 C.B.N.S. 178; *Gardner*

v. *Lucas* (1878), 3 App. Cas. 582 at p. 601; *Lauri* v. *Renad* (1892), 3 Ch. 402; Hardcastle, 3rd Ed., 351 *et seq.*; Maxwell on Statutes, 2nd Ed. 257. There is no doubtful language here; the timber must have been cut after the passing of the Act; it is not a remedial but a drastic, prohibitory statute.

[DUFF, J., referred to *Smylie* v. *The Queen* (1900), 27 A.R. 172.]

McPhillips, in reply.

Cur. adv. vult.

12th July, 1906.

IRVING, J.: The language of the Act in question is so indefinite that the provisions of the statute are applicable as well to those who have already (that is, prior to the passing of the Act on the 12th of March), cut timber on Crown lands, as to those about to engage after that date in the business. If the Act applies to those who have cut timber prior to the 12th of March, it applies also to those who have purchased timber cut prior to the 12th of March, although they, the purchasers, were not concerned in the cutting.

It is to be observed also, that the Act does not contain any clause providing for compensation.

Having regard to the drastic nature of the legislation, and to the absence of a compensation clause, we should, in my opinion, construe any ambiguous expressions in this Act so as not to impair existing rights. Adopting that rule, I am of opinion that the Act has no application to the logs in question.

IRVING, J.

The maxim that the King can do no wrong means that the King cannot be made amenable in the courts. It does not protect ministers of the Crown, for as Cockburn, C.J., said in *Feather* v. *The Queen* (1865), 6 B. & S. 257, "as the sovereign cannot" authorize wrong to be done, the authority of the sovereign would afford no defence to an action brought for an illegal act committed by an officer of the Crown. A minister of the Crown, if he commit a trespass against the person or property of another, may be sued as a private person: *Raleigh* v. *Goschen* (1898), 1 Ch. 73.

In *Walker* v. *Baird* (1892), A.C. 491, Captain Walker, the senior officer of H.M. ships on the Newfoundland station, in his

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statement of defence, endeavoured to justify a certain seizure made by him of private property, as matters of state and public policy sanctioned by the Imperial Government. The Privy Council said the suggestion that the court was not competent to enquire into a matter involving the construction of treaties and other acts of state, was wholly untenable.

As to the right to proceed by writ of replevin, the reason given by the learned Chief Justice seems to me sufficient. There has been no seizure or detention by the Crown, but merely a pretended exercise of a statutory authority. An action for an injunction would lie: see *Nireaha Tamaki* v. *Baker* (1901), A.C. 561.

The appeal must be dismissed with costs.

DUFF, J.: I agree with the Chief Justice that the rule requiring us not to construe Acts of the Legislature to the prejudice of existing proprietary rights, if the language bears another sensible meaning: *Main* v. *Stark* (1890), 15 App. Cas. 384 at p. 388, excludes from the operation of the statute under consideration all timber cut before the passing of it. It is not necessary now to consider whether the like exclusion applies to timber cut afterwards under rights conferred by licence or lease existing at the date of the legislation.

DUFF, J.

I agree also in the rejection of Mr. *McPhillips'* contention that (the timber in dispute being in possession of the Crown) the plaintiff cannot proceed by action, but is put to his remedy by petition of right.

The authority to seize is not conferred upon the Crown. If, in a case warranting the intervention of the Chief Commissioner under the statute, the Lieutenant-Governor in Council should assume to proceed without the concurrence of that officer, the statute would not, I think, afford a legal justification for the seizure; and in the like case in enforcing the powers conferred by the statute, the Chief Commissioner acts not as the organ of the Crown, but as the grantee of legislative authority. So here the Chief Commissioner did not purport to act otherwise than as a statutory officer. The timber is, consequently, not in the possession of the Crown; and in point of fact, the plaintiff in

this action claims nothing against either the Crown or any servant of the Crown as such.

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In this view, Mr. *McPhillips'* proposition respecting the limitations imposed on the operation of the special remedy by way of replevin need not be considered. It is to be observed, however, that the procedure now known by that name has its conditions and its scope prescribed by statute, and applies to all cases where goods have been wrongfully taken or detained; and moreover, that replevin even in its ancient form did lie against the King for goods in his possession taken from a tenant under distress for rent: Manning, Exchequer Practice, 89. The cases cited by Mr. *McPhillips* (*Rex* v. *Oliver* (1717), Bunb. 14; and the anonymous case in Anstruther, 205 and 212), when examined, plainly admit of no pertinent application. In both these cases proceedings had been taken in the Exchequer Court on behalf of the King; in the first to recover a fee farm rent; and in the second for condemnation of goods alleged to be contraband seized by the revenue officers. It was held that in the first case the attempt to replevy goods taken by the commissioners under office found, and in the second case the attempt to replevy the goods seized constituted a contempt of the Court of Exchequer. In both cases the goods were held under process of the Court of Exchequer, and the replevisor was rightly attached for interfering with the possession of that court.

DUFF, J.

MORRISON, J.: The logs in question, which were purchased by the plaintiff from the hand logger, were cut before the date of the passage of the Timber Manufacture Act, 1906, from section 2 of which it will be seen that in terms at any rate, the Act is not retrospective, and in my opinion it was not the intention of the Legislature to make it so, assuming they had the power to pass such a piece of legislation.

MORRISON, J.

Neither in British Columbia nor by the Dominion are grants made of "timber lands," but the policy of the Legislature and Parliament is to grant licences and leases in respect thereto, the continuance of which is perpetuated, subject to compliance with the statutory requirements which exist at the time of so leasing

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or licensing, or which may be promulgated in due and anticipated course of departmental regulation or legislative enactment, creating thus what is practically equivalent to a Crown grant.

It would be so contrary to manifest justice in my judgment for the Legislature to invade this settled and well recognized policy by passing retrospective, or what in a case of this kind would savour of confiscatory legislation, that I cannot accede to the contention of counsel for the appellant that this Act goes so far.

MORRISON, J.

I agree with the learned Chief Justice that the timber in question was not in the possession of the Crown when replevied.

I would dismiss the appeal.

Appeal dismissed.

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STAR MINING AND MILLING COMPANY v. BYRON N. WHITE COMPANY.

Mining law—Extralateral rights—Trespass workings—Continuous or faulted veins.

Evidence—Inspection—Conflicting theories.

In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct.

The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the de-

fendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting, were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry.

ACTION for damages and an injunction in respect of the alleged taking of ore by the defendants from the Rabbit Paw and Heber fractional mineral claims, tried at Nelson by HUNTER, C.J., in February, 1904. The points in dispute are incorporated in the reasons for judgment. Statement

Davis, K.C., and *S. S. Taylor, K.C.*, for plaintiffs.
Bodwell, K.C., and *Lennie*, for defendants.

23rd November, 1905.

HUNTER, C.J.: This is an action for damages, and an injunction arising from the taking of ore by the defendants from the Rabbit Paw and Heber fractional mineral claims, owned by the plaintiffs.

The ore was admittedly taken from within the limits of the said claims, but the defendants justify under the law governing their claims (known as the Slocan Star and the Silversmith), that is to say, they allege that they are entitled to the ore as belonging to a vein, the apex of which is on their own claims, and which they have in due course of mining followed down into the plaintiffs' ground.

The mountain on which the claims are situate looks towards the north, and the vein works backward with depth towards the south. The defendants sank a shaft from their fifth level, and worked thence westerly into the defendants' ground, as they contend along their vein, and it is from this drift that most of the ore in question has been taken. Judgment

The plaintiffs claim that in so doing the defendants have not been pursuing the Slocan Star vein, but that this vein is cut off by what they term the Black Fissure, which extends from a point at or near the head of the shaft on the fifth level in a northwesterly direction to the point B on the plan affixed to the defendants' model, and beyond into the slates.

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At the trial a large mass of evidence was given in support of the respective theories, the plaintiffs claiming that the Slocan Star vein was cut off, as already stated, by the Black Fissure, and the defendants maintaining that the Slocan Star vein continues around point B to a point C on the model, and connecting with the Silversmith vein which they were working at the same level, and in fact that the Silversmith and Slocan Star constitute one and the same vein.

Difficulties having arisen as to the selection of an indifferent engineer to inspect and report upon the condition and appearance of the workings, I considered it advisable to inspect them myself in conjunction with an engineer chosen by each of the parties, and counsel were invited to attend the inspection, which, however, they both agreed was unnecessary. The plan adopted was that each engineer was to point out and explain upon the ground the principal facts in support of his contention, and that the other was then to explain them from his point of view. The result was that as the connection of the two veins between points C and D-27 on the fifth level was not apparent to the eye, it was ordered that such work should be done as would, if possible, shew the continuity of the vein through that distance.

This work having been done and a second view having been had, I have come to the conclusion, after hearing further evidence and what was urged, that the defendants' contention is correct, and that the fifth level shews a continuous vein traversing the Silversmith and Slocan Star.

Judgment

With respect to the origin of this vein, I incline to accept the defendants' theory in preference to that of the plaintiffs. The former was that the remarkable curve which the vein takes at the point where the work was ordered to be done arises from the fact that the fissure passes around the nose of a large dyke of porphyry (which had long before intruded in a heated condition through the slates which there constitute the country rock), in preference to traversing it, the porphyry being a much harder and denser material than the surrounding slates; and I do not consider that the theory is weakened by the fact that the fissure does traverse small tongues of that material. The defendants' theory was that the Black Fissure cutting off the Slocan Star

vein was caused by the contraction of the heated porphyry, but it seems difficult to reconcile this with the fact that small tongues of porphyry are found cut by the fissure, and that spathic iron or siderite which is found close to the porphyry cannot exist in the presence of any considerable degree of heat. However this may be, I do not think I am called on to definitely decide as to the correctness of either theory, as I consider there is abundant confirmatory evidence of the contention that the Silversmith and Slocan Star veins constitute one and the same vein.

Mr. Elmendorf, the defendants' engineer, pointed out several places in the east portion of the fifth level which is admittedly on the Slocan Star vein—notably three—one being at the face, the second in the rise 75 feet east of the cross-cut, and the third at the junction of the level and the cross-cut—where identically the same material and appearance is to be found as that which composes the barren portion of the Black Fissure, which Mr. Sizer, the plaintiffs' engineer, admitted to be the case. And although he admitted that there were many spots in the different levels of the Slocan Star which were barren and composed of the self same material as the Black Fissure, he maintained there was less evidence of crushing movement in the Star vein than in the Fissure, but I do not see how any distinction can be based on this ground alone to differentiate different portions of a vein which is continuous in fact. It is true that at one or two points, notably at and beyond B, the material composing the vein and the adjoining slates appeared to be more compressed, shattered and contorted than usual, but I think this was to be expected owing to the sharp curve taken by the fissure and the weight of the superincumbent mass of porphyry.

Judgment

Inspection of the fifth level disclosed the fact that ore is found between stations 19 and 20, as well as all around the "horse" or shaft (*i.e.*, where the vein widens out at the western boundary of the Slocan Star and commences its north-westerly course in the Heber fraction); and also for a distance of 280 feet from the shaft as far as station 27, that is to say, for 280 feet in the Black Fissure, and there is nothing to distinguish this ore from that in the Slocan Star vein. Mr. Sizer explained the existence of ore in this 280 feet by saying that for a distance of 80 feet

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up to the cross-cut it was the Slocan Star vein broomed out, as it were, and butting up against the Black Fissure; and that, since for the next 30 feet there is little or no trace of ore, but from that on to the uprise in the Rabbit Paw ground (a distance of about 40 feet), ore is found to occur, these circumstances point to the existence of another vein separate from the Slocan Star vein, and also cut off by and brooming out against the Black Fissure; and in explanation of the fact that ore is found in the remaining 90 feet up to station 27, invokes the theory of drag ore, or suggests that the Black Fissure has been mineralized for that distance. I have therefore, on the one hand, the contention that the presence of ore in this 280 feet indicates continuity of vein, and, on the other, a theory which has little to commend it except the ingenuity born of despair, and which the fact that the ore is found over the entire width of the vein is of itself sufficient to demolish.

Certain places were visited which Mr. Sizer claimed supported his theory, and would demonstrate it if exploratory work were ordered to be done. Mr. Sizer contended at the trial that evidence could be found at the angle of the stope near station 19, about 25 feet above the fifth level, in support of his theory of cut off (Exhibits D and 69), but a shot having been put in since the trial, has wiped out any appearance of junction or cut off. In the stope above, where Mr. Sizer contended at the trial a similar appearance could be observed (Exhibits E and 70) the ore has dropped down since the trial and shews the vein continuing on the course shewn by Exhibit 70, and has also uncovered a clear hanging wall of porphyry. At the west face of the Intermediate above No. 5 level, there was before the trial an angle as shewn in Exhibit G, and Mr. Sizer contended that if this were removed a clean cut off would become apparent. Work has been done and the level continued for a distance of 23 feet, with the result that the vein appears to proceed in the course shewn in Exhibit 71, and there is a good ore body now shewing in the face. In the presence of this debacle all that Mr. Sizer could suggest was that the level was not run far enough, and that the vein might be 70 or 80 feet in width, and that it broomed out in the same way as below. There was also a place in the angle of the Inter-

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mediate below five, where Mr. Sizer stated at the trial that a crack 18 inches in depth was to be seen which supported his contention that the Black Fissure cut off the vein and proceeded on beyond; but this spot was not then open to examination as the shaft was full of water.

Silversmith level No. 4 was then examined. This is entered through a horizontal tunnel which penetrates the nose of the dyke for about 50 feet, when vein matter in place becomes observable, and at a distance of 126 feet Mr. Elmendorf pointed out ore, and it was sworn at the trial that ore was found nearer the mouth of the tunnel by a distance of about 50 feet. I have no doubt that this tunnel simply cuts through a downward bulge in the porphyry, and that if it had followed this bulge it would have followed ore or vein matter all the way in from the exit.

The outcrop was next inspected, where a series of pits (over 50 in a distance of about 1,300 feet) had been dug shewing the apex rounding the dyke, its lowest point being at the nose of the dyke. Mr. Sizer candidly admitted that he could not dispute the fact that the Silversmith vein continued its way easterly around the point of the dyke, but that at a short distance east of the mouth of the tunnel, it was intercepted by the Black Fissure. He could not, however, pretend to fix the exact place, nor say which pit was the most easterly of the Silversmith outcrop, or which was the most westerly of the Slocan Star. In fact, such a feat was obviously impossible, for the simple reason that in all the pits identically the same vein matter was visible. Evidence was given at the trial that ore in place had been found in the top of pit 19, *i.e.*, the mouth of the shaft which communicates with the fifth level, and this was not successfully impeached by the plaintiffs. The significance of the fact that ore in place is to be found in and near pit 19 lies in the circumstance that this pit is, roughly speaking, the corresponding point on the apex to the middle point of the Black Fissure as it appears in the fifth level.

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The work ordered to be done between C and D-27 was inspected in May last, and the *locus* shewed in places a clearly defined hanging wall and the characteristic vein filling present in the Silversmith and Slocan Star veins.

Mr. Fowler, the engineer who attended on the inspection on

HUNTER, C.J. behalf of the plaintiffs in the absence of Mr. Sizer, stated that

1905 he was unable to see how this wall could be connected with the

Nov. 23. hanging wall of the Slocan Star vein, and no doubt it would be

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Inspection in presence of Mr. Elmendorf and Mr. Fowler was also had of the place in the Intermediate below five, not accessible on the former inspection, where Mr. Sizer had discerned a crack, and which he claimed, if opened up, would shew the Black Fissure cutting off the Slocan Star vein. I am satisfied that this is a mere slip in the vein filling, and that it is only one of a number of such instances in the mine. I might add that ore occurs here and there in this level west of the shaft, the last occurrence being about 125 feet from the shaft, and about 12 feet from the face.

This second inspection having been had, further evidence was heard in July last, and the only matter developed which calls for any comment was that Mr. Sizer seemed to be uncertain as to what width he would assign to the butt-end of his so-called

Judgment No. 2 vein, and as to what portion of the ore found in the alleged Black Fissure he would call drag ore.

Lastly, it should not be overlooked that the fact that this so-called Black Fissure was followed up unerringly for a distance of over a thousand feet without cross-cutting into the adjoining rocks as far as point B, is a strong argument to shew that the defendants were successfully following the Slocan Star vein in its various turnings, an argument which is better appreciated when one has been underground and seen the *locus in quo*.

Much stress was laid upon the fact that the Black Fissure as seen in the fifth level was barren for over 1,100 feet, but in my opinion, there is nothing in this to militate against the contention for continuity. Other instances of veins being barren for long distances were cited and there is nothing to guarantee that this

portion of the fifth level may not improve with depth, until a point is reached when the ascending solutions were less subject to the influence of the overhanging porphyry and there is, however, the difficult fact to contend with that, as already stated, assay ore was found in pit 19.

I was accordingly at the close of the evidence of the opinion that this so-called Black Fissure is a myth, and that the Slocan Star and Silversmith veins constitute one and the same vein. After the evidence was closed, Mr. *Davis* applied for an order that further work be done on the ground that not enough had been done to establish his theory, and that without fresh work it was useless for him to continue, that there was no object in arguing the case as it stood, and that unless more work was done, the case was practically settled. As I was satisfied on what I had already seen and heard that his theory was false and could not be demonstrated to be true, I refused the application, but left the question open until after I had heard argument on the whole case. The argument was fixed for November 6th last, but on that day Mr. *Macneill* appeared for the plaintiffs and informed the court that he was instructed merely to formally renew the application, which being formally refused, he withdrew from the proceedings.

Nothing, then, having been urged by Mr. *Macneill* as to why I should change my opinion and order further work done, I remain of that opinion, and consider that it would be only imposing a serious burden on the defendants without any advantage to the plaintiffs if I were to order any more work to be done in support of a theory which did not keep its original form, but grew with the litigation, and from time to time shewed great elastic powers in accommodating itself to the facts.

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There is, therefore, nothing left for me to do but to dismiss the action with costs.

Mr. *Bodwell* pressed for a declaration as to the nature and extent of the rights of his clients, but as there is no counterclaim praying for such a declaration, it is not open to me to do so. Even if there were, it would not necessarily be incumbent on me to do so. As matters stand, the dismissal of the action determines all the issues in favour of the defendants.

Action dismissed.

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VOIGT v. GROVES *ET AL.*

Mining law—Adverse action—Mineral Act Amendment Act, 1898, Cap. 33, Sec. 11—Effect and intention of—Failure of plaintiff to prove title—Admission by him that the evidence on which he relies to defeat his adversary's claim will also defeat his—Jurisdiction of trial judge to proceed under section 11 after such admission—Finding of trial judge—Credibility of witnesses—Trial.

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At the commencement of the trial of an action brought to enforce an adverse claim under the provisions of section 37 of the Mineral Act, plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversed, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim. The trial judge proceeded to hear evidence as to defendants' right to the ground, under the provisions of section 11 of the Mineral Act Amendment Act, 1898, Cap. 33, and dismissed the action, but found that defendants had not affirmatively proved their title to the adverse claim. Counsel for defendants did not on this admission, move for dismissal:—

Held, by the Full Court (MARTIN, J., *dissentiente*), that as soon as this admission was made by the plaintiff, it was open to the defendants to move for dismissal for the reason that there was no ground in controversy within the meaning of section 11, and that they were not bound in the circumstances to bring forward their title for investigation.

That section 11 was designed, where there is a real controversy within the meaning of section 37 of the Mineral Act, to get rid of the rule theretofore acted upon that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title, thereby putting both parties on an equality as regards the onus of proof. The section presupposes a real controversy, a genuine *lis*, and not a challenge by a party who comes into court and admits no title in himself.

Per DUFF, J.: On an appeal from a judgment by a trial judge, sitting alone, the hearing of the appeal is a re-hearing of the cause; and where, giving to the views of the trial judge as to the credibility of particular witnesses the weight which is justly due to such views, the court of appeal cannot reconcile his decision with the inferences to be drawn from admitted facts, or from facts proved by credible witnesses

or documents, that court should not generally regard itself as bound by his conclusions.

Semble, the court will not allow itself, by means of sham proceedings, to be made an instrument to effectuate a fraudulent design.

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ADVERSE action. Plaintiff claiming as owner of the Victor and Mary V. mineral claims adversed the application of the defendants Wright and Barron for a certificate of improvements to the Olympia mineral claim.

At the close of the trial the learned judge dismissed the action, and also found that the defendants had not affirmatively proved their title to the Olympia claim, and against this finding the defendants appealed.

The trial took place before IRVING, J., at Kamloops, on the 17th and 18th of May, 1905.

Before any evidence was given at the trial, it was stated by counsel for the plaintiff that his position then was merely to ask for a declaration that the Olympia was an invalid claim, and that he would not be able to ask for a declaration that the Mary V. and the Victor were valid claims; in other words, that the evidence on which the plaintiff relied to defeat the Olympia would also defeat the Mary V. and the Victor.

Statement

Davis, K.C., and *Denis Murphy*, for plaintiff.
J. A. Macdonald, K.C., and *Nelson*, for defendants.

The appeal was argued at Victoria, on the 16th and 18th of January, 1906, before HUNTER, C.J., MARTIN and DUFF, JJ.

The arguments on the point decided sufficiently appear in the reasons for judgment.

J. A. Macdonald, K.C., for appellants (defendants).
Davis, K.C., for respondent (plaintiff).

Cur. adv. vult.

20th April, 1906.

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HUNTER, C.J.: It was conceded both below and here that the plaintiff could not establish her title, and the sole question we have to consider is whether the learned judge was right in his finding as to the Olympia. The admission as to the plaintiff's title to the ground was made at the opening of the case, it being

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quite candidly stated by Mr. *Davis* that the evidence on which he relied to defeat the Olympia would also defeat his client's claims. The learned judge, notwithstanding this admission, proceeded to hear evidence as to the defendants' right to the ground, apparently considering that section 11 of the amending Act of 1898 required him to do so. As soon as this admission was made, it was, I think, open to the defendants to move for dismissal for the reason that there was no ground in controversy within the meaning of the section, and that they were not bound to bring forward their title for investigation.

In my opinion the section was designed, where there is a real controversy, to get rid of the rule theretofore acted on that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title. Before this enactment, it not infrequently happened that the defendant, who might have been the subsequent locator, was enabled by means of superior resources to push his claim to the stage of being enabled to apply for a certificate of improvements before his adversary, and in that way threw the onus on the latter to affirmatively shew that he had the best title to the ground; and the object of the enactment was thenceforward to put both parties on an equality as regards

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the onus of proof. The section, however, presupposes a real controversy, a genuine *lis*, and not a challenge by a party who comes into court and says he has no title himself. It was not designed to overthrow one of the most firmly rooted principles of our law that the holder of an interest in land can be called on to produce his title for investigation by a judicial tribunal only by some person who not merely claims to be entitled thereto, but has given some evidence of title in himself. In what different position, then, was the plaintiff after this admission from that of any stranger? As regards the suggestion that a plaintiff might lose something by being candid, I think that is not so, as if at the close of his case he had not produced some trustworthy evidence of title in himself, the judge would be bound on motion of the defendants to dismiss the action.

The defendants, however, do not seem to have taken the point at once, but delayed at least until after the close of the plaintiff's case, which of course was avowedly directed not to making out her own title, but to attacking their title. Mr. *Macdonald* says he did take the point at the close of the whole case, but there is no record of this having been done, nor is there any trace of it to be found in the stenographer's notes. Mr. *Davis* says he has no recollection of it, and our learned brother informs us that he has neither note nor recollection of it. I therefore think we must take it that Mr. *Macdonald* submitted to have his client's title investigated by the tribunal, and that he cannot be heard to say now that it should not have been investigated. In my opinion it was too late to take it after the plaintiff had adduced her evidence, and even assuming that Mr. *Macdonald* did take it at the close of his own case, it is immaterial whether Mr. *Davis* objected that he had waived his right or not, as the question was no longer one between Mr. *Davis* and Mr. *Macdonald*, but between Mr. *Macdonald* and the court. It seems to me a fundamental principle that if a party allows the court to proceed with an investigation without objection, and takes the chances of a favourable issue, he cannot be allowed afterwards to say to the court that it should not have made the investigation, and the point as to waiver is beside the mark.

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On the merits, however, I agree with my brother DUFF, whose judgment I have had the advantage of reading. I also think, in view of the fact that these proceedings were a misuse of the statute for the purpose of consummating a fraud, that the moment the court grasps their true nature, it is its duty *ex mero motu suo* to bring them to a summary end.

Further proceedings, if there are any, should be in another court.

The appeal should be allowed and the action dismissed.

MARTIN, J. [Having referred to and discussed the effect of *Gelinas* v. *Clark* (1901), 8 B.C. 42; *Manley* v. *Collom* (1901), 8 B.C. 153, (1902), 32 S.C.R. 371; *Clark* v. *Docksteader* (1905), 36 S.C.R. 622; *St. Laurent* v. *Mercier* (1903), 33 S.C.R. 314; *Osborne* v. *Morgan* (1888), 13 App. Cas. 227; *Chappelle* v. *Rex*

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(1904), A.C. 127; *Slater* v. *Laberee* (1905), 6 O.W.R. at p. 628; *Tanghe* v. *Morgan* (1904), 11 B.C. 76; *Canadian Company* v. *Grouse Creek Flume Co.* (1867), 1 M.M.C. 3 and *Hartley* v. *Matson* (1902), 32 S.C.R. 644, 2 M.M.C. 23] continued:

Finally, as to section 11 of Cap. 33 of 1898. The first time it was given effect to was, it happens, by myself in *Ryan* v. *McQuillan* (1899), 6 B.C. 431, 1 M.M.C. 289; and as the learned trial judge herein says:

> "It has been the practice of the court here to permit the person filing the adverse claim, although shewn in the course of his case that his adverse claim is not a good one, to continue the contest. I do not see that the plaintiff, by stating in opening his case that he now knows that he cannot succeed, should be placed in any different position from that occupied by a plaintiff who attempts and fails to make a case. In continuing he does so at the risk of increased cost to himself."

So far no difficulty has been experienced in enforcing its very useful provisions, and it has been held to extend to all adverse actions "which come before the court for trial," *Schomberg* v. *Holden* (1899), 6 B.C. 419, 1 M.M.C. 290, wherein the amount of proof necessary on the part of a senior locator was considered; and see also the note to that case on the point of proof and onus, p. 291. In *Dunlop* v. *Haney* (1899), 7 B.C. 305, 1 M.M.C. 369, I had occasion to consider the effect of the section (pp. 370-1).

The meaning of the words "adverse proceedings" was there considered, and also in *Gelinas* v. *Clark* at p. 432, and *Cleary* v. *Boscowitz* (1902), 8 B.C. 225, 32 S.C.R. 417, 1 M.M.C. 506. Subsequently, in *Dunlop* v. *Haney* (1899), 7 B.C. 300, 1 M.M.C. 344 at p. 347, I again drew attention to another unexpected effect of the section, and the Full Court in *Caldwell* v. *Davys* (1900), 7 B.C. 156, 1 M.M.C. 387, held that it was the duty of both parties to insist on giving such evidence even when the learned trial judge deemed it unnecessary, because it was the duty of the judge to pass upon the title of both parties. In *Rammelmeyer* v. *Curtis*: *Powers* v. *Curtis* (1900), 8 B.C. 383, 1 M.M.C. 401, Mr. Justice DRAKE acted on the section; and in *Cleary* v. *Boscowitz*, *supra*, this Full Court held that where the defendant was the senior locator, the fact that the defendant had duly recorded certificates of work was of itself affirmative evidence of the defendant's title, and this decision was affirmed by the Supreme Court. In that case there is a

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remark by Mr. Justice DRAKE which was not concurred in by the rest of the court, *viz.:*

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"I think that when it is shewn that the action is wrongly conceived, as this is, and the certificates of work by the defendant have been produced, the time has not arrived to call upon the defendant to prove any further title. The plaintiffs have to shew a *prima facie* title; having done so, the defendant is then called upon to shew his title."

This really means, of course, that the production by the plaintiff of the defendant's certificate was sufficient evidence to discharge the onus on the defendant of making out a *prima facie* case. The learned judge has, however, I speak with every respect, somewhat confused the point and treated the matter as though no evidence had in fact been given in support of the defendant's title, which evidence may in a proper case be given by admission from the plaintiff as well as otherwise.

It is quite clear that the main object in passing the section was to obtain the assistance of the court in determining the difficult and complicated questions that constantly arose in the Lands and Works Department in applying for certificates of improvements under section 36; and by section 37 the court was substituted for the Government in the determination thereof. Section 11 is, indeed, supplementary to section 37, and has proved to be in practice a necessary piece of legislation. But it is now contended that where, on a case being called on for trial, the plaintiff admits that he has no evidence in support of his own title, there are no longer any "adverse proceedings" and all the court can do is to make an order dismissing the action. To my mind, that is putting a strained and unwarrantably restricted construction upon the Act. It might just as well be said that there were no "adverse proceedings" if, after the case had lasted say two days, and many witnesses had been examined, it unexpectedly appeared on cross-examination that the plaintiff had no free miner's licence, and consequently that, with the collapse of the plaintiff's case, the judge's jurisdiction also vanished. To merely state such a contention is, in my opinion, to refute it. And I have no doubt that it would be the duty of the court to call upon the defendant to prove his title even if the plaintiff did not appear when the case was reached on the list and called on for hearing. That there may exist difficulties in carrying into

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complete effect and upon all occasions the provisions of a statute is no reason for hesitating to enforce them to the full practical extent. It may very well be that nice questions will arise as to what effect, if any, can be given to the section in proceedings before trial, such as on a motion to dismiss for want of prosecution, but it is nevertheless, to me at least, beyond doubt that once the case is entered on the cause list for trial, or as the statute puts it, literally "brought before the court," then the judge is seized of the matter and the section attaches, and must be enforced. Nor is his jurisdiction affected by the failure of the plaintiff's case at the beginning, or at the middle, or at the end thereof, because it depends not upon the plaintiff's action, but upon the fact that the questions at issue are before the court. It is for the judge to satisfy himself as to what is sufficient "affirmative evidence of title" in the circumstances, and he may accept if he sees fit, as was done in *Cleary* v. *Boscowitz*, *supra*, the admissions of the plaintiff, and also avail himself of the services of either party if counsel are willing to assist the court in the discharge of a sometimes onerous duty. On the other hand, if he suspect collusion or deception, he would probably refuse the services of either counsel, adjourn the case, and call upon the Attorney-General, as the conservator of public rights, to aid in the performance of a public duty. Speaking as one who has held many such trials, I see no reason to anticipate any more insuperable difficulty in the future in giving reasonable effect to this salutary enactment than I have in the past.

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Applying the section to the case at bar, I am of the opinion that the learned trial judge adopted the proper course in the exercise of his discretion and jurisdiction.

Holding the foregoing views, it is unnecessary to say anything about the question of waiver, and it follows that the judgment should be affirmed and the appeal dismissed.

DUFF, J. [Having dealt fully with the facts]: I do not forget the rule relating to the weight to be attached to the finding of the trial judge on questions of fact. Where one's view of the intrinsic credibility of individual witnesses is the controlling factor in a case, and where the estimate of such witnesses based

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upon their demeanour must largely determine the character of that view, an appeal on questions of fact, although given theoretically, is, generally, in practice an appeal in name only. But one cannot refuse to recognize that there is a right of appeal on such questions, and that on an appeal from a judgment after a trial by a judge sitting alone, the hearing of the appeal is a rehearing of the cause; and where, giving to the views of the trial judge as to the credibility of particular witnesses the weight which is justly due to them, one finds that one cannot reconcile his decision with the inferences one draws from admitted facts, from facts proved by credible witnesses, by documents, from circumstances which are common ground, then I think that generally one should not regard oneself as bound by his conclusions: see *Coghlan* v. *Cumberland* (1898), 1 Ch. 704; *Hood* v. *Eden* (1905), 36 S.C.R. 476 at p. 483; *Rickmann* v. *Thierry* (1896), 14 R.P.C. 105 and *Grahame* v. *Moulton* (1906), 22 T.L.R. 380. . . . .

The learned judge took the view that by reason of section 11 of the Mineral Act Amendment Act, 1898, he was obliged to consider the validity of the defendants' title.

The learned judge appears to have thought that, notwithstanding the fact that she had no interest in the subject-matter of the action cognizable in a court of law, the plaintiff was, under that section, entitled, as of right, to press an attack upon the defendants' title. I do not think it necessary for the purposes of this case to lay down any general rule respecting the application of that section. In my judgment this case is, by its circumstances, clearly differentiated from any class of cases falling under its operation.

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The evidence is conclusive that before the commencement of the action the promoters of it knew that the claims on which it is ostensibly based did not, and could not, afford a foundation for a colourable claim to any part of the Olympia. They knew that they had, and could plausibly claim, no interest in the ground within the limits of the Olympia. The statutory plan filed with the Mining Recorder, a copy of which is in evidence, shews the Mary V. and the Victor encroaching on the Olympia. But the plaintiff knew when she made the affidavit verifying this plan

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as shewing the boundaries of the adverse claim (as the surveyor who prepared the plan, by his own admission, knew) that this claim, so defined, had not a shadow of foundation. The claim was a fiction; the statutory affidavit and plan a mere pretence. It was never intended (it is idle to suggest in the face of the facts that such an intention could ever have been entertained) that it should be prosecuted beyond the moment when the light of day should fall upon it. Had the defendants obtained discovery, the essential allegations in the statement of claim must have been struck out long before the trial. The failure to obtain discovery enabled the plaintiff to reach the stage of trial; but at the opening of her case, her counsel announced that he claimed no right of any kind in the property which was the subject of the defendants' application for a certificate of improvement. The object of the proceedings we are not left in the dark about; the plaintiff's counsel explained on the hearing of the appeal that the plaintiff seeks by impeaching the Olympia to clear the ground for a subsequent location. In my opinion, such proceedings cannot be brought within section 11 without enlarging the words of the section.

It is manifest that to bring section 11 into play this condition must be satisfied, namely, that there shall be adverse proceedings within the meaning of that phrase as it is used in the Mineral Act. To ascertain that meaning, one must turn to section 37 of

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that Act, and from sub-section 2 of that section it is plain that those only are adverse proceedings in which the actor claims an adverse right of some kind "either to the possession of the mineral claim referred to in the application for the certificate of improvement, or some part thereof, or to the minerals contained therein."

Such proceedings necessarily involve an attack upon the title of the applicant; but the Legislature did not create the special procedure prescribed by section 37 with the object of exposing a person who under the provisions of the Mineral Act applies for a Crown grant of mineral lands to such attacks from persons claiming no interest in such lands. The affidavit and plan which the section requires shall be filed were obviously regarded as some measure of security against such attacks. The procedure is pro-

vided as a means whereby those asserting rights of the character described in the section may secure protection for such rights. To attempt, by means of proceedings under colour of the statute, to attack the validity of the applicants' title, where no adverse right is, or can be, claimed in the subject-matter of the application, is alike a fraud upon the enactment and an abuse of the process of the court. The author of such a proceeding can by it acquire no status which can avail him for any purpose, once the real nature of the proceeding is disclosed. To such proceedings section 11—which plainly pre-supposes a real adverse proceeding within the meaning of section 37, and a real controversy between an applicant for a certificate of improvement and a real claimant to an adverse right—can have no application.

It was argued that the proposed construction is required to bring the legislation into harmony with the object with which it was passed, *viz.:* to call the courts to the assistance of one of the departments of the Provincial administration in the performance of its duty to pass upon questions arising out of applications for certificates of improvement and Crown grants of mineral claims. I should have thought that if the Legislature intended to transfer to the court the administrative functions of one of the departments of the Government, care would have been taken to express that intention in unambiguous words; but the answer to the suggestion is that the function which the court discharges under section 11 does not, by the plain terms of the section, come into activity, except where the court has before it parties who are engaged in a controversy as to the title to mineral lands which both are claiming; and that it is only by doing violence to the language in which that section is expressed that it can be held that the court has any duty to perform under that section in the absence of such a controversy.

There is another aspect of this question: I have sufficiently stated the terms of settlement between Voigt and his partners, to which the plaintiff was a party, to make it clear that the attempt to impeach the Olympia in this action is a gross fraud on that settlement. I do not think anything in the Mineral Act so far binds the hands of this Court as to compel it to suffer itself to be used by persons like Voigt in pursuing such plans

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as those disclosed in his correspondence with Fraser by means of such proceedings as these. We are not concerned with the motives of persons who put in motion the process of the court in accordance with the law. But the court will not allow itself, by means of sham proceedings, to be made an instrument to effectuate a fraudulent design. Here we have glaringly displayed every element entering into that class of cases in which the court interferes to protect itself from such an imposition. It is a case, I think, for recalling the language of James, L.J., in *Ex parte Griffin* (1879), 12 Ch. D. 480 at pp. 482-3; approved by Lord Watson in *King* v. *Henderson* (1898), A.C. 720 at p. 733:

> "It would, I think, be a shocking thing for any court of justice in a civilized country to be made the instrument of proceedings like these."

One point remains to be considered in connection with this aspect of the case. It is said that the defendants, having invited the learned trial judge to adjudicate upon their title, cannot now complain that he has done so. In my opinion, this point is not well taken. It is not a case in which the parties have submitted themselves to an adjudication *extra cursum curiæ*, like *Bickett* v. *Morris* (1866), L.R. 1 H.L. (Sc.) 47 at p. 53; *Burgess* v. *Morton* (1896), A.C. 136; *Canadian Pacific Railway Co.* v. *Fleming* (1893), 22 S.C.R. 36; for, at all events, before the learned judge gave his decision, as is quite apparent from his reasons, counsel for the defendants objected that this case was not a case justifying the exercise of the jurisdiction of section 11; and the learned trial judge, in point of fact, dealt with the question of title as in the exercise of a jurisdiction conferred on him by section 11. It is argued, however, that the objection to the exercise of the jurisdiction came too late, inasmuch as the defendants' counsel had, without objection, permitted the plaintiff to give evidence, and had offered evidence himself upon the defendants' title. There was some dispute between counsel as to what occurred at the trial. Counsel for the defendants stated that at the conclusion of the plaintiff's case he had taken the point that in the circumstances he was not called upon to give evidence in support of his title. This was disputed by counsel for the plaintiff, and the stenographer's notes disclose no such objection. On consultation with the learned trial judge, it was found that his note-book

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contained nothing indicating that any such objection had been made. It is plain, however, that when counsel for the defence in argument at the close of the trial took the position that section 11 was not applicable to the proceedings, counsel for plaintiff argued the point, and did not object that the defendants' counsel had, by his failure to take the objection earlier, waived it; and moreover, that the point was dealt with on the footing that the objection had been taken in time.

After full consideration, I have come to the conclusion that in such circumstances waiver, if it was to be relied upon, should have been advanced at a time when the circumstances were fresh in the recollection of everybody, and before the judge, whose personal knowledge would have enabled him to dispose of it at once. Such an objection cannot, I think, be taken for the first time in the court of appeal.

DUFF, J.

For these reasons, I think that point is not now available to the plaintiff. Moreover, holding the view that these proceedings are an abuse of the process of the court, and a fraud upon those provisions of the Mineral Act dealing with adverse proceedings, it would, I think, be our duty in any case now to give effect to that view, and to direct that the action be dismissed as of that character. No stage of the action is too late, I think, to call into exercise the power of the court to purge its records of proceedings so tainted: see *Davey* v. *Bentinck* (1893), 1 Q.B. 185.

Appeal allowed, Martin, J., dissenting.

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RICHARDS v. WOOD. SHAW, GARNISHEE.

Practice—Attachment of Debts Act, 1904, B.C. Stat. Cap. 7, Secs. 2 and 3—"District Registrar"—Interpretation Act, R.S.B.C. 1897.

FULL COURT

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RICHARDS *v.* WOOD

In an action in the Supreme Court for an account of certain rents and profits, plaintiff obtained an order attaching all debts, obligations and liabilities payable or accruing due from the garnishee to the defendant, to answer a judgment to be recovered by the plaintiff against the defendant up to the amount of $6,245. The order was made and issued by the Deputy District Registrar at Vancouver, acting under the provisions of section 3 of the Attachment of Debts Act, 1904. Defendant applied to MORRISON, J., in Chambers, to set aside this order, but the summons was dismissed, and defendant appealed:—

Held, by the Full Court, that as the term "District Registrar" is expressly defined by the Attachment of Debts Act, 1904, to mean District Registrar of the Supreme Court, therefore District Registrars are *personæ designatæ*, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intendment of a special statute.

Per IRVING, J.: The Attachment of Debts Act, 1904, contemplates the attachment of a definite, ascertained amount, and a mortgagor suing for an account of moneys received by a mortgagee in possession cannot make the affidavit required by the statute as to the "actual amount of the debt."

Statement

APPEAL from the decision of MORRISON, J., dismissing an application heard before him at Vancouver on the 22nd of February, 1906, to set aside an attaching order issued by the Deputy District Registrar at Vancouver, assuming to act under section 3 of the Attachment of Debts Act, 1904. The order attached all debts accruing due from the garnishees to the defendant to answer a certain judgment recovered against him, up to the sum of $6,245.

McCrossan, for plaintiff.
Marshall, for defendant.

The appeal was argued at Vancouver on the 24th of April, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Davis, K.C., for appellant.
Bird and *Brydone-Jack*, for respondent.

Cur. adv. vult.

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HUNTER, C.J.: This is an appeal from the dismissal of an application to set aside an attaching order issued by the Deputy District Registrar at Vancouver, assuming to act under section 3 of the Attachment of Debts Act, 1904.

That Act, however, in terms only empowers such orders to be made by a judge or a District Registrar. Even if the Deputy District Registrar had assumed to act as the delegate of the District Registrar, I should think it was reasonably clear that such an order would be a nullity.

It cannot be contended that the Interpretation Act meets the difficulty, as that only provides generally that the term "Registrar" shall include deputies; whereas, the term "District Registrar" is expressly defined by the Attachment of Debts Act itself to mean District Registrar of the Supreme Court. I think, therefore, that the District Registrars are *personæ designatæ*, and that it was not intended to confer on their deputies the power to make attaching orders. It is obvious that such persons, many of whom are not members of the legal profession, might cause irrecoverable loss by their negligence or incompetency in issuing such orders, and I think we ought not to hold that such powers have been vested in such persons in the absence of unmistakable language.

HUNTER, C.J.

Moreover, if authority be needed, reference to *Dechene* v. *City of Montreal* (1894), A.C. 640, will shew that a general interpretation Act cannot be invoked to control the plain intendment of a special Act.

The appeal should be allowed, but without costs, both here and below, as the point was not taken either before us or the learned judge.

IRVING, J.: In my opinion, the Act contemplates the attachment of a definite ascertained amount. I am unable to see how a mortgagor suing for an account of moneys received by a mortgagee, who, it is alleged, is a mortgagee in possession, can make

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MORRISON, J. 1906 Feb. 22. the affidavit required by the statute "as to the actual amount of the debt."

I would allow the appeal.

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Appeal allowed.

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THE MUNICIPALITY OF THE DISTRICT OF SOUTH VANCOUVER v. RAE. (No. 2).

SOUTH VANCOUVER v. RAE

Municipal law—Member of Council contracting with municipality—Whether contract is void—Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Secs. 21 and 22—Penalty—Action to recover back money paid—Statement of claim disclosing cause of action.

R. being reeve of plaintiff municipality, did certain work repairing a stone crusher, for which work the municipal council voted him $75, such sum being shewn in the accounts as expenses. Subsequently, he spent considerable time, at the request of the council, in advocating the passage through the Legislature of a loan bill, in respect of which time he was voted $100.

An action was brought for the recovery of these two sums of money as illegal payments in contravention of section 21 of the Municipal Clauses Act, and also for penalties under section 22 for sitting and voting as reeve after the receipt of these respective sums. The claim for penalties was abandoned at the trial, and the action resolved itself into a question of law, as to whether the statement of claim disclosed a cause of action in the circumstances:—

Held, that the statement of claim did not disclose a cause of action, so the contract was not made void by the statute, and there were no grounds alleged on which it might be declared void in equity.

The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto.

MOTION before HUNTER, C.J., at Vancouver on the 31st of May, 1906, on question of law raised by the pleadings. The action was brought to recover money paid by the plaintiff municipality to the defendant on an alleged contract.

Statement

Bird and *Brydone-Jack*, for the defendant: Sections 19 to 23 of the Municipal Clauses Act, while providing for disqualification of a member of the council in case of his acting or voting after entering into a contract with the corporation, do not declare that any such contract is illegal and that consequently the money paid under such a contract is not recoverable unless it be shewn that the latter is unfair in fact and that the corporation has not obtained the benefits of the contract. They cited *Foster* v. *Oxford, Worcester and Wolverhampton Railway Company* (1853), 22 L.J., C.P. 99; and Am. & Eng. Encyclopædia of Law, Vol. 30, pp. 1,178, 1,179 and 1,180.

Argument

Cowan, K.C., and *Reid*, for the plaintiff: A contract between a municipal corporation and its official is void *per se*. They cited *Melliss* v. *Shirley Local Board* (1885), 14 Q.B.D. 911; *Aberdeen Railway Co.* v. *Blaikie Bros.* (1854), 1 Macq. H.L. 461, 9 Scots' R.R.H.L. 365; *Municipality of East Nissouri* v. *Horseman* (1859), 16 U.C.Q.B. 576; *Kaye* v. *Croydon Tramways Co.* (1898), 67 L.J., Ch. 222; *Flanagan* v. *The Great Western Railway Company* (1868), 38 L.J., Ch. 117.

HUNTER, C.J.: The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto. The disqualification consequent on such a contract is not a penalty, which if so would go to shew that the Legislature meant to prohibit all contracts. But Mr. *Cowan* argues that the contract is bad on equitable grounds. The short answer to that is that there are no facts disclosed on the pleadings to found a case for the equitable jurisdiction. All such contracts are not void in equity, *e.g.*, a contract by which the defendant loaned his rock crusher to the municipality on condition of being recouped the expense of its operation. On the other hand, a contract by which it was intended that the defendant should reap a profit at the expense of the municipality might or might not be void in equity depending on the circumstances.

Judgment

The pleadings contain nothing more than an allegation that there was a contract under which a certain sum was paid, and seeks recovery on the ground that the statute makes it illegal.

The statement of claim therefore discloses no cause of action

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against the defendant. Leave to the plaintiff to amend within ten days. If amended statement of claim not delivered within that time, action to stand dismissed without further order. Costs to be defendant's in any event.

Order accordingly.

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Partnership—Action for price of work done—Plaintiff contracting in partnership name—Failure to register declaration of partnership pursuant to Sections 74, 75 and 76 of the Partnership Act, R.S.B.C. 1897, Cap. 150—Effect on contract—Penalty.

Plaintiff sued the defendant for a balance due on a printing contract. Plaintiff carried on business under the name of the Victoria Printing and Publishing Company, during the term of the said contract, until after his action was launched, and in excess of a period of three months, without having complied with the provisions of sections 74 and 75 of the Partnership Act; which requires (Sec. 74) every person trading alone under a firm or company name implying a plurality of partners, to file a declaration to that effect with the Registrar of the County Court of the county in which the business is being conducted; and (Sec. 75) that such declaration shall contain certain particulars and be filed within three months of the adoption of such firm or company name. Defendant contended that plaintiff's action was barred by his non-compliance with sections 74, 75 and 76, and that he therefore could not enforce the contract:—

Held, by the Full Court, affirming the finding of the trial judge in favour of the plaintiff, that while the plaintiff came within the wording of the statute, and became liable to the penalty provided for not registering, yet the penalty is imposed for something not contemplated by the contract in this case, and he was therefore entitled to recover.

Statement

APPEAL from the decision of LAMPMAN, Co. J., in an action tried before him at Victoria, in November, 1905. The facts on which the learned County Court judge gave his decision are set out in the head note.

Moresby, for plaintiff.
R. T. Elliott, for defendant.

The appeal was argued at Victoria on the 24th of January, 1906, before IRVING, DUFF and MORRISON, JJ.

R. T. Elliott, for appellant (defendant), cited *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335; *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624; *Cope* v. *Rowlands* (1836), 2 M. & W. 149; *Law* v. *Hodgson* (1809), 2 Camp. 147; *Marchant* v. *Evans* (1818), 8 Taunt. 142; *Langton* v. *Hughes* (1813), 1 M. & S. 593; *Gordon* v. *Howden* (1845), 12 Cl. & F. 237; *Musgrove* v. *Chun Teeong Toy* (1891), A.C. 272; *Shaw* v. *Benson* (1883), 11 Q.B.D. 563; *Jennings* v. *Hammond* (1882), 9 Q.B.D. 225.

Peters, K.C., for respondent (plaintiff): There is nothing in the Partnership Act prohibiting us from making a contract; it merely provides that we must register.

Cur. adv. vult.

20th April, 1906.

IRVING, J.: By Part III. of the Partnership Act, which Act came into force 1st July, 1894, certain declarations are required to be registered. Among others:

"74. Every person who is engaged in business for trading, manufacturing, or mining purposes, and who is not associated in partnership with any other person or persons, but who uses as his business style some name or designation other than his own name, or who in such style uses his own name with the addition of 'and Company,' or some other word or phrase indicating a plurality of members in the firm, shall cause to be delivered to the Registrar of the County Court of the County in which such person carries on or intends to carry on business, a declaration in writing signed by such person."

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The plaintiff in this action falls within the wording of the statute, and he should have registered a declaration that no other person was associated with him in partnership. He therefore became liable, under section 76, to a penalty of $100, but the defendant who is being sued for the price of certain work done for him by the plaintiff, says that this court should not assist the plaintiff to recover.

"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance

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to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition. Lord Holt, *Bartlett* v. *Vinor*, Carthew, 252. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue or any other object. The sole question is whether the statute means to prohibit the contract?" *Cope* v. *Rowlands* (1836), 2 M. & W. 149 at p. 157.

In determining what the statute means, the case of *Fergusson* v. *Norman* (1838), 5 Bing. N.C. 76 at p. 84, points to a distinction between certain requisites to be done before or at the time of entering into the individual contract, which requisites are to precede the contract and to make it out, and certain other duties imposed on one of the parties, which last mentioned duties are entirely collateral to the individual contract.

Maxwell on Statutes (1896 Ed.) p. 560, gives a number of instances in which no action could be maintained for the price of goods sold, *e.g.*, *Law* v. *Hodson* (1809), 11 East, 300, where bricks not made of certain specified dimensions, corn and coal not sold according to certain measure; *Forster* v. *Taylor* (1834), 5 B. & Ad. 887, where the price of butter not branded with the maker's name could not be recovered; and again at p. 561, *Bensley* v. *Bignold* (1822), 5 B. & Ald. 335, where printers were required to affix their names to the book which they printed. It was held that the printer could not maintain an action for his work and materials in printing a book in which he had omitted to comply with this statutory provision.

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These are all instances of something being done before, or at the time of, or in connection with the individual contract—the work in respect of which the action is brought. In the brick case, the penalty was only for manufacturing the bricks for sale, not for selling them. In the butter case, the penalty was for packing the butter in prohibited vessels, not for selling it.

In the present case, the penalty imposed is for something not contemplated by the contract. In Benjamin on Sale, 5th Ed., p. 533, are laid down certain rules as deducible from the authorities:

1. Where a contract is prohibited by statute, it is immaterial to inquire whether the statute was passed for revenue purposes only, or for any other

object. It is enough that Parliament has prohibited it, and it is therefore void.

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2. When the question is whether a contract has been prohibited by statute, it is material, in construing the statute, to ascertain whether the Legislature had in view solely the security and collection of the revenue, or had in view, in whole or in part, the protection of the public from fraud in contracts, or the promotion of some object of public policy. In the former case the inference is that the statute was not intended to prohibit contracts; in the latter, that it was.

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3. In seeking for the meaning of the law-giver, it is material also to inquire whether the penalty is imposed once for all, or whether it is a recurring penalty. In the latter case, the statute is intended to prevent the dealing, to prohibit the contract, and the contract is therefore void; but in the former case such is not the intention, and the contract will be enforced."

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In *Victorian Daylesford Syndicate, Limited* v. *Dott* (1905), 2 Ch. 624, Buckley, J., applied this third test.

IRVING, J.

It seems to me that under the third rule the plaintiff's contention is correct, and that he is entitled to recover.

DUFF, J.: The distinction between *malum in se* and *malum prohibitum* has, as regards the question of their legality, long since disappeared. The question in the case of transactions in respect of which a penalty is prescribed is, are such transactions prohibited? If so, no cause of action can arise out of them. The general rule no doubt is that *prima facie* the imposition of a penalty involves a prohibition; although in the case of penalties imposed purely for revenue purposes, is an exception from the general rule. Has the Legislature in this case imposed a penalty upon the transaction in respect of which this action is brought? The Act provides that if A B shall carry on business under the name of C D, without complying with the statutory provisions relating to the registration of partnerships, he shall be subject to a penalty; but, in my opinion, that does not in itself involve the exaction of a penalty from A B for entering into a contract with X Y under the name of C D. This consideration, I think, supplies the distinction between this case and all the cases relied upon by Mr. *Elliott*.

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It is, of course, indisputable that, before giving the statute effect according to defendant's contention, it must be clear that

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its language requires that the construction proposed shall be placed upon it.

The appeal should be dismissed with costs.

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MORRISON, J.: I think that the construction sought to be put upon sections 74, 75 and 76 of the Partnership Act by defendant's counsel is repugnant to the general purview of the Act. The cases cited by him in support of his contention do not appear to me to be apposite. In all of them there was some special statutory provision directed against the particular contract sought to be enforced. Our Legislature, it appears, has purposely designated certain lines of trade or business to which they directed their particular attention, and passed special Acts dealing with them, such, for instance, as that of pawnbrokers; the object being to protect purchasers by rendering such contracts as are contemplated void. And those Acts leave little doubt as to what those dealings are. They afford a protection against fraud or imposition of which the dealings in question may be susceptible.

MORRISON, J. The Partnership Act is not, I submit, intended to protect purchasers, as in this case, of plaintiff's goods, nor to prohibit contracts such as are in question here. It cannot be said that the omission to register is a fraud, nor that the claim is bottomed in an illegal contract. This is not a case for the protection of revenue nor for the recovery of the price of prohibited goods, nor the case of a secret partnership prohibited by statute.

I cannot see what construction of the Act can be successfully urged that would justify the invalidating of a contract such as we have before us.

I would dismiss the appeal.

Appeal dismissed.

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GROBE *v.* DOYLE

Mining law—Contract, construction of—Working agreement—Option to purchase—Ownership of ore—"Net proceeds"—Evidence of usage.

Under an option to purchase a mineral claim, and develop the same during the term of the option, one of the conditions was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . . and to be applied in part payment to the vendors." Defendant contended that the words "net proceeds" as used in the option, meant a sum to be arrived at after deducting from the gross proceeds the cost of mining, delivery at the smelter and of smelting:—

Held, on the facts, that the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purposes of conversion and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms of the agreement above mentioned. Pending the payment of the purchase price provided for in the option, the defendant acquired no right of property in the ore *in situ*, and none after extraction from the mine.

The operation of developing the property was, pending the payment of the purchase price, to be done by defendant for the owners of the property, and in shipping or dealing with the ore, he was to deal with it as a trustee for the plaintiffs, and the proceeds would be in his hands as such trustee.

ACTION tried before DUFF, J., at Nelson, on the 16th and 17th of February, 1906, to rescind an agreement whereby the defendant was given an option to purchase the Yankey Girl mine, and develop and work the same during the term of the option. The plaintiffs further claimed the proceeds of ore mined and shipped by the defendant in his operations under the option, and alleged a number of breaches by the defendant of the agreement in question, among others, that the net proceeds of the ore mined had not been paid to their account as provided in the agreement. The defendant maintained that there were no net proceeds after deducting expenses of mining and marketing. Statement

W. A. Macdonald, K.C., and *S. S. Taylor, K.C.*, for plaintiffs.
R. M. Macdonald, and *R. W. Hannington*, for defendants.

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DUFF, J.: The agreement between Lovell, Grobe and Macleod on the one hand, and Doyle on the other, provides for the sale of certain mineral claims therein mentioned to Doyle, the defendant, in consideration of certain payments to be made on dates specified. In the meantime, according to the terms of agreement, the defendant became entitled to be put into possession of the mineral claims, and acquired the right to develop and work them subject to certain conditions as to the number of men to be employed and the manner in which the development work was to be done. The agreement also provides that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors at the Canadian Bank of Commerce, and to be applied in part payment to the vendors." The agreement also contains a clause which may be described as a forfeiture clause, conferring upon the plaintiffs the right to cancel the agreement in case of breach by the defendant of any of its stipulations. The plaintiffs claim that the defendant broke or committed a breach of the terms of the agreement and so brought the forfeiture clause into play at various times during the months of June and July following its execution. The breaches complained of, are that the defendant in prosecuting development work and extracting ore from the mineral claims violated the terms of the agreement in respect of the manner in which the work was to be done; that the defendant failed to keep employed the number of men that the agreement provided he should keep employed for the purpose of prosecuting development work during the life of the agreement; that clause 7, relating to the disposition of the proceeds of ore shipped from the property, has been violated in that the net proceeds of a large quantity of ore shipped from the property have not been paid in accordance with the terms of that clause.

Judgment

It is not in my judgment necessary that I should decide upon the questions which arise respecting the manner in which the defendant worked the mineral claims, or respecting the allegation that he failed to employ on development work the number of men required by the agreement. I have come to the conclusion that the defendant committed a breach of clause 7, and that is sufficient to dispose of the case. It is not disputed that a

large quantity of ore was shipped from the properties which are the subject of this agreement to the Hall Mines and Granby smelters, and that the proceeds of the smelting of these ores were received by the defendant and that these proceeds have not been deposited in accordance with the terms of that clause. It is contended on behalf of the defendant that the phrase "net proceeds" as used in that clause means a sum to be arrived at after deducting from the gross proceeds the cost of smelting, the cost of delivery at the smelter, and the cost of mining; and it is not disputed that on that construction there is nothing which can be described as net proceeds. That is a construction which in my judgment cannot be sustained. The plaintiffs offered evidence to shew that in mining transactions this phrase has a fixed meaning, and it was sought to place a construction upon it by reason of usage among people engaged in mining transactions. I held at the beginning of the trial that I could not properly consider evidence of that character because of the fact that the contention was not properly raised in the pleadings. It may be conceded that the phrase "net proceeds" as it stands is open to more than one necessarily exclusive interpretation. The meaning to be attributed to the phrase depends in my opinion upon what is to be regarded as the subject of the transaction which is dealt with in that clause. Mr. *R. M. Macdonald* contends that the transaction is a transaction which begins with the taking of the ore from the mine. The plaintiffs on the other hand contend that the transaction to which it relates is a transaction which begins with the shipment of the ore on the railway. In the one case of course, if Mr. *Macdonald's* contention were correct, the net proceeds would be arrived at by deducting the cost of mining as well as the other elements to which I have referred; in the other case it is of course obvious that the phrase imports the deduction of the cost of transportation and smelting only.

Judgment

Where in a written instrument you have language which is capable of more than one exclusive interpretation it is always desirable, for the purpose of ascertaining which of the different possible interpretations most probably agrees with the intention of the parties, to look at the circumstances surrounding the

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execution of the instrument. I do not of course mean that you are to consider discussions which preceded the execution of the instrument, or negotiations, as affording direct evidence of such intention; but you are to look at the situation of the parties, the nature of the subject-matter, the course of dealing between the parties, and the general course of dealing in the business to which the transaction relates so far as known to the parties at the time, together with the language of the instrument for the purpose of ascertaining what the parties had in view as the object of the transaction and what provisions they would most likely agree to for the purpose of reaching that object.

The plaintiffs were the owners of this property. They lived in Kootenay. The defendant came from Chicago, having, so far as the evidence shews, no interests of any kind whatever in this country. The plaintiffs, through lack of means, were unable to proceed with the development of their property and their policy, upon which they were all in agreement, was that they should attempt to sell; and these facts were perfectly well known to the defendant. The plaintiffs entered into the transaction with a view of selling the property to the defendant, or, failing that, the procuring of such development of the property as would exhibit its character to possible future purchasers.

Judgment

The agreement was entered into on the 13th of March, 1905. The first payment the agreement provides for was to be made on the 15th of September, 1905. The defendant acquired the right of immediate possession and the right to proceed immediately to work and ship ore from the property. The defendant entered into no obligation to work or develop the property. The obligations which he entered into were purely conditional; in the event of ore being shipped, then the proceeds were to be paid as I have mentioned; in the event of work being done, insofar as development work at any rate was concerned, it was subject to certain conditions, and the obligation to observe these conditions was the only obligation into which he entered. Mr. *Macdonald* contends that in these circumstances we must take it from the language of the agreement read as a whole that the arrangement at which the parties arrived was this:

the defendant acquired the right to extract ore from the property; that the ore when extracted became the property of the defendant subject only to this, with respect to any ore which should be shipped to a smelter the net proceeds should be deposited in the bank according to clause 7; that in ascertaining the net proceeds the defendant should be entitled to deduct the cost of mining as well as the cost of conversion of the ore, and further, that this privilege of extracting ore and shipping it from the property subject to this condition came into effect immediately upon the execution of the instrument six months before the date when by the terms of the agreement the defendant would be called upon to make up his mind whether he should act upon his option of purchase by making the first payment, or abandon it. It seems to me that it is a most unlikely thing that an agreement of that character would have been entered into by these parties in the circumstances. There is, as I have pointed out, nothing in the agreement which obligates the defendant to deal in any particular manner with the ore extracted from the mine. If it be true that the agreement conferred upon the defendant the right of property in the ore subject only to his liability to account for the net proceeds in case of there being any, then the plaintiffs placed themselves in such a position that they had absolutely no protection, no kind of security whatever (except the bare personal covenant of the defendant) that the provisions of clause 7 would be observed. Is it to be supposed that these plaintiffs deliberately placed this defendant in a position in which, during the six months preceding the date fixed for the first payment, he would have absolutely untrammelled control over the disposition of ore extracted by him from the properties during that period subject only to his liability to account for these proceeds? It is perfectly obvious that if the construction contended for be the true construction the defendant acquired under the agreement the right to hold the ore extracted until after the lapse of his rights under the agreement and then proceed with the conversion of it. In such case it is not easy to see what would be the plaintiffs' remedy if the defendant should be minded to act dishonestly. Having regard to the situation of the parties I cannot

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believe that the plaintiffs deliberately placed themselves in such a position. It is strongly contended by Mr. *R. M. Macdonald* that the language employed in this part of the agreement conferring upon the defendant the right to work the property imports in its natural meaning the right to appropriate to his personal benefit, and as his property, the ore extracted from the property. In my opinion that is not the necessary meaning of the language employed, and reading that part of the agreement with clause 7, and in the light of the circumstances, I have come to the conclusion that that is not its meaning. The true view is, I think, this: the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purpose of conversion, and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms contained in clause 7. Pending the payment of the purchase price provided for in the agreement the defendant in my opinion acquired no right of property in the ore *in situ* and none after extraction from the mine.

The operation of developing the property was, pending the payment of the purchase price, to be done by the defendant for the owners of the property, and in shipping or dealing with the ore he was to deal with it as a trustee for the plaintiffs, and the proceeds in his hands would be in his hands as such trustee. If this view be correct very little difficulty meets us respecting the construction of the phrase "net proceeds." That the plaintiffs should agree that their property, through the mere process of conversion into cash, should as to the greater part of the proceeds become the property of the defendant, is altogether too violent a supposition.

Judgment

Apart altogether from these considerations there are considerations arising out of the language of clause 7 itself which appear to me to be conclusive. I have no doubt that the clause was adopted for the protection of the plaintiffs, not, as Mr. *Macdonald* strongly argues, merely as a regulation to serve the convenience of both parties to the contract. I apprehend that there can be no doubt that as a measure of protection such a clause would be quite useless unless the sums required to be

deposited should be sums readily capable of ascertainment. Now if the sums were to be ascertained in the manner contended for by Mr. *Macdonald* not only are they not readily capable of ascertainment, but the plaintiffs would be in such case entirely at the mercy of the defendant as to whether they should be ascertained at all except by means of legal proceedings. There is nothing in the agreement requiring the defendant to keep any accounts by which the cost of mining particular shipments of ore could be determined; there is nothing requiring him to submit his books for the inspection of the plaintiffs, nor to supply the plaintiffs with any information whatever which would enable them in any particular case to arrive at the extent of such cost; and if the application of this clause depends upon a preliminary ascertainment of this cost, it is obvious that as a protection to the plaintiffs it is quite useless. Now when we look at the structure of the clause itself we find that what it deals with is "ore shipped," or rather the net proceeds of ore shipped, not the net proceeds of the working of the properties, nor the net proceeds of ore mined from the properties, but the net proceeds of ore shipped. Moreover the clause obviously refers only to ore shipped for conversion, that is ore shipped from the property to a mill or smelter for conversion. The language is, I apprehend, quite clearly open to this construction, namely, that the transaction dealt with by the clause is the conversion of the ore at the place of conversion; and that the deductions which the parties had in mind are the deductions which in the ordinary course of business would be made at the smelter; these deductions according to the evidence including freight and smelting charges. All the considerations which I have mentioned lead me to the conclusion that this is the construction which should be adopted. The view I suggested during the course of the argument, namely, that the deductions should include the cost of transportation from the mine to the railway, is open to some of the objections to the construction contended for by Mr. *Macdonald;* in that case the sum required to be deposited would not be a fixed and ascertained sum, and moreover would not be capable of ascertainment except by means of an account based upon information in

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the possession of the defendant, which, under the terms of the agreement, the defendant is not bound to give to the plaintiffs, and the accuracy of which the plaintiffs would have no means of testing if given.

There remains the question of waiver. The evidence of the plaintiff Grobe satisfies me that nothing has occurred which would justify me in coming to the conclusion that the right to cancel the agreement in consequence of the breaches which are complained of and which have been proved did occur. And with regard to the plaintiff Graham, about whose rights I had some doubt in respect to the question as to whether or not he had waived his rights of cancellation, Mr. *Taylor* has satisfied me that in the circumstances of this case the payments made on the 1st of June and the 1st of July have not the effect which Mr. *Macdonald* contends. It remains only to refer to the fact that the shipping clause in the agreement between Graham and the defendant is slightly different in its phraseology from that in the agreement to which I have just referred. The change in the language, however, is not substantial, and all the observations which I have made regarding the other agreement apply to Graham's agreement. The plaintiffs are entitled to a declaration that the defendant's rights under the agreement have been forfeited, and to an order directing the payment of the moneys in question in the action in accordance with their respective interests.

Judgment

Judgment accordingly.

GREEN *ET AL.* v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED, AND EDWARD COOK.

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Action, limitation of—Private and Public Acts, construction of—B. C. Stat. 1896, Cap. 55, Sec. 60—R.S.B.C. 1897, Cap. 58 (Lord Campbell's Act) —Public Authorities Protection Act, 1893 (Imperial).

Deceased, a workman employed by the defendant Cook on a contract work for the defendant Company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th of August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th of July, 1905.

Defendant Company set up, as a bar to the action as against them, section 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the Company:—

Held, on appeal, affirming the decision of MORRISON, J., that Lord Campbell's Act is a special Act; creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation.

Effect of the Public Authorities Protection Act, 1893 (Imperial), discussed.

APPEAL from the decision of MORRISON, J., on a point of law argued before him at Vancouver on the 12th of March, 1906, in an action brought by the widow and children of one Robert Lawson Green under the Families Compensation Act, Cap. 58, R.S.B.C. 1897 (Lord Campbell's Act), to recover damages for the death of the said Green, who it was alleged was employed as a workman by the defendant Cook, in building an addition to a sub-station of the defendant Company under contract, and whilst so employed came in contact with an exposed live electric wire, causing his death. He died on the 6th of August, 1904, the day of the accident. The writ was issued on the 15th of July, 1905, being within twelve months from the date of the death and the accident causing it. Statement

The defendant Company in paragraph 12 of their defence

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pleaded section 60 of 59 Vict., Cap. 55, Statutes of British Columbia, 1896, as a bar to the plaintiffs' right of action by reason of its not having been commenced within six months from the date of the acts complained of.

Section 5 of the Families Compensation Act provides that every action thereunder shall be commenced within twelve calendar months after the death of the deceased person. Section 60 of 59 Vict., Cap. 55, the defendant Company's private Act, reads as follows:

"60. All actions or suits for indemnity for any damage or injury sustained by reason of the tramway or railway or the works or operations of the Company shall be commenced within six months next after the time when such supposed damage is sustained, or if there is continuance of damage, within six months next after the doing or committing of such damage ceases, and not afterwards, and the defendant may plead the general issue, and give this Act and the special matter in evidence at any trial to be had thereupon and may prove that the same was done in pursuance of and by authority of this Act."

Statement

The argument at the trial proceeded on the assumption that the provisions referred to in those two Acts dealt with the same kind of liability.

Macdonell, for plaintiffs.

L. G. McPhillips, K.C., for defendant Company.

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MORRISON, J.: Were I to give effect to the contention of counsel for the defendant Company I must hold that there is a conflict between the Acts, and that the provisions of the private Act of the defendants must prevail against those of the public Act as to the limitation of time within which the action herein must be brought. To do this, would, in my opinion be dealing violently with cardinal rules of interpretation of statutes.

MORRISON, J. Having regard to the intention of the Legislature in enacting the Families Compensation Act, and the Workmen's Compensation Act, can it be successfully contended, assuming there is a conflict between these Acts and the defendants' private Act, that the limitations in their provisions do prevail?

In the case of a public Act, you construe it keeping in view the fact that it must be taken to have been passed for the public advantage, and you apply certain fixed canons to its construc-

tion. In the case of a private Act, which is obtained by persons for their own benefit, you construe more strictly provisions which they allege to be in their favour, because the persons who obtain a private Act ought to take care that it is so worded that that which they desire to obtain for themselves is plainly stated in it: *Altrincham Union Assessment Committee* v. *Cheshire Lines Committee* (1885), 15 Q.B.D. 597.

The provisions of Acts incorporating a company for purposes of profit must be jealously scrutinized and they must not be held to possess any rights unless given in plain terms, or arise as a necessary inference from the language: *Scottish Drainage and Improvement Company* v. *Campbell* (1889), 14 App. Cas. 139.

Section 60 of the defendant Company's Act does not make any explicit reference to the death of a person injured. The Families Compensation Act has reference explicitly to that contingency. And applying the canons of construction cited above I can only reconcile these two Acts by construing the former, as being confined to cases of actions for damage done, say to property or to injury sustained by an individual not causing loss of life, and the latter as applying to cases of injury resulting in death.

Again scrutinizing the words of the defendants' Act and comparing them with the Acts in question, in all the cases cited on behalf of the defendant Company both English and Canadian, there is a difference in phraseology in addition to the important fact that they are all public Acts, one limiting the provisions of the other, such as *Cairns* v. *Water Commissioners for Ottawa* (1876), 25 U.C.C.P. 556; *Conger* v. *Grand Trunk R.W. Co.* (1887), 13 Ont. 160; *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454 and *Kent County Council* v. *Folkestone Corporation* (1905), 1 K.B. 620.

The cause of action to the plaintiffs herein arose upon the death of the deceased Green, and the action was commenced within twelve months therefrom: *Zimmer* v. *Grand Trunk R.W. Co. of Canada* (1892), 19 A.R. 693. In *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59 at p. 67, Lord Selborne referring to Lord Campbell's Act, says:

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"Lord Campbell's Act gives a new cause of action clearly, and does not merely remove the operation of the maxim '*actio personalis moritur cum persona*,' because the action is given in substance not to the person representing in point of estate the deceased man, who would naturally represent him as to all his own rights of action which could survive, but to his wife and children, no doubt suing in point of form in the name of his executor. And not only so, but the action is not an action which he could have brought if he had survived the accident, for that would have been an action for such injury as he had sustained during his lifetime, but death is essentially the cause of the action, an action which he never could have brought under circumstances which if he had been living would have given him, for any injury short of death which he might have sustained, a right of action, which might have been barred either by contributory negligence, or by his own fault, or by his own release, or in various other ways."

Again Lord Blackburn at pp. 70-71 referring to an action under Lord Campbell's Act says:

"An action which . . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under the circumstances suffers pecuniary loss by the death."

Even assuming that the defendant Company's Act was passed after the Families Compensation Act, I do not think it either controls or repeals the Families Compensation Act, nor is it engrafted upon it to the extent of this section 60. A special statute does not derogate from a special statute without express words of abrogation. *A fortiori*, when a special private Act conflicts with a special public Act. Or, putting it another way, I go further and hold that these provisions do not conflict. The word "damage" in section 60 in my opinion has reference to mischief done to property and it cannot be used interchangeably with the word "injury," which is applicable, I submit, only to that which affects the *person* particularly in the sense in which it is used in this Act: *Smith* v. *Brown* (1871), 40 L.J., Q.B. 214. Lord Cockburn, C.J., in that case deals fully with the meaning of the word "damage."

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Again, the word "injury" does not mean or include "death." In *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 52 L.J., Q.B. 640 at p. 643, *per* Brett, M.R., "personal injury" is not "loss" (of life).

I therefore am of the opinion that the action herein was commenced in time.

The appeal was argued at Victoria on the 14th and 15th of June, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

L. G. McPhillips, K. C., and *Joseph Martin, K. C.*, for the appellants (defendant Company): According to section 3 of Cap. 58, R.S.B.C. 1897, the Families Compensation Act, the action must have been brought in such a way that it could have been brought by the man who was killed; that is to say: had he been injured during his lifetime, he would have had to bring his action within six months: *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454. If deceased were alive and brought action in respect of an injury, section 60 of Cap. 55, 1896, would be a bar. As to public Acts and conflict of statutes, see *Kent County Council* v. *Folkestone Corporation* (1905), 1 K.B. 620; *Williams* v. *Mersey Docks and Harbour Board* (1905), 1 K.B. 804; *Dame Mary Miller* v. *Canada Grand Trunk Railway* (1906), A.C. 187 and *Haigh* v. *Royal Mail Steam Packet Co.* (1883), 52 L.J., Q.B. 640.

Macdonell, and *McHarg*, for respondents (plaintiffs): The cases cited by counsel for appellants all apply under the Public Authorities Protection Act. The private Act of the Railway Company does not take away our special right: *Zimmer* v. *Grand Trunk R. W. Co. of Canada* (1892), 19 A.R. 693; the time limit in the general Railway Act of Canada and the British Columbia Act is a year. On the effect to be given to a private statute, see Hardcastle, 3rd Ed., 502; as to limitation of actions, *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* (1905), 10 O.L.R. 419; *Seward* v. "*Vera Cruz*" (1884), 10 App. Cas. 59; as to "damage" and "injury," Stroud's Judicial Dictionary and *Smith* v. *Brown* (1871), 40 L.J., Q.B. 214. The phrase "by reason of the works or operation of the railway" in section 60 do not extend to actions such as that at bar; the accident in question here did not occur by reason of the works or operations of the Company, but through a defect. The right of action contended for by the appellants does not exist here, as

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the man died at the time. If he had died seven months after the accident, the only question would have been as to the right of action by the widow, whether it was one year after the death or only six months after the accident. The *Haigh* case, *supra*, is overruled by the "*Vera Cruz*" case, *supra*. The appellant Company here is not a public body carrying out duties under public statutes, and, in England, would not be entitled to the benefit of the Public Authorities Protection Act: Maxwell, 4th Ed., 449.

Martin, in reply: The man dying with a cause of action, you simply take over that cause of action as he had it. He cited *Kelly* v. *Ottawa Street R.W. Co.* (1879), 3 A.R. 616.

McPhillips, referred to *Smith* v. *Shaw* (1829), 10 B. & C. 277.

Per curiam: The appeal will be dismissed, but written reasons will be given later.

On the 31st of July, 1906, the judgment of the Court was delivered by

HUNTER, C.J.: This is an action brought on behalf of a widow and her children under the Families Compensation Act, commonly called Lord Campbell's Act.

The deceased was instantly killed by touching a live wire on the defendants' premises while engaged as an employee of the Company.

Assuming that the death occurred under such circumstances as would have given the deceased a good cause of action against the Company if he had survived, the Company contends that the action is barred by reason of the provisions of one of the constating Acts relating to the defendant Company, *viz.*: section 60 of Cap. 55 of the B.C. Statutes of 1896 [already set out].

Judgment

It was argued by the learned counsel for the Company that the effect of this section is to modify the provisions of section 5 of Lord Campbell's Act, which requires the action to be brought within twelve calendar months after the death, so far as concerns the defendant Company, by reducing that limitation to six months after the time the injury was received, *i. e.*, that it is a later special enactment which governs the case to the exclusion of the former and more general enactment. The cause of

action created by Lord Campbell's Act is shewn by the remarks of Lords Selborne and Blackburn in the "*Vera Cruz*" case (1884), 10 App. Cas. 59, not to be the same cause of action that was vested in the deceased, but an entirely new cause of action; that is to say, an action is given for the benefit of the dependents not merely because the deceased died from his injuries, but because he died possessed of a good cause of action in respect of the injuries, which indeed would seem obvious, as it would be difficult to hold in the absence of express language that the statute intended to create a liability to the dependents when there was none to the deceased at the time of death. That the cause of action given the dependents is quite different from that vested in the deceased is also evident from the fact that the latter gets compensation for his injuries: the former for the pecuniary loss (if any) caused by the latter's death.

The learned counsel seek to apply the provisions of section 60 of the private Act literally, and contend that the action must be brought within six months after the injury is sustained. But if this section is to have any application at all, the word "injury" *quoad* the plaintiffs, cannot mean the personal injury sustained by the deceased, for that is not the "injury" for which the action is brought, but the injury sustained by the plaintiffs by reason of the death of their provider who had a good cause of action at the time of his death. If it were otherwise, and we were to hold that the plaintiffs are to bring their action within six months after the injury is received by the deceased, that would be to hold that section 60 by implication only has destroyed a large number of causes of action which would have been otherwise good under Lord Campbell's Act, as death in many cases does not take place within six months of the injury.

Judgment

The argument was, however, supported by reference to the case of *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454 In that case Darling and Bigham, JJ., held that the provisions of the Public Authorities Protection Act, 1893, which provides that the action must be commenced within six months of the act, neglect or default complained of, over-rode the limitation in Lord Campbell's Act so far as concerned public authorities. There again I should have thought,

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if the statute had any application to the class of action created by Lord Campbell's Act, that the "act complained of" *quoad* the plaintiffs, consisted not of the injury received by the deceased, but of the death of the deceased having a good cause of action on account of the injury.

But apart from that, I cannot accept this decision as a guide to the interpretation of the enactment in question here, because the language of the two enactments is materially different in certain respects (and the danger of applying decisions on one statute to another statute of a similar kind has been frequently pointed out, *e. g.*, in *Ex parte Blaiberg* (1883), 23 Ch. D. 254 *per* Jessel, M.R., at p. 258); and because the Protection Act was passed to protect persons or authorities engaged in the performance of statutory or other public duties, whereas this enactment is passed in the interest of a private trading corporation; and lastly, because the observations made as to the nature of the cause of action in the leading judgment appear to be in direct conflict with those of the Lords already referred to in the "*Vera Cruz*" case.

It may be that the decision could be supported on the ground that the Protection Act was a special Act passed to make a uniform time limitation for all actions against persons performing statutory or other public duties; but however that may be, I cannot accept the decision as a guide to the interpretation of the enactment in question here.

Judgment

On the other hand, in *Zimmer* v. *Grand Trunk R. W. Co. of Canada* (1892), 19 A.R. 693, we have a decision of the Court of Appeal for Ontario which is expressly in point. It was there decided that an enactment similar to section 60 of the defendant Company's Act, being section 83 of the Consolidated Railway Act of Canada, did not apply to actions under Lord Campbell's Act, although the learned judges did not all assign the same reasons for coming to that conclusion. I agree with the conclusion, but even if I did not I would hesitate before refusing to adopt it as the decision was upon enactments that had been in force for many years in Ontario, and is now fourteen years old, and has no doubt governed the rights of many litigants throughout Canada; and it would be unfortunate if the courts

of different Provinces were to come to opposite conclusions on identical legislation of this character, and this, even assuming that that Court was prepared to accept the view that the section embraced personal injuries as well as injuries to property.

There is, however, a short ground on which I think the plaintiffs are entitled to succeed. Lord Campbell's Act is a special Act creating a special cause of action, and makes special provision as to the time within which it is to be brought; and it would be contrary to well-settled rules of statutory construction to hold that this special cause of action, so specially provided for, came within the scope of a general limitation clause passed for the benefit of a private corporation.

Appeal dismissed.

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Taxation—Assessment Act, 1905, Cap. 2—Income, taxation of—What constitutes income—Outgoings, meaning of under the Act—Interest paid by Bank to depositors in Ontario.

By the Assessment Act (B. C. Stat. 1905, Cap. 2) it is provided that Banks shall be taxed upon their actual gross income derived from business transacted within the Province, subject to certain deductions which are set out in Form 1 of the Act. Form 1 provides, *inter alia* a deduction on account of outgoings or necessary expenses incurred and actually paid by the Bank in the production of income. The Bank of Hamilton operates two branches in British Columbia, and there was charged as a deduction a certain sum which was ascertained by deducting four per cent. on the average of the weekly sums which, in the books of the head office, were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not shew whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amount of money employed by the Bank in its banking business in British Columbia in obtaining income. The charge of

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four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the Bank, and one per cent. was a charge representing the general expenses of the Bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a considerable sum of money on which interest was paid by the Bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—

Held, that had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that said moneys had actually been employed in the British Columbia business, then the said three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction.

Held, also, that said deduction of one per cent. was rightly not allowed by the Court of Revision as it included elements which did not properly enter into the computation of the statutory deductions.

Statement

APPEAL from the decision of the Court of Revision and Appeal in an assessment of the Bank of Hamilton in respect of its business in British Columbia. The facts are set out in the head note.

The appeal was argued at Vancouver on the 23rd and 24th of April, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Argument

L. G. McPhillips, K.C., and *Plunkett*, for the appellant Bank: Our capital is not used in the banking business here; the moneys we use are deposits of our customers on which we pay three per cent., and we say that this is a necessary outgoing within the meaning of the Act, which must be deducted. This Act is intended to tax us on our income; to decide what is income we must take the gross receipts and then deduct certain exemptions.

[DUFF, J.: Does not "income" mean gross income from all sources in British Columbia?]

We have to fix the source of the income from which this money is derived.

As to "outgoings" he cited *Cross* v. *Raw* (1874), L.R. 9 Ex. 209; *In re Bennett: Jones* v. *Bennett* (1896), 1 Ch. 778; *London County Council* v. *Attorney-General* (1900), 70 L.J., Q.B. 77 at p. 80.

As to construction of taxing statutes:

[HUNTER, C.J.: Of course the English rules as to construction of taxing statutes do not apply here, because they refer to a number of earlier Acts, whilst here we have a complete code, intended to sweep all property under taxation, and that code is governed by our own Interpretation Act.]

In re Micklethwait (1855), 11 Exch. 452; *Oriental Bank Corporation* v. *Wright* (1880), 5 App. Cas. 842; *Charlton* v. *The Attorney-General* (1879), 4 App. Cas. 427; *Pryce* v. *Monmouthshire Canal and Railway Companies* (1879), *ib.* 197; *Cox* v. *Rabbits* (1878), 3 App. Cas. 473; *Commissioners of Inland Revenue* v. *Angus* (1889), 23 Q.B.D. 579; *Re Yorkshire Guarantee Co.* (1895), 4 B.C. 258 at p. 267 and *Re Templeton* (1898), 6 B.C. 180.

Maclean, K.C., D.A.-G., for the Crown: The Bank sent in a return shewing that they had made a gross income of $49,000; they deducted $23,000 for expenses, and they deduct $26,000 more, being four per cent. on an average balance which they keep with their head office. This four per cent. they make up as being three per cent. which they pay their depositors in Ontario, one-quarter per cent. for transmission to British Columbia of the balance referred to, one-quarter per cent. for loss during transmission, the money being looked upon as non-productive during that period, and one-half per cent. for collection in Ontario. But they do not give any particulars of these figures, and as they are attacking the assessment, the onus is on them to prove it is wrong. Argument

As to the question of law, it is arguable whether the three per cent. paid to Ontario depositors is deductible under the British Columbia Act. There is no special canon of construction as to taxing Acts; the court will give the benefit of any doubt to the subject, and that is as far as it will go. On this point see *Attorney-General* v. *Carlton Bank* (1899), 2 Q.B. 158 at p. 162.

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The only case in which an individual can claim exemption on borrowed capital is where he borrows it from some person in the Province paying interest on it. The salaries, office expenses of every kind connected with this branch, and rent, if they pay rent, would be outgoings; but to be so, they must be paid out here in the Province. The three per cent. claimed as an outgoing is paid to Ontario creditors.

McPhillips, in reply.

Cur. adv. vult.

On 31st July, the judgment of the Court was delivered by

DUFF, J.: I can find nothing in the Act justifying the view that the Legislature is treating for taxation purposes the branches of a Bank in British Columbia as independent income earning bodies, and therefore I cannot agree with the contention of the appellant Bank that the charge made against the British Columbia branches for domestic purposes (four per cent. of the average weekly sum standing to the debit of the British Columbia branches in their account with the head office) is to be treated *per se* as an outgoing, or necessary expense actually incurred and paid out by the Bank in the production of its income derived from transactions in British Columbia within the meaning of Form 1. This charge is a bookkeeping entry, and nothing more. If, in dealing with banks, the Legislature had intended to constitute such an entry in itself a deduction as an outgoing or expenditure, nothing would have been easier than to say so, and the Legislature, I have no doubt, would have said so.

Judgment

I think, however, that the interest paid to depositors, or others, on moneys employed in banking transactions in British Columbia, from which the appellant's income in this Province is derived, is an outgoing incurred and actually paid by it in the production of that income, and therefore a proper deduction under sub-section 4 of section 5; that is to say, the interest actually paid upon moneys actually so employed is a proper deduction. I think the evidence is not satisfactory upon the question how far the average of the weekly balances charged against the British Columbia branches in the books of the head office corresponds with the amount so employed throughout the

year. I am not impressed, any more than I think it likely the Legislature would be impressed, with Mr. *McPhillips'* view as to the impracticable character of the calculations required to ascertain the exact sum so employed through the British Columbia agencies at any given time; and we have neither this exact sum, nor any plain statement by any servant of the Bank, speaking of his knowledge, that it is approximately the same as the sum arrived at by taking the average referred to. I should suppose that the two are nearly identical, but the evidence does not justify one in treating them so as a basis of judicial decision.

The parties should be able to arrive at an agreement on this question; but if not, the appellants should, I think, as an indulgence, be at liberty to have the question further investigated in the Court of Revision on payment of the costs of appeal.

The deduction of one per cent. for expenses claimed by the Bank should, in my opinion, be disallowed. The affidavit of the general manager convinces me that the charge of one per cent. against the British Columbia branches, upon which the claim for the deduction is based, includes elements which do not properly enter into the computation of the statutory deductions. The language of the affidavit is not unambiguous, but it leaves no doubt in my mind that to support this deduction some portion of the interest paid by the Bank on money borrowed which is kept idle and unproductive as a part of a reserve, or for other purposes, must be treated as chargeable against the British Columbia branches as an outgoing or expense within the meaning of the Act. Such a charge, I have no doubt, does not necessarily represent an outgoing or necessary expense actually incurred and paid in the production of the income derived from transactions in British Columbia, and there is nothing in the circumstances to shew that in this case it does so in point of fact.

Judgment

The actual decision of the judge was right on the material before him, but the appellant must in any event have appealed to correct the view of the judge on the first question I have discussed.

On the whole, I think there should be no costs of the appeal.

Appeal dismissed without costs.

MORRISON, J. (In Chambers)

1906

July 19.

FULL COURT

July 24.

B. C. WIRE AND NAIL COMPANY, LIMITED v. THE OTTAWA FIRE INSURANCE COMPANY.

Practice—Pleading—Supreme Court Rules, 1906, Order 30, r. 1; Order 20, r. 1 (b).

The court has jurisdiction, under Order 30, to direct the delivery of a statement of claim.

Semble, Orders 20 and 30 may be read together for this purpose.

B. C. WIRE AND NAIL CO. *v.* OTTAWA FIRE INSURANCE CO.

APPEAL from an order of MORRISON, J., in chambers, at Vancouver, on the 19th of July, 1906.

Plaintiffs took out a summons under Order 30 of the Supreme Court Rules, 1906, for directions, including delivery of statement of claim, production and examination of parties. MORRISON, J., dismissed the summons on the ground that he had no jurisdiction to entertain the application because pleadings were not mentioned in Order 30.

Statement

Bourne, for plaintiffs.

J. A. Russell, for defendants.

The appeal was heard at Victoria, on the 24th of July, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Craig, for appellants: Orders 20 and 30 should be read together. There is clear authority for the court to order delivery of pleadings; otherwise, after issue of writ there would be no means of bringing the action to trial.

Argument

Harold B. Robertson, for respondents: The rule had been expressly amended in England so as to include pleadings.

Per curiam: The court has jurisdiction, under Order 30 to direct the delivery of a statement of claim. Orders 20 and 30 may be read together for this purpose.

Judgment

WINDSOR v. COPP.

DUFF, J.

1906

Jan. 20.

WINDSOR v. COPP

Mining law—Adverse claim—Official Administrator, status of in administering estates of free miners dying intestate—Duty of Administrator to perform the conditions of the Mineral Act—Mineral Act, R.S.B.C. 1897, Cap. 135, Secs. 16 (g.), 24, 28, 53, 98—Mineral Act Amendment Act, 1898, Cap. 33, Secs. 5 and 11.

The Official Administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown.

The Official Administrator, not having maintained the assessment work on a mineral claim, the ground was relocated and recorded by another person under the name of the Parkside mineral claim and assessment work done on it. The original claim, known as the June, was, subsequently to such relocation, sold by the Official Administrator to plaintiff, who performed and recorded the annual assessment work:—

Held, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had lapsed, and that the ground was open to location under the Mineral Act.

Semble, section 5 of the Mineral Act Amendment Act, 1898, does not affect the decision in *Peters* v. *Sampson* (1898), 6 B.C. 405.

Where, before the issue of a certificate of work a third interest intervenes to the area in question, section 28 of the Mineral Act does not apply.

In his declaration the locator of the Parkside did not set forth all the words which were put upon the initial post at the time of location:—

Held, upon the evidence, applying the curative force of sub-section (*g.*) of section 16 (as enacted by section 4 of Cap. 33, 1898), that the defect complained of was not a substantial non-compliance with the provisions of section 16; and that the rule to be followed in such cases is that the words on the initial post shall be quoted in the affidavit with sufficient accuracy to enable the identification of the record as the record of the particular location to which it refers, and to prevent fraudulent substitution of other language for the language placed upon the posts at the time of location.

Statement

ADVERSE action tried at Nelson on the 20th of January, 1906, before DUFF, J., to determine the title of a mineral claim held under different locations. The plaintiff's claim, known as the June, was located on the 5th of June, 1899, and passed by

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bill of sale to one John McDermott. McDermott died on the 29th of August, 1901, and letters of administration to his estate were granted to the Official Administrator. No assessment work was done on the claim by the Official Administrator and on the 30th of August, 1902, the Parkside mineral claim was located upon the same ground by the defendant's predecessor in title. On the 3rd of April, 1903, the Official Administrator sold the June mineral claim to the plaintiff and conveyed the same by bill of sale which was duly recorded. After purchasing the June mineral claim the plaintiff did the annual assessment work and had the same recorded. The defendant applied for a certificate of improvements in respect to the Parkside and this action was brought to adverse such application and to have it declared that the June mineral claim was a good, valid and subsisting mineral claim.

In the affidavit to record the Parkside the words "initial post" were not stated to have been placed upon the No. 1 post although the evidence shewed that as a matter of fact such words were upon the No. 1 post. There was no evidence that the locator of the Parkside had discovered rock in place.

R. M. Macdonald, and *A. M. Johnson*, for plaintiff.
S. S. Taylor, K.C., for defendant.

Judgment

DUFF, J.: I think that the plaintiff must fail. It is not disputed that the June mineral claim lapsed by virtue of the provisions of section 24 of the Mineral Act and that the ground within its limits became by the provisions of that section "vacant and abandoned" prior to the location of the Parkside mineral claim, unless the validity of the June mineral claim at the date of the location of the Parkside is to be deemed to be established by the certificate of work granted to the plaintiff after that date; or secondly, unless the Official Administrator in whom after the death of John McDermott the June became vested was excused from the performance of the duties imposed upon the holders of mineral claims generally by the provisions of section 24.

To deal with the last question first; it is contended by Mr. *Macdonald* that the possession of the Official Administrator

is the possession of the Crown, and that the June so long as vested in the Official Administrator was held by the Crown in trust for the beneficiaries entitled to share in the estate. It is argued that section 24 of the Mineral Act binds the Crown only insofar as that section applies to the Crown expressly or by necessary implication; and that the section is not expressly or by necessary implication made applicable to an interest in a mineral claim held by the Crown through an official administrator as part of the estate of a deceased person; and consequently that the provisions of that section are not obligatory upon an official administrator in respect of mineral claims vested in him in his official capacity.

I am unable to agree that this claim was held by the Official Administrator as a representative of the Crown in such a sense that his interest in or possession of it can be treated as an interest or possession vested in the Crown. The Official Administrator is, I think, to be regarded as a statutory officer only. The legislation creating the office and prescribing duties of it seems to have been framed with the view of providing for cases, which must have been common in the earlier period of the history of the Province, of deceased persons leaving within the Province nobody who, in accordance with the practice of the court, in respect to the administration of the estates of deceased persons, would be entitled to assume the administration of their estates, and nobody having any special interest in seeing that their property shall reach those who are entitled by law to receive the benefit of it. There is nothing, so far as I can see, in the legislation which supports Mr. *Macdonald's* contention as to the Official Administrator's relation to the Crown or as to the legal effect of his possession of the property belonging to an estate in the course of administration. It would be a legal anomaly that there should be fastened upon the Crown obligations of the same character as those imposed upon an administrator with relation to property in his possession as administrator. Our present system provides no machinery whereby the Crown can be made amenable to those remedies in granting which the court acts *in personam*, and the officers of the Crown insofar as they are under the control of the Crown and in respect of

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their acts as servants of the Crown are within the necessary scope of that principle which excludes the Crown itself from the control of the courts. Mr. *Macdonald* did not shrink from the logical consequences of his argument and contended that the effect of the legislation to which I have referred is to make the administration of an estate by an official administrator a branch of the public administration of the Province; and that in respect of his official duties the Official Administrator is not subject to the control of the courts to any greater extent than the extent to which such control would apply to—for example—an officer of the Department of Finance in regard to his duties as such officer. As I have said, I can find nothing in the Act which supports this view; nor was any sufficient reason suggested for leading one to the conclusion that the Legislature in providing for the appointment of public officials in the circumstances that I have mentioned deemed it necessary to remove these officials from the control to which other individuals having the like duties are everywhere subject; or to deprive persons beneficially interested in estates coming into the hands of these public officials of any of the remedies which have always been available to such persons for the protection of their interests.

Let us test the contention by considering the consequences which would follow its adoption. Mr. *Macdonald's* contention would of course apply equally to all classes of property coming into the hands of an official administrator, and in every case in which such property is held subject to statutory conditions the argument would be equally effective to exempt the Official Administrator, and through him the persons beneficially interested in the property, from the performance of these statutory conditions. Pre-emptions, coal leases, timber leases and licences, readily occur to one as examples of the various classes of property coming within the sweep of Mr. *Macdonald's* argument. A view leading to such conclusions should not, in my opinion, be accepted unless it is founded on very plain language. Those cases in which it has been held that property held by the Crown or by servants of the Crown for public purposes, or in connection with the performance of public services, is not subject to taxation under the English legislation relating to the subject of

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taxation have been pressed upon me. With respect to these cases it is only necessary to say that the mineral claim in question here was held by the Official Administrator not for public purposes, nor in connection with public services, but in the exercise of public functions and under statutory authority, and for the strictly private purpose of administering the mineral claim and other property of the deceased in accordance with the law governing the administration of the estates of deceased persons. It is perfectly clear that the decisions referred to have no application to the case of property held by a public official in trust for private persons.

It is argued further that section 53 of the Mineral Act applies; that section reads as follows:

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

I express no opinion on the question whether an Official Administrator is a Government official within this section, nor upon the question whether the plaintiff, as a purchaser from the Official Administrator, having no interest in the claim at the time when it is charged that the Official Administrator was guilty of an act of omission or commission in respect of this claim, is entitled to invoke the benefit of that section. Whatever else may be said about section 53 this seems to be clear, that an act of omission or commission to be within that section must be a failure to do something which a government official ought to do, or a doing something which a government official ought not to do. Now it is contended that the failure to do the assessment work in this case is an act of omission on the part of a government official; but I am unable to say on the evidence before me that the Official Administrator ought to have done this work. Assuming that he had in his hands the funds to pay the cost of doing it, or was in a position to get them, there is no evidence before me to shew that he would have been justified in making the necessary expenditure. His failure to make it cannot therefore be said to be an act of omission within the provision in question.

Judgment

I have still to deal with the question whether by the operation of section 28 the plaintiff is relieved from the consequences

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of the failure on the part of the Official Administrator to comply with the provisions of section 24. The facts are that the certificate which is relied upon here was granted after the expiration of one year from the granting of the previous certificate, and after the time when the Parkside mineral claim was located. In other words, at the time of the location of the Parkside claim, and before the granting of the certificate which is relied upon here, the June had lapsed, and the ground within its limits must, for the purpose of this litigation, be deemed to have become "vacant and abandoned," unless the effect of these things is obviated by the application of section 28. Section 24, which is the section under which the granting of certificates of work is authorized, provides for the granting of certificates of work first within the period of one year from the time of location, and then within the period of one year from the granting of the last certificate of work. I am not at liberty to hold that a particular certificate of work is a certificate of work within the meaning of section 28 only when it is issued within one year after the last preceding certificate of work. In the case of *Peters* v. *Sampson* (1898), 6 B.C. 405, the decision of the Full Court is to the effect that the provisions of section 24 in that respect are not to be imported into section 28. Mr. *Taylor* has called my attention to section 5 of the Mineral Act Amendment Act, 1898, providing that if the free miner shall have done the work within the year and if he shall "within thirty days after the time for obtaining and recording said certificate, record the same and pay an additional fee of ten dollars ($10) such record shall have the same effect as if recorded within the year"; but I am inclined to think that that amendment after all does not affect the decision in *Peters* v. *Sampson*. For the purposes of this case, therefore, I must take it that a certificate of work issued after the expiration of a year after the last preceding certificate of work has the same effect under section 28 as a certificate issued within the year, providing the conditions existing at the time of the issue of the certificate are the same as the conditions which existed in the case of *Peters* v. *Sampson*. In this case I have already mentioned the fact that after the expiration of a year from the date of the last preceding certifi-

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cate of work and before the date of the certificate of work in question the Parkside mineral claim was located. In other words, unless Mr. *Macdonald's* contention can be given effect to, the ground had become vacant and abandoned, and had been taken up by a free miner under the provisions of the Mineral Act; and the question to be considered is whether in these circumstances it can be said that the certificate of work can be treated as one to which section 28 applies. To my mind there is in the nature of things the strongest *a priori* probability that the Legislature did not intend section 28 to apply in such cases. Looking at the case of *Cleary* v. *Boscowitz* (1902), 32 S.C.R. 417, we find that the judgment of the Supreme Court of Canada delivered by Mr. Justice Sedgewick expresses the views of the court respecting the policy of the Legislature in the enactment of section 28. Now, reading section 28 in the light of this view as to its policy, I have no difficulty whatever in coming to the conclusion that that section does not apply to the circumstances here. So long as the only interests in the claim are those of the holder of the paper title, the person actually in occupation and working the claim, and the Crown itself, then it would not be at all unreasonable that the Legislature should hold that a certificate of work granted by the statutory officer with respect to the payment of rent should be conclusive evidence and have all the effect given to it by section 28. The Mining Recorder in one sense, according to the view expressed in the language of Mr. Justice Sedgewick, just referred to, may be taken to represent the Crown, and that being the case, so long as the only interests are the interests of the Crown and of the person in occupation, there would seem to be no objection whatever to the adoption of such a rule. But where before the issue of the certificate a third interest has intervened, where a third party acting within his rights under the Mineral Act acquired an apparent title to the area in question, it would seem to be a singular policy to provide that the interest of this third person may be annihilated by the act of a government official which he is powerless to prevent. It would require, in my judgment, some very express language to establish the conclusion that the proper construction of section 28 leads to that result. The

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obvious injustice and inconvenience attending such a construction seem to be conclusive against it. If Mr. *Macdonald's* contention be correct, then any mineral claim which has lapsed in consequence of a failure on the part of its holder to perform the conditions prescribed by section 24 may be revived after any period by the issue of a certificate of work by the Mining Recorder; and any free miner locating ground formerly occupied by a lapsed claim takes and holds his claim only subject to a liability to be divested of his interest in the ground at any time before obtaining his certificate of improvements, by the issue of a certificate of work to some person claiming under the holder of the lapsed claim.

For these reasons I think section 28 does not avail Mr. *Macdonald* and it follows that the plaintiff must fail. Section 11 of the Amendment to the Mineral Act of 1898 requires me, however, to consider the question whether the defendant's claim is valid. In the view I have taken of the plaintiff's rights this question must be considered on the assumption that at the time the Parkside was located the ground upon which it was located was open to location under the Mineral Act. The defendant's right to the Parkside then is to be determined on the assumption that no interest of any kind exists in respect of this ground except the interest of the defendant and the interest of the Crown. The defendant has received several certificates of work. Notwithstanding the decision of the Supreme Court in *Collom* v. *Manley* (1902), 32 S.C.R. 371, I see no reason why the evidentiary value of occupation and payment of rent in controversies relating to the title to land should not be given its full effect in cases respecting mineral claims; and there is nothing in that decision which affects the value of these certificates of work as such evidence. In my opinion these certificates of work are more than *prima facie* evidence that the location of the Parkside mineral claim was a valid location and that the provisions of the Mineral Act in respect of location were fully complied with. Of course I do not say they are conclusive evidence, because in *Collom* v. *Manley* the Supreme Court of Canada decided that that is not the law.

Judgment

It appears from the evidence given here that the declaration

filed by the locator of the Parkside does not set forth all the words which were put upon the initial post at the time of location; and it is contended that, this having appeared in the evidence, the defendant must by affirmative proof given at this trial shew facts bringing him within the scope of the curative provisions of sub-section (*g.*) of section 16. Before considering the question whether the absence from the declaration of the particular words to which I have referred constitutes a substantial non-compliance with the provisions of section 16, I refer very briefly to the question whether, assuming there has been such a substantial non-compliance, the defendant has succeeded in bringing himself within the provisions of sub-section (*g.*) It is contended by Mr. *Taylor* that the declaration itself, stating as it does that mineral in place was discovered, and that the other provisions of section 16 were complied with is sufficient evidence in this respect. In my opinion that contention ought not to be accepted. It seems to me it would nullify all the conditions of sub-section (*g.*) if it were accepted. The declaration is admissible in evidence as shewing that the provisions of section 16 with regard to recording have been complied with, but I see nothing in section 98 of the Mineral Act which would justify one in coming to the conclusion that the rules of evidence have been reversed to such an extent as to make a statement in this *ex parte* affidavit admissible as evidence, in support of the allegation that the conditions which the Legislature prescribed in sub-section (*g.*) have been observed. Nor do I think the oral evidence given by the defendant is at all sufficient to lead to the conclusion that mineral in place was actually discovered within the provisions of that section. I refer to the judgment of Mr. Justice Sedgewick in *Collom* v. *Manley, supra*, on that point; it was there held that evidence of a very similar character was wholly insufficient for the purpose of establishing facts to bring the locator within that sub-section. Now the evidence given here was certainly no stronger than that under discussion by Mr. Justice Sedgewick, and I am not at all satisfied that the defendant has in fact any personal knowledge of the discovery by the locator of mineral in place. I was at first inclined to think that where there are certificates of work extending over

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a considerable period, and proof of actual occupation during that period, these facts constitute presumptive evidence of a valid location of so weighty a character that the effect of that evidence could only be got rid of by proof, not only that the locator had failed to comply substantially with some of the provisions of section 16, but that the facts necessary to bring him within the protection of sub-section (*g.*) did not exist. I think, however, that the language of sub-section (*g.*) hardly permits this view.

I have come to the conclusion that the defect complained of is not a substantial non-compliance with section 16—in other words, that in the location and recording of the Parkside the provisions of section 16 were complied with. The language relied on is as follows: "The words written on No. 1 and No. 2 posts shall be set out in full." Now, I think it is necessary in order to sustain this contention that Mr. *Macdonald* should make good the argument that the provisions require that the affidavit shall contain an exact copy of the words on posts Nos. 1 and 2. The language in my opinion does not necessitate that construction, and if you look at the form of the affidavit referred to in section 16 the view that an exact copy is required is not borne out. There seems to be no reason why an exact copy should be required. Of course there must be a minimum, there must be a limit to the variation permissible, and I think there is no difficulty whatever in fixing such a reasonable limit; and that reasonable limit seems to me to be supplied by this rule, namely, that the words shall be quoted with sufficient fullness and sufficient accuracy to enable one to identify the record as the record of the particular location to which it refers, and to prevent fraudulent substitution of the language for the language placed upon the posts at the time of location. I think the object of the provision is to secure means for such identification, and to provide against the possibility of such frauds. Applying that test here there can be no doubt that the declaration fulfils the requirements of the section, and it follows that the defendant's location is a valid location. The result is that the action will be dismissed and it will be declared that the defendant's claim is sustained.

Judgment

Judgment for defendant.

REX v. T.———

HENDERSON, CO. J.

1906

Sept. 14.

REX v. T.———

Criminal law—Perjury—Criminal Code, Sec. 145—Crime alleged to have been committed on examination for discovery in a civil suit—Criminal Code.

The accused having been charged with perjury committed on his examination for discovery before the Registrar in a civil suit, elected to take speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery:—

Held, that as every statement made upon oath by the person examined during his examination for discovery, forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of section 145 of the Criminal Code.

Discretion of Court exercised by refusal to hear charge of perjury while civil proceedings are pending.

MOTION in the County Court Judge's Criminal Court to quash a charge for perjury alleged to have been committed on an examination for discovery before the Registrar in a civil suit; heard before HENDERSON, Co. J., at Vancouver, on the 15th of August, 1906. Statement

Wintemute, for the Crown.

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

14th September, 1906.

HENDERSON, Co. J.: The accused is charged with having committed perjury on his examination for discovery at Vancouver on the first day of August, 1906, before the Registrar of the Supreme Court of British Columbia in an action wherein one Robert McCurdo is plaintiff and the accused is one of the defendants.

He has been committed for trial on this charge by the Magistrate, and has elected to take a speedy trial. Judgment

Mr. McPhillips, counsel for the accused raises the preliminary objection, which may be expressed broadly, that perjury cannot be assigned on an examination for discovery. He cites, in support of his contention, several authorities, all of which I have looked into.

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The argument is advanced that, as the person examined for discovery, in this case the accused, cannot use the examination as "part of his evidence" at the trial of the civil action, the circumstances do not constitute perjury as defined by section 145 of the Code, admitting for the sake of the argument that the statements complained of in such examination are false.

I cannot accede to this argument. Section 145 reads, in part, as follows:

> "Perjury is an assertion as to a matter of fact, opinion, belief or knowledge, made by a witness in a judicial proceeding as part of his evidence, upon oath or affirmation, whether such evidence is given in open court, or by affidavit or otherwise, and whether such evidence is material or not, such assertion being known to such witness to be false, and being intended by him to mislead the court, jury, or person holding the proceeding."

According to my view every statement made upon oath by the person examined, during his examination for discovery, forms part of his evidence, within the meaning of section 145. I am unable to see that a witness under cross-examination may not give evidence as effectually as under examination-in-chief. Nor do I agree with the further contention of Mr. *McPhillips*, that as the Registrar, who holds the proceeding, *i. e.*, the examination for discovery, makes no adjudication, he cannot be misled and therefore perjury cannot be committed. But, as the evidence given in the proceeding is taken down and may be used on the trial of the action, the court might be misled, and the circumstances would clearly be such as are intended to be covered by the definition. I think, however, that the definition of "judicial proceeding" in sub-section 3 of section 145 leaves no room for argument on this point. It seems to me only necessary to quote the first part of the sub-section:

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> "Every proceeding is judicial within the meaning of this section which is held in or under the authority of any court of justice."

It is not contended that there is any defect or irregularity in the holding of the examination, in fact the regularity of the proceeding is admitted.

The case of *Drew* v. *The King* (1903), 33 S.C.R. 228, cited by Mr. *McPhillips* with special reference to the (dissenting) judgment of Mr. Justice Mills, confirms my opinion. Notwith-

standing the dissenting judgments of the Chief Justice and Mr. Justice Mills, the Supreme Court has decided in the case just cited, that a person swearing falsely upon the hearing of a charge by a magistrate may be properly convicted of perjury notwithstanding that the magistrate had no jurisdiction over the subject-matter of the complaint. I must overrule the objection.

Mr. *McPhillips* makes the further submission that I ought, in the exercise of my discretion, to refuse to hear the case during the pendency of the civil action.

After a perusal of the authorities cited I am of opinion that the point is well taken.

In the case of *The Queen* v. *Ingham* (1849), 19 L.J., M.C. 69, wherein it was sought to compel two Justices of the Peace to proceed with and hear an information charging one Browne with perjury, Coleridge, J., said:

"The question is, whether, having exercised a discretion in the matter, we think the Justices were wrong, and should now be compelled to proceed. It is enough to say that there is abundant reason for thinking that the course they have taken is the most likely to answer the ends of justice, and is full of convenience. Here the very party against whom the witness gives evidence in a pending suit, comes and seeks to destroy that evidence by convicting the witness of perjury. Surely such a proceeding can only be for the purpose of preventing justice."

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Chief Justice Hagarty in *Chadd* v. *Meagher* (1874), 24 U.C. C.P. 54 at p. 58, in delivering the judgment of the Court said:

"We find in the cases a strong disapproval expressed of the practice of indicting parties or witnesses for alleged perjury in a civil suit, while proceedings are still pending."

I think, therefore, that I should be exercising a proper discretion by refusing to hear the criminal charge until after the trial of the civil action.

Order accordingly.

DUFF, J.

1906

Sept. 25.

BELYEA v. WILLIAMS. RICHARDS, GARNISHEE.

Practice—Attachment of debts—Judgment creditor—Judgment obtained in Supreme Court, sought to be attached in County Court—Jurisdiction.

BELYEA v. WILLIAMS

On proceedings under the Attachment of Debts Act in the County Court, to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the said debt was made.

On an application for a writ of prohibition to the County Court judge, prohibiting him from dealing with said Supreme Court judgment:—

Held, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied.

APPLICATION for a writ of prohibition directed to the County Court judge, restraining him from dealing, in attachment proceedings, with a certain judgment obtained in the Supreme Court.

On the 29th of January, 1895, R. T. Williams and Joseph Sears obtained a judgment against F. G. Richards in the Supreme Court for $2,466.26. Prior to proceedings for attachment subsequently taken, Sears assigned his interest in said judgment to Williams. On the 13th of October, 1905, A. L. Belyea obtained a judgment in the County Court against Williams for $450 and costs. Belyea sought to obtain payment of his judgment by attaching in the County Court the judgment obtained by Williams and Sears in the Supreme Court. On the 27th of November, 1905, Belyea obtained from LAMPMAN, Co. J., an order absolute attaching the moneys due from Richards to Williams under the Supreme Court judgment.

Statement

Richards then applied to DUFF, J., for a writ of prohibition directed to the judge of the County Court and Belyea to prohibit them from further proceeding under the garnishee order absolute, on the ground that said court had no jurisdiction to make the order.

Argument

W. J. Taylor, K.C., in support of the application: In *Macpher-*

son v. *Tisdale* (1885), 11 Pr. 261, no question in the argument or judgment seems to have been raised as to the jurisdiction of the Division Court in attaching a judgment due by the garnishee to the principal debtor theretofore obtained in a superior court. The practice is contained in R.S.O. 1877, Cap. 47, Sec. 124.

In 1880 the Division Courts Act was amended by Cap. 8, of the statutes of that year; and in section 14 it is enacted that where the jurisdiction of the court is disputed, notice of intention to question it must be given in garnishee cases.

In 1885 the Division Courts Act was further amended by Cap. 14 of the Ontario statutes of that year, at section 1, by adding to section 14 a provision that "every such notice shall be in writing; and prohibition to a Division Court shall not lie in any such suit from any court whatever, where such notice disputing the jurisdiction has not been duly given as aforesaid."

In the case of *Macpherson* v. *Tisdale, supra,* no mention of such a notice having been given is set forth, and presumably no such notice was given, and therefore the question of jurisdiction did not arise.

The same section requiring notice to be given if the jurisdiction is questioned occurs in the Division Courts Act, R.S.O. 1887, Cap. 51, Sec. 176. It also appears in the same words in R.S.O. 1897, Cap. 60, Sec. 205, and does not seem to have been repealed.

Argument

Morphy, contra: As to difference between appeal and prohibition: *The Queen* v. *Lord Mayor of London* (1893), 62 L.J., Q.B. 589. Writ is discretionary: see judgment of Lord Esher, M.R., in *Broad* v. *Perkins* (1888), 21 Q.B.D. 533. In *Moore* v. *Gamgee* (1890), 25 Q.B.D. 244, it was held that the objection to the jurisdiction was one that could be waived, following *In re Jones* v. *James* (1850), 19 L.J., Q.B. 257. See also *Bank of Elgin* v. *Hutchinson* (1867), 13 Gr. 59; *Blevins* v. *Madden* (1861), 11 U.C.C.P. 195. As to jurisdiction see *Dierken* v. *Philpot* (1901), 2 K.B. 380. If there is unnecessary delay the application may be refused: *In re Denton* v. *Marshall* (1863), 1 H. & C. 654.

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BELYEA v. WILLIAMS

25th September, 1906.

DUFF, J.: I have come to a clear opinion that the attachment proceedings were *coram non judice*; and the defective jurisdiction being apparent on the face of the proceedings, the order for prohibition is *ex debito justitiæ*.

Where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot, in my opinion, be applied under the existing legislation. The Legislature must, I think, be taken not to have intended that the person against whom such a claim is made, or the holder of the claim, should be forced by the intervention of a third person (alleging himself to be a creditor of such holder) to have the merits of the claim, or defence, as the case might be, determined against his will by a tribunal in which the claim would not be cognizable in proceedings taken directly to enforce it.

Judgment

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Land Act, R.S.B.C. 1897, Cap. 113, Secs. 7, 8, 13, 17, 19, 95—Pre-emption record, status to attack—Power of Commissioner to cancel—Unoccupied Crown lands—Collusion between pre-emptors.

Butters obtained a pre-emption record of the land in dispute in 1901. Bessette applied for a record in respect of the same land in 1904. In the year 1893, one Kitchen had obtained a pre-emption record of this land and made certain improvements thereon to the value of about $1,000. In March, 1900, Kitchen applied for and obtained a pre-emption record of certain other lands, and in April, one Boutilier obtained a pre-emption record of a certain portion of the lands in question. Boutilier abandoned his pre-emption right, and Kitchen and Butters entered into an agreement whereby Kitchen agreed that Butters pre-empt the land on his paying for the improvements $200 in cash and the balance when he should realize the same out of the land, and Kitchen, until so paid, should retain an interest in the land.

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Bessette's application, which set up non-occupation of the land by Butters, and collusion between Butters and Kitchen, was refused by the Assistant Commissioner, who found against the charge of collusion, and on that of non-occupation, he came to the conclusion that there was no provision in the Land Act for cancelling a certificate of improvements when once issued. On appeal to MORRISON, J., this decision was affirmed:—

Held, by the Full Court, that the arrangement entered into between Butters and Kitchen was, in the circumstances, not such as to preclude Butters from making the statement set forth in Form 2 of the Land Act, as the term "collusion" as used in the Form means collusion with somebody to defeat the provisions of the Act.

The Legislature has refrained expressly from conferring upon the Commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact.

Semble, it is a condition of the power conferred by section 13 that the Commissioner shall find a cessation of occupation in fact, and the section has no application to any question arising under section 7 or section 8.

Hereron v. *Christian* (1895), 4 B.C. 246, dissented from.

Decision of MORRISON, J., affirmed.

APPEAL from the decision of MORRISON, J., on an appeal to him from the ruling of the Assistant Commissioner of Lands and Works under the Land Act. The facts in dispute are set out in the head note. Statement

Davis, K.C., for appellant.

L. G. McPhillips, K.C., for respondent.

The appeal was argued at Vancouver on the 26th of April, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Davis, K.C., for appellant: This is a dispute between two claimants for a pre-emption. We contend that Butters did not occupy the land according to the Land Act, and, secondly, that in his application for the land he made a false statement. In 1901 Butters made the location and surveyed the land, it having been previously occupied as a pre-emption; in 1903 he obtained a certificate of improvements. In 1904 Bessette made his application. It is doubtful if we can take advantage of Butters having obtained his certificate by fraud, as the certificate may be conclusive as between him and the Crown so far as Argument

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a third party is concerned; but there are important duties to be performed by him, one of which is occupation. We can shew that the land has not been properly occupied according to the Act. In other words, the certificate of improvements does not give him an unassailable title. We are not asking the court to give us a record; we merely say that the Commissioner should have cancelled Butters' record; and if the court tells the Commissioner he has done wrong, he will do right: see remarks of DAVIE, C.J., in *Hereron* v. *Christian* (1895), 4 B. C. 246 at p. 250.

[HUNTER, C.J.: The appeal to the Full Court, though, is as between parties. If there is only one party in the case of a Commissioner refusing to grant a certificate, you could not bring an action against the Commissioner. If the proceedings are regarded as actions, there must be someone besides the applicant and the Commissioner.]

It is all a question of status. We, having staked, certainly have a right. We can only appeal on a point of law. There was no suggestion at the hearing that we had no status. He referred to sections 8, 13 to 16, 22 and 25, and Forms 2, 4 and 5 of the Land Act. Butters and Kitchen were in collusion on the agreement to pay for the improvements. The applicant cannot convey, tie up or charge the land he is applying for.

Argument

Creagh, for respondent: The certificate of improvements is conclusive. The power of the Commissioner, under section 13 to cancel the record, is before the issuance of the certificate. Bessette has no authority to attack the record; the only person who can do so is one with a prior title. Only a pre-emptor has a right to appeal: see sections 18, 19 and 20. As to status, see *In re Wier* (1898), 31 N.S. 97 and *Farmer* v. *Livingstone* (1882), 8 S.C.R. 140. Bessette's application was premature and irregular, as the lands were not "unreserved and unoccupied." He should have got Butters' record out of the way: *Whitney* v. *Taylor* (1895), 158 U.S. 85.

As soon as he issues the record the Assistant Commissioner is *functus*: *Carroll* v. *Vancouver* (1904), 11 B.C. 493, and there is no right to cancel except there is express statutory provision.

See also *Attorney-General for Trinidad and Tobago* v. *Bourne* (1895), A.C. 83.

Davis, in reply.

Cur. adv. vult.

31st July, 1906.

HUNTER, C.J., concurred in the judgment of DUFF, J.

IRVING, J.: I would dismiss this appeal. In my opinion, the question as to jurisdiction in *Hereron* v. *Christian* (1895), 4 B.C. 246, was wrongly decided. The Commissioner only has power to cancel in cases falling within section 13. He cannot, under that section, determine the validity of location under section 8.

The appeal must be dismissed, because section 95 confines the appeal to "persons affected." The appellant cannot be regarded as a person affected as long as the original pre-emptor's record remains uncancelled, for it is only after that record has been cancelled that the land in question becomes open to be recorded as a pre-emption.

DUFF, J.: I find no ground for disturbing the finding of the Assistant Commissioner that the evidence does not support the charge of collusion, which finding has been affirmed by MORRISON, J.

The respondent, Butters, is the holder of a pre-emption record in respect of the west half of the west half of section 16, and the east half of the east half of section 17, Township 40, Osoyoos Division, granted on the 25th of January, 1901; Bissette, the appellant, has applied for a record of pre-emption in respect of the same land, which application the Commissioner has refused.

It is not disputed that at the date of Butters' application this land was unoccupied land within the meaning of the Crown Lands Act, and properly the subject of a pre-emption record.

Some years prior to Butters' application, one Kitchen occupied the same land under a pre-emption record, and during his occupation had made some improvements; but Kitchen, having before the date of Butters' application, obtained a record in respect of other lands, his pre-emption lapsed under section 17 of the Crown Lands Act, and the land became *ipso facto* open

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to be recorded by others. Butters, before making his application, arranged with Kitchen that he should pay to Kitchen certain sums of money in respect of his improvements. There is some conflict between the evidence of Butters and that of Kitchen as to the nature of this arrangement. As stated by Butters, the arrangement was that Butters was to pay to Kitchen $200 in cash, and the value of Kitchen's improvements. The amount of this last payment does not appear to have been specified, but it was to be paid by Butters out of any moneys realized from the sale of the property if he should sell it, or out of the profits if he did not sell. Butters says that Kitchen was to have an interest in the meantime in the property to the extent of these sums. I do not think that this is the kind of arrangement which is referred to in the declaration prescribed by section 8 of the Crown Lands Act, that is to say, I do not think that the existence of that arrangement enables us to say that the applicant could not honestly make the statement set forth in Form 2 in the schedule to the Act, namely, that "my application to record is not made in trust for or on behalf or in collusion with any other person or persons, but honestly on my own behalf for settlement and occupation for agricultural purposes." There is nothing to shew that the application was made in trust for Kitchen, or on behalf of Kitchen, and I think that the word "collusion" as used in the form means collusion with somebody

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to defeat the provisions of the Act, or collusion with somebody in trust for whom, or on whose behalf the application is made. The evidence is, in my opinion, quite open to the view that Butters regarded himself as bound in honesty to compensate Kitchen for the value of Kitchen's work and improvements, the benefit of which would eventually accrue to him. It is, in my opinion, entirely inadequate to fasten upon Butters the charge that any statement contained in his declaration was made by him knowing the same to be false within the meaning of section 8 of the Act. That is the view which the Assistant Commissioner and MORRISON, J., appear to have taken, and as I have said, I see no sufficient grounds for disturbing it.

I should not wish, however, to be understood to give any sanction to a construction of the Crown Lands Act which would

invest an Assistant Commissioner with power to cancel a pre-emption record, in circumstances such as those disclosed here, upon the sole ground that in his opinion the applicant in declaring that his application was made without collusion with anybody else had knowingly made a false statement. It is undisputed, as I have said, that the land, the subject of the application, was open to be recorded as a pre-emption under the Act. The qualification of the applicant under the statute is not disputed. That the applicant did the things which the statute required him to do to entitle him to demand a record in respect of the lands is admitted. The record was granted, and occupation (whether it subsequently ceased or not) was taken under it, and two years afterwards a certificate of improvements was granted to the holder under section 22. Now, the Act expressly confers upon the Commissioner (that is to say, the Chief Commissioner and the Assistant Commissioner) the power in certain cases to cancel a pre-emptor's record. These cases are specified in sections 13 and 19. In the first of these cases the power is to be exercised upon the ground that the pre-emptor has ceased to occupy his claim. In the second, the power is to be exercised on the ground that statements have fraudulently been made in a declaration filed under the provisions of section 19. The Legislature seems to have refrained expressly from conferring upon the Commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact. It is hardly necessary to add that the exercise of such a power cannot be upheld unless a grant of it is to be found either in the express language or by plain implication from the provisions of the Act.

DUFF, J.

I cannot agree with the observations of DAVIE, C.J., in *Hereron* v. *Christian* (1895), 4 B.C. 246, at p. 250, regarding the construction of section 13. In my opinion, it is a condition of the power conferred by that section that the Commissioner shall find a cessation of occupation in fact, and that the section has no application to any question arising under section 7 or section 8. Doubtless the views therein expressed account for the procedure adopted by the respondent in this case.

Still less should I wish to appear to give any adherence to

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the view that the Commissioner is authorized in passing upon an application for the record of a pre-emption to treat as a nullity (in circumstances such as exist in this case) a subsisting record in respect of the same land on the ground only that in his opinion a charge such as is made here, has been, or could be substantiated against the holder of the existing record. The Act provides no machinery by which such a question can be investigated upon such an application. The Chief Commissioner, so far as I can see, would not, for the purpose of investigating such a charge, be acting within his powers in calling before him witnesses, or in receiving from them evidence under oath when called. Moreover, the investigation of such a question by the Commissioner upon an application for the grant of a second record could be relevant to one question only—the sole question open to the Commissioner to consider as regards the status of the land in respect to which the application was made—namely, whether such land is unoccupied within the meaning of the Act. I am unable to doubt that land, which is the subject of an *ex facie* valid record granted to a qualified applicant, after compliance with the prescribed statutory conditions, and at a time when the land was properly the subject of such a grant under the Act, is not comprehended within the description "unoccupied land" where occupation has been taken under the record, and a certificate of improvements has been granted to the holder of it. It would, I think, be repugnant to principle to hold that upon a charge such as that made here, which is essentially a charge of perjury, a record, in such circumstances, could be treated as non-existent except as the result of some proceeding before an appropriate tribunal initiated by a person having an interest in the land, and affording the holder of the record a full opportunity to make his defence.

DUFF, J.

A long line of decisions of the Supreme Court of the United States has settled that such a record, until removed by a proper proceeding, must be treated as segregating from the public lands open to settlement, the land to which it relates. I refer to the decision of the court delivered by Mr. Justice Brewer in *Whitney* v. *Taylor* (1895), 158 U.S. 85 at pp. 90 and 91 [which the learned judge quoted].

The case comes, in my opinion, clearly within the principle applied by the Judicial Committee in *Osborne* v. *Morgan* (1888), 13 App. Cas. 227, and by the Supreme Court of Canada in *St. Laurent* v. *Mercier* (1903), 33 S.C.R. 314, and *Farmer* v. *Livingstone* (1882), 8 S.C.R. 140. I do not, of course, deal with cases where no valid pre-emption could have been recorded in respect of the land in dispute, or where the holder was incapable of acquiring a valid pre-emption record under the law. Such cases have no resemblance to that before us.

The petitioner further asked for relief upon the ground that the evidence was sufficient to establish a case within section 13 of the Crown Lands Act, and that the Commissioner ought to have cancelled the record on the ground that the occupation of Butters had ceased within the meaning of that section. In my opinion, the petitioner has no status to raise that question in this Court. Proceedings under section 13 presuppose a valid and subsisting record, and for the purpose of dealing with this point the record in question must be assumed to be such. The Commissioner (upon what grounds it is, I think, for our present purposes, immaterial) has held that no case has been made out for the exercise of the power conferred by section 13. The petition is presented under section 95, which gives a right of appeal to any person "affected by the decision of the Commissioner" under the Act. In my opinion, the petitioner is not a person "affected by" the Commissioner's decision. *Ex hypothesi* the land in question is not open to be recorded as a pre-emption. The petitioner's application for such a record is, therefore, not an application authorized by the Act. The petitioner consequently stands in no different position with respect to this land from that of any other person who would be entitled, upon the cancellation of Butters' record, to apply for a record of it. To hold that he has a right of appeal under section 95 would be to construe that section as conferring such a right upon every member of the community so entitled.

DUFF, J.

Appeal dismissed.

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CALORI v. ANDREWS

CALORI v. ANDREWS.

Sale of land, contract for—Specific performance—Statute of Frauds (29 Car. II., Cap. 3)—Sufficient memorandum—Principal and agent—Authority, ratification of—Negotiations by cablegram and letter—Description of purchaser.

A., who temporarily resided in England, had had certain dealings with a firm of real estate agents, C. & Co., in Vancouver, who cabled to him enquiring the lowest price, cash, he would accept for a certain lot in Vancouver. He replied "$13,000 net." C. & Co. cabled back that the best offer they could get was $12,000, net to him, and asking if they could accept. A. made no reply. Subsequently C. & Co. cabled that they had sold the lot for $13,000 net, had accepted, without stating purchaser's name, a deposit of $500, and asking confirmation by cable. A. cabled "writing acceptance." The letter following upon this stated that his reason for cabling in those terms was that he "wanted it distinctly understood that I could not complete the deal until I returned." . . . . "It would be impossible to close before, as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to the first of April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall. Kindly make it known to the purchaser so that there will not be any misunderstanding, be sure and tell the purchaser that I cannot give him possession of the premises, he will simply have to accept the present tenant, of course I accept the thirteen thousand dollars net cash offer, with the understanding that I am not to be called upon to produce any title papers other than these in my possession, no doubt you have explained all this to your client." . . . . "Kindly write and let me know if your client accepts these terms." C. & Co. handed this letter to plaintiff's solicitors, who accepted "unreservedly the stipulations made by Mr. Andrews," but added, "We are ready at any minute to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction." C. & Co. communicated this to A. The latter in reply repeated, in effect, the terms of his former letter. There was some evidence at the trial about a proposed change in the terms of payment from a cash basis to instalments:—

Held (IRVING, J., *dissentiente*), that A.'s letter following his cable "writing acceptance," read with C. & Co.'s cable announcing sale at $13,000, and the letter of plaintiff's solicitors to C. & Co. constituted a memorandum of a contract between the plaintiff and defendant sufficient to satisfy the Statute of Frauds.

Affirmed by S. C. of Can. 38 S.C.R. 588.

That the letter of plaintiff's solicitors to C. & Co. contained an unqualified acceptance of the terms proposed in A.'s letter to C. & Co., and did not import the proposal of a fresh term.

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APPEAL from the decision of MORRISON, J., in an action tried before him at Vancouver in December, 1905.

The plaintiff's claim was for specific performance of an alleged agreement in writing for the sale of certain real property in the City of Vancouver for the sum of $13,000.

Clark & Co., a Vancouver real estate firm, cabled to the defendant, who was residing in England, enquiring the lowest cash price he would take for his lot. Defendant replied "$13,000 net." Clark & Co. then cabled him "Best offer I can get twelve thousand dollars net to you; can I accept?" There was no reply by defendant to this message, which was dated the 9th of January, 1905. On the 25th, Clark cabled defendant that he had sold the lot for $13,000 net, that a deposit of $500 had been paid, and asking confirmation by cable. The receipt contained the words "Subject to confirmation of owner." Defendant on the 27th cabled "Writing acceptance," and on the 2nd of February sent the following letter:

Statement

"I am in receipt of your cablegram dated January 26th, offering me $13,000 cash for my property on Hastings Street lately occupied by MacKay as a Hardware Store. I answered your cable (writing acceptance) my reason for doing this was I wanted it distinctly understood that I could not complete the deal until I returned which may not be until April. It would be impossible to close before as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms that is, the adjustments to be calculated to the first of April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall. Kindly make it known to the purchaser so that there will not be any misunderstanding, be sure and tell the purchaser that I cannot give him possession of the premises, he will simply have to accept the present tenant, of course I accept the Thirteen thousand dollars net, cash offer, with the understanding that I am not to be called upon to produce or procure any title papers other than these in my possession, no doubt you have explained all the details to your client. I may state that the title to the Hastings Street property was accepted by Davis, Marshall & Macneill acting for Hull.

"Kindly write and let me know if your client accepts these terms, as other parties have written and cabled me for price.

"Your prompt attention will greatly oblige."

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Clark & Co. handed this letter to plaintiff's solicitors, who wrote them the following letter:

"Find enclosed herewith copy of letter of F. T. Andrews to you in regard to the sale of his Hastings Street property to Mr. Calori. We have retained the original letter pursuant to your kind permission and will thank you to confirm the terms suggested by Mr. Andrews to him by letter. It will be quite satisfactory to Mr. Calori to take the property over subject to the tenancy and so far as the question of title deeds is concerned we accept unreservedly the stipulations made by Mr. Andrews. We are ready at any minute to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction and we shall be obliged if you will ask Mr. Andrews to have such title deeds as are in his possession forwarded here with a solicitor's abstract to enable us to examine into the title fully."

This letter was forwarded to defendant by Clark & Co. together with the following:

"Yours of Feb. 2nd confirming sale of lot on Hastings Street to A. Calori received.

"We enclose letter from Mr. Calori's solicitors accepting the whole of your conditions and stipulations unreservedly so that the deal will be completed immediately on your arrival April 1st. You will notice that Mr. Calori's solicitors ask to have title deeds forwarded so that they may examine title.

"Your letter is now in their possession and the money $13,000 net to you, is awaiting the signing of necessary papers. If you do not execute the deed we sent kindly send the same back to us or bring with you when you come.

Statement

"Hoping to see you April 1st."

This was acknowledged by defendant on the 21st of March as follows:

"Re my Hastings Street property.

"I am in receipt of your favour of the 23rd ult. It will be impossible for me to do anything further in the above matter until I return.

"I hope to sail for Canada on the 6th of April and as I have some business to attend to at Ottawa, I will not be in Toronto until the latter part of April. I will write you as soon as I arrive at Toronto. I am writing my agent at Vancouver to continue to collect the rents. I stated in my previous letter that all adjustments would have to be made to the first of April, providing the deal is closed. The title papers that I got belonging to the above property are deposited in a vault in Toronto."

Defendant took no further steps in the negotiations.

On this state of facts the parties went down to trial, and MORRISON, J., gave judgment for plaintiff, but did not hand down any written reasons.

The appeal was argued at Victoria on the 6th and 7th of June, 1906, before HUNTER, C.J., IRVING and DUFF, JJ.

Cowan, K.C., and *Reid*, for appellant (defendant): There was no concluded agreement between the parties; this transaction never passed beyond the treaty stage; the parties were merely negotiating. Plaintiff, to succeed, must shew that there is a contract concluded between the parties, and that there is a note, a memorandum in writing, of that contract sufficient to satisfy the requirements of the Statute of Frauds: *Hussey* v. *Horne-Payne* (1878), 8 Ch. D. 671, (1879), 4 App. Cas. 311. There is no evidence that Clark had any authority to make a contract binding upon the defendant; defendant's cablegram that he would accept $13,000 net does not confer upon the agent power to enter into a contract for the sale of the property: *Hamer* v. *Sharp* (1874), L.R. 19 Eq. 108, 44 L.J., Ch. 53 at p. 55; *Ryan* v. *Sing* (1884), 7 Ont. 266; *Wilde* v. *Watson* (1878), 1 L.R. Ir. 402. Defendant's cablegram that he is writing acceptance is not an unqualified or any confirmation of the authority assumed by Clark in accepting the deposit of $500. "If you adopt [a man] as your agent on your own behalf, you must adopt him throughout, and take his agency *cum onore*": *Hovil* v. *Pack* (1806), 7 East, 164 at p. 166; *La Banque Jacques-Cartier* v. *La Banque d'Epargne de la Cite et du District de Montreal* (1887), 13 App. Cas. 111, 57 L.J., P.C. 42 at p. 46; *Marsh* v. *Joseph* (1897), 1 Ch. 213, 66 L.J., Ch. 128 at p. 135. Defendant's answer "writing acceptance" did not constitute an offer which upon acceptance by the plaintiff would have created a contract to sell: *Harvey* v. *Facey* (1893), A.C. 552. Even if defendant's answer constituted an offer, it was revoked by plaintiff's subsequent offer of $12,000: *Hyde* v. *Wrench* (1840), 3 Beav. 334; and the cablegram sent by Clark that he had sold for $13,000 could not operate as an acceptance reviving such offer. An acceptance must be unqualified: *Dyas* v. *Stafford* (1882), 9 L.R. Ir. 520; *Holland* v. *Eyre* (1825), 2 Sim. & S. 194; *Honeyman* v. *Marryatt* (1857), 6 H.L. Cas. 112; *Crossley* v. *Maycock* (1874), L.R. 18 Eq. 180; *Ryan* v. *Sing* (1884), 7 Ont. 266; *Culverwell* v. *Birney* (1887), 14 A.R. 266; *McIntyre* v. *Hood* (1883), 9 S.C.R. 556.

Argument

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Correspondence, without parol evidence, is insufficient to identify the purchaser.

On the 2nd of February, 1905, the defendant was ignorant that any contract had been executed by Clark, and the only description of the purchaser then contained in the correspondence was that of "client": *Skelton* v. *Cole* (1857), 1 De G. & J. 587; *Jarrett* v. *Hunter* (1886), 34 Ch. D. 182; *Thomas* v. *Brown* (1876), 1 Q.B.D. 714; *Maber* v. *Penskalski* (1904), 15 Man. L.R. 236. See also, as to description, *Champion* v. *Plummer* (1805), 8 R.R. 795; *Smith* v. *Surman* (1829), 33 R.R. 259; *White* v. *Tomalin* (1890), 19 Ont. 513; *McIntosh* v. *Moynihan* (1891), 18 A.R. 237. On the point of acceptance, see *Harvey* v. *Facey* (1893), A.C. 552 at p. 555. He also cited *Trimble* v. *Hill* (1879), 49 L.J., P.C. 49 at p. 51; *Attorney-General* v. *Dean and Canons of Windsor* (1860), 8 H.L. Cas. 369 at p. 392; *Bristol and Swansea Aerated Bread Co.* v. *Maggs* (1890), 59 L.J., Ch. 472; *Queen's College* v. *Jayne* (1905), 10 O.L.R. 319; *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481.

Argument

Even though there be a contract and a sufficient memorandum thereof, still the rule is that the remedy by specific performance is not a matter of course, but a relief in the nature of indulgence, and it is within the discretion of the Court to withhold such relief: *Harris* v. *Robinson* (1892), 21 S.C.R. 390; *Coventry* v. *McLean* (1892), 22 Ont. 1; *Goring* v. *Nash* (1744), 3 Atk. 186, *per* Lord Hardwicke at p. 188 and *Powell* v. *Lloyd* (1828), 31 R.R. 598.

For example, the relief will be withheld if there is any uncertainty as to the terms of or the parties to the contract and the parties will be left to their remedy at law: *May* v. *Thomson* (1882), 51 L.J., Ch. 917; or the mere existence of a *bona fide* dispute: *Clowes* v. *Higginson* (1813), 1 V. & B. 524; *Griffin* v. *Coleman* (1873), 28 L.T.N.S. 493.

There was a secret commission to Clark from plaintiff, which disentitles the latter to a decree: *Panama and South Pacific Telegraph Company* v. *India Rubber, Gutta Percha and Telegraph Works Co.* (1875), 10 Chy. App. 515; *Ex parte Bennett* (1805), 10 Ves. 381.

Martin, K.C., and *Bird*, for respondent (plaintiff): There is here a clear contract. Andrews made a new offer, and all the letters are connected shewing who the purchaser was. *Hussey* v. *Horne-Payne, supra*, is distinguishable from this.

As to secret commission, that is a question of fraud. In all the cases in which relief has been refused on this ground, the court has been satisfied that one of the parties bribed the agent of the other. There is nothing of that kind here; Andrews' stipulation that he would take $13,000 net shewed that he understood Calori was to pay the commission. There was nothing wrong in that.

[DUFF, J.: It is one thing to say there was nothing wrong, and another to say there was not even the incipiency of agency.]

Clark assumes to act on Andrews' behalf without any authority whatever. Exhibit 5 (the receipt for deposit of $500, "subject to confirmation of owner") is not signed by Clark as Andrews' agent.

[DUFF, J.: In that document Clark holds himself out as Andrews' agent.]

No; Andrews is not bound by that. That was a personal matter: an unwarranted intrusion into a business he had nothing to do with.

[*Per curiam*: Where and how is that $500 disposed of?] Argument

He simply held that to hand it over to Andrews if he ratified the deal.

[HUNTER, C.J.: As to a sufficient memorandum under the Statute of Frauds, can you bundle together a lot of letters and call them a sufficient memorandum?]

One document is signed; he receives and assents to it, and then all the other documents may be referred to in that connection.

[HUNTER, C.J.: Andrews has always taken the position that Clark was Calori's agent; how, therefore, are you to bind Andrews by anything Clark says?]

Clark was his agent on the 2nd of February, by his letter; we start with the correspondence of that date; but we must

MORRISON, J. look at the whole correspondence to see the real position of affairs.

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[HUNTER, C.J.: But if there is nothing on the face of that correspondence to shew whom Clark was acting for, how do you satisfy the statute?]

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Clark was never authorized by Calori to do anything for him; and under the statute a person must be authorized. Now we submit that Andrews did authorize Clark to convey new terms to Calori: *Buxton* v. *Rust* (1871), L.R. 7 Ex. 1.

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Cur. adv. vult.

31st July, 1906.

HUNTER, C.J. HUNTER, C.J., concurred in the reasons for judgment of DUFF, J.

IRVING, J.: The defence on which I think the defendant is entitled to succeed is that of the Statute of Frauds.

The defendant, who was residing in England, received from Messrs. Clark & Co. a cablegram enquiring the lowest price he would accept for a lot in Vancouver, to which he replied $13,000 net. Messrs. Clark & Co. cabled that $12,000 was the best price obtainable, and asked authority to close at that figure. To this cablegram the defendant, who had not in any way authorized Clark to act for him, made no reply. Some ten days later Clark & Co. cabled that they had sold the lot for $13,000 net, to which the defendant replied 2nd February:

"I am in receipt of your cablegram offering me $13,000 net. . . ."

The plaintiff had at this time paid a commission to Clark, who was doing all he possibly could to bring about the sale.

IRVING, J.

When Andrews wrote on the 2nd of February he expressed himself satisfied with the price, but did not mention the name of the purchaser. He inserted certain stipulations which made his letter a new proposal. The plaintiff's solicitor accepted this offer, whether unconditionally or conditionally I need not stop to discuss. I shall assume that there was an unconditional acceptance, in which the name of the purchaser was duly mentioned, signed by the purchaser, but the defendant says that he has signed nothing which directly, or by sufficient reference, sets out who the purchaser is.

The letter of 21st March does not contain Calori's name. It acknowledges receipt of Clark's letter of 23rd February, in which Clark says: "Yours of 2nd February confirming sale to Calori received," etc. Now, as a matter of fact, the letter did not mention Calori's name, nor did it confirm any sale. The letter of 23rd February would be a sufficient memorandum to satisfy the Statute of Frauds if Clark had authority from Andrews to sign such a memorandum, but in my opinion he had none. He was, as I have already said, in receipt of a commission from Calori, and Andrews persistently refused to recognize him as his agent.

I am unable to find in the whole correspondence a memorandum of the agreement authenticated by the defendant's signature. The statutory evidence of the existence of the contract is missing. The omission may have been accidental—it probably was—or intentional, but the defendant has a right to say: "You have no sufficient memorandum of the agreement signed by me, and I am not bound." He, in fact, did say: "It will be impossible for me to do anything further in the matter of the sale of my property until I can return to Vancouver."

IRVING, J.

The authorities on this question of the sufficiency of the memorandum are numerous, but not one of them has held that the mere admission of the receipt of a letter can be construed into an acknowledgment that the letter so received correctly states one of the terms of the contract. The governing principle is that there must be over the signature of the person to be charged, or his lawfully authorized agent, an admission or recognition of the pre-existing contract.

The letter of 21st March neither affirms nor disaffirms the agreement. It says simply, I have your letter of 23rd February, and the matter must rest until I can reach Vancouver.

On this ground I would allow the appeal.

DUFF, J.

DUFF, J.: Two questions are raised by this appeal, first, was there a concluded agreement between the parties; and second, if so, is there a sufficient memorandum of it to satisfy the requirements of the Statute of Frauds.

On the first question Mr. *Cowan* argues that at the time the

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defendant refused to complete, the parties had not passed beyond the stage of negotiation. The dispute upon this point is to be determined by an examination of the correspondence in evidence, beginning with the cable message of the 6th of January, 1905, from Clark to Andrews, and terminating with the letter of May 19th, 1905 [stating that he is leaving for the west and is bringing with him all the title papers], from Andrews to Clark. Mr. *Cowan*, indeed, sought to support his contention by reference to conversations which occurred after the close of the correspondence. Of these oral communications (assuming the correspondence to disclose a concluded bargain) it is, I think, sufficient to say that they appear to me to have related to the legal effect of that bargain and the mode of carrying it out, and not to be fairly open to be characterized as the continuing of an unsettled negotiation.

In my opinion, Andrews' letter of the 2nd of February (read with Clark's message of the 25th of January), and the letter of the 22nd of February from the plaintiff's solicitors to Clark constitute a contract between the plaintiff and the defendant. By his letter of the 2nd of February, Andrews authorizes Clark to communicate to the plaintiff his acceptance of the proposal described in the message referred to, subject to certain specified conditions (*viz.*: that the property shall be accepted subject to an existing tenancy; that the 1st of April shall be fixed for the date of completion, when the purchaser is to be let into receipt of the rents; and that the defendant shall not be called upon to produce or procure any title papers other than those in his possession); and requests Clark to ascertain and advise Andrews whether the plaintiff will accept these proposed additional terms. I cannot construe this letter as anything but a proposal to enter into an agreement for the sale of the property described on the terms mentioned. It is not a proposal to open negotiations on the subject of a sale; it is a present proposal of a contract of sale to be presently accepted or refused. Mr. *Cowan* relied strongly upon the sentences:

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> "I wanted it distinctly understood that I could not complete the deal, which may not be until April. It would be impossible to close before as the title deeds belonging to the property were left in Toronto."

I am unable to doubt that this passage refers to the completion of the sale by the delivery of the conveyance and the payment of the purchase money. In that sense it harmonizes with the whole letter; in the sense proposed, namely, as postponing until April the concluding of the agreement, it seems impossible to reconcile it with the language of the letter, or with the antecedent communications. The acceptance (the letter of February 22nd from the solicitors to Clark) affords the defendant a more favourable topic; but a critical reading of it confirms my first impression, namely, that it contains an unqualified acceptance of the terms proposed in Andrews' letter to Clark.

The question whether the language of this letter imports the proposal of a fresh term is purely a question of construction. One must read it with the letter to which it is a reply, and ascertain whether it expresses an unconditional acceptance. Consider the course of the communications: Andrews in his letter to Clark authorized the latter to communicate with the purchaser, and to ascertain from the purchaser his views as to the terms proposed, and then to communicate the purchaser's reply to him. This letter Clark handed to the purchaser's solicitors, and in response the letter under consideration was written. It opens by stating "We will thank you to confirm the terms suggested by Mr. Andrews to him by letter." That is, of course, an unconditional acceptance (and a request to Clark to communicate to Andrews an unequivocal acceptance) of the terms proposed by Andrews. The letter then deals with two of the stipulations mentioned in Andrews' letter—those, namely, relating to the tenancy and the title deeds; and having assented to them in terms, proceeds:

"We are ready at any minute to pay this money over to Mr. Andrews so soon as a proper title is evidenced to our satisfaction and we shall be obliged if you will ask Mr. Andrews to have such title deeds as are in his possession forwarded here with a solicitor's abstract to enable us to examine into the title fully."

Does this sentence qualify the acceptance of Andrews' terms contained in the earlier part of the letter, or the introduction of a fresh term? In my opinion, it has nothing to do with the terms of the agreement, but should be, and can reasonably be read only as indicating the suggestions of the writers in their

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character of solicitors for the purchaser respecting the steps to be taken towards the completion of the sale. The writers are not discussing the acceptance or the terms of the acceptance; they are discussing that which follows a concluded agreement, namely, the payment of the purchase money and the making of the title? In the ordinary course the purchase money would be paid when the solicitors for the purchaser should satisfy themselves respecting the vendor's title. The solicitors, speaking in that character, inform the vendors that the purchase money is in their hands; that they are ready to pay it over so soon as a title shall be manifested, and suggest steps to be taken to expedite the examination of it. To my mind, it means plainly: we on the part of the purchaser are prepared to carry out the agreement at once so soon as you, the vendor, have satisfied the condition of the purchase, namely, that you shall appear to have a title to the property sold. In the face of the statement that "we accept unreservedly the stipulations" relating to title deeds, the suggestion that the last sentence in the letter proposes any modification of these stipulations is hardly susceptible of discussion. Nor does the reference to a solicitor's abstract affect them. Andrews had stipulated that he should not be called upon to produce or procure any "title papers" other than those in his possession. It seems quite clear that under an acceptance *simpliciter* of this term

DUFF, J.

Andrews could not have escaped the obligation to provide a solicitor's abstract. But assuming that to be doubtful, I cannot regard the request by the solicitors to be furnished with a solicitor's abstract as importing any qualification of the acceptance. In any case, there was nothing to shew that the vendor was not in possession of a solicitor's abstract.

It is material, further, that the letters of the 2nd of February and the 22nd of February be read in the light of the communications which preceded them. The first of these letters was in response to a communication from Clark conveying what Andrews treated as, and what in substance was, a proposal from the plaintiff. That proposal was encumbered by no conditions whatever respecting the examination of the title; and the sole question remaining to be dealt with on behalf of the purchaser

in reply to the letter of the 2nd of February, was whether the purchaser would agree to the additional terms proposed by Andrews in that letter. Upon that question the letter of the 22nd of February (although its unnecessary elaboration offers a tempting field for the exercise of critical ingenuity), is, I think, sufficiently explicit.

Mr. *Cowan* argued that the decision of the Court of Appeal in *Hussey* v. *Horne-Payne* (1878), 8 Ch. D. 670 must be taken to furnish the rule governing the construction of the letter of the 22nd of February. I do not think that decision can be regarded as an authority on the point upon which it proceeded. Lord Cairns did not agree with the reasons of the Court of Appeal; and although Lord Selborne did not discuss them, he seems to have agreed with Lord Cairns' view. (See *Chipperfield* v. *Carter* (1895), 72 L.T.N.S. 487 at p. 488, *per* Wright, J.); and the rule seems to be that where the House of Lords on appeal from the Court of Appeal sustains the Court of Appeal, but for different reasons, the reasons given by the Court of Appeal are to be taken to be disapproved: *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 111. Moreover, judicial decisions upon the construction of words in formal documents which are not terms of art are not generally to be regarded as authorities governing the construction of similar words in other documents of a like character: *Grey* v. *Pearson* (1857), 6 H.L. Cas. 61 at pp. 106 and 108; and questions as to the effect of such documents are purely questions of construction: *Rossiter* v. *Miller* (1878), 3 App. Cas. 1,124 at p. 1,152. The document under consideration in *Hussey* v. *Horne-Payne* differed widely from that before us. There the acceptance was expressly conditioned on the approval of the title by the purchasers' solicitors. The question argued both in the Court of Appeal, and in the House of Lords, was whether such a condition added anything to what the law would imply from an acceptance *simpliciter*. Here, for the reasons I have given, my view is that the reference to the vendor's title cannot be read as modifying the unqualified assent to the vendor's terms found in the letter when read as a whole.

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I have still to deal with Mr. *Cowan's* argument based upon

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subsequent correspondence. Now, this correspondence may properly be looked at for certain purposes. It may be looked at for the purpose of ascertaining whether notwithstanding the existence of documents which bear the appearance of a concluded agreement, there were at the time of the writing of the letter of 22nd February, points of negotiations still undecided between the parties not referred to in the written communications; or it may be looked at to ascertain whether both parties concurred afterwards in treating the preceding communications as amounting only to an unconcluded negotiation. But where a definite offer in writing, intended to include all the terms of a proposed agreement, is accepted in terms, I do not see on what principle the offeror alone can, by introducing fresh topics of negotiation, or some qualification of his offer, dissolve a *vinculum juris* already established. There is nothing in the speeches of the Lords in *Hussey* v. *Horne-Payne* to countenance such a contention. The principle of the decision is shortly stated by Lord Selborne in the House of Lords (1879), 4 App. Cas. 311 at p. 323:

> "And it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement."

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To the same effect is the language of Lord Cairns at p. 320. Neither Lord Cairns nor Lord Selborne says anything which supports or suggests the view that either party can, by starting fresh negotiations after a contract has been concluded, reopen that contract without the consent of the other; and that view, in my opinion, is alike opposed to principle and authority: *Bellamy* v. *Debenham* (1890), 45 Ch. D. 481 at pp. 492-5.

Now, in this case it cannot be argued that at the date of the letter of 22nd February there were any unsettled points of negotiation not disclosed by the correspondence, because the negotiations are contained in the correspondence; nor can it be argued that in the subsequent correspondence the plaintiff treats the letters in question as amounting to anything less than a concluded agreement. Indeed, the plaintiff's conduct from the

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date of his acceptance onward unequivocally confutes the suggestion that at any time after that date he treated the business as still in the stage of negotiation.

Nor can I read the defendant's letter of the 21st of March as treating any term of the agreement as still open to negotiation. The phrase "providing the deal is closed" when read with the previous letters is plainly seen to refer to the completion of the sale. In that sense he uses similar words in his letter of the 2nd of February; and in that sense a similar phrase is obviously used by Clark in his letter of the 23rd, to which the letter under discussion is a reply. The defendant had, in his letter of the 2nd of February, guarded himself against assuming any obligation to supply the deficiencies in his title; if it should prove defective, the purchaser was not bound to accept it, and the sale might not be completed. It is, I think, to this contingency that the phrase in question relates.

There remains the question arising out of the Statute of Frauds. The point made by Mr. *Cowan* is that there is no memorandum authenticated by the signature of the defendant containing the name or a sufficient description of the plaintiff as a party to the contract.

I am disposed to think that the letter of the 21st of March sufficiently recognizes the correspondence beginning with the message of the 25th of January and including the letters of the 22nd and 23rd of February, written by the solicitors and Clark respectively (in which the plaintiff is named as the purchaser) as containing the terms of an agreement between him and the plaintiff. I think also there is much to be said in support of the view that the letter of 2nd February constituted Clark the agent of Andrews to inform Andrews of the answer given by the purchaser to the proposals contained in that letter; with the consequence that Clark's letter of the 23rd of February may be taken to be signed by the authority of the defendant. There is nothing, I think, extraordinary in the view that a person in Clark's occupation should, in a negotiation such as he was conducting, be empowered to act alternately as the agent of each of the parties, or for that matter, at one and the same time as the agent of both. In each case it would be a question whether a

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particular act should be treated as the act of one or the other, or as done by Clark on his own responsibility without the authority of either. The letter of the 23rd of February may, I think, be fairly treated as written by Clark with the authority, and on behalf of the defendant,

Now, it is settled law that to constitute a memorandum within the Statute of Frauds it is not necessary that the document should be written with the object of attesting or verifying the agreement: *In re Hoyle* (1893), 1 Ch. 85 at pp. 98, 99, 100; or that the agent's authority (where the signature of the agent is relied upon) shall be an authority to sign a record of the contract as such: *John Griffiths Cycle Corporation, Limited* v. *Humber & Co., Limited* (1899), 2 Q.B. 414 at p. 417. It is sufficient on the one hand if the document contain a recognition of the terms of the agreement in fact, and, on the other, if in fact the agent had authority to sign it for any purpose.

It is hardly open to discussion that the letter of the 23rd of February, read as it must be with the letter of the 2nd of February, and the cablegram of the 25th, supplies all the elements of a good memorandum under the statute.

I prefer, however, to rest my decision of this question upon neither of these grounds, but upon the message of the 25th of January, read with the letter of the 2nd of February. These, in my opinion, contain a description of the plaintiff as the purchaser sufficiently definite to enable any tribunal to identify him with certainty. The rule of law governing the point is stated in *Rossiter* v. *Miller* (1878), 3 App. Cas. 1,124, by Lord Cairns at pp. 1,140-41:

DUFF, J.

> "In point of fact, my Lords, the question is, is there that certainty which is described in the legal maxim *id certum est quod certum reddi potest.* If I enter into a contract on behalf of my client, on behalf of my principal, on behalf of my friend, on behalf of those whom it may concern, in all those cases there is no such statement, and I apprehend that in none of those cases would the note satisfy the requirements of the Statute of Frauds. But if I, being really an agent, enter into a contract to sell Blackacre, of which I am not proprietor, or to sell the house No. 1, Portland Place, on behalf of the owner of that house, there, I apprehend, is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise; and I should be surprised if any authority could be found, and certainly none

has been produced, to say that a contract under those circumstances would not be valid."

By Lord O'Hagan at p. 1,147:

"On the second point, all the learned judges in both the courts below have been of one opinion, in favour of the appellants, and I have no doubt that that opinion is correct. The parties to a contract in writing must, no doubt, be specified, but it is not necessary that they should be specified by name. The whole course of decision and practice shews that it is not. If they are so indicated, by description or by reference, as to be ascertained, or certainly ascertainable, the exigency of the statute in that respect is satisfied."

And by Lord Blackburn at p. 1,153:

"It is enough if the parties are sufficiently described to fix who they are without receiving any evidence of that character which Sir James Wigram in his Treatise calls evidence 'to prove intention as an independent fact.'"

Now, the letter of the 2nd of February refers to and incorporates the message of the 25th of January and the expressions "your client" and "the purchaser" in the letter must be read as importing the terms of the message; thus expanded, they signify "your client who has paid a deposit of $500 on the purchase of" the property on the terms mentioned. Now, the fact is that on the day on which the message was sent the plaintiff paid Clark, who sent the message and to whom the letter of the 2nd of February was addressed, the sum of $500 and received from Clark a receipt which reads as follows:

"25 January, 1905.

"Received of A. Calori the sum of $500.00 Five hundred deposit on lot 24, block 8, D 196, on purchase price of $13,000.00 (net to F. T. Andrews). Subject to confirmation of owner. Title being satisfactory."

Can it be disputed that there is here "that certainty described" in the maxim quoted by Lord Cairns, or that the purchaser is "so indicated by reference" as to be "certainly ascertainable" in the language of Lord O'Hagan; or that he is sufficiently described to fix who he is without receiving independent evidence of intention as a matter of fact, in the language of Lord Blackburn?

If the description stopped with the words "your client" it would hardly need the authority of Lord Cairns to prove its insufficiency; but the further *indicia* supplied by the message and the receipt take it out of the category of the equivocal.

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It might be argued that there might be more than one such payment, and more than one such receipt. That is the argument which was rejected by Farwell, J., in *Carr* v. *Lynch* (1900), 1 Ch. 613; where a memorandum signed by the vendor not naming the purchaser was held to describe the latter sufficiently by reason of the fact that the memorandum contained a receipt for £50 paid on its date. "In this case," said Farwell, J., at p. 615, "it is plain on the memorandum that the lease is to be granted to the person who paid the £50." Here, the letter of the 2nd of February identifies the purchaser as the person who had paid Clark the $500 mentioned in the message of 25th January. So in *Ryan* v. *United States* (1890), 136 U.S. 68, referring to a memorandum containing a description of property which gave the number of the sections, but omitted the townships and ranges, Harlan, J., in delivering the judgment of the Court, said:

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> "It is well said by the Solicitor-General that, in the absence of any evidence to shew it, or to raise doubt upon the subject, the presumption is not to be indulged that Ryan owned, in or near the village of Sault Ste. Marie, two tracts of land in different townships and ranges which would answer the description of southwest quarter of southwest quarter of section 6, and southeast quarter of southeast quarter of section 1."

The appeal should be dismissed with costs.

Appeal dismissed.

HILL v. HAMBLY AND ANOTHER.

IRVING, J. (In Chambers)

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Practice—Adding parties—Consent of parties added as plaintiffs—Consent signed by attorney—Sufficiency of power—Trial of action before referee —Powers of referee as to amendments—Reviewing referee's order.

An action, involving mainly the taking of accounts, was referred to the District Registrar, the referring order giving that officer all the powers of a judge as to certifying and amending. On this authority the District Registrar, on application, added certain parties plaintiff, upon plaintiff filing a consent thereto of the parties so added. The writ of summons and statement of claim were afterwards amended.

Defendant Hambly took out a summons to strike out the amendments to the writ and pleadings on the ground that the amendments were made without an order of the court or a judge thereof, and that as to the plaintiffs added, no proper consent signed by them had been filed. The documents purporting to be consents were filed by the plaintiff under a power of attorney authorizing him to sue for, recover and receive the amount of a certain judgment debt recovered in another action:—

Held, that the action in which the consents were filed was a new action, that the power of attorney was, in the circumstances, insufficient, and that the amendments made in pursuance of such consents so filed must be struck out.

Held, also, that the order conferring on the District Registrar power to amend, would also authorize him to add parties.

Held, also, that the application to strike out the amendments made by the District Registrar was not an appeal, but a substantive application to strike out certain amendments made by the District Registrar.

But, *semble*, on the authority of *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236, an appeal from the official referee lies to a judge in Chambers.

ACTION brought against the Sheriff and Deputy Sheriff of North Kootenay for moneys alleged to be in their hands payable to the plaintiff, being the proceeds of certain executions recovered by the plaintiff and others in a number of different actions against the Canadian Timber and Saw Mills, Limited. The plaintiff's claim was in respect of his own judgment and also as assignee from the other judgment creditors. The action was ordered to be tried before the Acting Registrar at Nelson

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for the reason that it involved almost altogether the taking of accounts. The order referring the action gave the Acting Registrar all the powers as to certifying and amending of a Judge of the Supreme Court. In pursuance of these powers the Registrar made an order adding as parties plaintiff the various assignors under the assignments to the plaintiff Hill. The consents in certain cases to being so added were signed on behalf of the proposed new plaintiffs by the plaintiff Hill purporting to act under powers of attorney. The defendant Hambly thereupon took out a summons to strike out the amendments, and the application came up for hearing before IRVING, J., at Victoria, on the 19th of July, 1906.

The grounds of the application are sufficiently set out in the reasons for judgment.

J. H. Lawson, Jr., in support of the summons.

Barnard (for *R. M. Macdonald*), *contra.*

25th July, 1906.

IRVING, J.: This is an application on the part of the defendants for an order to strike out certain amendments made to the writ and pleadings herein by the plaintiffs on the 9th of April, 1905.

The defendants are Sheriff and Deputy Sheriff respectively for North Kootenay.

Judgment

Hill, and certain other creditors of the Canadian Timber and Sawmills Company, obtained judgment against that Company. Execution was issued, and the Sheriff realized some $5,260.80. He paid to the plaintiff Hill the sum of $3,688,64, and charged for his own costs $500—$4,188.64, and the amount due is $1,072.16.

On the 17th of December, 1905, MARTIN, J., made an order that this cause, being a cause in part consisting of matters of account which could not, in the opinion of the judge, be conveniently tried before a jury, or conducted by the court or its ordinary officers, be tried before the District Registrar of this Court at Nelson, who by the said order was given all the powers as to certifying and amending as a Judge of the Supreme Court, and with power to direct judgment to be entered and otherwise deal with the whole action.

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On the 29th of March, 1906, the original plaintiff Hill, and the Sawmill Company, obtained from the District Registrar an order permitting certain persons to be added, namely, Kinman, Dunn, Teetzel and Burr, upon the plaintiff filing a consent in writing thereto of the parties so to be added. Certain documents, purporting to be consents, were filed, and the writ of summons and statement of claim were afterwards amended under the present style of cause on the 9th of April.

On the 26th of April the defendant Hambly took out a summons to strike out the amendments to the writ and pleadings on the ground that the amendments were made without an order of the court or a judge thereof, and that as to the four plaintiffs added, no proper consent signed by them had been filed. The consents in question were signed by Hill who professed to act under a power of attorney which authorized him to sue for, recover and receive and give effectual discharges for the sum thereby assigned, that is to say, the amount of the judgment obtained by these gentlemen whose names I have mentioned against the Company. It is an old doctrine that powers of attorney must be construed strictly: *Attwood* v. *Munnings* (1827), 7 B. & C. 278. The decision of the Privy Council in *Bryant, Powis, & Bryant* v. *La Banque du Peuple* (1893), A.C. 170, gives a very good illustration of this, Lord Macnaghten there saying at p. 177, that

Judgment

"Where an act purporting to be done under a power of attorney is challenged as being in excess of the authority conferred by the power, it is necessary to shew that on a fair construction of the whole instrument the authority in question is to be found within the four corners of the instrument, either in express terms or by necessary implication."

If the power of attorney relied on by the plaintiff be examined, it will be seen that it authorizes Mr. Hill to recover the judgment debt obtained by the above named persons respectively against the defendant.

The present action is a new action, distinct from the action in which the judgments which were assigned to the four persons above named were obtained, and therefore the power of attorney is insufficient, and that the amendments must be struck out.

Mr. *Barnard* submitted that I had no jurisdiction to entertain this application, and that the appeal from the District

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Judgment

Registrar should have been taken to the Full Court. In the first place, I would point out that this is not an appeal from the District Registrar's decision, but a substantive application to strike out certain amendments made by him. Apart from that, I think an appeal lies to a judge in Chambers on the authority of *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236. In that case, Bonsey, in reply for the defendants, contended that the official referee was an officer of the court, and therefore the court had an inherent jurisdiction to review the exercise of his discretion, which jurisdiction, in the absence of any statement or rule to the contrary was exercisable by a judge in Chambers. Denman and Wills, JJ., seem to have adopted that argument. Wills, J., said, "The official referee is an officer of the court, and as such is subject to the control of the court." Denman, J., said, "It is clear that the court has the power to set the official referee right, and I do not think that either rule 48 or rule 49 of Order XXXVI. contains any language qualifying or interfering with the language of rule 50." These three rules have been omitted from our rules, but the judgment seems to turn on the fact that the official referee is an officer of the court.

I think the order of MARTIN, J., conferring on the referee power to amend, would authorize him to add parties: see the reasons of the Court of Appeal in *Byrne* v. *Brown* (1889), 22 Q.B.D. 657.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. McGREGOR.

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Statute, construction of—Vancouver Island Settlers' Rights Act, 1904, B.C. Stat. 1904, Cap. 54—Constitutional law.

Section 3 of the Vancouver Island Settlers' Rights Act, 1904, enacts that upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of the Act, shewing that any settler occupied or improved land within the said railway land belt prior to the enactment of chapter 14 of 47 Victoria (the Settlement Act), with the *bona fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.

Section 4 provides that the rights of such grantees shall be asserted by and defended at the expense of the Crown:—

Held, reversing the decision of MARTIN, J., that, notwithstanding the decision of the Privy Council in *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429, the Legislature considered that there may be persons who have valid claims to lands within the Company's land grant, but who by reason of poverty or limited means, are unable to assert their rights; that it decided to enable such rights, if any, to be effectively asserted by authorizing Crown grants in fee which grants would transfer any interest left in the Crown and throw the onus of the litigation on the Railway Company while the rights, if any, of the grantee are to be upheld by the Province, but that there is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown, or attempts to deprive the Company of any interest vested in it under its patent from the Dominion.

Held, further, on the evidence, affirming the finding of MARTIN, J., in this respect, that the defendant had no legal authority for his entry upon and occupation of the lands in question when he went upon them in 1879, that he was never recorded as a pre-emptor, and that, therefore there was no valid alienation of the land in question taking it out of the grant to the railway. There being no interest left in the Crown, in right of the Province, to convey, the grant given to the defendant by the Province was inoperative.

Reversed by Privy Council July 22, 1907

APPEAL from the decision of MARTIN, J., in an action tried before him at Victoria on the 13th, 14th and 24th of October, 1905. Statement

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The points in dispute are set out in the arguments and judgments in the case.

Luxton, K.C., for plaintiff Company.

A. E. McPhillips, K.C. (*Heisterman*, with him), for defendant.

29th December, 1905.

MARTIN, J.: It must first be determined what the legal status of the defendant was at the time he entered upon and occupied the lands in question in 1879. This depends upon the fact of their being reserved or not from settlement at that time. By section 42 of the Land Act then in force, R.L.B.C. 1871, No. 144, it is enacted that:

> "The Governor shall at any time, and for such purposes as he may deem advisable, reserve, by notice published in the Government Gazette, or in any newspaper of the Colony, any lands that may not have been either sold or legally pre-empted."

And in pursuance of the powers thereby conferred a certain area on this Island, including said lands, was reserved, as set out by the orders in council cited; and that reserve, in my opinion, whatever its object, operated against the public generally, including those claiming rights under section 11 of the Terms of Union. The propriety of that valid executive act cannot be questioned here.

Such being the case, the defendant at the time of the passing of the Act relating to the Island Railway, the Graving Dock, and Railway Lands of the Province, B.C. Stat. 1884, Cap. 14 (commonly called the Settlement Act because of the recital in its preamble that it was passed "for the purpose of settling all existing disputes and difficulties between the two Governments"), had no legal authority for his entry upon and occupation of Crown lands, and hence was merely what is commonly known in this Province as a "squatter" thereon; though "squatter" may be included in the term "settler": *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429 at pp. 436-7. It is manifest that if the defendant is to be considered as being a squatter at that time, he can only save himself by relying upon the Vancouver Island Settlers' Rights Act, 1904. That is a statute of a very unusual kind, and it is a public and general one, aud contains this exceptional section:

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"4. The rights granted to the settler under this Act shall be asserted by and be defended at the expense of the Crown."

This gives a significant indication that the Legislature was aware that it was legislating in a manner quite out of the common, and in a matter wherein litigation was to be expected, and was prepared not only to confer unusual benefits, but to support and assist the beneficiaries in their enjoyment of the rights conferred.

Reading the Act with the preamble and this section as a key to its true intent and meaning, and bearing in mind that as it is a public and general statute, statements of fact therein contained must be accepted as being accurate (*Attorney-General* v. *Ludgate* (1901), 8 B.C. 242, (1904), 11 B.C. 258), I have no doubt, after a careful perusal of it, what one of its chief objects is, *i. e.*, to recognize squatters as being entitled to special rights in the premises; to treat them in fact as if they had been in occupation of unreserved Crown lands pursuant to the Land Act. This view is especially supported by the first paragraph of the preamble referring to "certain persons . . . who have been unable to obtain titles in fee simple to the lands occupied by them," by the reference to certain "decisions of the courts that the land was not open for settlement," and to the succeeding recital. There is, however, no doubt about the point, for the definition of the word "settler" in section 2 (*b.*) is clear and far-reaching:

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"Unless the context otherwise requires:

"(*b.*) 'Settler' shall mean a person who, prior to the passing of the said Act, occupied or improved lands situate within the said railway land belt, with the *bona fide* intention of living thereon."

This language includes the defendant, for I can see nothing in the context to warrant my excluding him, and he is therefore entitled to claim the benefit of the Act if he has conformed to the requirements of section 3, which he has done, and has consequently received a Crown grant in fee simple "in accordance with the provisions of the Land Act in force at the time said land was first so occupied or improved by said settler." It is clear, to me at least, that the Legislature passed this peculiar statute with the object of remedying some real or fancied hardships which had been brought to its attention in consequence of

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the litigation referred to, and that it intended to implement and put a new interpretation upon the Settlement Act, which should place certain early squatters as well as others in an assured position as against all the world.

It is admitted that the Legislature in dealing with "property and civil rights in the Province" is paramount because they come within its exclusive control by virtue of the B.N.A. Act, Sec. 92, Sub-Sec. 13. The learned counsel for the plaintiff not unnaturally protested against the passage of legislation of this questionable class as being equivalent to confiscation of private property, but as the Lord Chancellor recently said in *Musselburgh Real Estate Company* v. *Provost &c., of Musselburgh* (1905), A.C. 491 at p. 497:

> "Now, my Lords, it is said, and I think justly said, that it is contrary to the policy of Parliament to take away rights—to give anything in the nature of property to others without giving compensation for it. But I think, on the other hand, it must be frankly admitted that where you are dealing with public necessities and public security, Parliament does sometimes do that. As it has been pointed out, it does it with respect to roads, and I think it does it with respect to harbours also."

Doubtless it is quite true, as the same counsel submitted, that where two constructions are reasonably open, the court will lean to that which will not work an injustice. But where the meaning is plain, as here, it is the duty of the court so to construe it, and whatever may be the consequences that result, they form part of the burden of responsibility which the Legislature deliberately assumed when it passed the statute presumably in the public interest. In regard to the point of there being no compensation for this appropriation, I have not overlooked Mr. *McPhillips'* argument that lands in contiguous areas are to be made good to the Dominion in lieu of lands alienated, as provided by the 11th section of the Terms of Union, and by section 5 of the Settlement Act. But it is at least doubtful if such provisions have reference to the present case, because section 11 refers only to lands "which may be held under pre-emption right or by Crown grant," and the defendant did not originally so hold. And section 5 is limited to "lands equal in extent to those alienated up to the date of this Act," etc. It is not, however, strictly necessary to express a final opinion on this point,

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but I mention it to shew that I am not favourably impressed with the contention that the plaintiff Company will be able as a matter of legal right to obtain compensation for the lands it has been deprived of.

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Such being my view of the matter, it is unnecessary to consider at length the question of the existence of the prior letters patent from the Crown in favour of the plaintiff Company under the Settlement Act, because, where the Legislature, with full knowledge thereof, declared by a public and general enactment that others were entitled to antagonistic rights therein, the last word of the Legislature on the subject must prevail. No authority, as might have been expected, could be found on the exact point, which differs radically from such cases as *Victor* v. *Butler* (1901), 8 B.C. 100, 1 M.M.C. 438; *Alcock* v. *Cooke* (1829), 5 Bing. 340; or *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; but to my mind it presents no practical difficulty. The peculiar result may, I think, also be regarded as somewhat akin to that in the *Colonial Secretary of Natal* v. *Behrens* (1889), 58 L.J., P.C. 98, *viz.*, there has been without compensation, and by virtue of subsequent legislative authority, a lawful resumption of possession (here constructive) of lands alienated to a subject, upon which the right of that subject is *pro tanto* extinguished and reverts to the Crown: p. 101.

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On the whole case, in the face of the Act, I cannot bring myself to say, as prayed, that the defendant has no right, title or interest in the coal or timber on said lands, nor can I see how he can be enjoined from working or felling the same.

It follows that there is no other course, in my opinion, open to me than to dismiss the action with costs.

The appeal was argued at Vancouver on the 3rd, 4th and 5th of April, 1906, before HUNTER, C.J., DUFF and MORRISON, JJ.

Luxton, K.C., for appellant (plaintiff) Company.

[HUNTER, C.J., to *A. E. McPhillips, K.C.*, for respondent (defendant): If we are affected by the decision of the Privy Council you can only rest your title to the land in question under this Act. Is that your position?]

Argument

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McPhillips: Except that the statute sets aside the decision of the Privy Council.

[DUFF, J.: You rest on the state of facts as declared by the statute?]

McPhillips: In the court below I went on two grounds; the learned trial judge held with me on the statute, but I do not want to be confined to that.

Luxton: The land in suit was reserved from pre-emption or sale in 1873 under powers contained in the Land Act then in force; it was not, therefore, open to pre-emption at the time defendant alleges he entered upon it in 1879—pre-emption could be of unreserved land only. This land was included in the grant to the Dominion Government made by 47 Vict., Cap. 14, and was granted to and is now held by the plaintiffs under grants from the Dominion pursuant to 47 Vict., Cap. 6 (Dominion), and it was so vested in the plaintiffs at the time of the passing of Cap. 54 of 1904. Moreover, defendant admits that at the time of the alleged entry he was informed by the Government agent that the land was not open to pre-emption. If defendant knew when he went on the land that it was not open for settlement, then he was and is a trespasser. This Act, Cap. 54, should be construed strictly, according to the authorities.

Argument

I submit that the statute is one which it is not competent for the Legislature to pass in such a way as to affect our lands. The lands now in the hands of the Company are not subject to the jurisdiction of the local Legislature in this respect. They are held as the result of joint legislation.

[HUNTER, C.J.: The question is whether the local Legislature is not precluded by this joint legislation.]

The plaintiffs are holders of a subsidy and are not in the position of an ordinary freeholder. We are not land owners in the Province merely, but deputies of the Dominion Government. The order in council of the 1st of July, 1873, seems to have been based on section 11 of the Terms of Union. The statute refers in the preamble to the Terms of Union, but there is an erroneous recital of facts in the statute. *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429, shews this is not such

land in respect of which defendant could become a pre-emptor. We submit that this land subsidy is the ultimate result of a solemn compact between the two Governments, and in order to take this property away from the plaintiff Company, joint legislation of Canada and the Province would be necessary. Supposing we broke our agreement, would not the Dominion get the lands, as they had been conveyed to the Dominion by the Province? Having been given the land for a specific purpose, how can it be taken away from plaintiff Company? They were given the land for building and operating a railway; that was the consideration for the contract, and the Province cannot alter the tenure of that land, after it has become the property of the Dominion, without an Act of the Dominion Parliament. It is not in the power of the Province but of the Dominion, to make such a law: *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal, Ottawa, et Occidental* (1880), 5 App. Cas. 381. The holding of these lands as a subsidy necessitates their being kept for the continuous operation of the railway, and any legislation interfering with them is as much an interference with the railway as if a conveyance of it were made by the Province. If the Province has the power to pass this statute, they have power to confiscate the entire railway belt.

[HUNTER, C.J.: Can the Legislature revise the finding of a body like the Privy Council?]

Argument

The legislation is repugnant to that of Canada, which says that we are to hold this land as a subsidy. He referred to *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1897), 5 B.C. 541 and *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367. It is not within the competency of the Legislature: *Dobie* v. *The Temporalities Board* (1881), 7 App. Cas. 136 and *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1882), *ib.* 178. On the subject of Dominion and Provincial Railways, see *Re Canadian Pacific and York* (1898), 25 A.R. 65 at p. 70; *Holman* v. *Green* (1881), 5 S.C.R. 707 at p. 714 and *The Queen* v. *Farwell* (1887), 14 S.C.R. 392 at p. 417. It is not necessary to declare in the Act that the Railway Company is one for the general advantage of Canada: *Hewson* v. *Ontario Power Co.* (1905), 36 S.C.R. 596;

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it can be done without expressing it in words: *Toronto Corporation* v. *Bell Telephone Company of Canada* (1905), A.C. 52 and *The Sydney and Louisburg Coal and Railway Company* v. *Sword* (1892), 21 S.C.R. 152 at p. 155. See also *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348 at pp. 360 and 361. The holding of this land subsidy affects the whole of the Dominion, as the works, building the railway, etc., were to be paid for partly out of the consolidated revenue, and only Dominion legislation could interfere with it.

[HUNTER, C.J.: I notice that you do not claim a declaration that the Crown grant is void.]

It would involve that. But we can ask the Court to make that declaration now. All we say is that that patent obtained by Mr. McGregor, as far as it affected the coal, is void. The purchase of the surface rights can only be from the Esquimalt and Nanaimo Railway Company. In order to give effect to our contention we would get a declaration that McGregor's grant is inoperative, *ergo* void.

[HUNTER, C.J.: What you should have asked for is a declaration that you are entitled to this land in fee simple under your Dominion Patent and that you are holding the surface rights to this land in trust for this man.]

We are not seeking to interfere with ordinary surface rights.

Argument

Although the Terms of Union are referred to in one of the recitals to the Act, Cap. 54, yet the reserve in question of 1873 was a very wide one. The Act of 1871 puts no limit to the power to make a reserve for any purpose.

[HUNTER, C.J.: Is it not easier for you to take these recitals as mere pious expressions of opinion by the Legislature, stopping short of actual confiscation?]

These recitals are not conclusive on the court. Again, if this man had a right to pre-empt in 1880, he did not comply with the provisions of the Land Act. The *Hoggan* case shews that it was only unoccupied, unreserved land that he could pre-empt, and besides this essential there are other requirements to be complied with precedent to any claim.

[HUNTER, C.J.: Mr. *McPhillips* seems to be on the horns of

this dilemma: either this legislation is confiscatory in its effect, or this Provincial Crown grant is a conveyance of zero; and a cardinal doctrine in the construction of statutes is not to construe an Act as confiscatory unless it is so in express terms.]

On the subject of the recitals to the Act, he cited *Dwyer* v. *The Town of Port Arthur* (1893), 22 S.C.R. 241 at p. 244; *The North-West Electric Co.* v. *Walsh* (1898), 29 S.C.R. 33 at p. 48 and *Mollwo March & Co.* v. *The Court of Wards* (1872), L.R. 4 P.C. 419.

As to confiscation, see *Attorney-General* v. *Horner* (1884), 14 Q.B.D. 245 at p. 257; *Countess of Rothes* v. *Kirkcaldy Waterworks Commissioners* (1882), 7 App. Cas. 694 at p. 702 and *Commissioner of Public Works (Cape Colony)* v. *Logan* (1903), A.C. 355. The case of *Smith* v. *Great Western Railway Co.* (1877), 3 App. Cas. 165, shews that a statute will not be construed so as to effect any monstrous injustice: *Metropolitan Asylum District* v. *Hill* (1881), 6 App. Cas. 193 at p. 208.

The statute in question here in no way divests us of the land; at any rate not in terms sufficient to divest us of the fee simple and vest it in someone else.

A. E. McPhillips, K.C., for respondent: It was never the intention of the Legislature to legislate these settlers out of their rights. We dispute that the Government agent ever made any adjudication that there was a reserve.

Argument

[DUFF, J.: You distinguish the *Hoggan* case, then? There there was a refusal by the Government agent to take the application.]

The highest curative court, the Legislature, can explain its language by enacting that these lands were open to pre-emption notwithstanding any previous erroneous view and declare that at that time certain persons were on the land and were entitled to pre-emption records.

[HUNTER, C.J.: You could say that the Legislature is entitled to define the word "pre-emption" under that Act.]

Merely to define the facts which would fulfil the provisions of the Land Act of 1875. The Act of 1904 is a declaratory statement that the Company was and is entitled to get lieu lands for those alienated, and this removes the question of there

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being no compensation granted even if it was (which is denied) conferring of new rights.

[HUNTER, C.J.: You can accept either horn of this dilemma: that this legislation is nugatory, or else it is *ex post facto* legislation of the most vicious character.]

There was at the time McGregor went on the land an existent right of pre-emption according to section 11 of the Terms of Union and by the Act of 1904, the Legislature declares this right.

[HUNTER, C.J.: Can the Legislature, by the Act of 1904, assign a meaning to the expression "pre-emption right" as used in the Terms of Union? I do not think it can. The language of section 11 is the language of the Imperial Parliament, and it is plain that their meaning of pre-emption rights is pre-emption rights which are recorded.]

That which was to be worked out to entitle the settlers to a pre-emption record was what was to be done with the Land Act coupled with the Terms of Union. The Terms of Union were not kept as to Vancouver Island and therefore they do not apply to the Island insofar as lands granted for railway aid are to be considered. It cannot be said that the Settlement Act is part of the Terms of Union. If the Settlement Act had been confirmed by Imperial legislation, then it would have been part of the Terms of Union. In the Settlement Act the Legislature was not dealing with this railway as part of the transcontinental road, but as a railway by itself; certainly not the railway contemplated by section 11.

Argument

[HUNTER, C.J.: Do you not think that the right view to take of the Settlement Act is this: The Imperial Parliament, having left it to the Dominion and Provincial Governments, by the Terms of Union, to work out this scheme, and they having worked it out by the Settlement Acts, then neither party can alter the terms of those Acts without the consent of the other party?]

We refer to the case of Manitoba where legislation was enacted having relation to the School Law—but there there was a confirmatory Imperial statute. Section 26 of the Settlement Act speaks of existing rights. We say if there was a right on the part of this respondent to have a pre-emption

record, that was an existing right. It was inchoate and always remained and the Legislature has now in manifest terms declared it.

As to whether any land passed, see *The Queen* v. *Demers* (1893), 22 S.C.R. 482 at p. 487.

The courts will not declare nugatory any statute law unless the language is absolutely intractable.

[DUFF, J., referred to *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627.]

In *Farwell* v. *The Queen* (1894), 22 S.C.R. 553 at p. 559, the word "lands" was considered; also see *Conger* v. *Kennedy* (1896), 26 S.C.R. 397 and *O'Connor* v. *The Nova Scotia Telephone Company* (1893), 22 S.C.R. 276 at p. 292.

[HUNTER, C.J.: What have you to say as to the necessity for joint legislation?]

The Province has supreme authority over property, *i. e.*, lands, and the Legislature has foreclosed all other interests by this statute. The recital of facts is conclusive: *The Queen* v. *Mayor of Oldham* (1868), L.R. 3 Q.B. 474; *Powell* v. *Kempton Park Racecourse Company* (1899), A.C. 143; *Salkeld* v. *Johnston et al.* (1849), 1 Mac. & G. 242 at p. 264; *Farley* v. *Briant* (1835), 3 A. & E. 839; *Stowel* v. *Lord Zouch* (1797), 1 Pl. Com. 353. The law of Quebec is the same as ours as to the effect of the preamble to a statute: *Joseph* v. *City of Montreal* (1896), 10 Que. S.C. 531 at p. 536.

Argument

That the Legislature intended to grant something definite and not illusory, he cited *Overseers of West Ham* v. *Iles* (1883), 8 App. Cas. 386; *London and North Western Railway Co.* v. *Evans* (1893), 1 Ch. 16 at p. 27; *Kinney et al.* v. *Plunkett et al.* (1894), 26 N.S. 158; *Municipal Building Society* v. *Kent* (1884), 9 App. Cas. 260 at pp. 275, 284 and 285; *Labrador Company* v. *The Queen* (1893), A.C. 104 at p. 123; *Caledonian Railway Co.* v. *North British Railway Co.* (1881), 6 App. Cas. 114 at p. 124; *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 518; *Salmon* v. *Duncombe, supra; Canada Sugar Refining Company* v. *Reg.* (1898), A.C. 735 at p. 741; *Gaudet* v. *Brown* (1872-3), L.R. 5 P.C. 134 at p. 153; *Giovanni Dapueto* v. *James Wyllie & Co.* (1874), *ib.* 482; *Norton* v. *Spooner* (1854), 9

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Moore, P.C. 103 at p. 129; *Doe dem. Bywater* v. *Brandling* (1828), 7 B. & C. 643 at pp. 660, 661, 664 and 665; *Ontario Mining Company* v. *Seybold* (1903), A.C. 73 at pp. 82 and 84; *Beard* v. *Rowan* (1835), 34 U.S. 301; *Beley* v. *Naphtaly* (1897), 73 Fed. 120 at p. 124, (1898), 169 U.S. 353.

As to the jurisdiction of the Province to deal with lands in the Province: *Re McDowell and the Town of Palmerston* (1892), 22 Ont. 563 at pp. 564-6.

As to there having been previous litigation and later judicial determination, see *Niagara Falls Park* v. *Howard* (1892), 23 Ont. 1, (1896), 23 A.R. 355; *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140 at p. 157 and *Nelson and Fort Sheppard Ry. Co.* v. *Jerry et al.* (1897), 5 B.C. 396 at pp. 422-4.

[*Per curiam*: The Court is perfectly clear on this: that an unrecorded record is not an alienation within the meaning of the Act.]

The Legislature can take A's land and give it to B, and even without compensation. It is not a matter for the court to find on that. We submit that the Legislature has said that lieu lands are to be given for those taken, and therefore that difficulty is removed. There is no reported holding which would entitle the court to say that the Province has not an unfettered jurisdiction to deal with lands within its confines. If it was *in medio*, in trust in the Dominion for the building of this road, then there might be a condition, a restriction, but once the Dominion has conveyed to the railway Company, where can the court say the limit of jurisdiction arises on the part of the Province?

Argument

Luxton, in reply: As to recitals in statutes see *The Queen* v. *The Inhabitants of Haughton* (1853), 22 L.J., M.C. 89; *Sewell* v. *Burdick* (1884), 10 App. Cas. 74 at p. 105 and *Vyner* v. *Mersey Docks* (1863), 14 C.B.N.S. 753 at p. 814.

As to a second grant where one has already been given: *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927; *Alcock* v. *Cooke* (1829), 5 Bing. 340 and *Alton Woods' Case* (1600), 1 Co. Rep. 100.

Cur. adv. vult.

On the 31st of July, 1906, the judgment of the Court was delivered by

HUNTER, C.J.: This is an action for a declaration that a Crown grant of section 7G., Oyster District, Vancouver Island, issued to the defendant under section 3 of the Vancouver Island Settlers' Rights Act, 1904, conveyed no interest in the coal or base minerals thereunder, or the timber thereon. The Crown grant issued on the 31st of May, 1904, and the defendant paid $160 for the same, being at the rate of $1 per acre for the lands assumed to be conveyed.

The plaintiffs' contention is that the lands in question passed to them under the patent from the Dominion Government by which the lands conveyed to that Government by section 3 of what is commonly called the Settlement Act of 1884, were transferred to the plaintiffs in 1887, and therefore that there was no interest left in the Crown which could be conveyed to the defendant; and, in any event, if the Act of 1904 assumes to empower the Crown in right of British Columbia to divest the plaintiffs of their title to the land in question, it is unconstitutional and void as being in violation of the Terms of Union.

The defendant occupied the land in 1879, no doubt with the intention of becoming a settler in accordance with the pre-emption laws then in force. He made the usual application to be entered as the pre-emptor of the land, but it was returned to him with the information that the land was reserved, but that when the reserve was removed he would be given the first opportunity to record a pre-emption.

Judgment

The land remained under reserve until the statutory conveyance to the Dominion Government, and the defendant never was recorded as a pre-emptor. He did, however, on June 19th, 1884, pre-empt the surface rights under section 23 of the Settlement Act, and it is not denied by the Company that he is entitled to a grant of the surface rights; but they allege on the contrary that they have always been ready and willing to make the grant on payment of the sum of $160 as provided by the section. The defendant has, however, never paid the money to the plaintiffs, and has always insisted that he is entitled to a Crown grant in accordance with the land laws in force in 1879.

The land in question is admittedly within the area included in the statutory transfer to the Dominion Government. Out-

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side of a portion not material to consider, this statutory transfer excepts only lands held under Crown grant, lease, agreement for sale or other alienation by the Crown, and Indian, naval and military reserves.

The learned counsel for the defendant stoutly maintained that, inasmuch as the defendant had made a *bona fide* application for a pre-emption record, and had done all that the law required of him to obtain it, he ought to be regarded in this Court as having obtained a pre-emption record, and therefore that the land was in the eye of the law alienated by the Crown within the meaning of the exception created by section 6 of the Settlement Act and the patent to the plaintiffs. This is, of course, clearly untenable. In the first place, there can be no doubt about the land having been validly reserved from pre-emption; but even if it were not, it must be plain that the transfer to the Dominion Government excepted only *de facto* alienations by the Crown, and it is impossible to say that there was any alienation of the land in law or in fact in the absence of any pre-emption record having been issued.

The learned counsel also contended that it was evident from the preamble to the Settlers' Rights Act that the Legislature considered that the defendant, as well as others in a similar position, had been unjustly treated, and that the decision of the Judicial Committee in the *Hoggan* case was erroneous, and that it was competent to the Legislature to redress the wrong and effectively vest the land in the defendant. Of course, such legislation would, especially when the matter has been set at rest for over a decade by the decision of the court of last resort, be in the last degree high-handed and confiscatory; and Mr. *Luxton* contended that it was *ultra vires* as being a breach of the Terms of Union.

Judgment

It is a grave and difficult question as to how far the Legislature could legally go in interfering with the rights secured to the Company by virtue of the Settlement Act and the Terms of Union as interpreted by the tribunal of last resort; but fortunately for us I do not think it is necessary to consider this aspect of the matter, inasmuch as regard for the Legislature requires us, if possible, to avoid holding that it intended by

ex post facto law to divest the plaintiffs of property which belongs to them by virtue of the Terms of Union.

I think that the Act stops short of this: that it merely expresses dissent from the decision; that the Legislature considered that there may be persons who have a valid claim to lands within the belt, but who are unable to assert their rights by reason of poverty or limited means; that it decided to enable such rights, if any, to be effectively asserted by authorizing the issue of Crown grants in fee, which would, of course, transfer any interest left in the Crown, and which would throw the onus of the litigation on the Company while the rights, if any, of the grantee are to be upheld and maintained by the Province.

There is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown or attempts to deprive the Company of any interest vested in it under its patent from the Dominion, and we must, of course, impute a rational and beneficial intention to the Legislature rather than an irrational and injurious intention.

Therefore, while it may be found that no useful result has been achieved by the enactment, it is a more rational and beneficial intention to ascribe to the Legislature to hold that it has provided a mode of re-opening the question without expense to any settler (so-called) desiring to do so, rather than to hold that it intended to override the decision of the Sovereign in Council, and to deprive the plaintiffs of their property without compensation.

Judgment

The Act may possibly be of use to some person to aid him in obtaining his rights, or in ventilating his grievances, fancied or real; but so far as concerns the present defendant, the grant is inoperative, as there was no interest left in the Crown to convey.

The appeal should be allowed with costs here and below, and relief given as prayed.

Appeal allowed.

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NEWSWANDER v. GIEGERICH.

Champerty and maintenance—Damages for wrongfully maintaining action against plaintiff—English criminal law in Canada, introduction of—Common interest in suit—Parties interested in litigation—Litigious rights—Illegal consideration.

An action lies for unlawful maintenance, notwithstanding that the plaintiff was unsuccessful in the action maintained, on proof of special damage:—

Held, on the evidence, *per* IRVING and MORRISON, JJ. (HUNTER, C.J., *dissentiente*), that in this case, the plaintiff had suffered no damage.

Decision of DUFF, J., reversed.

APPEAL from the decision of DUFF, J., in an action for damages for wrongfully maintaining another in a previous action against the plaintiff, tried before him and a jury at Nelson on the 6th, 7th and 8th of February, 1906.

The plaintiff, who was defendant in the action of *Briggs* v. *Newswander* (1902), 32 S.C.R. 405, brought this action against the present defendant for damages by reason of the defendant having wrongfully maintained Briggs in that action. In *Briggs* v. *Newswander* the plaintiff claimed an interest in certain mining property by virtue of an agreement which Newswander had entered into with him and subsequently failed to carry out. The action of *Briggs* v. *Newswander* failed at the trial and also on appeal to the Full Court, but on appeal to the Supreme Court of Canada it succeeded to the extent that Briggs was declared to be entitled to a one-quarter interest in the property. Before the action was launched an agreement was entered into between Briggs and Giegerich whereby Giegerich undertook to pay Briggs' costs in consideration of his receiving one-half of whatever was recovered in the action.

Statement

On appeal to the Supreme Court of Canada a further agreement was entered into under which Giegerich was to receive a nine-tenths interest in the result of the litigation in consideration of furnishing enough money to carry the appeal through to the Supreme Court of Canada. Upon the judgment of that

Court being delivered, Briggs assigned the whole of the judgment and his one-quarter interest in the property to Giegerich, in pursuance of his agreement, Giegerich paying him $500 for the remaining one-tenth interest.

In order to obtain title to the one-quarter interest Giegerich was compelled to bring action against one Fleutot, to whom the whole property had been meanwhile conveyed, and the action of *Giegerich* v. *Fleutot* (1904), 35 S.C.R. 327, was commenced. In this latter action Giegerich failed as to his nine-tenths interest on the ground that his title was derived through an illegal, champertous agreement.

The action, the subject of this appeal, was then brought by Newswander for damages, including costs he had been put to and which had been paid for him by Fleutot, an additional sum for which he was still liable on that account, moneys that he had himself paid out on account of the litigation and the amount of a judgment for costs which had been recovered against him in that action. He succeeded, and defendant, Giegerich, now appeals on the grounds, among others, that the judgment in the action is against the findings of the jury, that the judgment is also against the law and that the plaintiff failed to shew that he sustained any damage through any act or conduct of the defendant in the action of *Briggs* v. *Newswander*.

The questions submitted to the jury and the answers thereto were as follow:

Statement

"(1.) Did Giegerich agree with Briggs to supply funds to enable Briggs to carry on his action against Newswander, and to carry the action on appeal to the Full Court and the Supreme Court of Canada? Yes.

"(2.) Did Briggs agree with Giegerich that in consideration of such assistance he would give Giegerich a share in the property recovered as a result of the action? Yes.

"(3.) Did Giegerich supply Briggs with funds in accordance with the agreement? Yes.

"(4.) Was Briggs induced to bring and carry on the action and appeals by his agreement with Giegerich and the assistance supplied by Giegerich? Briggs was enabled to bring action through the financial assistance of Giegerich.

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"(5.) If so, did Giegerich enter into this litigation for the purpose of stirring up strife and litigation? No.

"(6.) Did Giegerich solicit Briggs to enter into any agreement to commence or carry on the action and appeals? No.

"(7.) Would Briggs have sued Newswander or prosecuted the appeals but for the agreements and assistance referred to? Not unless he was able to obtain financial assistance from other sources.

"(8.) What, if any, interest of any kind had plaintiff in the Cork and Dublin? No interest.

"(9.) Did Fleutot agree to pay plaintiff $2,000 and 400 shares, as shewn in his letter of January, 1901? Yes.

"(10.) Was there an agreement between Fleutot and Newswander that costs of defence in *Briggs* v. *Newswander* should be charged against Newswander? If not, what was the arrangement? The costs were to be charged against Newswander as Fleutot's agent.

Statement

"(11.) Did Newswander defend the action of *Briggs* v. *Newswander* solely as the agent and nominee of Fleutot, or did he defend it partly as a person interested in the subject-matter of the action? Solely as the agent of Fleutot.

"(12.) Did Fleutot pay McAnn & Mackay $3,200 in respect of their services in connection with the action and appeals in *Briggs* v. *Newswander*, subject to the arrangement referred to in question 10? Yes.

"(13.) Is Newswander indebted to McAnn & Mackay in the sum of $550? Yes, as Fleutot's agent.

"(14.) Did Newswander in addition personally pay $165.60 as expenses reasonably incurred in connection with the action and appeals? Yes, but as Fleutot's agent."

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

Davis, K.C., and *R. M. Macdonald*, for defendant.

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DUFF, J.: The jury have found that the defendant assisted Briggs to carry on the action of *Briggs* v. *Newswander* and the appeal to the Supreme Court of Canada, and that this assistance was afforded under an arrangement between Briggs and the defendant by which the defendant became entitled, in the event

of success, to a share in the fruits of the litigation. They have also found that the defendant did not solicit Briggs to initiate or carry on the litigation, and that the assistance was not furnished with the object of stirring up strife and litigation. These findings, indeed, but express the undisputed facts. Since the decision of the Supreme Court of Canada in *Meloche* v. *Deguire* (1903), 34 S.C.R. 24, it is not open to doubt that the defendant in pursuing this course of conduct brought himself within the provisions of the law relating to the offence of champerty. By that decision it is established that the specific offences of champerty and maintenance were made offences in the colonies now constituting the Dominion of Canada by the various Acts of the Imperial Parliament (all framed in substantially similar terms) providing for the introduction into those colonies of the criminal law of England; and since that decision it must be taken to be settled law that assistance furnished a litigant party for the purpose of conducting litigation under an agreement of the character above described by a person not having an interest in the litigation, such as the law recognizes as justifying the giving of such assistance is none the less guilty of the offence of champerty, because his object in entering into the agreement, or in furnishing the assistance, was not the stirring up of strife and litigation. The law forbids such agreements and the performance of such agreements because of their tendency in general to promote unnecessary litigation and to pervert "the remedial process of the law into an engine of oppression." The jury have also found (what they were bound to find on the evidence) that Briggs was enabled to carry on the action and appeals referred to through the assistance furnished by Giegerich; and if the costs which were put upon Newswander by reason of these proceedings, which were brought about by the unlawful act of Giegerich, constitute such special damage as the law recognizes, the established principle of our law that where an individual suffers a special injury by reason of the unlawful act of another, that individual is entitled to redress in the courts from the author of the unlawful act, is applicable here.

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It was argued by Mr. *Taylor* on his application for a non-suit,

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that in this special case there was no such special injury flowing from the defendant's unlawful act as can be recognized by a court of law; inasmuch as (the plaintiff in *Briggs* v. *Newswander* having succeeded in establishing his right to the property which was the subject of the litigation) the expenses incurred by Newswander in that litigation are to be attributed, not to the assistance which Giegerich gave Briggs, but to Newswander's unlawful conduct in resisting the righteous demand made upon him by Briggs. It is not within my province to express any opinion upon the intrinsic merits of the reasoning involved in that contention. I am precluded from giving effect to it by reason of decisions which I am bound to follow. In *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210, Lord Selborne apparently treated the question as still open to be considered by the House of Lords; but in *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1, Lord Coleridge, though not expressly deciding the point, uses language which leaves no doubt in my mind that in his opinion the contention could not be supported; and in *Giegerich* v. *Fleutot* (1904), 35 S.C.R. 327, in respect of the self-same transaction which is the subject-matter of this action, having before him the fact which is the basis of the contention I am now considering, namely, that Briggs had succeeded in his litigation against Newswander, Mr. Justice Killam, in delivering the judgment of the Supreme Court of Canada, uses these words: "Newswander had a right of action against Giegerich for maintenance. The transaction was wrongful towards him." Reading the judgment as a whole I do not think that this language can properly be treated as *obiter dictum* only; but if so I should be obliged to give to it that weight which is due to a considered opinion expressed by the court of last resort in Canada. The plaintiff is, therefore, entitled to maintain his action.

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There remains the question of damages. The jury have found that Newswander had no interest in the property which was the subject-matter of the action of *Briggs* v. *Newswander*, and that in defending that action he acted as the agent and nominee of Fleutot. It is argued that in these circumstances it must be taken that Newswander has suffered no injury, since all the loss

resulting from the litigation would be borne by Fleutot. That contention is disposed of by the jury's findings in answer to questions 9 and 10; these questions and answers are as follow:

"(9.) Did Fleutot agree to pay plaintiff $2,000 and 400 shares, as shewn in his letter of January, 1901? Yes.

"(10.) Was there an agreement between Fleutot and Newswander that costs of defence in *Briggs* v. *Newswander* should be charged against Newswander? If not, what was the agreement? The costs were to be charged against Newswander as Fleutot's agent."

Briggs and Giegerich selected Newswander as the defendant against whom they should proceed. The natural and necessary consequence of the proceedings was to throw upon Newswander in the first instance the burden of the costs incurred, and whatever right of indemnity might in ordinary circumstances have been available to him, the jury have found in effect that in the circumstances there was no right of indemnity. Some difficulty seemed at first sight to be presented by the form of question 10. Further consideration has convinced me that the phrase "cost of defence," in its natural meaning, embraces all costs incurred by reason of the defence; and in the instructions to the jury the question was dealt with as if all such costs were included within the scope of the enquiry which the jury were directed to make. Moreover, the jury obviously accepted Newswander's statement that the burden of the defence was thrown upon him by reason of his misconduct in the matter of his agency in executing improperly and without authority the document which was the occasion of the litigation in *Briggs* v. *Newswander;* and, consistently with that view, it could not be maintained that in respect of any of the consequences of the litigation Newswander could assert a right of indemnity as against Fleutot. Had there been any evidence that Newswander was induced to defend the action by reason of an express promise by Fleutot to indemnify him, the case might have been different. But there was no such evidence, and because of the absence of such evidence, I declined to accede to the request of Mr. *Taylor* to put to the jury the question whether in point of fact there was such an agreement between the parties.

It follows that the plaintiff is entitled to recover in respect of all the heads of damage which the jury has passed upon; and in

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respect, as well, of the judgment recovered by Briggs against Newswander for costs. With regard to the last mentioned item, and with regard to the sum of $550 owing, but not paid to McAnn & Mackay, if arrangements are made to indemnify the plaintiff, judgment need not be entered for those amounts; otherwise these sums are to be paid into court.

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The appeal was argued at Victoria on the 5th and 6th of June, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

S. S. Taylor, K.C., for appellant (defendant): As Newswander was unsuccessful in the action of *Briggs* v. *Newswander*, and was compelled in that action to yield to Briggs his rights, he (Newswander) cannot be heard to say that he suffered any damage by such action; and, therefore, as damage is the gist of the action at bar, Newswander must fail. This is an action for damage sustained by reason of an unlawful maintenance, and he cannot recover unless he can prove special damage. There is no case decided in the reports allowing a man to bring an action of this nature where the person maintained was successful in the original action. This is asserted in face of *Bradlaugh* v. *Newdegate* (1883), 11 Q.B.D. 1, where Newdegate was guilty of maintaining one having no interest in the original action but merely a man of straw. Here Briggs is the actual person interested. There also the decision was not delivered until after the original action was unsuccessful in the House of Lords, although tried and argued before the judgment of the House of Lords was delivered.

Argument

As to damages, see *Metropolitan Bank* v. *Pooley* (1885), 10 App. Cas. 210; *Cotterell* v. *Jones and Ablett* (1851), 21 L.J.,C.P. 2, referred to in *Basebe* v. *Matthews* (1867), L.R. 2 C.P. 684; *Quartz Hill Gold Mining Company* v. *Eyre* (1883), 11 Q.B.D. 674 and *Harris* v. *Brisco* (1886), 17 Q.B.D. 504. No particular wrong has been done to any person, and therefore there can be no nominal damages awarded in such a case: *Alabaster* v. *Harness* (1895), 1 Q.B. 339; *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186; *Giegerich* v. *Fleutot* (1904), 35 S.C.R. 328. On the question of conspiracy, damage must be proved: *Quinn* v. *Leathem* (1901), A.C. 495.

Questions 8 to 14 are answered by the jury in favour of Giegerich, and the trial judge was in error in finding to the contrary. These answers shew that Newswander never had any interest in the Cork and Dublin claims, but that he located them as agent of Fleutot. In fact, the findings, taken with the charge of the trial judge, are open to but one construction and that is in favour of the defendant.

[HUNTER, C.J.: The first question is, will an action for maintenance lie for nominal damages? If for special damages, what special damages are there in this case?]

Newswander having been maintained in the first action by Fleutot, he will not be given consideration in the shape of nominal damages even. The cases on that are set out in *Giegerich* v. *Fleutot* (1904), 35 S.C.R. 327. Newswander has been equally guilty in an illegal act; worse than that, he swore he was an owner.

[HUNTER, C.J.: He had an agreement for sale.]

The jury have found that to be a concocted sham.

Davis, K.C., for respondent: Fleutot paid the costs subject to the arrangement that they were to fall on Newswander. The latter was never owner except under the agreement with Fleutot by which for a certain sum he was to turn over the claims to Fleutot and get him a Crown grant. The damage is the whole amount that Newswander has had to put up as to costs. It is immaterial whether he was Fleutot's agent or not; he was to get a certain amount of money; that was remuneration and nothing else. The question of interest is only a play on words; his only interest in defending this suit was to protect or save his $2,000. As agent he made this mistake, and as such agent Fleutot says to him you will have to pay, and Fleutot having paid the costs, he reserved to himself under the agreement the right to be reimbursed. This was the vital point before the jury all the time.

Argument

As to damages: The rule in maintenance cases is that you can recover any money which you have been forced to pay. That was the decision in *Bradlaugh* v. *Newdegate, supra.* You compare the position of the man before the action is brought and

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his position after the action, and the difference is what he is entitled to.

Taylor, in reply.

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

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It is, in my opinion, immaterial whether the statement of Killam, J., in delivering the judgment of the Supreme Court in *Giegerich* v. *Fleutot*, that Newswander had a right of action against Giegerich for maintenance is or is not *obiter*, it having been decided in *Meloche* v. *Deguire* (1903), 34 S.C.R. 24, that the criminal law of England relating to maintenance and champerty forms part of the general criminal law of Canada. That being so, as Giegerich engaged in champertous litigation against Newswander, it follows that Newswander must have a good cause of action against Giegerich if he could shew special damage.

If the question as to the introduction of the English law relating to champerty and maintenance were *res integra*, one might have felt some doubt in view of the remarks of Sir Montague Smith in *Ram Coomar Condoo* v. *Chunder Canto Mookerjee* (1876), 2 App. Cas. 186, relating to the origin of the law on this subject, and of his statement that "a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being *per se* opposed to public policy."

HUNTER, C.J.

On the other hand, even if it had not been decided by the Supreme Court that the English criminal law had been introduced, this particular suit might perhaps have been supported on the ground that there was a gambling in litigation by the defendant to the special annoyance and injury of the plaintiff, and not merely a *bona fide* assistance rendered to Briggs to enable him to have his day in court and avail himself of the remedial process of the law. It may be that the right to be let alone—the right to be free from molestation or injury without just cause or excuse—a general principle of which concrete illustrations are afforded by the law of libel, nuisance, trespass, conspiracy, and the like, would have been broad enough to have afforded a ground for decision even though there was no malice

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or stirring up of contention. As it is, however, this Court is spared the necessity of inquiring into these points, as the rights of the parties to this suit have already been decided in the Supreme Court of Canada subject to the proof of special damage.

As to this latter matter, I do not see any difficulty caused by the answers of the jury. They seem to me when viewed in the light of the charge to clearly shew that the jury considered that Newswander had no interest in the claims as such, but that he had a promise from Fleutot that he would be remunerated for his services in connection with the claims; that he yielded to Fleutot's demand that the costs of the litigation should be charged up against what he was to receive, and that therefore he had a substantial interest in defending the suit. This being so, there can be no doubt that he sustained special damage, as the question is not whether he was justified in defending the suit, but whether it would have been brought and maintained but for the interference and assistance of Giegerich.

HUNTER, C.J.

No question was made before us as to the amount of the damages, and therefore the appeal should be dismissed.

IRVING, J.: I agree with the learned trial judge for the reasons set out in his judgment, that we must hold that an action for maintenance lies, notwithstanding the fact that the person maintained succeeds in his action.

But dealing with this particular case, I am not able to accept the view of the learned trial judge that the answers to questions 9 and 10 shew that the jury did accept Newswander's statement that the burden of the defence in *Briggs* v. *Newswander* was thrown upon him by his arrangement with Fleutot.

IRVING, J.

Having regard to the charge and the answers to questions 10, 11, 12, 13 and 14, it seems to me that the jury came to the conclusion that Newswander was throughout the mere agent or nominee of Fleutot, and that the present action is really brought by Fleutot in Newswander's name.

I think the appeal should be allowed on the ground that Newswander sustained no damage whatever.

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MORRISON, J.: It has been urged that Newswander was invited to bring this present action by the *obiter dictum* of Killam, J., in *Giegerich* v. *Fleutot* (1904), 35 S.C.R. 327. However that may be, I agree with the learned Chief Justice that whether he did so bring his action or not, or whether Killam, J's statement was or was not *obiter* is immaterial in a consideration of the main point in this appeal.

The practice of learned judges making statements on matters not immediately before them which have a tendency to promote litigation has been deprecated in many reported instances. In my opinion Newswander has not suffered special damage as a consequence of Giegerich's maintenance. I support this opinion upon my understanding of the jury's answers submitted to them and the evidence upon which they were based.

I gather from the answer to question 4 that the jury could not have entertained the view that Giegerich assisted Briggs in his suit maliciously and for the purpose of stirring up and maintaining litigious strife.

I think Giegerich's assistance was given *bona fide* to Briggs; that Briggs, for aught there appears in the material before us, would have brought and continued his action in any event, and that Newswander has suffered no special damage in consequence of anything that Giegerich did in so assisting Briggs.

I would allow the appeal.

Appeal allowed, Hunter, C.J., dissenting.

BOW, McLACHLAN & CO. v. THE "CAMOSUN."

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Exchequer Court of Canada—Admiralty jurisdiction—Action for balance of contract price for building ship—Counter-claim for moneys expended in repairs owing to alleged defective work—Striking out.

Bow, McLachlan & Co. v. The "Camosun"

Plaintiffs built a ship in Paisley, Scotland, for a company in Vancouver, B. C. On her way out certain repairs were made, amounting to £3,638. The first instalment of the purchase price not being paid, action was commenced by seizure of the ship. Defendants counter-claimed for the above-mentioned sum, the expenditure of which they alleged was rendered necessary by the defective work and material in her construction and equipment. On a motion to strike out this counter-claim as not being a subject of admiralty jurisdiction:—

Held, that, the counter-claim not being one made by the builders of the ship, and not being made against the ship, the motion to strike it out must be allowed.

Jurisdiction of the Exchequer Court of Canada considered.

MOTION by plaintiffs to strike out counter-claim of defendants on the ground that it is in respect of a claim which is not the subject of admiralty jurisdiction. Heard before MORRISON, Acting Local Judge in Admiralty, in Chambers, at Vancouver, on the 7th of July, 1906. Statement

Cassidy, K.C., for plaintiffs, in support of the motion.

C. B. Macneill, K.C., for defendants, *contra*.

MORRISON, ACTING LO. J.A.: The plaintiffs, shipbuilders, in the year 1905, built and equipped the steamship "Camosun" at their works in Paisley, Scotland, for the present owners, the Union Steamship Company of British Columbia, for the contract price of £28,000, to secure the payment of which sum what is called an interim mortgage was taken in the name of one Gordon T. Legg, as trustee for the Union Steamship Company, and in whose name the ship was temporarily registered in Scotland when constructed. Upon her arrival at Vancouver, B. C., she was conveyed to and registered in the name of the Union Steamship Company, Limited, whereupon an agreement Judgment

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was entered into between plaintiffs and the Union Steamship Company as to the mode and time of payment of the sum secured by the mortgage from Legg. The first instalment, as provided by this agreement, fell due on the 9th of February, 1906, *viz.*, £5,248, and was not paid in full by the Company.

Plaintiffs thereupon commenced these proceedings, claiming the sum of £21,638 alleged to be the balance due pursuant to the said agreement. The ship was arrested and released on bail being furnished. The defendants counter-claim for the sum of £3,638, which they allege was paid out by them on account of repairs made on the ship at the ports of Montevideo and San Francisco, whilst she was *en route* from Scotland to British Columbia, owing to plaintiffs' negligence in building and in the use of defective work and material in her construction and equipment, and they tendered plaintiffs the difference between this amount and the instalment then due. An application is now made to strike out this counter-claim, on the ground chiefly that it is in respect of a claim which is not the subject of admiralty jurisdiction. The other grounds advanced by Mr. *Cassidy* were but feebly pressed, so I shall not deal with them.

What is the extent of the jurisdiction in Admiralty of the Exchequer Court of Canada? To aid in ascertaining this, reference must be made to The Exchequer Court Act, 50 & 51 Vict., Cap. 16 (Dominion); The Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., Cap. 27 (Imperial); The Admiralty Act, 1891, 54 & 55 Vict., Cap. 29 (Dominion); The Admiralty Court Act, 1861, 24 Vict., Cap. 16 (Imperial); and cases as to the Admiralty jurisdiction of the High Court in England.

Judgment

The Colonial Courts of Admiralty Act, 1890, Sec. 2, Sub-Sec. 2, enacts as follows:

> "The jurisdiction of a Colonial Court of Admiralty shall, subject to the provisions of this Act, be over the like places, persons, matters, and things, as the Admiralty jurisdiction of the High Court in England," etc., etc.

The Admiralty Act, 1891, in its preamble recites the provisions of the Colonial Courts of Admiralty Act, 1890, and section 3 declares the Exchequer Court to be a Colonial Court of Admiralty having and exercising within Canada all the juris-

diction, powers, and authority conferred by the Colonial Courts of Admiralty Act, 1890.

Sections 15 and 16 of the Exchequer Court Act define the jurisdiction of that court, shewing that it has no general common law jurisdiction apart from its admiralty jurisdiction. Section 24 enacts that issues of fact shall be tried by a judge without a jury. From those statutes it appears that the jurisdiction of the Exchequer Court on the Admiralty side is no greater than the Admiralty jurisdiction of the High Court in England. The Admiralty side of the High Court in England is presided over by a judge of the High Court, who exercises a double jurisdiction. In *The Cheapside* (1904), P. 339 at p. 343, Collins, M.R., deals with this double jurisdiction of the judge of the Court of Admiralty. Owing to such double jurisdiction of the Court of Admiralty litigants in admiralty could invoke their common law remedies. See also *Pinney* v. *Hunt* (1877), 6 Ch. D. 98.

There were no authorities cited before me, nor do I think it was even contended, that, apart from this double jurisdiction of the judge in Admiralty in England, could a counter-claim such as the present one be considered by him.

The Admiralty Court Act, 1861, 24 Vict., Cap. 10 (Imperial), extended the jurisdiction of the judge of the High Court of Admiralty in England, and the jurisdiction so conferred by proceedings *in rem* or *in personam*; section 4 gives jurisdiction respecting claims for the building, etc., of a ship if the ship or proceeds are under arrest of the court, etc.

Judgment

The counter-claim here is not by the builders of the ship, nor is the claim against the ship. I can find nothing in the long *catena* of cases available touching the admiralty jurisdiction of the High Court in England, nor in the statutes referred to, which would justify me in supporting the contention of the defendants that the Exchequer Court of Canada has jurisdiction to entertain this counter-claim. To do so, doubtless, would be assisting in re-opening the floodgates of admiralty jurisdiction, as was feared by Lord Esher in *The Queen* v. *Judge of City of London Court* (1892), 1 Q.B. 273 at p. 299.

The Judicature Act, 1873, does not afford any assistance to

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defendants, although by that Act the Admiralty Division of the High Court in England possesses all the jurisdiction ordinarily exercised by the other divisions of the High Court, yet the Act confers no new admiralty jurisdiction.

The motion to strike out the counter-claim is allowed with costs.

Motion allowed.

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Nov. 9.

VARESICK v. B. C. COPPER CO.

VARESICK AND ANOTHER v. THE BRITISH COLUMBIA COPPER COMPANY, LIMITED.

Master and servant—Workmen's Compensation Act, 1902, Cap. 74, Second Schedule, Sec. 8—"Dependants."

Section 8 of the Second Schedule to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation, or of any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides:—

Held, on the facts, that the applicants had not proved that they were dependants of the deceased, but,

Semble, the principle governing Lord Campbell's Act, governs in the Workmen's Compensation Act, *viz.*: given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to the deceased in any of the relationships mentioned in the Act.

APPLICATION on the part of the applicants, aliens, resident in Austria, for compensation from the respondents under the Workmen's Compensation Act, 1902.

Statement

George Varesick, a son of the applicants, was on the 4th of December, 1905, employed at the respondents' smelter assisting in dumping hot slag, and on that day met his death from injuries received through a motor car conveying the slag pot accidentally running over the dump.

CLEMENT, Co. J., was appointed arbitrator and the arbitration took place in Greenwood on the 9th of November, 1906.

The employment, death, etc., were admitted, but the respondents denied that the applicants were "dependants" within the meaning of the Act, that compensation is only payable to dependants who are, by the laws of the Province, under legal obligation for support, and they further contended that the Act should not be construed as extending its benefits to persons without the jurisdiction of the County Court.

O'Shea, for applicants.
Hallett, for respondents.

CLEMENT, CO. J.: In this case the applicants, father and mother of the deceased workman, are aliens, resident now and at the time of their son's death, in Austria; and it is urged by the respondents that the Workmen's Compensation Act, 1902, ought not to be construed as extending its benefits to them.

Reference was made to section 8 of the Second Schedule which makes provision for recording an award in the "County Court for the district in which any person entitled to such compensation resides" with a view to its enforcement as a County Court judgment; and it would appear that any award I might make in favour of these applicants could not be directly enforced in the manner contemplated by the Act except indeed in the remote contingency that the applicants or one of them might even yet come to reside in this Province. At first blush I was inclined to the opinion that this was the only clue afforded to the Legislature's intention in regard to the area within which—so far as beneficiaries are concerned—the Act should have operation; and that the well-established presumption against such a construction of a British statute as would make it affect, either prejudicially or beneficially, persons other than British subjects or inhabitants of the British Isles (see *Jefferys* v. *Boosey* (1854), 4 H.L. Cas. 815, 24 L.J., Ex. 81; *Cope* v. *Doherty* (1858), 2 De G. & J. 614, 27 L.J., Ch. 600; *The Wild Ranger* (1862), 32 L.J., Adm. 49) would operate to forbid such a construction of the Workmen's Compensation Act as would extend its benefits to dependants resident without the Province. Further consideration, however, has led me to a different conclusion.

Judgment

The basic idea of the Act is accident insurance for the work-

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man: see judgment of Lord Macnaghten in *Fenton* v. *Thorley & Co.* (1903), 72 L.J., K.B. 787; and, as one would naturally expect, the insurance money, so to speak, is to go, in the event of death, to those in whose favour the workman would be likely to take out an ordinary policy, namely, to those dependent upon his earnings. To confine such dependants within geographical boundaries, or boundaries of any sort, would seem absurd on the face of it. How the difficulty above pointed out as arising under section 8 of the Second Schedule is to be surmounted, is a matter for subsequent consideration. Its existence is not, in my opinion, sufficient reason for so construing this statute as to turn its clearly intended benefit in many cases into "dead sea fruit." There is no decision, so far as I am aware, upon this point under the statute—see, however, *Rex* v. *Owen* (1902), 71 L.J., K.B. 770—but Lord Campbell's Act, which is in some respects *in pari materia* with the Act now under consideration, has been held to enure to the benefit of the widow and children, all resident in Norway, of a Norwegian whose death was caused by the negligence of a British subject upon the high seas: *Davidsson* v. *Hill* (1901), 70 L.J., K.B. 788. Given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, that statute, in the opinion of the court, clearly intended, in the case of death, to make the wrongdoer liable in damages to all those, no matter of what race or residence, who stood to the deceased in any one of the relationships mentioned in the Act. The principle of this decision governs the present case.

Judgment

All this, however, is *obiter*, as the applicants have, in my opinion, failed to prove their dependence in fact. The facts are that the son left his father's home in Austria several years ago; that he did at irregular intervals send money to his parents, the applicants, amounting altogether to perhaps $400 in six years; that the only remittance within a year before his death was of a sum to pay the passage to America of a younger brother; that the father is the owner of a small plot of ground of, say, five acres, unencumbered so far as appears; that he works with this another plot of about the same size "on shares," the whole, say 10 acres, being an olive orchard; that the family at home con-

sists of father, mother, adult brother, and a hired boy of 19; and that in some years the crops are good, while in other years it is hard work to make both ends meet. Whether or not the father, a man of 65 or 66, has any savings put by does not clearly appear; in fact the evidence as to the condition of affairs "at home" was not at all satisfactory to my mind, although, perhaps, this may have been due to the failure of the deceased's brother, who gave evidence through an interpreter, to make himself clearly understood. But, making and, I confess, wishing to make every allowance possible upon this score, I find myself unable to say affirmatively that the applicants were at the time of the son's death in fact dependent for their maintenance in a manner befiting their station in life upon the earnings of the deceased. No doubt they did derive benefit from his earnings to the extent I have indicated, and it may well be that they would still further have benefited had their son lived, but these considerations do not necessarily predicate dependency: see judgment of Lord Shand in *Main Colliery Co.* v. *Davies* (1900), A.C. 358, 69 L.J., Q.B. 755 at p. 757; *Simmons* v. *White Brothers* (1899), 68 L.J., Q.B. 507.

Judgment

If they insist upon it, the respondents are entitled to their costs.

Application refused.

BOLE, CO. J.

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Oct. 24.

REX v. HUGHES.

Indian, sale of liquor to—Who is an Indian—Person following Indian mode of life—Indian Act, amendment of 1894, Cap. 32, Sec. 6—Mens rea.

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A quarter-breed is as much entitled to purchase liquor as a white man, provided he does not come within the purview of the amendment to the Indian Act enacted by section 6, Cap. 32, 1894.

In this case, there being nothing to shew that the defendant knew or had cause to suspect that the person to whom he sold the liquor was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted reasonably in the circumstances.

MOTION to quash a conviction for selling liquor to an Indian. Heard before BOLE, Co. J., at New Westminster on the 24th of October, 1906.

Defendant was convicted of selling liquor to an Indian contrary to the provisions of the Indian Act. It was admitted that the appellant sold gin to one Jack Nelson, who though described in the conviction as an Indian, was as a matter of fact a quarter-breed. It was contended by the prosecution that Nelson, although not a breed was still an Indian within the meaning of the amendment of the Indian Act, which reads thus: "In this section the expression Indian, in addition to its ordinary signification as defined in section 2 of this Act, shall extend to and include any person, male or female, who is reputed to belong to a particular band or who follows the Indian mode of life, or any child of such person," 57 & 58 Vict., Cap. 32, Sec. 6. It was alleged that Nelson followed the Indian mode of life and lived on an Indian reservation.

Statement

Kennedy, for appellant.
McQuarrie, for respondent.

BOLE, Co. J., *held*, assuming for the sake of argument that the contention of the prosecution could be sustained (though the evidence adduced did not satisfy the court on this point), *prima facie*, a quarter-breed is as much entitled to buy liquor

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as a white man, provided he does not come within the purview of the amendment of the Indian Act above cited. As a general rule there is a presumption, that, *mens rea*, or a knowledge of the wrongfulness of the act is an essential ingredient in every offence; except in such cases as come within the exception to this general rule, there must in general be guilty knowledge on the part of the defendant or of someone whom he has put in his place to act for him or in the particular matter in order to constitute an offence: *The Queen* v. *Tolson* (1889), 58 L.J., M.C. 97; *The Queen* v. *Mellon* (1900), 7 C.C.C. 179; that Nelson from his appearance was a quarter-breed apparently entitled to purchase liquor, if he thought proper to do so. That there being nothing to shew that the defendant knew or had cause to suspect that Nelson was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted as any reasonable man could be expected to do under the circumstances.

Judgment

Appeal allowed, and conviction quashed with costs.

Conviction quashed.

REX v. JIMMY SPUZZUM.

IRVING, J.
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Oct. 23.
REX v. JIMMY SPUZZUM

Criminal law—Evidence—Complaint in case of rape—Questions put to complainant by her aunt the following day—Admissibility of.

Where the complainant makes a statement, to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature.

CRIMINAL trial before IRVING, J., at the Fall Assizes, 1906, held at New Westminster.

Statement

On the trial of the accused for rape, the Crown offered as a

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witness the complainant's aunt, who, in consequence of reports which she had heard, had gone to the complainant's house on the afternoon of the day after the alleged rape had been committed and had put to her a certain question. The complainant was about sixteen years of age, living in her father's house with a brother aged eight and a sister aged four. The mother was dead. Prisoner broke into the house at night during the father's absence, and committed the offence. In the morning of the next day the complainant went to her aunt's house and there told a cousin, aged nine, that the house had been broken into, but to this child she made no mention of the rape. The girl's aunt, who was not at home when the girl called, having on her return, been told that a man had broken into the house, immediately went to the complainant's house and asked her "what was the trouble?"

Statement

W. Myers Gray, for the accused, objected to the admission of this evidence, on the ground that anything the complainant said in answer to questions was conversation and not a complaint. He cited *The Queen* v. *Lillyman* (1896), 2 Q.B. 167; *Reg.* v. *Merry* (1900), 19 Cox, C.C. 442 and *Rex* v. *Osborne* (1905), 74 L.J., K.B. 311.

Argument

McQuarrie, for the Crown.

IRVING, J., *held* that, in view of the discretion which, as decided by *Rex* v. *Osborne*, *supra*, the trial judge has to admit or reject evidence under similar circumstances, and it not appearing that the question asked by the aunt in this case was of a suggestive or leading character, he would admit the evidence.

Judgment

[The accused was, on the whole evidence, convicted and sentenced to imprisonment for life.]

PHAIR v. SUTHERLAND.

BOLE, CO. J.

1906

June 11.

PHAIR v. SUTHERLAND

Practice—County Courts Act, B. C. Stat. 1905, Cap. 14, Secs. 68 and 70—Application of section 70—Venue—Change of—General right of judge to make a change.

The plaintiff's right to select the place of trial is not to be lightly interfered with, and the onus is on defendant to shew that the preponderance of convenience is against the place selected.

Where an action is brought by a relative of the registrar, and it is clear that the registrar is not the real plaintiff, the defendant is not entitled to invoke section 70 of the Act.

APPLICATION by defendant, under section 70 of the County Courts Act, for a change of venue, heard before BOLE, Co. J., at New Westminster, on the 11th of June, 1906.

Statement

The action was brought by C. A. Phair and an attempt was made to shew that C. A. Phair was a trustee for Caspar Phair, the registrar of the Court at Lillooet, the registry in which the action was brought, and thereby to bring the matter under section 70 of the County Courts Act and have it transferred to another County Court.

Cherry, in support of the application, produced an affidavit to the effect that C. A. Phair, the plaintiff, was *alter ego* for Caspar Phair, the registrar.

Argument

Reid, contra, argued that section 70 only applied where an officer of the court was suing in his own name; and he produced an affidavit of A. W. A. Phair, a clerk in plaintiff's store, repudiating any ownership by Caspar Phair in the matters in dispute.

BOLE, Co. J.: The application herein is to change the venue from Lillooet to New Westminster on the ground that Mr. Caspar Phair, the registrar of the Court at that place is the real plaintiff. The plaintiff is a near relative of Mr. Phair's.

Judgment

Section 70 of the County Courts Act provides for a change of venue when an officer of the court sues in his own right, but as the weight of positive evidence seems to point to the conclusion

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that Mr. Caspar Phair is not the plaintiff, I am confined to deciding whether the defendant is entitled under section 68 to a change of venue from Lillooet to New Westminster. The plaintiff has a right to select the place of trial; a right not to be lightly interfered with where the place has not been vexatiously chosen, and the onus is upon the defendant to shew that the preponderance of convenience is against the place selected: *Standard Drain Pipe Co.* v. *Fort William* (1895), 16 Pr. 404; *Wood* v. *Kay* (1879), W.N. 206; *Madigan* v. *Ferland* (1896), 17 Pr. 124; *Green* v. *Bennett* (1884), 50 L.T.N.S. 706; *Noad* v. *Noad* (1873), 6 Pr. 48; *Bridcut* v. *Duncan and Sons* (1891), 7 T.L.R. 514 and *Dowie* v. *Partlo* (1893), 15 Pr. 314.

Now, I cannot say that the defendant has satisfied me that the venue should be changed, and I must refuse the application.

Application refused.

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HENDERSON v. CANADIAN TIMBER AND SAW MILLS, LIMITED.

Master and servant—Monthly hiring, with contingent yearly hiring—Reasonable notice, what constitutes.

Plaintiff was employed by defendant Company as their manager at a salary of $200 per month until a mill, which they were constructing, was completed and working, when he was to be engaged at a salary of $2,500 per annum, payable monthly. He worked under the $200 per month arrangement a certain time, and for a portion of a month after the mill had been completed, when he was dismissed without notice:—*Held*, affirming the judgment of LEAMY, Co. J., and the verdict of the jury, that it is usually an implied term of hiring in similar cases that the service could be determined by a reasonable notice, and the jury here having fixed on three months, that was a reasonable notice in the circumstances.

APPEAL from the judgment of LEAMY, Co. J., in an action

tried before him and a jury at Revelstoke on the 1st of December, 1904, when the jury returned a verdict in favour of the plaintiff for $600. The facts fully appear in the headnote and arguments.

McCarter, for plaintiff.
Whealler, for defendant Company.

The appeal was argued at Vancouver on the 11th of April, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

Davis, K.C., for appellant: The question is whether the plaintiff was entitled to recover $600, or any sum in lieu of notice. The only agreement is that under which he was to act as manager at $200 per month until the mill is in running order; then there is a contingent agreement that, certain conditions having been satisfied, he is to become manager at a salary of $2,500 a year, payable monthly. The whole employment is subject to the directors being satisfied with him. He never got any money under the new contract; they were dissatisfied with him. The old agreement was discontinued, so that he was either working on a *quantum meruit* basis, or under the second agreement. The second agreement was not in force until the mill was in working order and unless the directors were satisfied.

[*Per curiam:* He stayed in your employment a month.]

Argument

This Company's head office is in England, and it takes a month's time to get a communication from them. They dismissed him on the earliest possible occasion. He was not entitled to any notice, because he was not employed under a yearly or monthly hiring.

There must be evidence of a custom of notice or no notice to go to the jury, but there is no such evidence here. The only evidence is that which he himself gives, and he says that five months' notice will be sufficient: *Moult* v. *Halliday* (1898), 1 Q.B. 125, is authority that a custom of this sort must be proved in each case as a question of fact. Also see *Fox-Bourne* v. *Vernon and Co., Limited* (1894), 10 T.L.R. 647.

S. S. Taylor, K.C., for respondent: There was a definite arrangement for three months' notice, and we submit that that

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applies to the $200 a month arrangement and the $2,500 a year. Our contention is that the letter written by him in October referring to the conversation in May (when there was a verbal arrangement for three months' notice), connects the two transactions into one understanding. The only reason given for dismissal is the shutting down of the works. Provided he got no notice, the new arrangement came into effect automatically.

[HUNTER, C.J., referred to *Pearse* v. *Schweder & Co.* (1897), A.C. 520, on the jurisdiction of the court as to setting aside a verdict.]

Everything has been condoned. The letter of the 7th of July is a scolding letter, but not by any means an indication of dismissal. The jury had a right to look at that evidence in order to arrive at a conclusion whether there was, on the facts, a right to three months' notice. This man had been a month in the new employment, and that, too, with the knowledge of the directors, for they actually paid his wages up to the 20th of August.

As to whether the $2,500 per annum arrangement was a new contract or an increase in wages, see *Boston Deep Sea Fishing and Ice Company* v. *Ansell* (1888), 39 Ch. D. 339 at p. 358; *McIntyre* v. *Hockin* (1889), 16 A.R. 498 at pp. 500, 501 and 502.

As to notice, see *Lowe* v. *Walter* (1892), 8 T.L.R. 358 at p. 367.

Argument

We are not obliged to prove custom. Unless the jury was unreasonable, the verdict will not be disturbed. He cited *Barratt* v. *Great Northern Railway Company* (1904), 20 T.L.R. 175 at p. 177; *Fenton* v. *Emblers* (1762), 3 Burr. 1,278; *Davey* v. *Shannon* (1879), 4 Ex. D. 81 at p. 86; *Ridley* v. *Ridley* (1865), 34 L.J., Ch. 462.

Davis, in reply: No condonation was pleaded or set up. The three months' notice could not apply to the first agreement, as that was for a fixed time. If the mill had been completed on the 20th of August, they could have dismissed plaintiff then. As to his having been paid up to the 20th of August, that was paid after suit was brought, and therefore was not a ratification. He referred to *Bolckow* v. *Seymour* (1864), 17 C.B.N.S. 107 at p. 115.

Cur. adv. vult.

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HUNTER, C.J., concurred in the reasons for judgment of IRVING, J.

IRVING, J.: The plaintiff's employment was to be paid for at the rate of $125 per month until the mill was completed and in thorough working order; when that stage was reached, a new arrangement was to come into force if the plaintiff had given full satisfaction to the directors.

I think the words "erected and in full work" must mean completely erected and in full working order. It surely never was the intention of the parties that the plaintiff should continue in their employ in the event of their deciding not to work the mill. This construction of the letter of the 21st of October harmonizes with the letter of the 13th of November.

On the 20th of August, 1904, the plaintiff was discharged without notice.

The mill was in full running order in July, 1904, and the plaintiff acted as manager until the 20th of August, 1904.

Did the terms of the letter of the 6th of July, or the conduct of the managing director generally amount to an expression of satisfaction by the directors? I cannot bring myself to believe that the directors were satisfied. Nevertheless, they acted in such a way as to make it possible for the plaintiff to believe that he was being continued in their service notwithstanding the difficulty with the Customs. In these circumstances, plaintiff was entitled to notice—but to what notice? It seems an extraordinary thing that there should be any difficulty in an every-day case of this kind, but the multitude and diversity of decisions make it a most embarrassing one to deal with. The earlier cases proceeded on the assumption that if a master hired a servant without mentioning the time, the hiring was a general hiring, and therefore a hiring for a year; but the modern method is to determine each case as a question of fact, upon its own circumstances.

IRVING, J.

In *Fairman* v. *Oakford* (1860), 5 H. & N. 635; and in *Creen* v. *Wright* (1876), 1 C.P.D. 591, the court took the view that it was usually an implied term of hiring in cases similar to this

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that the term could be determined by a reasonable notice. The jury have fixed on three months' notice as a reasonable notice, and I agree with them: see *Harnwell* v. *Parry Sound Lumber Co.* (1897), 24 A.R. 110.

The appeal should be dismissed.

MORRISON, J.: Doubtless the right, retained by a party employing another to dismiss him, presupposes the contingency that the employee will disclose, during the term of his employment, some incapacity justifying his dismissal. This is an incidental risk against the happening of which a term of notice is agreed upon, and must in all fairness be observed. If the contingency happens, then this notice must be given, or damages paid in lieu thereof, subject of course to the existence of certain extreme exceptions.

From the correspondence and the oral evidence, I am satisfied the notice to be given was to be three months, and that the plaintiff was dismissed without that notice being first given. I am also satisfied that Ward knew and approved of the plaintiff's action in the affair of the Customs.

It is quite plain to me that the real reason for dispensing with the plaintiff's services was owing to the Company being in financial difficulties, not caused by the plaintiff, and that they were at the time determined to cease operations. The reasons assigned by Ward were, I think, mere timid pretexts.

I would dismiss the appeal.

Appeal dismissed.

ATTORNEY-GENERAL *EX REL.* KENT v. RUFFNER AND BLUNCK.

IRVING, J.

1906

Feb. 6.

ATTORNEY-GENERAL *v.* RUFFNER AND BLUNCK

Costs—Action by Attorney-General—Payment of costs by relator or Attorney-General—18 & 19 Vict., Cap. 90 (Imperial), whether in force in British Columbia.

In an action by the Attorney-General at the relation of a private individual, the Crown sues as *parens patriæ*, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs.

The Act 18 & 19 Vict., Cap. 90 (Imperial), is not in force in British Columbia, and the machinery by which the Act is to be worked out could not be applied here.

ACTION by the Attorney-General on the relation of a private individual. Judgment as to costs was reserved for argument, which was heard at Victoria, in February, 1906, before IRVING, J. Statement

Wilson, K.C., A.-G., in person.
Peters, K.C., for defendants.

6th February, 1906.

IRVING, J.: In giving judgment in this case, that the action be dismissed with costs, at the request of the defendants' counsel I reserved the question whether the costs were to be payable by the Attorney-General or the relator, or both.

Since then I have had the benefit of hearing an argument by the Attorney-General and counsel for the relator as to the question reserved.

When a suit was instituted on behalf of the Crown, or on behalf of those who enjoy its prerogative, or whose rights are under its especial protection, the matter of complaint was, prior to the coming in force of the Supreme Court Rules, 1883, offered to the court by way of information by the Attorney-General *ex-officio*, or with a "relator." Judgment

In either case, the Crown sued as *parens patriæ*, and except for the purposes of costs there was no difference between an *ex-*

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officio information and an information at the relation of a private individual: *per* Jessel, M.R., in *Attorney-General* v. *Cockermouth Local Board* (1874), L.R. 18 Eq. 172 at p. 176.

Since the making of the Supreme Court Rules of 1883, the action is commenced by writ, but by Order 16, rule 20 (B.C. marginal rule 110) before the name of any person can be used in any action as relator, such person shall sign a written authority to the solicitor for that purpose.

Now, as the Attorney-General can file an information without a relator at all, I can see no object in requiring a relator, still less a consent in writing, unless it is for the purpose of making the relator responsible for the costs of the action.

Daniell's Chancery Practice, 6th Ed., at p. 65, says:

"Although it is the general practice, where a suit immediately concerns the right of the Crown, to proceed without a relator, yet instances have sometimes occurred where relators have been named. In such cases, however, it has been done through the tenderness of the officers towards the defendant, in order that the Court might award costs against the relator if the action should appear to have been improperly conducted."

And in a note to the above:

"For an instance of the oppression arising from not naming a relator, see *Attorney-General* v. *Fox*, Ld. Red., 23, n. (*g*), where no relator being named, the defendants, though finally successful, were put to an expense almost equal to the value of the property."

Judgment

In *Attorney-General* v. *Logan* (1891), 2 Q.B. 100, Bigham, Q.C., now Bigham, J., and the present Attorney-General, in their argument said:

"The only object of inserting the name of a relator is to make him responsible for the costs of the proceedings."

Wills, J., at p. 103, said:

"There is authority for saying that a relator need not have any personal interest in the matter, except as one of the public; he need not, in fact, be himself damaged at all; and if that is so, the introduction of the relator is really only a matter of costs."

Vaughan Williams, J., now Lord Justice, at p. 106, said:

"As I understand the practice, when the Attorney-General proceeds at the relation of a private person or a corporation he takes the proceeding as representing the Crown, and the Crown through the Attorney-General is really a party to the litigation. It is quite true that when the proceeding is taken at the relation of a subject, the practice is to insert his name in the proceedings as the relator, and to make him responsible for the costs, but I do not think that this practice in any sense makes the relator a party

to the proceedings, although he is responsible for the costs, any more than (to take a converse case) an infant who brings an action is responsible for the costs of it. If I am right, it would seem that the practice of making the relator directly responsible for the costs of the action had its origin not in the protection of the defendant, but of the Crown."

In our own Court, BEGBIE, C.J., in *Anderson* v. *Corporation of City of Victoria* (1884), 1 B.C. (Pt. 2) 107 at p. 108, speaks of the Attorney-General "receiving a proper indemnity as to costs." This may mean as to his, the Attorney-General's costs, and if so, does not touch the question as to defendant's costs. In *Attorney-General* v. *London County Council* (1901), 1 Ch. 781, (1902), A.C. 165, where the Attorney-General on the relation of certain persons and companies carrying on the business of omnibus proprietors, being ratepayers, brought an action against the council to restrain it from running omnibuses, there was a discussion as to the Attorney-General's powers and duties in an information. Vaughan Williams, L.J., at p. 807, said: "The relators are ratepayers, and as such have a right to ask the Attorney-General to allow his name to be used," etc. How could they have the right, except on being responsible for the costs occasioned to the defendants if the latter should prove successful?

Judgment

In *Attorney-General* v. *C. P. R.* (1905), 11 B.C. 289, DUFF, J., in dismissing the action, did so with costs to be paid by the relators.

Mr. *Peters* contended that the Attorney-General was liable for costs under Imperial statute, 18 & 19 Vict., Cap. 90, under which Act costs are payable by the Crown as between subject and subject, but I am of the opinion that that Act is not in force here. It was not a general Act, but required a special Act to make it applicable to the Isle of Man, and the machinery by which the Act is to be worked out could not be applied here.

Wallbridge, C.J., of Manitoba, decided in *Attorney-General* v. *Richard* (1887), 4 Man. L.R. 336, that that statute had not been imported into Manitoba.

In my opinion the order should be confined to making the costs payable by the relator.

Order accordingly.

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ESQUIMALT WATERWORKS COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VICTORIA.

Water and watercourses—Prior rights—Riparian ownership—English law relating to riparian rights, introduction of into British Columbia—Appropriation of waters—Authorization of user of water by records or grants—Statutes, construction of—Water Privileges Act, 1892—Water Clauses Consolidation Act, 1897, R.S.B.C., Cap. 190—Esquimalt Water Works Act, 1885—Expropriating statutes, effect of general Acts on earlier special Acts—Municipal Corporation, rights of—Water companies.

By section 9 of the plaintiff Company's charter of 1885, they were empowered from time to time and at all times thereafter to survey, set out and ascertain such parts of the land within a prescribed area as they might require for the purposes of their undertaking, to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries as they should judge suitable and proper, and to acquire any interests in the said lands or waters, *viz.*: Thetis lake or Deadman's river, or any privileges that might be required for the purposes of the Company.

By section 10 of the same Act, "the lands, privileges and waters which shall be ascertained, set out, or appropriated by the Company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the Company."

By an amending Act of 1892, passed on the 23rd of April, 1892, the provisions of the principal Act as to appropriation and diversion were extended so as to embrace Goldstream river and its tributaries, except that there is no express vesting clause similar to that contained in said section 10. It is also provided that the power to divert and appropriate water from this river and its tributaries is to be subject "to any grant of rights, privileges or powers arising under the provisions of the Corporation of Victoria Water Works Act, 1873"; and by section 9, that nothing in the Act is to be construed as in any way limiting or derogating from any grant or privilege accorded to the City under the provisions of the said Act. By section 10 it is stated that the powers as to Goldstream are conferred only on the condition that the Company will supply, on terms which are specified, a maximum quantity of 5,000,000 gallons *per diem* to the City if so required.

The Company in 1892 commenced operations on Goldstream river by clearing the banks and building dams for the purpose of making reservoirs, and making other improvements. In 1897 the Water Clauses Consolidation Act was passed, by which all unrecorded

and unappropriated water and water-power, declared by the Water Privileges Act, 1892, to be vested in the Crown, were brought under one comprehensive code for administrative purposes. Between 1892 and 1898 the Company had purchased from various owners the lands along the Goldstream river and contended in the action that it had thus become entitled to the riparian rights of such owners:—

Held, that the Water Privileges Act, 1892, vested in the Crown the right to the use of all the water in Goldstream river. The Company's Act of 1892 merely gave it a right to take what was necessary for its purposes, and by taking possession of the source of the river it could not claim the exclusive use of the water from the source of the river to its mouth.

The Water Clauses Consolidation Act, 1897, was intented to control the acquisition and use of waters not appropriated on or before the 1st of June, 1897, and prescribed a method by which the right to use such waters, as well recorded as unrecorded, could be obtained. The Act intended that existing companies should be limited strictly to their corporate powers.

The purchase of lands by the Company gave it no greater right than the owners possessed, *viz.*: a right to the uninterrupted, undiminished and unpolluted flow of the water past their lands for the purposes incidental to their ownership. The Company purchased those lands solely by virtue of the limited authority given it by its Act of incorporation, and for the purposes only of that Act.

Under the provisions of the Water Clauses Consolidation Act, 1897, the City have a right to the waste or unrecorded waters of Goldstream river, and under the Corporation of Victoria Water Works Act, 1873, they have a right to the compulsory acquisition of the whole of the interests of the Company on the said river.

Per HUNTER, C. J.: Having regard to the nature of the undertaking and the conditions imposed, the Legislature, when it conferred the right "from time to time and at all times hereafter" to divert and appropriate the waters of Goldstream, granted an exclusive licence, subject only to the rights conferred on the City by its Act of 1873 and amending Acts. That right having sprung into existence, should not, in the absence of clear and unmistakable language, be prejudiced by any subsequent legislation. That the option as to how or where the water is to be taken, is left entirely with the Company, which is given the exclusive use and control of the stream.

Per DUFF, J., at the trial: The enactments dealing with the introduction into the colonies of British Columbia and Vancouver Island, of the general body of English law, clearly do not amount to a declaration of the non-existence of the law regulating riparian rights in those colonies.

Judgment of DUFF, J., reversed (HUNTER, C. J., *dissentiente*).

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APPEAL from the judgment of DUFF, J., in an action tried before him at Victoria on the 4th, 5th, 6th, 7th, 8th, 9th, 11th, 12th and 13th of December, 1906, wherein the plaintiff Company obtained an injunction restraining the City from recording under the Water Clauses Consolidation Act, 1897, any of the waters of Goldstream river for municipal purposes, and declaring that the waters of the said river are, by virtue of the Company's incorporating Act of 1885, and amendments, vested in the Company.

Statement

The action arose upon an application of the City for a record of water under the Water Clauses Consolidation Act, 1897; a record was attempted to be made by the City upon Goldstream at a point below the power house of the Tramway Company, whither the water is carried by pipes, and from which point the waters of Goldstream flowed again into the bed of Goldstream and thence into Saanich inlet. The Water Company applied for and obtained an injunction restraining the City from proceeding with this application for a record. The Water Company was incorporated in 1885, and by its Act of incorporation became entitled to divert the waters of Thetis lake and Deadman's river for the purpose of supplying the inhabitants of Esquimalt and surrounding peninsula and with power to supply along the pipe line, and the district in the Act mentioned with water. In 1892, the Water Company obtained a further Act, authorizing it to divert the waters of Goldstream. The City had, in 1873, obtained an Act authorizing the appropriation of water at any point within a radius of twenty miles of the City for the purpose of supplying the needs of the inhabitants of Victoria. When, in 1892, the Water Company obtained its extending Act, provision was made protecting the prior rights of the City. This provision was set forth in the Water Company's Act of 1892, in two sections. Section 1, after giving power to the Water Company to appropriate the waters of Goldstream, stated that this power was "subject, however, to any grant of rights, privileges or powers arising under the provisions of the Corporation of Victoria Water Works Act, 1873"; and in section 9 of the Act it was declared that "nothing in this Act shall be construed as in any way

limiting or derogating from any grant or privilege accorded to the Corporation of the City of Victoria under the provisions of the Corporation of Victoria Water Works Act, 1873."

The Water Company's Act of 1892 extended the field within which the Company might obtain water in order to supply the needs of the inhabitants of Esquimalt and peninsula surrounding.

On the 10th of May, 1892, the Water Company made a contract with the National Electric Tramway & Lighting Company for a supply of water to that Company for power purposes. This contract dealt with the question of power entirely. Thereupon the Water Company constructed a reservoir. By reason of defaults in the National Electric Tramway Company the water was never taken by that Company. On the 25th of September, 1897, another contract was made by the Water Company, this time with the British Columbia Electric Railway & Lighting Co., the successors in title of the National Electric Tramway & Lighting Company. This latter contract dealt entirely with the question of the supply of water for power purposes. The Tramway Company were thereby enabled to generate power for distribution within the City of Victoria. The Water Company constructed further reservoirs, so that they were enabled, in August, 1898, to furnish the Tramway Company with power at the Company's power house on Goldstream, just above the point where the City sought to obtain a water record. The waters of Goldstream had never been utilized by the Water Company between 1892 and August, 1898, for any purpose, except as aforesaid.

Statement

The Water Company's original Act of incorporation authorized that Company to regulate the distribution and use of water "on all places" and "for all purposes" by section 12.

The plaintiffs' evidence went to shew that the Water Company had constructed its works (1.) with a view to augmenting its supply to the peninsula; (2.) to meet an obligation their 1892 Act imposed on them of supplying water to the City of Victoria; (3.) that the pipes were not laid to bring in the water to the peninsula, because if the City required the supply, they were entitled to larger pipes, and a more extensive outlay would be

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necessary than if the water were brought to the peninsula alone.

The point taken by the City was that up to August, 1898, the waters of Goldstream had never been put to a beneficial use by the Water Company within the meaning of the Water Clauses Consolidation Act, 1897.

In June, 1897, the Water Clauses Consolidation Act became law. After reciting that water not then held under Acts of the Legislature then existing, or thereafter to be passed, had been vested in the Crown in 1892; that water privileges might be obtained under various statutes of the Province, and that water and water-power in the Province not under the exclusive jurisdiction of the Parliament of Canada, so far as such water-power remained unrecorded and unappropriated on the 23rd of April, 1892, was declared to be vested in the Crown in the right of the Province, the Act proceeded to declare that it was necessary and expedient to provide for the due conservation of all water and water-power so vested in the Crown, and to provide means whereby such water and water-power might be made available to the fullest possible extent in aid of the industrial development and of the agricultural and mineral resources of the Province. This Act still further recited that it was expedient to enact an exclusive and comprehensive law governing the granting of water rights and privileges and to provide and regulate the mode of acquisition and enjoyment of such privileges, and the royalties payable to the Crown in respect thereof. The Act gave a definition of unrecorded waters as follows:

Statement

> "Unrecorded water shall mean all water which for the time being is not held under and used in accordance with a record under this Act or under the Acts repealed hereby, or under special grant by public or private Act, and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose."

Luxton, K.C., and *Peters, K.C.* (*R. T. Elliott*, with them), for plaintiff Company.

W. J. Taylor, K.C., and *Bodwell, K.C.*, for defendant Corporation.

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DUFF, J.: The plaintiff Company sues to restrain the defendant Municipality from proceeding with applications to the Lieutenant-Governor in Council for a grant of water records

authorizing the diversion of water from Goldstream river and its tributaries, under the Water Clauses Consolidation Act, 1897, for the purpose of supplying water to the inhabitants of the municipal area. The Company's case necessarily rests upon the contention that it has acquired rights in these waters which would be invaded by the grant of such records, and that there is no authority under the statute to make any grant having that effect. It will be necessary to discuss fully the bearing of the Water Clauses Consolidation Act, 1897, and of the Water Privileges Act of 1892, upon the rights of the parties to this action; but I proceed first to consider the nature and extent of the rights acquired by the Company in the streams in question as if those rights fell to be ascertained without regard to the provisions of either of these enactments.

The Company was incorporated in 1885 by an Act of the Legislature of British Columbia. By that Act it was, *inter alia*, provided in section 8:

"The Company and their servants may, and shall have full power to design, construct, build, purchase, improve, hold and generally maintain, manage and conduct water works and all buildings, materials, machinery and appliances therewith connected in the town of Esquimalt and the peninsula adjacent thereto, bounded by the Victoria Arm and Harbour, the Straits of Fuca and Esquimalt Harbour, and other parts as hereinafter provided.

"9. It shall be lawful for the Company, their servants, agents and workmen, from time to time, and at all times hereafter, as they shall see fit, and they are hereby authorized and empowered to enter into and upon the land of any person or persons, bodies politic or corporate, in the town of Esquimalt, or within ten miles of the said town, and to survey, set out and ascertain such parts thereof as they may require for the purposes of the said water works, and to divert and appropriate the waters of Thetis lake and Deadman's river, and its tributaries, as they shall judge suitable and proper, and to contract with the owners and occupiers of the said lands, and those having an interest or right in the said waters, for the purchase of the same respectively, or of any part thereof, or of any privilege that may be required for the purposes of the Company, and for the right to take all or any timber, stone, gravel, sand and other materials from the aforesaid land or any lands adjacent thereto, for the use and construction of the said works. [Provisions as to arbitration proceedings in the event of dispute].

"10. The lands, privileges and waters, which shall be ascertained, set out, or appropriated by the Company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the Company. . . . . .

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and all such water works, pipes, erections and machinery, requisite for the said undertaking, shall likewise be vested in and be the property of the Company."

This Act was in 1892 amended by a statute which enacted in section 1:

"The Esquimalt Water Works Act, 1885, shall be so construed as to give power to the Esquimalt Water Works Company to divert and appropriate so much of the waters of Goldstream river and tributaries as they may deem suitable and proper, subject, however, to any grant of rights, privileges or powers arising under the provisions of the Corporation of Victoria Water Works Act, 1873."

In section 3:

"All the rights, powers and privileges conferred on the said Company by the Esquimalt Water Works Act, 1885, shall extend and apply to the appropriation and diversion of the waters of the Goldstream river and its tributaries, and also to the conveying of such water from the place or places of diversion to the town of Esquimalt and the peninsula adjacent thereto, as defined by section 8 of the said Act, in the same way and to the same extent as if such rights, powers and privileges had been originally conferred by the said Esquimalt Water Works Act."

And in section 10:

"The rights and privileges conferred by this Act are subject to and have been conferred only upon the following conditions:

"(*a.*) Should the Corporation of the City of Victoria at any time so desire, the Council of the Corporation may, by resolution, notify the Esquimalt Water Works Company to furnish them with a supply of water from the works of the Esquimalt Water Works Company, and it shall thereupon be obligatory upon such Company, within fifteen months after the service of such notice on the Company, to supply and deliver, at some point west of Victoria Arm, within the limits of the City of Victoria, into the water mains of the City of Victoria, under a pressure (at sea level) of not less than one hundred and ten pounds to the square inch, such quantity of pure water up to the amount and for the period specified in such resolution, or any subsequent resolution of a similar nature, as will satisfy the needs of the Corporation of the City of Victoria, the Corporation paying the Company therefor at the rate of six cents per thousand gallons; and the Company shall supply water to the Corporation of the City of Victoria for the purpose of fire protection at the rate of $4 per month for each fire hydrant which the Corporation may desire to connect with the Company's pipes, and shall supply water for flushing and washing gutters, or for the filling of tanks for fire protection purposes, free of charge."

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(*b.*) [Proviso as to quantity *per diem*, and period of supply].

(*c.*) [As to right and liability of the Corporation in taking or not taking such quantity].

Since the passing of the amending Act of 1892, the Company

has purchased the lands (except some small areas still vested in the Crown) traversed by the streams mentioned in the third section; the lands occupied by the lakes which are the headwaters of these streams, and (except the areas mentioned) the whole of the watershed drained by them. Shortly after the passing of the Company's amending Act, the Company entered into a contract with the National Electric Railway Company, binding itself to supply to the Railway Company at a point on Goldstream river, certain quantities of water at a fixed minimum head for the generation of electric energy, and partly to equip itself to carry out this contract, partly to provide for a possible advance in the demands of water to supply the district served by the Company's system, partly to provide means to meet the inchoate obligation imposed by section 10 of the Company's amending Act, in the event of that obligation becoming operative, the Company proceeded to establish a reservoir at the lower of a series of lakes which formed the headwaters of Goldstream river proper, and this work was completed in the year 1893.

The Railway Company having passed into liquidation, the arrangements with that Company lapsed; but in 1897 the Company entered into a contract with the British Columbia Electric Railway Company, binding itself to provide water for the same purposes, in increasing quantities up to 15,000,000 gallons daily, as the Electric Company should require it, at that Company's power-house at Goldstream river, having a specified minimum head. In consequence of that contract the Company has spent large sums of money in establishing reservoirs at the remainder of the series of lakes mentioned, and providing for works necessary to enable the Company to fulfill the requirements of the contract. Down to the present time no part of the waters of Goldstream river or its tributaries, has been applied by the Company for the purpose of supplying the inhabitants of the district referred to in the Company's principal Act with water for consumption; and in point of fact, with the exception of the application to the purposes of the contract mentioned, these waters are not actually applied by the Company to any beneficial purpose. Before discussing the question as to the rights in respect of these streams acquired by the Company

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under these Acts, it is necessary to deal with a point raised by Mr. *Bodwell*, which bears generally upon the questions arising in this case.

It is argued that the English law relating to riparian rights never became a part of the law of this Province. The first Imperial statute relating to Vancouver Island appears to be 12 & 13 Vict., Cap. 48, which is reprinted in the Revised Statutes of British Columbia of 1897. The Act does not contain, nor does there appear to have been passed before the union of the colonies of British Columbia and Vancouver Island in 1866, by Parliament or other law-making authority, any enactment containing any express provision for the establishment of the law of England as the law of the last mentioned colony. In these circumstances, we must apply the common law rule relating to the introduction of English law into colonies acquired by settlement. That rule is authoritatively stated by the Privy Council in *Cooper* v. *Stuart* (1889), 14 App. Cas. 286 at pp. 291 and 292. Now, the rule of law which regulates the rights of riparian owners insofar as we are concerned with it, may be stated in the language of Lord Wensleydale in *Chasemore* v. *Richards* (1859), 7 H.L. Cas. 349 at p. 382. This rule, founded, as pointed out by Farwell, J., in *Bradford Corporation* v. *Ferrand* (1902), 2 Ch. 655 at p. 661 in the *jus naturæ*, and worked out on the principle of *æqum et bonum*, in my opinion cannot be said to be less applicable to the circumstances of the colony of Vancouver Island in 1849 than the circumstances of other colonies into which it has never been doubted it was carried by the settlers who established those colonies. By the operation of the common law rule it was carried into the Australian settlements: *Lord* v. *The Commissioners for the City of Sydney* (1859), 12 Moore, P.C. 473; into the American settlements: *Tyler* v. *Wilkinson*, 4 Mason, 397; *Lux* v. *Haggin* (1886), 69 Cal. 255, 10 Pac. 674 and by the Act of 1792, which but enacts the common law rule in express terms, it was introduced into Upper Canada: *Booth* v. *Ratte* (1890), 15 App. Cas. 188. So far as I can ascertain, it seems never to have been doubted that with the general body of English law it was introduced into all the colonies forming the Dominion of Canada, except Quebec. By an ordinance

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promulgated in 1867, after the union of the colonies of British Columbia and Vancouver Island it was enacted as follows:

"From and after the passing of this ordinance, the civil and criminal laws of England, as the same existed on the 19th day of November, 1858, and so far as the same are not from local circumstances inapplicable, are and shall be in force in all parts of the colony of British Columbia."

I see no reason for thinking—even supposing the Municipality's contention can, as regards the mainland of the Province, be supported—that this ordinance made inapplicable to Vancouver Island any part of the body of English law which theretofore was the law in that colony; indeed, if not from local circumstances, inapplicable to that colony, it must, in my opinion, be treated as coming within the ordinance. I am unable, moreover, to agree with Mr. *Bodwell* that even as regards the mainland the rule in question comes within the language of the exception. I do not find that the point has been the subject of express decision, although in a dissenting judgment in *West Kootenay P. & L. Co.* v. *Nelson* (1906), 12 B.C. 34 (the majority of the court expressing on this point no opinion) MARTIN, J., states his view to be that the rules of English law on this point have been, since 1870, the law of the whole colony of British Columbia; and the judgment of DRAKE, J., in *Columbia River Co.* v. *Yuill* (1892), 2 B.C. 237, proceeds upon that view, although the point was not argued. The judgment of Gwynne, J., in *Martley* v. *Carson* (1889), 20 S.C.R. 634 at pp. 658 and 659 is addressed to the construction of the Land Act, and does not touch the point. Mr. *Bodwell*, indeed, relied upon certain provisions of the Land Act first appearing in the B. C. ordinance of 1865 authorizing the diversion of natural streams and lakes for specified purposes in support of his contention. As to these enactments, omitting for the present the consideration of the legislation of 1892 and 1897, it is sufficient to say in this connection that whatever modification of the rights of riparian proprietors they should be held to have effected, they clearly do not amount to a declaration of the non-existence of such rights, and in my opinion they cannot fairly be regarded as affording any indication that the view of the legislative authority accorded with that now advanced on behalf of the Municipality.

By their transactions, the Company acquired in the streams in

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question the riparian rights incident to the ownership of the lands purchased, subject, as to some of the parcels, to certain reservations in the grants from the Crown, which I shall refer to more particularly later. But I do not think that as regards its rights in respect of the streams in question, the Company can be treated as a riparian proprietor simply. The Company's Acts, in my judgment, treat Goldstream river and its tributaries as entities which are the subjects of proprietary rights. The principal Act provides for the purchase by the Company of the rights and interests of persons having rights and interests in these streams as streams. In other words, it provides for that which, at common law, would be a legal impossibility: *Stockport Waterworks Co.* v. *Potter* (1864), 3 H. & C. 300; the severance of the right of an owner of land traversed by a natural stream in the stream itself from his proprietary interest in the land. This interest, once acquired by the Company for the purposes of its statutory undertaking, either by contract or by compulsory appropriation under the provisions of the Act, becomes, in my opinion, vested in the Company, and is thenceforward held under a statutory title, the nature and extent of which must be ascertained from the provisions of the statute itself. The statute, in short, to use the language of Brett, L.J., becomes the charter of the Company's rights. The Legislature, in other words, for the purpose of enabling an undertaking of public interest to be effectually carried on, conferred upon the Company the power to acquire for the purposes of that undertaking, rights which, as separate from the ownership of land, are unknown to the common law, namely, the whole sum of the rights of a riparian proprietor in, or in respect of a natural stream of water flowing through or past his land, and gave to the Company in respect of the rights so acquired, a parliamentary title. In the language of the Act itself, the waters so appropriated by the Company for the purposes thereof, were thereupon and forever, to be vested in the Company.

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I was, at first, strongly impressed with the force of Mr. *Bodwell's* contention that to effect an appropriation within the language of the statute there must be a severance of some definite portion of water from the stream itself or that, at all events,

an appropriation can take effect under the provisions of section 10, from which I have just quoted, only to the extent to which it is accompanied by a reduction into possession of a definite quantity of water. This contention harmonizes fully with the use of the word "appropriate" in the earlier cases, which proceed upon the principle that running water is entirely *publici juris*, and subject to be made the property of the first occupant who reduces it into possession by abstraction from the stream; and with the principles governing the acquisition of water rights in natural streams in many of the Pacific States of the United States of America. But the contention, I have come to the conclusion, is not well founded. It is true that exclusive property in water in a running stream, as so many pints or so many globules of fluid, can only be acquired by the abstraction of the fluid from the stream. In *Embrey* v. *Owen* (1851), 6 Exch. 353, Parke, B., at p. 369, uses this language:

"The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is *publici juris*, not in the sense that it is a *bonum vacans*, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only. But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

And in *Lyon* v. *Fishmongers Company* (1876), 1 App. Cas. 662 at p. 683, Lord Selborne says:

"The title to the soil constituting the bed of a river does not carry with it any exclusive right of property in the running water of the stream, which can only be appropriated by severance, and which may be lawfully so appropriated by every one having a right of access to it."

And see *John White & Sons* v. *J. & M. White* (1906), A.C. 72 at p. 80. But there is a sense in which a stream as a stream may properly be spoken of as the subject of ownership. In *Williams* v. *Morland* (1824), 2 B. & C. 910 at p. 914, Holroyd, J., said:

"Running water is not in its nature private property. At least it is private property no longer than it remains on the soil of the person claiming it."

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In *Bush* v. *Trowbridge Waterworks Company* (1875), L.R. 19 Eq. 291 at p. 293, Sir George Jessel, M.R., referring to the language of the 6th section of the Waterworks Clauses Act, 1847, says:

"Meaning, as it appears to me, the owners or occupiers of the portion of the stream with which the company are interfering."

Also see in the same case on appeal, 10 Chy. App. 459, *per* James, L.J., at p. 462.

[Reference to *Stone* v. *Corporation of Yeovil* (1876), 2 C.P.D. 99 at p. 108; *Girdwood* v. *Belfast Water Commissioners* (1877), 1 L.R. Ir. 28, *per* Chatterton, V.C.]

And the Legislature can, of course, create a new species of property: *Medway Co.* v. *Romney* (1861), 9 C.B.N.S. 575.

In that part of the 10th section which I have quoted, the statute seems to me to be dealing with the appropriation of the streams themselves. It is to be observed that the Legislature speaks of the appropriation of waters and of interest in waters, not an appropriation of water. I agree with the view expressed by Chatterton, V.C., in the case I have just quoted, p. 40, that the word "waters" in the plural would mean something different from the actual water passing through the streams. But aside from this, that part of section 10 seems to me to be merely the complement of those parts of section 9 which provide for the acquisition by the Company of rights in land and in the streams in question. The principal Act first authorizes the Company to acquire these rights, and provides means by which, in the absence of an agreement, they may be acquired compulsorily; and then proceeds to declare in section 10 expressly that these rights, purchased by agreement, or compulsorily taken, shall be vested in the Company forever. The word "appropriate" itself, in its natural meaning, signifies to make one's own, that is, to take to oneself to the exclusion of others: Imperial Dictionary. One does not readily see why an interest or right in a stream taken under section 9 is not an appropriation of that right or interest. The Company takes it to itself to the exclusion of the former proprietor; in the fullest sense appropriates it.

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A flood of light has been thrown upon the construction of this statute by a decision of the Judicial Committee of the Privy

Council, reported since the argument—*Saunby* v. *London (Ont.) Water Commissioners* (1906), A.C. 110. The Act which the court had to construe in that case is, in terms, almost identical with that now under consideration, that is Cap. 102 of the statutes of Ontario (1873). The plaintiff in the action, who was a mill owner, complained that the water-power of his mill was interfered with by the water commissioners, who, at a point on the River Thames, below his millsite, had penned back the river for the purposes authorized by their enabling Act. The commissioners sought to justify under their Act, contending that the plaintiff's only remedy was to invoke the compensation clauses. Lord Davey, in delivering the judgment of the Judicial Committee at p. 114, said: [which his Lordship read].

This opinion manifestly proceeds upon the view that under the statute in question, the commissioners were not authorized to deal with the streams in question in such a manner as to invade the legal rights of others. This is the view expressed by Sedgewick and Killam, JJ., who dissented from the opinion of the majority of the Supreme Court of Canada in opinions founded largely upon the fact, it would seem, that the statute makes no provision for the compensation of persons whose property is merely injuriously affected as distinguished from persons whose property is taken. [The learned judge quoted the remarks of Sedgewick, J. (1904), 34 S.C.R. 650 at p. 657].

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In short, before doing anything which will injuriously affect the rights of others in land, or in the waters in question, the Company must acquire such rights. The Act does not authorize the Company to divert these waters, or sensibly to diminish their flow until it has first acquired the rights of the riparian proprietors, of which, apart from the statute, such Acts would be an invasion. The Company, that is to say, does not acquire the right to divert as against the lower riparian until it has first appropriated that riparian's right to the flow of the stream, and no abstraction or diversion of the water of the stream in itself can, under the statute, effect an appropriation of anybody's rights. It is, in the sense I have mentioned, namely, the acquiring of rights in the streams and waters referred to under the statute for the purpose of the Company's undertaking, that the

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word "appropriated" is used in the passage I have just quoted from Lord Davey's judgment; and I quote from Sedgewick, J., at pp. 656, 657 and 658, of the report of the judgment in the Supreme Court of Canada, in further confirmation of my view: [which the learned judge proceeded to do].

As I have pointed out, it is not open to dispute since the decision in *Saunby* v. *London (Ont.) Water Commissioners, supra,* that without the consent of riparian proprietors, the Company cannot, under its statutory powers, divert any of the waters in question for the purpose of supplying the district of Esquimalt, or for the purposes of carrying out any obligation to supply the City of Victoria, which might arise under section 10 of the amending Act of 1892, without first acquiring the rights of the riparian proprietors below the point of diversion; and, indeed, it is equally apparent that as against non-assenting riparian owners below its reservoirs, the use of the waters of Goldstream river in the manner in which they have been used since 1897, for the purpose of supplying water for conversion into electric energy to the B. C. Electric Ry. Co.—involving the impounding of the sources of supply, the checking of the flow at some seasons, and the augmenting of the flow at others—would be a wrongful interference with the rights of such proprietors. It is not, I think, material for our present purposes whether the statutory powers of interference with the flow of Goldstream river authorize such interference for the purpose of carrying out an arrangement like that made between the Company and the B. C. Electric Ry. Co. It is not open to dispute that since 1898 the Company has, in the *bona fide* belief that in so doing it was acting within the limits of its powers, controlled and altered the flow of the river from time to time, to suit the necessities imposed by these arrangements. In the absence of evidence it may be assumed in respect to the lands acquired since 1898, that the Company acted with the assent of the proprietors; but with respect to all of the lands, the legitimate inference, in my opinion, is that they were purchased by the Company in order to give it such control of the streams in question as will enable it to carry out its statutory undertaking. We are not, I think, to suppose that the Company was not aware of the nature of its

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rights, or of the conditions upon which alone it could legally exercise its powers. Finding that it has taken the steps necessary to satisfy these conditions, we must, I think, assume that the steps were taken with that end in view. Indeed, I have heard no suggestion, and one does not occur to me, other than the desire to obtain control of the flow of the streams, in order to apply them to the purposes authorized by its Acts, which would account for the purchase of these lands.

Are the Company's rights in the waters then affected by the circumstances, first, that the rights of the riparian proprietors were acquired by contract, and not by the exercise of their compulsory powers; and secondly, that they were acquired as incidents to the ownership of the lands themselves, and were not in the process of appropriation severed from that ownership? The Act requires that before the compulsory powers of the Company may be put into exercise with respect to any rights in waters or land, the Company must first endeavour to contract for the purchase of those rights with their owner; and I do not stop to argue the question whether if an agreement is arrived at, the provisions of the Act apply to the rights of purchase in any less degree than if the prices were settled by arbitration. The second branch of the question at first sight presents greater difficulty, But on consideration, I have come to the conclusion that a similar answer must be given to it. I repeat that the Company as a condition to putting its powers to divert into operation, must acquire the rights of the lower proprietors. It is quite obvious that in many cases the value of the riparian rights themselves, apart from the land, severed from the land, might be difficult of ascertainment. In some cases these riparian rights might constitute the sole value of the land, and altogether one could readily conceive that it would be less costly to purchase the proprietor's holding complete, than to proceed to arbitration with respect to the value of his water rights.

Now, under the Company's principal Act, it had no power to deal with real estate generally, but if for the purpose of enabling it to control the flow of Deadman's river, it deemed it advisable to purchase the land traversed by that river, rather than confine itself to the purchase of the rights of the riparian proprietors

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in respect of it, could it be maintained that the provisions of the statute apply in any less degree to rights so acquired as incident to the ownership of the land than to rights acquired by severance from the ownership of the land? Let us apply one test. The power to dispose of its property is, in the case of a *quasi* public corporation, created by special Act of Parliament, such as the plaintiff Company (see *Proprietors of Staffordshire and Worcestershire Canal Navigation* v. *Proprietors of Birmingham Canal Navigation* (1866), L.R. 1 H.L. 254 and *Reg.* v. *South Wales Railway Co.* (1850), 14 Q.B. 902), a limited power. It is limited by this rule, namely, that apart from authority expressly given or appearing by necessary implication from its incorporating Act such a corporation may not dispose of its property if by such disposition it should disable itself from carrying out its objects (in which the public have an interest), for which its special powers were conferred upon it. The introductory words of section 10, which I have quoted, constitute, in my opinion, an express legislative application of that principle to the undertaking of this Company. The lands appropriated by the Company under its statutory powers for the purpose of its undertaking, are declared to be vested in the Company forever. I am unable to bring myself to think that under the Act of 1885, riparian rights, acquired through the purchase of the land to which they were incident, in order to enable the Company, in the lawful exercise of its powers, to divert the waters of Thetis lake for the purpose of carrying out the object of its undertaking, could legally be alienated from the Company in such a way as to put it in the power of any individual to stop the operation of its works. Section 4 of its amending Act confers upon the Company certain express powers with reference to the disposition of its real estate, but that does not, I think, materially affect the point before us. I conclude, therefore, that the several interests of the proprietors of the lands traversed by Goldstream river and its tributaries in the waters of these streams, became vested in the Company by its purchase of those lands under section 10 of the Company's Act, 1897.

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I come now to consider the effect of the legislation dealing with water rights. From the earliest times the law-making

authorities of the Province reserved to the Government the power to grant, through specified officials, rights in respect of the diversion of the waters of natural streams for use in agriculture and in mining; and I think (on the true construction of the legislation) subject to the payment of compensation, for use in other lawful ways. It is not very clear whether these grants (called "records") empowered the grantees to interfere with the common law rights of riparian proprietors except in the case of grants made for use in mining or agriculture. With regard to persons holding lands under grants from the Crown, the circumstance that the form of grant prescribed by the Land Act reserves to the Crown the right to take water privileges for mining and agricultural purposes only, affords strong support for the view that except for these purposes the grant of a water record conferred no power to interfere with such rights. It is not necessary, however, in my view, to determine that question. Riparian lands held by the Company issued under a title based upon a grant issued under the provisions of the Land Act, have annexed to them, subject to the reservations to which I have referred, the full rights of riparian ownership; while the rights incident to the lands acquired through grants from the E. & N. Railway Company are limited by no such reservation; and subject to the effect of the special legislation of 1892 and 1897, to which I shall presently come, it is not disputed that these rights remained unimpaired at the time the lands were acquired by the Company.

Now, the statutory power to grant a water privilege, or a record authorizing the diversion of water, prior to the Act of 1897, applied only to unappropriated water. It appears at once from a consideration of the language in which the enactments I am referring to are expressed, that the phrase "unappropriated water" as used by the Legislature, cannot be limited to unrecorded water; and if I am correct in my views as to the rights acquired by the Company under its enabling Acts, then the waters which are subject to these rights obviously cannot be described as "unappropriated waters." Riparian rights which became vested in the Company, morever, and were thereafter held by it under its statutory title, became, in my opinion,

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removed from the operation of the existing legislative provisions permitting water privileges for lawful purposes generally to be acquired in unappropriated waters. It is not necessary to consider whether in view of the reservation in the Crown grants in favour of the Crown and its licensees, this statutory title remained, in case of lands, the title to which was acquired through grant under the Land Act, subject to any rights which, under existing or future legislation, might be acquired under a record granted for mining or agricultural purposes, because in this action we are not concerned with any such grant, or any application for such a grant. This much seems, at all events to my mind, clear, that save only to the extent to which these reservations might support it, and subject to any question as to the effect of the Acts of 1892 and 1897, no water record granted under the laws that existed at the time of the passing of the Company's amending Act of 1892 could authorize any interference with the rights of the Company acquired under that Act.

Let us now consider the effect of the Water Privileges Act of 1892 and the Water Clauses Consolidation Act of 1897 on the Company's rights. And first of the Act of 1892. The contention of the Municipality is that this Act effects a statutory annulment of all riparian rights in this Province. The first observation I have to make is that if that was the object the Legislature set before it in passing the Act it is most unhappily framed for that purpose. The natural rights of a riparian owner as such are rights not of user, but rights incidental to the ownership of property: *Kensit* v. *Great Eastern Railway Co.* (1884) 27 Ch. D. 122, *per* Cotton, L. J., at page 133. They are proprietary rights incident to the ownership of the land, and yet section 2 of the Act, which is the section chiefly relied on in support of this contention, makes no reference whatever to such proprietary rights, but deals only with the right to the use of water. The opening sentence of the section which declares that the right to the use of all water is vested in the Crown in the right of the Province must, of course, be taken with the qualifications imported by the rest of the section. It obviously does not apply to the rights of user held under water records or express statutory grants and the general right of all persons to

use water for domestic supply and for cattle, at places of public access to natural streams, is expressly saved. One does not readily see why this general public right should be saved if the like right of the riparian owner was to be taken away, and it seems to me quite plain that that right is not taken away, but is clearly saved by the clause in the middle of the section, "save in the exercise of any legal right existing at the time of such diversion or appropriation." This latter clause, indeed, it is difficult to find any application for, unless one is to take it as applying to the rights of the class we are considering. All other rights seem to be expressly provided for in the latter parts of the section.

The third section provides some light to help us (to) arrive at the meaning of the second section. This section is obviously conceived with the object of preventing in the future the operation of some rule by which it was supposed that rights to the permanent diversion of natural streams and lakes might be acquired without the sanction of legislative authority, The reference to the rights acquired by a riparian owner by prescription give, I think, the key to the section. There seems to be nothing at common law to prevent any riparian owner, with the consent of the riparian proprietors below him, from permanently diverting a natural stream for any purposes whatever. The consent of the lower proprietors would not confer upon him any property in the water flowing in the stream, but there being none to dispute his right, in practice such a consent, in effect, would amount to a grant of the right to divert the stream itself. I am speaking, of course, apart from any question which might arise upon the public rights of navigation and public rights of fishing. The Crown at common law, except as riparian owner, would, in such case, have no power to interfere. The combined operation of sections 2 and 3 is clearly such, that, after the passing of the Act of 1892, such a diversion, unless proceeding under statutory authority, could be prevented at the instance of the Crown. It may very well be, too, that the Legislature thought well to declare in express terms, that the rule prevailing in many of the Pacific States of the United States, by which the right to divert the waters of the natural streams may

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be acquired by the diversion of such waters and the application of them to a beneficial purpose does not prevail in this Province. It is sufficient to say, however, upon this point, that the Act does not in unambiguous terms declare or enact that the pre-existing riparian rights, in respect of lands already granted by the Crown, are abrogated, and the settled principles of statutory construction require, where the intention to affect prejudicially a pre-existing right or status is not declared expressly or by necessary implication, to hold that the legislation has not that effect: *Main* v. *Stark* (1890), 15 App. Cas. 384; *Reid* v. *Reid* (1886), 31 Ch. D. 402 and *Young* v. *Adams* (1898), A.C. 469 at p. 473.

It is necessary to keep firmly in one's mind, in viewing this aspect of the question as to the construction of the Water Privileges Act of 1892, that the right of a riparian proprietor is not a mere privilege, but a right incident to his ownership of the land, "parcel of the inheritance," as it is commonly put by the text writers on the subject. See Coulson and Forbes on Waters, 2nd Ed., 112; Angell on Watercourses, 96 and 98; Woolrych on Waters, 146.

In respect of lands granted by the Crown prior to the passing of this Act, which description comprehends all the lands under discussion, except those acquired from the E. & N. Railway Co., the riparian rights annexed by law to the ownership of the lands subject to the reservation in respect of mining and agriculture contained in the grants themselves passed to the grantee under grants authorized by an Act of the Legislature. The fact that these rights were subject to curtailment by reason of grants of water records under existing legislation did not, in the absence of such records, affect the validity or scope of the rights. The wide difference between the rights and status of a riparian proprietor under the law as it stood prior to the passing of the Act of 1892, and the rights and status of such a proprietor when (according to the construction contended for) his interest in the flow of the stream has been taken from him and vested in the Crown, is at once apparent. That construction would, if adopted, lead to this result: that the owner of property bordering on a stream would be left without any remedy whatever against a wholly wrongful and unauthorized diversion of the stream, even

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to the extent of depriving him of its use for ordinary domestic purposes. The principle I have just stated applies, with special cogency, against such a construction.

As regards the Act of 1897, it cannot, I think, be maintained, that it does not, indirectly, interfere in a most substantial way with pre-existing riparian rights; but it is not, I think, necessary to conclude that that Act, any more than the Act of 1892, abrogates those rights. It makes provision by which persons complying with the conditions prescribed by it may acquire rights to divert water in circumstances under which such diversion, apart from the provisions of the Act, would be a wrongful invasion of the rights of riparian proprietors. But because to that extent the Act is retrospective in its operation, one is not bound to give—indeed, one is bound not to give—to it any further retrospective operation, unless that be necessary in order to give effect to its provisions. See *Reid* v. *Reid*, *supra*, *per* Bowen, L.J., at p. 408.

No records have been granted in respect to any of the waters in question, and the rights to these waters incident to the ownership of the lands purchased by the Company remained in the owners of these lands, unimpaired, as acquired by virtue of the original grants from the Crown at the time these rights were appropriated by the Company. Does the Act of 1897, then, authorize any interference with these rights? To my mind, it does not. The Legislature having, by the Company's principal Act, conferred on the Company certain rights in respect of the waters of Thetis lake and Deadman's river, it could hardly be contended that the Water Privileges Act of 1892, should be construed in such a way as to derogate from these rights; and the Legislature having contemporaneously with the passing of the Water Privileges Act of 1892 passed the Company's amending Act extending the application of its principal Act to the waters in question, there can, I apprehend, be little doubt that the powers and rights conferred upon the Company by that Act in respect to these waters are to be ascertained therefrom without regard to the provisions of the Water Privileges Act: see *The City of Vancouver* v. *Bailey* (1895), 25 S.C.R. 62 at p. 67. An analogous principle protects, I think, the Company's rights

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under its amending Act of 1892 from invasion under the colour of the provisions of the Water Clauses Consolidation Act, 1897.

If my view of the effect of the Company's Acts is correct, namely: that these Acts are to be regarded as the charter of the rights of the Company acquired under them, and that rights in the streams in question have become vested in the Company under the provisions of these Acts, which would be interfered with by the grant of the records which the Municipality is now applying for, then it seems apparent that no such grant can lawfully be made unless it appear that the Water Clauses Consolidation Act of 1897 has in some way repealed or modified the provisions of the Company's Acts. That I am not at liberty to hold, on the principle that I have just quoted from Mr. Justice Sedgewick, unless the intention to effect such a modification or repeal is to be found expressed in, or appears by necessary implication from, the language of the later Act.

The principle is well-settled, but it applies with especial force where such a repeal or modification would affect proprietary rights acquired under the earlier Act; and with still greater force where the powers under which these rights were acquired have been conferred upon a corporate body for public, or *quasi* public, purposes.

[References to Maxwell on Statutes; *Garnett* v. *Bradley* (1878), 3 App. Cas. 944 at pp. 968 and 969, *per* Lord Blackburn; *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59 at p. 69; *Fitzgerald* v. *Champneys* (1861), 2 J. & H. 53 and *The London and Blackwall Railway Co.* v. *The Limehouse District Board of Works* (1856), 3 K. & J. 123 at p. 126].

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In the Act of 1897 there is no express reference to the Company's Acts, and I can find nothing in the Act of 1897, or in the Company's Acts, or in both together, affording any justification to exclude the application of this principle. On the contrary, there is much in the history of the legislation relating to water rights, and particularly the legislation providing for the supply of water for consumption in municipalities and unorganized localities in the Province, which fortifies the contention that the Company's rights were not abrogated by the Act of 1897. In the year 1892 a number of Acts were passed conferring upon

corporate bodies the right to take water from natural streams and lakes for various purposes. In every one of these Acts, so far as I have observed, with the exception of the Company's Act, a provision was inserted, making the rights granted subject to any future legislation, relating to the subject-matter of the Act conferring. Between 1892 and 1897 it was the settled, if not the uniform, practice of the Legislature to grant privileges of a like character only upon a like condition, and in *Centre Star* v. *Rossland* (1903), 9 B.C. 403, it was held that a provision of this nature, which was found in the special Act there under consideration, was sufficient to exclude the application of the principle; and the rights acquired under the special Act were held to be subject to the conditions of the Water Clauses Consolidation Act.

That this legislative policy, expressed in provisions of the character to which I have referred, stopped short of interference with rights acquired under the Company's Act is, to my mind, forcibly indicated by the absence of any corresponding provision in the Company's amending Act of 1892. Further, Part III. of the Water Clauses Consolidation Act of 1897 (which provides for the establishment of systems of waterworks and the granting of records to municipalities, and to companies specially incorporated under the Act, authorizing the diversion of water for the purposes of such systems) affords positive evidence of a cogent character that the Legislature did not intend that Act to apply to the Company's undertaking. The Company's Act of 1885 was one of a series of Acts by which the Legislature made provision for supplying the inhabitants of various municipalities and districts in the Province with water. All are in their essential provisions framed very much after the same pattern, and provide for the establishing of waterworks systems for the supplying with water the inhabitants of Victoria, Vancouver, Nanaimo, New Westminster and Esquimalt District. In the case of Victoria, the powers were conferred directly upon the municipality. In the other cases, they were vested in corporate bodies. Coming to Part III. of the Act of 1897, by sections 44 (which by section 46 is made applicable to such specially incorporated companies, as well as to municipalities), it is enacted that: [the mere *bona fides*

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of a municipality is sufficient; and that there is no lapse from non-user].

The Legislature here proceeds upon the assumption that any such system of waterworks is likely to be a system of expanding requirements, and makes provision accordingly. The municipality, or a specially incorporated company (that is to say, a company specially incorporated under the provisions of the Water Clauses Consolidation Act), may obtain a record without regard to the present needs of the system to be established; and with respect to the unused or superfluous water, subject to the record, no rights can be acquired by record under the Act which are not subject to automatic reduction to meet the advancing needs of the waterworks system.

Now observe the effect of the contention we are considering upon the rights of companies of the class to which I have referred (that is to say, companies incorporated by special Act for the purposes of the same character as those designed to be secured by the provisions of Part III). The contention is, notwithstanding the Company may have complied with the conditions of its Act by purchasing all the rights in a given stream to which they apply, and thus have acquired the same right to use the waters of the stream for the purposes of its waterworks system as that conferred by a record under Part III.—that such of these waters as remain unused, because not needed for the present requirements are to be regarded, by reason of the operation of the interpretation clause, as "unrecorded water" within the meaning of the Water Clauses Consolidation Act; and therefore subject to the grant of records under sections 9 and 44 of that Act. The protection afforded by subsection (*a.*) of section 44 has no possible application to such a company; because it applies only to companies specially incorporated under the Water Clauses Consolidation Act; and, in short, the logical effect of the contention is that by the operation of the Water Clauses Consolidation Act, the rights acquired under these special Acts for the purposes of operating the systems long established under them are swept away in the sense that they are no longer held under statutory title, but subject to administrative discretion, while these systems are at

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the same time excluded from the protection carefully devised by the framers of the Act, for the benefit of new systems to be established by companies specially incorporated under the provisions of the Act itself. In this connection, it is not unimportant to consider the effect of section 10 of the Company's Act of 1892; the Legislature in imposing the obligation embodied in that section must be taken to have granted by implication the powers necessary to enable the Company to discharge it; and if the Company has been swept within the control of the administrative functionaries exercising the powers conferred by the Act of 1897, one would naturally have expected to see some provision analogous to sub-section (*a.*) of section 44, securing for the Company some protection to rights acquired to enable it to perform that obligation. There will be a declaration, therefore, that no grant can lawfully be made pursuant to the Municipality's application under the Water Clauses Act, and an injunction as prayed for.

There remains to consider the counter-claim. The decision in *Saunby* v. *London (Ont.) Water Commissioners*, to which I have referred, disposes of Mr. *Bodwell's* contention that by virtue of the Municipalities Act of 1873 (which corresponds in material particulars with the Act there dealt with) the Municipality has an interest in the waters in question to which the rights of the Company are subservient. No right can be acquired except through the proceedings prescribed by the Act. As no such proceedings have been taken, it would not be in accordance with the course of the court to make a declaration respecting the powers conferred on the Municipality by that Act. Such a declaratory judgment can only be properly pronounced as "ancillary to the putting in suit of any legal right": *Williams* v. *North's Navigation Collieries* (1889), *Limited* (1904), 2 K.B. 44 at p. 49, (1906), A.C. 136 at p. 144 and *North Eastern Marine Engineering Company* v. *Leeds Forge Company* (1906), 1 Ch. 324 at p. 329. The counter-claim will, therefore, be dismissed with costs. DUFF, J.

The appeal was argued at Victoria on the 5th, 6th and 7th of December, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

W. J. Taylor, K.C., for appellants (the Corporation): The Argument

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"beneficial purpose" mentioned in the definition of unrecorded water, meant a purpose lawful and in the case of the Water Company a purpose authorized by its statute of incorporation. The supply of water for power purposes as distinct from an ordinary water supply to the inhabitants of Esquimalt, was not authorized by the Water Company's Act. The Water Clauses Act repealed all the then existing law of the Province relating to the appropriation of water, and provided a new system whereby water might be appropriated or diverted. Section 4 of the Act enacted that "the right to the use of the unrecorded water at any time in any river, lake, or stream, is hereby declared to be vested in the Crown in the right of the Province, and, save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any river, water-course, lake, or stream, excepting under the provisions of this Act, or of some other Act already or hereafter to be passed, or except in the exercise of the general right of all persons to use water for domestic and stock supply from any river, lake, or stream vested in the Crown, and to which there is access by a public road or reserve."

Section 5 of this Act further declared that "no right to the permanent diversion or to the exclusive use of the water in any river, lake, or stream shall be acquired by any riparian owner, or by any other person, by length of use or otherwise than as the same may be acquired or conferred under the provisions of this Act, or of some existing or future Act."

Argument

The policy of this Public Water Act is obvious. Many charters had been granted authorizing various companies to appropriate water. Very many of the companies so authorized had utilized their powers to a certain extent; many of such companies had made no attempt whatever to appropriate water. The Act protected and preserved the rights of companies which had embarked capital into their undertakings. Beyond that point, however, companies were not protected. In other words, such waters as any of these companies had appropriated and had then actually in use for a beneficial purpose the companies could continue to use for such purposes. The Esquimalt Water Company did not at

this time use the waters of Goldstream for a beneficial purpose within the purview of its charter; in fact did not use the waters at all. The Water Company had a privilege of taking water from Goldstream. So far as it had exercised that privilege prior to January, 1897, it was protected. After that date its right to take under its Act expired.

The Water Company had, it was true, acquired a title in fee between 1892 and 1898 to the lands bordering upon Goldstream with a few exceptions. The ownership of the land, however, did not increase the powers of the Water Company under its Act.

The fact of the Company having constructed reservoirs upon its own land for the conservation of water might give the Company a right to the water while in the reservoirs, but could not give the Company control over such water when it escaped from the reservoirs into the body of the stream. The clause in the Water Company's Act declaring that water appropriated by the Company "should thereupon and forever after be vested in the Company," only vested a proprietary right in the Company for the purposes of the Company, *viz.*, a water supply for the inhabitants of Esquimalt and surrounding peninsula. Once that water escaped into the body of the stream dominion and control over it by the Water Company was lost.

Bodwell, K.C., on the same side, submitted that the order in pursuance of the trial judge's judgment should not have been made. There was no doubt that there was water in Goldstream, but on the admitted facts it was clear that it had never been attempted to be used except for power purposes, and this purpose is outside the scope of the Company's powers. Whether or not the amount of water in Goldstream would be sufficient to be beneficially used by the City was immaterial, but the City should not be enjoined as to that water, as such an order carried with it the declaration that the water was vested in the Company, which of course is disputed. The order should be limited to the amount of water that has been appropriated by the Company, and which is passing through the Company's works, but not to the water which is flowing down Goldstream, and which the Company exercise no control over, and cannot control. The learned trial judge evidently overlooked that point when mak-

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ing the order, but the point was taken on the argument.

[HUNTER, C.J.: Would not any other declaration be useless to the Company, because it would leave the question always open as to what water they had appropriated. Is not the real point of their suit to establish their title to all the waters in those streams?]

The Company cannot place their claim on any higher right than their right to the waters which they have appropriated and are actually using; they cannot claim water under a constructive appropriation. The City contend that all waters which the Company have not under control, and which they have not appropriated, are open to record. They rely on section 10 of their Act of 1885, and the effect given to that section by the trial judge was to give them an absolute right to all the waters of Goldstream. The moving reason on the part of the Company for the Act of 1892 was the contemplation of supplying power to the Tramway Company. Section 10 provides that "the lands, privileges and waters, which shall be ascertained, set out or appropriated by the Company . . . . shall thereupon and forever after be vested in the Company." As to the meaning to be given to the term "vest" as here used, he cited *Hinde* v. *Chorlton* (1866), L.R. 2 C.P. 104 at p. 114; *Stracey* v. *Nelson* (1844), 12 M. & W. 535; *Brumfitt* v. *Roberts* (1870), L.R. 5 C.P. 224; *Rolls* v. *Vestry of St. George the Martyr, Southwark* (1880), 14 Ch. D. 785 at p. 796; *Coverdale* v. *Charlton* (1878), 4 Q.B.D. 104 at p. 110. The Company obtains no more right to the water than is sufficient to carry out the purposes of their Act. It is not a paramount nor an exclusive right: *Mayor, &c., of Tunbridge Wells* v. *Baird* (1896), A.C. 434 at pp. 438 to 442; *Finchley Electric Light Company* v. *Finchley Urban Council* (1903), 1 Ch. 437 at p. 443.

Argument

[HUNTER, C.J.: By section 9, it shall be lawful for the Company "from time to time, and at all times hereafter" to do certain things.]

We do not dispute that, but it must be for the purposes outlined in the Act, and they had not diverted the water in question here for the purposes of the Act, but for an entirely different purpose. Even if the Water Clauses Consolidation Act does not

apply, then when they did from time to time divert water, that water became their property, but the property they get in the water so diverted is limited to the use they make of it, and must be for the purposes for which they were incorporated: *Harrison* v. *Duke of Rutland* (1893), 1 Q.B. 142.

The supplying of water for the inhabitants of the City of Victoria is not a purpose of this Company. Until the Corporation of the City of Victoria give the Company notice that the City requires a supply of water from them, the Company has no power to come into Victoria, so that they were anticipating things when they say they were preparing to supply Victoria with water. Supplying water for domestic purposes is what was contemplated by the Legislature in framing their Act, and for that purpose no doubt they could have appropriated the waters of Goldstream if the necessity had arisen.

Suppose the contention of the appellants is wrong in all other particulars except in respect to the supply of water to the City of Victoria, even then there has been no appropriation of the waters of Goldstream except for power purposes. Therefore, after the water passes through their power house, and escapes from them into the bed of the stream, it again becomes waste water of the Crown. The water is abandoned, and their right over it is lost when it once more finds its way into the stream. But the City claims no right to the water until it gets back into the stream: Farnham on Waters, pp. 2,017 to 2,091; *Cache La Poudre Reservoir Co.* v. *Water Supply & S. Co.* (1898), 53 Pac. 331 at p. 333.

Argument

The trial judge was in error in finding that the Company had obtained the right to the water of Goldstream by purchasing certain surrounding lands. It was never contemplated by the Legislature that there should be any monopoly in water, especially water of this kind, required for public purposes; in any event the Company by purchasing the lands surrounding Goldstream would only acquire the titles and rights of the previous purchasers. It was not set up or contended in any way that these prior owners had any exclusive right to the waters in those lands.

As to the effect of the Water Clauses Consolidation Act, 1897,

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the position of the appellants is that this water is all unrecorded water, waste water of the Crown; and even if it had not been unrecorded water in the beginning, having been allowed to escape from control, it becomes abandoned and reverts to the Crown.

One of the purposes of the Water Privileges Act of 1892, of which the Water Clauses Consolidation Act, 1897, is the successor, was that of regulating the powers and privileges of water companies, and to exclude the possibility of a monopoly in water. The interpretation clause of the 1897 Act shews that when a man has a water record and does not use it, the water goes back to the Crown; in other words, that there should be no water "held up" from use of the public.

[HUNTER, C.J.: Have you any rights there which are liable to be overridden by this Company at any time?]

We submit that the Act of 1897 takes all the powers of administration over unused waters and vests those powers in the Crown. Whatever rights of appropriation of water the Company had in the past they lost them on the passing of the Act of 1897, and instead of having an unrestricted right of appropriation for all time, they must now come in under the Water Clauses Act.

Argument

Again, unless the provisions of the Water Clauses Act are overridden, the City has the right to appropriate so much of that water as they require, and the Company have only a secondary right, because under the 1897 Act, the Municipality comes first, with the added advantage that they need not even specify for what purpose they require the water.

As to what if any compensation should be given to the Company for their works and improvements in the event of the City deciding to take over the whole of the water of that area, we submit that the Company certainly had no right to the water, and the question of compensation for the works might be considered; but in any event, in view of the language in the 1892 amendment to the Company's Act, whereby the rights of the City of Victoria were especially protected and preserved, the Company took a gambling chance. Therefore, the City must be right either under the old statute of 1873, or under the Water

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Clauses Consolidation Act, 1897. If the contention of the City be right, then both the Company and the City have lost the right to appropriate the water, the City under the 1873 statute, and the Company under the Water Clauses Consolidation Act, 1897, and under this Act the City has the prior right of appropriation.

Luxton, K.C., for the respondent Company, submitted that the Corporation had no authority to post the notices of their application on the Company's land; the Company under their Act of incorporation own the land and the waters upon them absolutely, and the Water Clauses Consolidation Act, 1897, does not apply.

[HUNTER, C.J.: Why then trouble yourself about the form of the notices at all?]

Sections 8, 9 and 10 of their 1885 Act, give the Company power to supply water anywhere on their lands between the springs or sources of supply and the points where the water is distributed in Esquimalt.

Then the word "vest," referred to in section 8, does not bear the restricted meaning given to it by counsel for the Corporation. This is apparent from the way the word is used in another connection at the end of the section, and if it were intended that the word should have that restricted meaning when applied to the water, and not when applied to the other property of the Company, the Legislature would have defined it accordingly: *Metropolitan Railway Co.* v. *Fowler* (1893), A.C. 416; *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884), 9 App. Cas. 480 at p. 491; *Medway Co.* v. *Romney* (1861), 9 C.B.N.S. 575.

Argument

Section 12 of the Act deals with the purposes to which the water may be applied; it regulates the use and distribution "for all purposes," instead of being limited to supplying domestic needs. In fact, long ago, when the Company were using only the Thetis lake supply, they furnished water to operate a Pelton wheel at the naval yard at Esquimalt. The Corporation seek to record water which the Company by its works have stored, after collection, in reservoirs.

[HUNTER, C.J.: No; water which you allow to escape; it is not under your control. The strongest argument which I can see in your favour is the contention that this water has been

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granted to you; that it goes with the land. If the waters mentioned in section 10 mean something more than waters reduced into possession, then it means the streams. Waters which have been ascertained and set out, it speaks of. The section speaks not only of the land, but of the waters, and some meaning must be given to the term waters, it seems to me.

[IRVING, J.: That, to me, also, is the strongest argument which I have heard yet for you. You must shew that you are entitled to prevent anyone from recording the water which you have allowed to escape from those reservoirs into the bed of the stream again.]

We have done everything we can possibly do in the direction of ascertaining and setting out the waters. We are entitled to rely not only upon our statute, but upon our common law rights. Having acquired these lands, we have put ourselves in possession of them and the waters upon them.

[HUNTER, C.J.: As a matter of fact, have you acquired the entire bed of Goldstream river?]

Yes; we have; also the whole source of these lakes in the Malahat district. The Company disputes the statement that they have acquired the Goldstream waters for the purpose solely of supplying power to the Tramway Company. As a matter of fact, the evidence shews that the Thetis lake supply was insufficient, and in 1892 the Company had to look elsewhere for water to meet their requirements. Then as to the status of the Tramway Company, their works are on the Water Company's pipe line; they are occupants within the meaning of the statute, and the Company is not only entitled, but bound to supply them. The Acts of 1892 and 1873 gave the City no right to the waters of Goldstream.

Argument

[HUNTER, C.J.: The Act of 1897 would seem to refer to waters not used; it seems to cut off all dormant rights; and unless you can shew that you have under your Act something in the shape of a grant, you may find you are in the same position as other companies which have not made use of their privileges.]

No; the intention of the Legislature was that, after April, 1892, when that Water Privileges Act came into force, any company which wanted to get power or incorporate for the purpose

of maintaining water or electrical works, could only do so by virtue of this Act; but it did not interfere with any Company incorporated by special Act or otherwise before the coming into force of the 1892 Act. Section 2 of the Act shews that clearly. The City's position was not extended by either the 1892 or the 1897 Act; there is nothing in that statute to divest companies already incorporated of the title to or the use of the waters which they had acquired. The water dealt with was water on the public domain.

[HUNTER, C.J.: There is a distinction between the man who owns water and the man who has a right to divert water. This Act seems to intend to sweep away the rights of the non-user. Now, you have to shew that you have something in the nature of a grant, and a strong argument in your favour is the presence of the word "water" in section 10. It looks to me, subject to what is brought out in argument, as if that was a grant of waters *qua* waters.]

We submit that it is; our rights are saved, as we hold rights granted prior to the passing of the Water Clauses Consolidation Act, 1897, and there is nothing in that Act to take our rights from us. The water in question now before the court is not unrecorded water within the meaning of the 1897 Act. Such water was then (1897) held under plaintiffs' Acts, and the definition of "unrecorded water" does not read so as to include water not "held and used," but only "held" under a private Act, and the latter words of the definition apply only to water recorded under the Act and not used: compare sections 7 and 18. Again, there is no water in the stream except in winter; therefore the application of the City is not a *bona fide* application under section 44. They cannot put themselves into possession of a supply of water for municipal purposes if the water is not there. Further, the water going down there now is not recordable water, because it is water stored up artificially by the Company, who, being owners of the watershed, have the right to store and keep all the waters of that area. In fact, if they chose, they could divert that water in an entirely different way, and allow none of it to flow down the stream bed: *Arkwright* v. *Gell* (1839), 5 M. & W. 203; *Brymbo Water Co.* v. *Lesters Lime Co.* (1894), 8 R. 329;

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Mayor, &c., of Bradford v. *Pickles* (1895), A. C. 587. Then a portion of this watershed comprises the E. & N. Railway belt, which was Dominion property, and the Province has no control over it so as to grant it away, or grant the waters on it.

[HUNTER, C.J.: According to that the Province could not expropriate any land there for the purposes of a school house.

[IRVING, J.: The land was not withdrawn from the power of the Legislature in general, or from the administration of justice.]

They cannot touch that subsidy. The City under the Act of 1873 have no power over Goldstream. What was contemplated there was one waterworks, and although they had a certain area set out in the Act, they chose to erect those works at Elk lake. Therefore, they have exhausted their rights: *Taylor* v. *Corporation of St. Helens* (1877), 6 Ch. D. 264; *Blakemore* v. *The Glamorganshire Canal Navigation* (1832), 1 Myl. & K. 154.

[IRVING, J.: Section 6 of the Act of 1892, I should think, disposes of your argument that they have exhausted their rights under the Act of 1873.]

The Acts of 1885 and 1892 together give the Company power to go to Goldstream and acquire the waters there. The Act of 1873 did not prevent the Company from going there, and the City had not gone there when we went. The City has no right to expropriate our works: *Regent's Canal City and Docks Company* v. *School Board for London* (1885), W.N. 4; *Bristol and North Somerset Railway Co.* v. *Somerset and Dorset Railway Co.* (1874), 22 W.R. 601; *Manchester, Sheffield and Lincolnshire R. Co.* v. *Great Northern R. Co.* (1851), 9 Hare, 284; *Regina* v. *South Wales Railway Co.* (1850), 14 Q.B. 902; *Dublin and Drogheda Railway Co.* v. *Navan and Kingscourt Railway Co.* (1871), 5 Ir. R. Eq. 393.

Argument

Peters, K.C. (*R. T. Elliott*, with them), on the same side: There is no authority for the City to go to Goldstream and prevent the Company forever from carrying on their works according to the requirements of the district which they have to supply under the terms of their Act. To deprive the Company of all the water that now remains there would be to say that the Company shall never improve or be able to enlarge their operations when the requirements call for it.

Bodwell: We are merely asking for the right to apply to the Chief Commissioner for a record.

[IRVING, J.: And the Chief Commissioner will adjudicate upon your application.]

Peters: By the statutes of 1885 and 1892 the Company had a right to go to Goldstream and appropriate all the waters there. That right had to be exercised by their in some way becoming the owners of the property, owners of the waters and the lands. When they had appropriated those waters, the Company became the absolute owners of them, and they were vested in the Company so that neither the City nor anyone else, except those entitled under old statutes, could take one drop of that water. The Company has a statutory grant of those waters. Having that grant, neither the Water Privileges Act of 1892 nor the Water Clauses Consolidation Act, 1897, can interfere with it.

As to the meaning to be given to the term "vest," as used in the 1885 statute, the cases cited by Mr. *Bodwell* all refer to instances where an understood restricted meaning was given to the word; they are all cases where a limited control only is given over the property in dispute. In the present case, absolute ownership is plainly intended.

Appropriation and use are not one and the same thing. The Company appropriated the waters long ago, and all at once; they acquired all the watershed from the source of supply to the sea. The building of reservoirs by the Company was not the act of appropriation; it was merely an incident in making use of the lands for the Company's purposes.

Argument

As to conflict between general and special Act, see *Bailey* v. *Vancouver* (1895), 4 B.C. 433.

As to the intention or effect of the Water Privileges Act of 1892, it was a mistake to suppose that the idea was to obviate the non-user of water privileges or the locking up of public water, as at that time there were but five companies in existence with water privileges by special statutes, and there was only one of these companies which was not making use of its rights. The Esquimalt Company not only has riparian rights by virtue of acquiring the title of previous holders or owners, but they have a parliamentary title to these waters: *Metropolitan Railway*

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Co. v. *Fowler* (1893), A.C. 416. Further, admitting that the City had the rights under the 1873 Act to go to Goldstream, they did not do so; the Company went there first, and therefore the rights of the City, whatever they were, are gone.

The Company's works are not intended for present needs, but for those of the future. It is incumbent upon them as a water company to look out for this.

In any event, even supposing the Company are travelling outside of their statutory powers, it is not the City who may complain, but some person injured, or the Legislature; perhaps the Attorney-General. The question is, not what cause has the City to complain, but has the Company acquired these rights wrongfully or illegally?

Argument

The rights of the City of Victoria are not rights of appropriation but of expropriation, and if they choose to exercise that right, the value they would have to pay would be the value at the time they exercise that right, not the value before the Company took over and improved the lands by conserving the water and erecting works: *Tyson* v. *Mayor of London* (1871), L.R. 7 C.P. 18.

Cur. adv. vult.

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HUNTER, C.J.: Thanks to the exhaustive judgment of the learned trial judge, as well as to the efforts of the learned counsel on both sides of this appeal, the questions for decision have been narrowed down to a comparatively small compass, there being, as I understand it, no material facts left in dispute.

By section 9 of the Company's charter of 1885, they were empowered from time to time and at all times thereafter to sur-

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vey, set out and ascertain such parts of the land within a prescribed area as they might require for the purposes of their undertaking, and to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries as they should judge suitable and proper, and to acquire any interests in the said lands or waters, *viz.:* Thetis lake and Deadman's river, or any privileges that might be required for the purposes of the Company.

By section 10 of the same Act, "the lands, privileges and

waters which shall be ascertained, set out, or appropriated by the Company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the Company," etc.

By the amending Act of 1892, the provisions of the principal Act as to appropriation, diversion and conveying were extended so as to embrace Goldstream river and its tributaries, except that there is no vesting clause similar to that contained in said section 10. It is also provided that the power to divert and appropriate water from this river and its tributaries is to be subject "to any grant of rights, privileges or powers arising under the provisions of the Corporation of Victoria Water Works Act, 1873"; and by section 9, that nothing in the Act is to be construed as in any way limiting or derogating from any grant or privilege accorded to the City under the provisions of the said Act. Then by section 10 it is stated that the powers as to Goldstream are conferred only on the condition that the Company will supply, on terms which are specified, a maximum quantity of 5,000,000 gallons *per diem* to the City if so required.

Much of the argument was devoted to the true meaning of section 10 of the principal Act, *i.e.*, as to what is the nature of the grant as regards the water, particularly as regards Goldstream; the City contending that there is only a right to use it for the purposes of the Company, and that such as goes to waste is recordable under the provisions of the Water Clauses Act, 1897; while the Company maintains that it has an absolute grant of the water, and that therefore no one can interfere with it. Both contentions have difficulties to cope with. On the one hand, if the Company has only a right to use the water, so much of section 10 as vests the "waters" in the Company is at least surplusage, as by section 9 it was already given the right "to divert and appropriate," if indeed, it would not be an absurdity to "forever after vest" only the water which is diverted and parted with to the consumers in pursuance of the undertaking. Nor, apparently, does it do to say that what is "forever" vested, is a theoretical quantum, as the quantum is constantly varying in volume. On the other hand, if we were to hold that there was an absolute grant of the "waters" themselves, *i.e.*, that this word was a general comprehensive term including all streams,

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creeks and bodies of water existing over the area acquired, there would then be the anomaly of a different construction being placed on the same language to be found in the same legislation passed on the same day respecting a similar undertaking, *viz.*: the Nanaimo Waterworks Company. That company's charter empowers it to divert and appropriate so much of the water from Nanaimo river at a certain point as it might consider suitable, and "forever after vests" the waters appropriated in the company, but it is of course hardly conceivable that the Legislature meant to make an absolute grant of a particular cross-section of the water in the river. It would also appear to be too fantastic a conception to consider that the Legislature intended that there should be successive grants in proportion to the amount diverted as the undertaking developed from time to time. The difficulty of holding that there was intended to be an absolute grant is also enhanced in the case of Goldstream by reason of the fact that there is no corresponding vesting clause in the amending Act of 1892.

On the whole, I think the best solution of the problem is to be got, by not dissecting any portion of the legislation too minutely, but by surveying the whole together. Treating it in this way, I think that the Legislature intended not to make a grant in terms of the "waters"—which of course it could do if it chose—but, what for most purposes amounts to the same thing, to con-

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fer an exclusive licence to use them from time to time and at all times for the purposes of the undertaking, which took effect in relation to any particular water from the time that all outstanding interests in respect of such water were acquired by the Company, and I think a strong argument in favour of this view is the presence of the conditions imposed in favour of the City in the Company's Act of 1892.

It is obvious that so long as those conditions remain in force no one else could be permitted to interfere with the waters unless they were also to be permitted to put the Company in jeopardy of losing its franchise under the Act, and of having its undertaking destroyed because of its inability to carry out the conditions by reason of the interference. It certainly could not have been the intention of the Legislature to leave it open to

any person to come in and say to the Company that it must take its water from Goldstream from above a certain point to supply the water that might be demanded by the City, because he intended to take water from below that point. There is nothing in the Act to say where or how the water is to be taken, and it seems clear that the option as to these matters is left entirely to the Company; in other words, it is given the exclusive use and control of the stream.

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But even if these conditions had not been inserted, I think the Legislature must be taken to have known that to establish waterworks plants requires large sums of money, and that unless there is a sufficient source of supply reserved to provide for expansion and development, few, if any, capitalists would embark on such an enterprise, and therefore the court should be slow to hold, in the absence of clear language, that the Legislature intended that after those who had obtained the franchise had proceeded to expend large sums of money on the faith of its being a reality, any corporation or person should have the right to come forward on the plea that the franchise was not an exclusive one, and claim to interfere with the streams which have been *bona fide* appropriated, and thereby seriously cripple, or perhaps destroy, the undertaking.

If then it is given the exclusive use and control of the stream, it would be contrary to sound legal principles to hold that the Water Clauses Act of 1897, being a later general Act, was intended to enable any person or corporation to interfere with the rights and obligations created by this special legislation in respect of these particular waters in the absence of plain and unmistakable language, and on this point I entirely agree with the remarks of the learned trial judge.

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I will assume, however, that the franchise does not amount to the exclusive use and control, but that there was only a right to divert and appropriate the water conferred. Even then, I think that the City's claim to record the so-called waste waters under the Act of 1897 is not well founded.

The Act declares all "unrecorded" water to be vested in the Crown (which of course once vested cannot be divested without a new record or grant) and proceeds to provide a general

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code by which the right to take such water is to be obtained depending on the character of the application and the circumstances. Unrecorded water is defined to be "all water which for the time being is not held under and used in accordance with a record under this Act or under the Acts repealed hereby, or under special grant by public or private Act, and shall include all water for the time being unappropriated or unoccupied or not used for a beneficial purpose."

This definition appears to be not altogether free from ambiguity, for in addition to water *held and used* under the Act and the Acts thereby repealed, it may mean to exclude water merely *held* under special Acts; or, on the other hand, it may mean to exclude only water *held and used* under special Acts. If it is ambiguous, then again of course well-known rules of construction would prevent us from holding that the Act was intended to have any application to particular streams dealt with by special Acts. But I will assume that by reason of the presence of the last member of the sentence the ambiguity in the former portion is removed. Even then, I think the fallacy in the argument for the City lies in assuming that the water which it alleges is going to waste below the power house is water which is not "used" within the meaning of the above definition. In my opinion, the word "used" in this definition does not mean "consumed," but means "made available"; in other words, that the holder of the

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right is using his right in respect of the water, but not necessarily altogether consuming it. In short, the language is not to be read literally, but the meaning is that the holder of the right must have been exercising his right; and the intention was to extinguish rights that had fallen into disuse (whether acquired before or after the Water Privileges Act of 1892) at the time of the coming into force of the Act, which was delayed a sufficient time after its passage to enable all holders who wished to do so to prevent the extinction. For instance, take the case of a miner holding at the time of the coming into force of this Act an ordinary water record for 100 inches, and suppose that some days prior to its passage he was using 90 inches, then later 80 inches, and on the day of its coming into force, 50 inches; could it be maintained that the coming into force of the Act had *ipso facto*

cut down his record to 50 inches and vested the other 50 in the Crown? I think it must be clear that his right was left intact. Then in what worse position can the Company be which has what amounts to a special statutory record of all the water in the stream?

Then again, assuming that the right to use all the water remained vested in the Company on the passing of the Act of 1897, under what provision has the City any status to obtain a record, interim or other, of the so-called waste waters? Not under section 18, as that section applies only to an "owner of land or a mine," who is seeking a record for ordinary domestic, agricultural or mining purposes, as indeed is shewn by the caption to Part II. of the Act—in fact the notices themselves purport to be given under Part III. of the Act—nor under the latter part, as the provisions of that part apply only to the case of "unrecorded" water.

It is hardly necessary to notice the Water Privileges Act of 1892, as there is nothing in terms in that Act which purports to affect rights conferred by former special Acts, and as it was obviously meant to provide a general scheme of regulations to apply to future specially incorporated companies, which scheme was replaced by the more extensive Act of 1897.

Then there is the circumstance that when the City was obtaining a revision and amendment of its powers in relation, *inter alia*, to the waters in question at the same time that it was securing the insertion in the Company's Act of 1892 of concessions in its interest, and a declaration of its rights under its franchise of 1873, no permission was given to the City to make either permanent or temporary use of such of the waters as were not being turned to account by the Company, and even assuming that the City did not seek the permission, it seems a reasonable inference that the Legislature, having, as it did, the needs and desires of the City brought to its attention, considered that to give such permission was impracticable and inexpedient.

There is also the circumstance to be taken into account, referred to by the learned trial judge, that while the Company's Act of 1892 makes no reference to future legislation, all the other private Acts passed in that year empowering the applicants to

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divert and appropriate water for sundry purposes, provide that the rights granted are to be subject to future legislation.

To recapitulate. I think the question is reducible to a very narrow one. Did the Legislature, having regard to the nature of the undertaking and the conditions imposed, when it conferred the right "from time to time and at all times hereafter" to divert and appropriate the waters of Goldstream, grant an exclusive licence subject only to the right conferred on the City by its Act of 1873 and amending Act? I think it did, and I find nothing in either of the subsequent general Acts referred to which is conclusive to shew that it intended to enable anyone under colour of those Acts to interfere with this franchise. If, however, the licence was not exclusive, it certainly became coupled with a constantly increasing interest, and we should not hold in the absence of clear and unmistakable language, that the interest having sprung into existence, was intended to be prejudiced by any subsequent legislation.

It was strenuously argued for the City that the Company were and are using the waters of Goldstream for a purpose not authorized by its charter, namely, the supplying of water which is used by the B. C. Electric Railway Company to develop electric energy, and that this fact gave it a status to record the water under Part III. of the Act of 1897.

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This seems clearly untenable. The plaintiff Company is empowered to construct, manage and maintain waterworks, and there is no limitation on the purposes for which the water may be supplied, or to which it may be devoted by the consumer. It is no concern of the Waterworks Company what is done with the water after it is delivered to the consumer. But even if the Company were exceeding their powers, the City has for that reason alone no more status to complain than any private person; the remedy for a misuse or an unauthorized use of the Company's powers being an action at the instance of the Crown, or some shareholder of the Company, or the interference of the Legislature.

For these reasons, in my opinion, the City's claim cannot be sustained, and therefore the appeal, so far as it concerns the claim, must be dismissed.

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Then as regards the counter-claim. The learned trial judge dismissed it with costs; and had he done so without prejudice to any proceedings that the City might take in respect of its rights under the Act of 1873 and amending Act, and the Company's Act of 1892, we might not perhaps have interfered. But as the matter stands, the dismissal might be found to embarrass the City in the prosecution of those rights, and I do not think that we ought to leave any uncertainty on the subject. It being therefore proper for this reason to open up the judgment to that extent, at least it seems to me that it is competent to us to exercise our own discretion.

The counter-claim asked, among other things, for a declaration as to the right of the City to divert and appropriate under the above mentioned Acts. It is to be observed that there are no facts left in dispute to enable the court to give such a declaration, and that the question is wholly one of statutory construction, and there can be no object after the facts have been ascertained by a long and expensive litigation, in leaving the City to commence another one for the purpose of ascertaining rights which could have been declared in the former suit.

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As far as concerns those rights, I think it clear, and in fact it was not disputed by Mr. *Peters*, that notwithstanding the rights granted to the plaintiff Company, the City's franchise under the Act of 1873 and amending Act remains in force; but it is equally clear that such franchise can now be lawfully exercised only by resorting to the powers of expropriation conferred by those Acts.

The counter-claim, however, also asked for a declaration that the City had a right to apply for and obtain a record under the Water Clauses Act, and this claim was rightly rejected by the learned trial judge.

In the result, the respondents remain entitled to the costs of the action, and should have the costs of the appeal on the claim, while each party should pay their own costs of the appeal on the counter-claim, and the judgment should be varied as indicated.

IRVING, J.: By the Company's Act of 1885, the plaintiffs

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were authorized to take any land situate within a certain area, which, in their opinion, might be required for the Company's purposes. They were also authorized to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries. The meaning of these words "to appropriate" is "to set aside for the purposes of": see *per* Nesbitt, J., in *Water Commissioners of London* v. *Saunby* (1904), 34 S.C.R. 650 at p. 668.

By the Company's Act of 1892, authority was given to the plaintiffs to divert and appropriate so much of the waters of Goldstream and its tributaries as they might deem suitable and proper (subject as therein provided), and all the rights, powers and privileges conferred by the Act of 1885 in respect of appropriation and diversion of Thetis lake and Deadman's river were extended and made applicable to the waters of Goldstream; but for some reason, possibly because of the grant or privilege accorded to the City of Victoria by the Corporation of Victoria Water Works Act, 1873, as amended in 1892, the rights, powers and privileges are confined to appropriation and diversion. The Act of 1892 does not profess to vest the waters of Goldstream in the plaintiffs in the same manner that the Act of 1885 vests in the plaintiffs the waters of Thetis lake and Deadman's river.

By the City of Victoria Act of 1892, also assented to 23rd April, 1892, the City Water Commissioner was authorized to divert and appropriate the waters of Goldstream and to acquire

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compulsorily or otherwise, the rights and privileges of any person having an interest therein.

By a third Act, also assented to on the 23rd of April, 1892, entitled, an Act to confirm to the Crown all unrecorded and unappropriated water and water-power in the Province, and for other purposes, the Legislature declared (I read from the preamble of the Act of 1897), that

> "All water and water-power in the Province, not under the exclusive jurisdiction of the Parliament of Canada, remaining unrecorded and unappropriated on the 23rd day of April, 1892, were declared to be vested in the Crown in right of the Province, and it was by the said Act enacted that no right to the permanent diversion or exclusive use of any water or water-power so vested in the Crown should after the said date be acquired or conferred save under privilege or power in that behalf granted or conferred by Act of the Legislative Assembly theretofore passed, or thereafter to be passed."

The water of Goldstream was on the 23rd of April, 1892, unappropriated and therefore fell within the sweep of the Act of 1892. But a right to its diversion or use had been given to the City of Victoria, and a similar right that (subject, however, to the right of the City of Victoria), had been given to the Esquimalt Waterworks Company.

Parliament imposed no terms as to the time within which the City or the Company should exercise the rights conferred on them respectively; nor did it indicate whether the user of Goldstream was to be a joint user; nor did it prescribe how disputes should be settled in the event of both the Esquimalt Waterworks Company and the City desiring to make use of its waters; nor did it prescribe any time within which the City must assert its intention of exercising its right to acquire the plaintiffs' rights in Goldstream.

In May, 1892, the plaintiffs began their operations on Goldstream. They cleared out the banks of the stream and erected dams for the purpose of making reservoirs, increased the volume of available water, and took precautions to insure its purity.

They also constructed works by which the water could be, and was, led to the Tramway Company's power house, and there used for the purpose of generating power for the use of the Tramway Company, but although they have abundant water for distribution, they do not employ any for any purpose, other than for the generating of power at this one place. The defendants seek to acquire this water, at a point below the power house, after it has done its work there, and before it reaches the sea.

It seems to me to be clear that whatever the rights of the City may be to these waste waters which they propose to acquire without paying the Esquimalt Waterworks Company for collecting there, the City has, under its Act of 1873, as amended in 1892, the right to acquire, by the compulsory powers contained in those Acts, the whole of the interest of the Esquimalt Waterworks Company in the Goldstream waters. That seems abundantly clear, and having regard to the pleadings, I think that a declaration on that point should have been made.

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Now, as to the acquisition of the surplus or waste waters, the question is more difficult.

The Esquimalt Waterworks Company by their Act of 1892, acquired (subject, etc.), a licence to take the waters of Goldstream. This privilege enabled them to appropriate waters in advance of their requirements and possibly (see *Wilts and Berks Canal Navigation Company* v. *Swindon Waterworks Company* (1874), 9 Chy. App. 451), to supply water for power purposes to the Tramway Company; but does their Act of 1892 confer on them such a property or ownership in the waters flowing in the natural bed of the Goldstream river as to prevent any other person from acquiring that water under the provisions of the Water Clauses Act of 1897? That question must be answered by considering the objects which were contemplated by the Act of 1892, and the scope of the Water Clauses Consolidation Act, 1897. The preamble to the Act, after referring to the Water Privileges Act of 1892, goes on to say:

"And whereas, it is necessary and expedient at the present Session, to provide for the due conservation of all water and water-power so vested in the Crown as aforesaid, and to provide means whereby such water and water-power may be made available to the fullest possible extent in aid of the industrial development, and of the agricultural and mineral resources of the Province;

"And whereas, for the furtherance of the purposes aforesaid, it is expedient to enact an exclusive and comprehensive law governing the granting of water-rights and privileges, and to provide and regulate the mode of acquisition and enjoyment of such privileges, and the royalties payable to the Crown in respect thereof."

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The Act then provides for the appointment of a set of officials to whom (under the supervision of the Lieutenant-Governor in Council) the administration of all the water by the Act vested in the Crown, is committed.

Provision is made for the acquisition of water for ordinary, domestic, agricultural and mining purposes, and the supplying of water by waterworks systems to cities, towns and unincorporated localities. As a consequence of the passage of the Act, the necessity of obtaining the sanction of the Legislature by Private Bill no longer exists. The Act deals with the acquisition and expropriation of "recorded" water and "unrecorded" water. "Recorded" water is not defined, but we can learn what it is by

reference to "unrecorded" water, which is defined as follows: [Already set out.]

Much reliance was placed by the counsel for the City on the words "not used for a beneficial purpose," and having regard to the preamble, and the scope of the Water Privileges Act, 1892, and Water Clauses Act, 1897, I do not see how the contention of the City that the waste waters of Goldstream are "not used for beneficial purposes" can be resisted, provided the Act of 1897 applies. It may seem unjust or unfair on the part of the City to avail themselves of all the work of the Esquimalt Waterworks Company, but that cannot affect the plain words of this section. The question then is, whether the Act of 1897 is applicable?

By the Act of 1892, passed on the 23rd of April, 1892, that is, some weeks before the Esquimalt Waterworks Company made any appropriation under their statute, there was vested in the Crown the right to the use of all the water in Goldstream.

The plaintiffs' Act of 1892 gave them power to divert and appropriate so much of the said waters as they should deem suitable and proper. If these two sections are compared, it will be seen how much more comprehensive is the language used in the Public Act than that found in the Private Act. In my opinion, the statute of 1897 was intended to control the acquisition and use of the waters not appropriated on or before the 1st of June, 1897. The rule that a later general Act shall not interfere with an earlier special Act is not being infringed. It is not in point. The Company's Act of 1892 did not give to the Esquimalt Waterworks Company the exclusive use of Goldstream water from its source to its mouth. Nor can the Company by taking possession of the source of the stream confer on itself any greater rights than those conferred by the statute. Their Act merely granted a licence to take what was necessary. By a public statute of the same date the Crown reserved to itself the rest of the waters in that stream, and in 1897 the Legislature prescribed a method by which the right to use these waters, as well recorded as unrecorded, could be obtained, that is to say, by application to a commissioner, from whom, instead of from the Legislature, a right to permanently divert water can be obtained.

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In making that grant the Commissioner must have regard to existing rights (section 15). His adjudication is subject to revision by the Lieutenant-Governor in Council (section 42*b*). In short, he can take into consideration all those matters which the Private Bills Committee would consider in dealing with a petition for a Private Bill. Under the scheme of the Act the Lieutenant-Governor in Council can see that no injustice is done to the plaintiffs, and at the same time see that the waste waters are made avilable for the defendants' requirements.

For these reasons I would allow the appeal and set aside the judgment. The plaintiffs' application for an injunction should be dismissed. The defendants are entitled to a declaration that they have the right to take the unrecorded waters under the Water Clauses Consolidation Act, 1897; also the right to take the waters of Goldstream under the Act of 1873. After making these two declarations, it seems unnecessary to make any declaration as to the plaintiffs' rights.

MORRISON, J.: The defendants, the City of Victoria, in 1905, invoked the provisions of Part III. of the Water Clauses Consolidation Act, 1897, which deals, *inter alia*, with the supplying of water to cities, and posted notices of their intention to apply for certain records of the water of Goldstream. Thereupon the plaintiffs brought the present action seeking to enjoin the defendants from further proceeding with those applications, basing their claim upon an exclusive right to the water of Goldstream, which they allege they have acquired from the Legislature and riparian owners respectively, and which right will be invaded if the records sought are granted. They also seek a declaration of their rights as claimed.

In the year 1873, the Legislature passed an Act dealing with the supply of water to the City of Victoria, then, as now, the Capital of the Province of British Columbia. The critical position of the Municipality as to the quality as well as the quantity of the water previously supplied was declared to be before them, and an area contained within a radius of twenty miles of the city was designated, from which a supply could be obtained—a species of water preserve—Goldstream lies within that radius,

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but the City did not seek to utilize its waters until the application in 1905.

In 1885, the Esquimalt Waterworks Company, the plaintiffs, were incorporated by special Act. The preamble sets out the objects to be, to construct, manage and maintain waterworks to supply the town of Esquimalt, the Royal Naval Dockyard, the Royal Naval Hospital and the residents of a peninsula particularly described, but which does not include the City of Victoria, with the right to take water for that purpose from Thetis lake and Deadman's river.

By section 9 they acquired rights of appropriation of those waters, but of course only for the purposes for which the Company was incorporated. By section 10, after appropriation, etc., the lands, privileges and waters became vested in the Company. The Company exercised those statutory rights.

In 1892, the Legislature had before them the whole question of the water rights within the Province, for at the session of that year, the Water Privileges Act, being chapter 47 of the statutes of 1892, was passed, as well as a number of Acts incorporating waterworks companies, electric light companies and power companies. The plaintiffs and defendants were both then before the Legislature as evidenced by the Act to amend the Esquimalt Waterworks Company's Act of 1885, chapter 51 of the Acts of 1892 and the Act to amend the Victoria Water Works Act of 1873, being chapter 64 of the Acts of 1892.

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The Water Privileges Act in its preamble states that the intention is to define and regulate the powers of companies, incorporated under special Act or otherwise, for constructing and maintaining waterworks and electrical works and having power to divert, appropriate and use streams of water for motive purposes. Section 2 enacts that the "right to the use of all water at any time in any river water-course, lake or stream, not being a navigable river or otherwise under the exclusive jurisdiction of the Parliament of Canada, was declared to be vested in the Crown in the right of the Province, and save in the exercise of any legal right existing at the time of such diversion or appropriation, no person shall divert or appropriate any water from any

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river, etc., excepting under the provisions of this Act or some other Act already or hereafter to be passed."

When this Act was before the Legislature, the rights of the plaintiff Company had not been extended to Goldstream. Doubtless the fact that the Legislature proposed passing such an enactment being known to the plaintiffs led them to secure the subsequent amendments of 1892. The preamble to the Company's amending Act of that year, shews the intention of the Legislature to be to give the Company power to improve their waterworks system by an extension of their operations to Goldstream, and to divert and appropriate its waters for conveyance to the town of Esquimalt and the peninsula described in their original Act, but in sections 1, 9 and 10, the rights of the City of Victoria in those waters are recognized, and those of the Company are subordinate thereto. Again, there does not appear in the amending Act any vesting clause similar to that in section 10 of the Company's original Act. The amendment to the City Water Works Act, passed also at this session, being chapter 51 of the Acts of 1892, does not cut down any rights given the City in 1873. In section 6 power is given the City to lay pipes and carry water through Goldstream district. And by section 14, the City is prohibited from distributing water within the area where the plaintiff Company have the right under their Act to distribute water; thus again shewing the limits within which the plaintiffs are confined in their operations. Upon the passing of the amendment to their Act, the plaintiffs purchased from the riparian owners on Goldstream their lands, and proceeded to build reservoirs, etc.

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From 1892 until 1897 the Legislature did not deal with the water question. In the latter year a comprehensive and exclusive law was passed governing the granting of water rights and privileges and regulating the enjoyment and use thereof, known as the Water Clauses Consolidation Act, 1897. Section 2 attempts to define "unrecorded water." Included in that definition is water "not used for a beneficial purpose." Doubtless, water may be used beneficially in a number of ways, but in whatever beneficial way it is used, say by the plaintiff Company, it must be in manner authorized by their Act of incorporation.

The plaintiff Company not being a power company, are precluded from performing the functions of a power company. So that any use of the water of Goldstream by the plaintiffs pursuant to their contract with the B. C. Electric Railway Company is *ultra vires*, and the water so used cannot be said to be used for a beneficial purpose. The learned trial judge finds that no beneficial use is or was made of the Goldstream water, except under their contract with the Tramway Company in 1898. That the Legislature did not intend to confer any such power upon the plaintiffs as they are exercising on Goldstream, seems to me manifest.

The doctrine of *ultra vires* as enunciated in *Attorney-General* v. *Great Eastern Railway Co.* (1880), 5 App. Cas. 473 at p. 481, was followed in a very recent case, *Attorney-Genera* v. *Mersey Railway Company*, decided by the Court of Appeal on the 4th of December, 1906, and reported in 23 T.L.R. 129. That principle is that "Where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited."

And Vaughan Williams, L.J., in the latter case at p. 136, says:

"You ought to give a wider construction to the words of a memorandum of association creating and defining the powers of a purely commercial company having no compulsory powers and no monopoly than you would give to the words of a statute creating a company like the railway company, having compulsory powers of land purchase and a practical monopoly."

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Were the plaintiffs' contention to prevail, the Company would have a practical monopoly.

Applying those principles to the Company's "charter of its rights" it must be held to be confined to the main purpose of its Act, and restricted in its operation to the area defined thereby. The supplying of water from Goldstream to an electric tramway company to enable it to operate its line of railway beyond those prescribed limits is to my mind, clearly *ultra vires*. (See sections 15 and 24 of the plaintiffs' Act, 1892).

If this view be right, and coupling it with the fact that the plaintiffs have made no use whatever of the water of Goldstream for a period of thirteen years, *i.e.*, from 1885 to 1898, I cannot discern what status they have to seek an injunction or even a

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declaration of their rights in this respect. The Legislature has made ample provision for the protection of the public as well as private corporations in circumstances such as exist in this case. True, the Company, instead of exercising its powers of expropriation in respect to Goldstream, purchased the riparian lands, and therefore claim they have acquired an absolute right to or property in the water.

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The purchase of lands gave the Company no greater rights than the owners possessed, *viz.:* the right to the uninterrupted, undiminished, unpolluted flow of the water past their lands, so that it could be enjoyed for the purposes incidental to their ownership. The Company purchased those lands solely by virtue of the limited authority given them by their Act of incorporation, and for no other purpose, however varied the other purposes to which the lands and water could otherwise be put.

The position of the Company, as compared to that of the riparian owner, as to the use of the water, is reversed. The riparian owner had the water as an incident to his right to the land. The Company have acquired the land as an incident to their right in the water. But in the present case, those incidental rights in this particular water are subject to that of the City. The rights or licence claimed are not absolute and exclusive as against the defendants. The Company in dealing with realty are restricted to the acquisition of such lands as may be required for the purposes contemplated by the Legislature: *Duke of Devonshire* v. *Pattinson* (1887), 20 Q.B.D. 263; *The Queen* v. *Robertson* (1882), 6 S.C.R. 52 at p. 94, *per* Gwynne, J.

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In the view I take, the waters of Goldstream are "unrecorded waters." It follows that the City may apply under the provisions of the Water Clauses Act for a record of water in Goldstream. The Commissioner, in considering that application must have regard to all the circumstances intended by the Legislature, including any rights of the plaintiffs there. The City in making this application are, in my opinion, pursuing just such a course as was contemplated by the Legislature in passing the Water Clauses Act, *viz.:* complying with the obligation to recognize the right of the Legislature to preserve their departmental supervision over the disposition of such an important public

utility as water. The state of the law before 1897 respecting water was unsatisfactory and by passing the Water Clauses Consolidation Act the Legislature attempted to remedy existing defects therein. They must therefore be held to have intended to limit existing companies very strictly to their corporate powers.

I would allow the appeal.

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STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (FOREIGN). (No. 2).

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Practice—Appeal—Security for costs—Companies Act, 1897, R.S.B.C. Cap. 44, Secs. 110 and 114—Supreme Court Act, B. C. Stat. 1904, Cap. 15, Sec. 101, as amended by Cap. 15, Sec. 2, 1905.

Defendants applied under section 114 of the Companies Act, for the costs of the action which had been decided in their favour, and also for the costs of the appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, defendants were aware of the plaintiffs' inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place the 27th of June, 1906, and the application for security was made on the 30th of July, 1906:—

Held, on appeal, that the application was made too late, plaintiffs having in the meantime perfected all necessary steps for taking an appeal.

Held, as to the costs of the appeal, that section 110 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed.

Decision of HUNTER, C.J., affirmed.

APPEAL from the decision of HUNTER, C.J., at Chambers, on an application for security for costs under section 114 of the Companies Act, 1897, in Victoria, on the 13th of August, 1906.

Statement

The facts in dispute are set out in the arguments and the reasons for judgment.

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Lennie, in support of the application.

O'Shea, contra.

HUNTER, C.J.: This action proceeded to judgment in December last, and the plaintiffs have duly appealed. The appeal would, in the usual course, have come on to be heard at the April sittings, but was stood over, both at that sittings and at the June sittings for want of a quorum. The defendants now ask that an order be made that the plaintiffs give security for the costs of the action and of the appeal, and base the application on section 114 of the Companies Act. With reference to the costs of the appeal, I think it is clear that section 101 of the Supreme Court Act, limiting the amount to $200, must prevail, assuming that section 114 is wide enough to embrace the costs of appeals to the Full Court, as the former is a special clause dealing with the question of the amount of security which is to be required in the case of appeals to the Full Court, and so must be held to displace all prior legislation inconsistent therewith.

With reference to the costs of the action, I am at present inclined to think that section 114 contemplates that the application should be made before judgment. At any rate it is obvious that, if it is not made until after an appeal is brought, the effect of the order must be to burden the prosecution of the appeal, and therefore to grant the application would appear to be opposed to the intention of the Legislature as expressed in said section 101, which is that no appellant is to be required to put up security to a greater extent than $200, although it is true that the section does not explicitly say that the court shall not have power to require security for the costs of the action as a condition of hearing the appeal. At any rate, even if it is open under the Companies Act to make the application after judgment, I do not think I ought to grant the application in the circumstances. The appellants have prepared their appeal books at great expense and were ready to prosecute their appeal for at least two sessions of the court and have been unable to have it heard through no fault of their own, and I do not think that I ought to make an order which might have the effect of throttling an appeal which was ready for hearing long before the application was made.

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There will be an order for security to the extent of $200 for the costs of the appeal with the costs to the defendants in any event *pro tanto;* the remainder of the summons is dismissed with costs in any event to the plaintiffs.

The appeal was argued at Vancouver on the 10th of November, 1906, before IRVING, MARTIN and MORRISON, JJ.

Lennie, for appellants: This is an application under section 114 of the Companies Act for security for costs, past as well as future, and increased security. Costs of trial were taxed in June, amounting to $18,385.66. Afterwards execution was issued but was returned *nulla bona,* and this was followed by an application for sale of the plaintiff Company's property, when an order was made directing the Crown grants of the plaintiff Company to be deposited in court. Plaintiff Company did not ask for a stay of execution.

The construction of section 101 of the Supreme Court Act as amended by Cap. 15 of 1905 is involved, but we contend we come within section 114 of the Companies Act, 1897. While section 101 of the Supreme Court Act is sweeping, yet it does not either expressly or by implication repeal section 114 of the Companies Act. The existing practice in England corresponds with ours previous to the 1905 amendment. The Supreme Court Act is a general Act governing practice and procedure; the Companies Act is also a general Act. The learned Chief Justice says the amendment to the Supreme Court Act is a special Act; we submit not: see *Headland* v. *Coster* (1905), 1 K.B. 219; *Imperial Bank of China, India, and Japan* v. *Bank of Hindustan, China, and Japan* (1866), 1 Chy. App. 437.

Argument

As to application not having been made until after judgment, it was not possible to get an idea of the Company's standing until after the examination of their officers on execution, when we found that the Company has no assets beyond an interest in certain mining claims. The Company is involved in other litigation also. In any event, section 114 of the Companies Act does not mean that the application is to be made before judgment: *In re Photographic Artists' Co-operative Supply Association* (1883), 23 Ch. D. 370; and in any event an appeal is a

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"legal proceeding" within the meaning of the section. Security will be ordered for past as well as future costs.

Davis, K.C., and *S. S. Taylor, K.C.*, for respondent Company: The decision in the last case cited was not made on our section 114, but on section 110 of the Companies Act. As to the sufficiency of the plaintiff Company's assets, see *Caillaud's Patent Tanning Company (Limited)* v. *Caillaud* (1859), 26 Beav. 427. The defendants had as much opportunity to know our standing last year as they have now. We applied to stay execution and produced our Crown grants. The defendants never appealed from this; therefore we have already not only given security, but have given the best security possible. Defendants are now estopped from asking for further security; they should have appealed.

Section 101 of the Supreme Court Act is nothing but special legislation; it is nothing else than a special rule of law or practice with reference to costs of appeal. One of the tests whether subsequent legislation over-rides previous legislation is whether it is put in an affirmative form. The inducing cause for the passage of section 101 is that no appellant shall be deprived of his right of appeal simply because he has not a large amount of money. The Legislature in passing that section were fully alive to section 114 of the Companies Act, and provided against the latter section working a hardship on the poor man.

Argument

As to security for costs of the trial, apart altogether from the delay in making the present application, the ordinary principle or practice of ordering security is before the trial has taken place: *Republic of Costa Rica* v. *Erlanger* (1876), 3 Ch. D. 62 at p. 69. The court is at liberty to make security for past costs, but not for costs after trial has taken place and judgment has been given. Section 114 is clearly aimed at future costs. The section is not for payment of costs incurred, but for security for costs to be incurred. In any event, there is a discretion in the court in ordering security and thereby heading off our appeal.

In short, section 101 of the Supreme Court Act means that if a person is in other respects in a position to carry on an appeal, he shall not be prevented from prosecuting that appeal so long as he puts up $200.

Bodwell, K.C., in reply: As to deposit of title deeds, the Chief Justice, on the application to sell, refused to make the order, because, in the event of the property being sold and the appeal being successful, there would be nothing to restore to the appellant. The title deeds are no security, because the only value of the property is the mineral upon it; if we are successful here we retain our own and have nothing to resort to for our costs. So far, although we have been successful, we have obtained no costs; there is no prospect that we will be able to recover any costs, and plaintiffs will give no security beyond the $200; in other words, they propose to carry on this litigation at our expense.

As to security for past and future costs, see *Massey* v. *Allen* (1879), 12 Ch. D. 807 at p. 811; *Lydney and Wigpool Iron Ore Company* v. *Bird* (1883), 23 Ch. D. 358.

It is immaterial to plaintiff Company when we apply; if they are a limited company in difficulties they must give security when the application is made.

Security for costs is a matter *ex debito justitiæ*: *Northampton Coal, Iron, and Waggon Company* v. *Midland Waggon Company* (1878), 7 Ch. D. 500 at p. 503. The only thing necessary to prove is a legal position, when the matter is taken out of the realm of discretion: *Pure Spirit Company* v. *Fowler* (1890), 25 Q.B.D. 235 at p. 237. Argument

The Legislature did not interfere with practice and procedure, but placed limited companies in a class by themselves. Section 101 of the Supreme Court Act does not alter section 110 of the Companies Act, the effect of which is, if a company is in difficulties then it must put up security.

Davis, further: There is no case shewn or cited where judgment has been obtained and then security given.

Per curiam: We are unanimously of opinion that this appeal should be dismissed.

Subsequently written judgments were handed down as follow:

IRVING, J.: The defendants apply under section 114 of the Companies Act for the costs of the action decided in their favour, IRVING, J.

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and also for the costs of the appeal from that decision. Section 114 is as follows:

"Where a company under this Act is plaintiff in an action, suit, or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by any credible testimony that there is reason to believe that if the defendant be successful in his defence the assets of the company will be insufficient to pay his costs, require sufficient security to be given for such costs, and may stay all proceedings until such security is given."

By section 101 of the Supreme Court Act it is provided that in no case shall the amount of the security for costs of appeal exceed the sum of $200. In my opinion that section must prevail, and the amount there specified should be the limit.

As to the costs of the action, section 114 gives to the judge what is, to a certain extent, a discretionary power. The judgment was given in February, 1905. Taxation took place 27th June, 1906, and writs of execution were thereupon issued, and this application was not made till 30th July, 1906. In March, 1905, the defendants were fully aware of the plaintiffs' insolvency, unless this case resulted in their favour. The learned Chief Justice thought the application was made too late and that on that ground (I express no opinion on the others) I think his decision should be upheld.

IRVING, J.

In *Northampton Coal, Iron, and Waggon Company* v. *Midland Waggon Company* (1878), 7 Ch. D. 500, it seems to have been assumed that security would not have been ordered at the late period at which it was in fact ordered, unless the plaintiffs by amendment had set up an entirely new case. It was only on the ground that the plaintiffs had made extensive amendments that the defendants were able to overcome objection to the delay.

In *Ellis* v. *Stewart* (1887), 35 Ch. D. 459, Cotton, L.J., said:

"It is the duty of a respondent who applies for security for costs to be prompt in his application, that the appellant may not go on incurring expense which in the event of his being ordered to give security for costs and being unable to find it, will be wholly thrown away."

The application is too late.

MARTIN, J.

MARTIN, J.: It is not necessary, in my opinion, to hold that section 114 of the Companies Act is or is not to be regarded as

a special enactment, or the same as regards the subsequent section 2 of the Supreme Court Act Amendment Act, 1905, because section 114 does not come within the rule relied upon in *Headland* v. *Coster* (1905), 1 K.B. 219 at p. 227. That is to say, the general words in the later Act are not capable of reasonable and sensible application, having regard to the history of the practice and legislation under consideration, "without extending them to subjects specially dealt with by the earlier legislation," and therefore such earlier legislation must be deemed to be altered thereby, and all appellants to be placed upon the same footing as regards the limit of security.

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As regards the second point relating to security for the costs of the action, I am of the opinion that Mr. *Lennie* is correct in his contention that it cannot be maintained that section 114 is restricted to cases before judgment. I am unable to find any such limitation in the very wide language of that section, nor do I see that said section 2 can be sufficiently invoked to curtail it in that respect.

MARTIN, J.

But I am clearly of the opinion that, upon all the very exceptional circumstances of this case, it would not be just to order security to be given, and therefore the appeal should be dismissed.

MORRISON, J.: I concur in the dismissal of the appeal.

MORRISON, J.

Appeal dismissed.

FORIN, CO. J.

1907

Jan. 9.

RE KASLO MUNICIPAL VOTERS' LIST

RE KASLO MUNICIPAL VOTERS' LIST.

Municipal Elections Act, R.S.B.C. 1897, Cap. 68, and B.C. Stat. 1902, Cap. 20, Sec. 4—Qualification of voters—Owner of real estate—Land Registry Act, B. C. Stat. 1906, Cap. 23.

In order to qualify as a voter at municipal elections under section 6 of the Municipal Elections Act, as enacted by section 2 of the Municipal Elections Act Amendment Act, 1902, with respect to real estate, it is necessary that the applicant should be the registered owner of such real estate under section 74 of the Land Registry Act, Cap. 23, 1906.

APPLICATION under section 11 of the Municipal Elections Act, R.S.B.C. 1897, Cap. 68, as amended by section 4 of the Municipal Elections Act Amendment Act, 1902, heard before FORIN, Co. J., at Kaslo, on the 9th of January, 1907. The applicants (thirteen in number) complained that their names had been improperly struck off the voters' list by the Court of Revision. On the 30th of November, 1906, being the last day for putting names on the voters' list, the applicants made declaration that they were severally the owners of certain lands within the limits of the City of Kaslo, and produced deeds to themselves of such lands, dated the 30th of November, 1906, but not registered. The City Clerk accordingly placed their names on the list. On objection being taken before the Court of Revision that inasmuch as the deeds not being registered passed no estate or interest in the land, in view of section 74 of the Land Registry Act, and that therefore the applicants were not owners within the meaning of section 6 of the Municipal Elections Act, as enacted in 1902, the Court of Revision caused the names to be struck off the list.

Statement

Lennie, for the applicants.
R. M. Macdonald, contra.

FORIN, Co. J., *held* that section 74 of the Land Registry Act, B.C. Stat. 1906, Cap. 23, makes registration essential to the passing of any estate or interest, either legal or equitable, in the land described

Judgment

in the deed. The applicants' deeds not having been registered, they were not owners as defined in the Municipal Elections Act, R.S.B.C. 1897, Cap. 68, Sec. 2; that consequently the applicants were not qualified to be on the voters' list as owners, and the judgment of the Court of Revision must be sustained.

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Application refused.

ROLFE v. CANADIAN TIMBER AND SAW MILLS, LIMITED.

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ROLFE v. CANADIAN TIMBER AND SAW MILLS, LIMITED

Master and servant—Company—Liquidation of operating as a discharge of servants.

Plaintiff was engaged as accountant of defendant Company in April, 1904. In the following August, the debenture holders seized the property and put in charge a receiver and manager, to whom plaintiff delivered the books of account, plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—

Held, reversing FORIN, Co. J. (who found that the seizure was fictitious), that there had been an actual seizure known to the plaintiff, and that, following *Reid* v. *Explosives Company* (1887), 19 Q.B.D. 264, the appointment of a receiver and manager operated as a discharge of the servants of the Company, and the plaintiff could not recover.

APPEAL from the decision of FORIN, Co. J., in an action tried before him at Trout Lake City on the 29th of May, 1906. The facts are set out in the head note and reasons for judgment of FORIN, Co. J. Statement

F. C. Elliott, for plaintiff.

R. M. Macdonald, for defendants.

19th July, 1906.

FORIN, Co. J.: The plaintiff sues for $493.69. He was engaged by the defendants as accountant on April 15th, 1904, at FORIN, CO. J.

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a salary of £250 a year. On the 30th of November, 1905, he was dismissed by the defendants. The defendants attempted to shew that some change in the Company had taken place and their counsel argued that this case had been brought within the cases of *Reid* v. *Explosives Company* (1887), 56 L.J., Q.B. 388 and *Brace* v. *Calder* (1895), 64 L.J., Q.B. 582, and that the plaintiff changed with a shuffle that was made by one Leslie Hill on behalf of some debenture holders. The defendant Company is still ostensibly carrying on business, the seizure made by the debenture holders was not *bona fide*, in my opinion it was fictitious; nor was there anything else that occurred to inform the plaintiff that any change had taken place. He says "I knew that all this shuffling was taking place, but I knew it was a 'game.'" So it appeared to him and he thought he was still the employee of the Company and there was no reason why he should not so consider his position. It would have been so easy for the Company to have informed the plaintiff that they were in the hands of a receiver, but here we have Ward, the general manager, signing a warrant for one Holt, who was seizing for the debenture holders as trustee, the same Holt who was secretary of the Company.

FORIN, CO. J.

I believe the plaintiff when he states that he never knew there was a change, nor do I believe there was really a change. I believe it was a shuffling made to suit interested parties, a clumsy attempt truly, and not such as to deprive the plaintiff of his right to receive the usual notice. He is entitled to recover the amount sued for.

The appeal was argued at Vancouver on the 6th of November, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

Argument

Davis, K.C., for appellants: Our defence is that after the fall of 1904, the plaintiff was no longer in the employ of the Company; that he was working for another man altogether for a year and a half after the term he says he was wrongfully dismissed; and in any event he was continued in employment and received the same salary. The question to be decided is whether he continued to work for the Company or was employed by the debenture holders as represented by the receiver and manager,

or for the latter personally. Plaintiff should have brought his action when the debenture holders took charge. His not having done so does away with his right of action now. As to whether there was in fact a seizure, Rolfe not only knew of the proceedings in that connection, but took an active part. If a mortgagee took possession, then under *Reid* v. *Explosives Company* (1887), 19 Q.B.D. 264, the employment of the employees is ended.

He was stopped.

S. S. Taylor, K.C., for respondent: *Reid* v. *Explosives Company, supra,* does not apply. Here the Company admit he is acting for them. There has been no actual seizure or displacement of any kind understood. In the *Reid* case there was an actual seizure, but here the whole evidence tends to shew that the seizure was a sham one.

Per curiam: That there was an actual seizure is shewn by the letter of instructions to plaintiff; therefore under *Reid* v. *Explosives Company, supra,* there was a dismissal. As plaintiff was in employment for some considerable time at the same salary, he suffered no damage.

Judgment

Appeal allowed.

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Jan. 21.

IN RE LONSDALE ESTATE.

Statute, construction of—Land Registry Act, B.C. Stat. 1906, Cap. 23, Sec. 68—Mandamus.

IN RE LONSDALE ESTATE

Section 68 of the Land Registry Act, Cap. 23 of 1906, dealing with the sub-division of land into town or other lots, provides, *inter alia*, that, in case a lot borders on the shores of any navigable water, streets leading to and continuing to such water, must be shewn at a not greater distance apart than 600 feet:—

Held, that the object of the section was to require land abutting on navigable waters to be sub-divided so as to provide straight and continuous access to the water at intervals of not less than 600 feet.

Per MARTIN, J.: The section does not apply unless the streets leading to the water reach it.

APPEAL from an order made by IRVING, J., at CHAMBERS in Vancouver on the 7th of September, 1906.

Statement

The trustees of the estate of Arthur Pemberton Heywood Lonsdale, deceased, submitted to the Municipal Council of North Vancouver a plan shewing a sub-division of a portion of lot 265, group 1, New Westminster district, in pursuance of section 68 of the Land Registry Act. The plan shewed a portion of the lot abutting on the water front, left not sub-divided, the strip so remaining averaging some 400 feet along the end of the lot between First street and the water front. The reeve declined to certify the plan on the ground that under section 68 of the Land Registry Act, the streets should be shewn extending down to the water. On application to IRVING, J., a writ of mandamus was issued directing the reeve to certify the plan in compliance with section 68. From this the Municipal Council appealed.

The appeal was argued at Vancouver on the 27th of November, 1906, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

A. D. Taylor, for the appellant: The object of section 68 of the Land Registry Act is to give the public access to the foreshore, so that if an owner sub-divides his land, he must open the roads or streets to the foreshore.

Davis, K.C., for respondent: The section provides that all streets which lead and continue down to the water must be not more than 600 feet apart. It is merely descriptive; the language is clear. If there are no streets, then there is nothing to which the section can apply.

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: This is an appeal from an order made directing a prerogative writ of mandamus to issue to the reeve of North Vancouver, commanding him to certify to a plan proposed to be filed in the Land Registry Office by the trustees of the estate of one Lonsdale, deceased. The reeve objects to certify on the ground that one of the requirements of section 68 of the Land Registry Act has not been complied with in that the plan does not shew streets not more than 600 feet apart leading continuously to the water. The provision in question reads as follows:

"3rd. That in case such section or lot borders on the shores of any navigable water, streets leading to and continuing to such water are shewn on such map at a not greater distance apart than six hundred feet."

HUNTER, C.J.

The enactment is certainly not as clear as it might be, and the learned judge adopted the view that there is nothing in it to compel the owner to lay out such streets, though if he does lay them out he must shew them on the plan. It seems to me, however, that the other view is the correct one, for the object of the section was not so much to require that any particular class of street should be shewn on the plan (as the plan would of course be defective and misleading unless it shewed *all* the streets laid out) as to require land abutting on navigable waters to be subdivided so as to provide straight and continuous access to the waters at intervals of not more than 600 feet. I therefore think that the reeve was right in refusing to certify.

MARTIN, J.: I think this sub-section (3) does not apply unless the streets which lead towards the water, reach it. The language is clear, and should be given effect to. The appeal should be dismissed.

MARTIN, J.

MORRISON, J.: It seems to me that the Legislature intended

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to give the public access to the shores of navigable water at intervals of not more than 600 feet. Were not that the intention, then I cannot understand why that sub-section was enacted. Were the respondent's views to prevail, a plan could be filed completely shutting out public access to navigable water. I think it was to prevent such a contingency occurring that the clause was inserted. The discretion here exercised is a judicial, not a ministerial one, and the reeve properly refused to approve the plan in question. I would allow the appeal.

Appeal allowed, Martin, J., dissenting.

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Jan. 9.

BOW, McLACHLAN & CO. v. THE "CAMOSUN." (No. 2).

Admiralty law—Rule 63 (Admiralty), scope of to include an equitable set-off—Counter-claim—Evidence—Trial—Balance of convenience.

BOW, McLACHLAN & CO. v. THE "CAMOSUN"

In an action in the Exchequer Court of Canada (Admiralty jurisdiction) for the price of a ship, where the circumstances entitle the defendant to a reduction of the amount claimed, if such claim can be substantiated, the court will not exclude the proposed set-off.

Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience is in favour of trying out any disputes concerning those repairs at the place where the ship is rather than at the place where she was built.

Statement

MOTION for leave to deliver an amended statement of defence, heard by MARTIN, Lo. J.A., at Chambers, in Vancouver, on the 26th of November, 1906. The facts in dispute are reported *ante*, p. 283.

Argument

Davis, K.C., in support of the motion: Though it has been decided by this Court and the Exchequer Court on appeal that this sum £3,638 cannot be set up as a counter-claim, nevertheless we can plead it as a defence: see rule 63; *Padwick* v. *Scott* (1876),

2 Ch. D. 736; Howell's Admiralty Practice; History of Admiralty Equitable Jurisdiction; Williams and Bruce, 3rd Ed., 43-4 and cases cited. This mortgage now depends entirely upon the amount due for the building of the ship, and if the amount depends on good workmanship the court will look behind the mortgage. *The Innisfallen* (1866), L.R. 1 Ad. & E. 72; *Minerva* (1825), 1 Hag. Adm. 347; *The Trident* (1839), 1 W. Rob. 29; *The Harriett* (1841), *ib.* 182; *The Juliana* (1822), 2 Dod. 504 at p. 521. But apart from all this rule 63 is enough; this is really a set-off arising out of same cause or matter; it reduces the claim to that amount and does not ask for a cross-judgment as a counter-claim does.

Bond, contra: The mortgage dated 9th February was given to secure the balance due on the ship, but the subsequent agreement made before the mortgage was due explains the true status, *i.e.*, so long as the terms of the agreement were performed the mortgage would not be called in.

If it cannot go in as a counter-claim, it would be wrong to allow it as a set-off; but this cannot be set off, as it is not a liquidated claim: An. Pr. 1907, pp. 273-4. A set-off cannot sound in damages. The ground taken by the Exchequer Court in dismissing the appeal from MORRISON, Acting Lo. J.A., was that this claim was not an admiralty matter and therefore could not be tried as a counter-claim or set-off. Although a court of admiralty may entertain an equitable defence on a mortgage, this is not an equitable defence; there has been no total failure of consideration, or non-acceptance. Here the ship has been taken and paid for, partly in cash and partly by mortgage: Chitty on Contracts, 14th Ed., p. 58. All that is left is to bring an action for wrongful construction. As to convenience of place of trial, the ship having been built in Scotland, it would be practically impossible to try the action here.

Argument

Davis, in reply: The decision of the Exchequer Court goes no further than that an action cannot be entertained in admiralty for defects in the construction of a ship. This charge is a set-off: see *Young* v. *Kitchin* (1878), 3 Ex. D. 127; *Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 App. Cas. 199; Y. Pr. 1907, p. 54.

MARTIN, LO. J.A. (In Chambers)

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BOW, MCLACHLAN & CO. v. THE "CAMOSUN"

9th January, 1907.

MARTIN, LO. J.A.: The nature and proceedings in this action are set out in the judgment of Mr. Justice MORRISON, *ante*, p. 283, which was affirmed on appeal to the Exchequer Court on the 13th of September last, not yet reported, but noted in 26 C.L.T. 779-81, with another decision in the same application. In this relation it may not be out of place to refer to a cognate decision on the jurisdiction of this Court: *Cope* v. *S.S. Raven* (1905), 11 B.C. 486; and see also *Vermont Steamship Co.* v. *Abby Palmer* (1904), 10 B.C. 383, 8 Ex. C.R. 462.

This is a motion in consequence of the former decision to deliver an amended statement of defence, and the objection arises from the following proposed paragraph thereof:

"7. Alternatively and by way of equitable defence to the plaintiffs' action, in the event of it being held that the said owners have made default under the said agreement and mortgages, and that the plaintiffs are entitled to recover from the defendants in this action the said owners say that the plaintiffs did not build the said ship Camosun in accordance with the terms of the contract, letters, plans and specifications set out in paragraph 4 hereof, but on the contrary the said ship Camosun was built by the plaintiffs negligently and with defective work and materials, and not in accordance with the requirements of Lloyds 100 A1 Class and Board of Trade, nor in accordance with the plans and specifications of the same, with the result that the said owners were forced to spend in repairing and replacing defective materials and bad workmanship, and in making the said ship comply with the requirements of Lloyds 100 A1 Class and Board of Trade, and in repairing and renewing fittings, decorations, furniture and stores damaged through leaking decks and hull, and other defective materials and workmanship and other incidental expenses, the sum of £3,638, particulars whereof have already been delivered to the plaintiffs, and the defendants, the owners of the said ship Camosun claim they are in equity entitled to, and in justice should be permitted to set off and deduct from any and all sums of money which may be payable by the said owners to the plaintiffs, the said sum of £3,638 so expended by them as aforesaid, with interest and costs."

Judgment

While Mr. *Bond* concedes that this Court will entertain equitable defences to a mortgage, he contends, first, that to allow this defence to be set up would be really evading or getting around said decision that it cannot be set up as a counterclaim. As to that, all I need say is that if rule 63 is broad enough to include it as a set-off, it is my duty to give effect thereto. It is not a sufficient ground to reject it that if alleged

in one way it is objectionable, though if set up in a different way it may be permissible. In pleading, much depends on how defences are put forward, and their character may be changed or obscured by the manner of allegation.

Secondly, it is urged that this is not a set-off in the true sense, but a counter-claim disguised, because it arises from an alleged breach of contract for negligent and defective construction and can only ask for unliquidated damages, and as there is not a total failure of consideration it is not an equitable defence to the mortgage; nor is there non-acceptance here, for the owners have taken the ship and paid for her, part in cash and part by the mortgage, and therefore all that is left is to sue as at common law on the said breach.

In reply, it is urged that this defence differs essentially from a counter-claim, for no cross-judgment is asked for, but merely the right to deduct from the balance of the purchase price represented by the mortgage the loss the owners have had to bear occasioned directly by the defective construction, which is simply reducing their claim *pro tanto*, and as the matter is all one between the same parties directly arising out of the same transaction, it is manifestly a case for the consideration of an equitable set-off, and *Young* v. *Kitchin* (1878), 3 Ex. D. 127, and *Government of Newfoundland* v. *Newfoundland Railway Co.* (1888), 13 App. Cas. 199, are relied upon as shewing that an equitable set-off can be founded on damages for breach of contract. At p. 213 of the latter case their Lordships of the Privy Council say:

Judgment

"That was a case of equitable set-off, and was decided in 1852, when unliquidated damages could not by law be the subject of set-off. That law was not found conducive to justice, and has been altered. Unliquidated damages may now be set off as between the original parties, and also against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment.

"It appears to their Lordships that in the cited case of *Young* v. *Kitchin* the decision to allow the counter-claim was rested entirely on this principle."

On considering the whole matter I cannot see that I should be justified in excluding this proposed set-off in circumstances such as these at bar, for they seem to me equitably to clearly

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entitle the defendants to a reduction of the mortgage, if they can be substantiated, and therefore an opportunity should be given them to do so.

Thirdly, I am asked to say in the language of the said rule that this set-off in my opinion "cannot be conveniently disposed of in the action." No evidence is before me on this point other than is contained in the pleadings and the judgments which have been referred to. It is stated in that of my brother MORRISON that the repairs in question were made at Montevideo and San Francisco while the Camosun was on her way out to this Province where she now is, and probably the greater part of them were made at San Francisco towards the close of the voyage. It certainly would be more convenient to dispose of the questions arising out of these repairs here, where the ship is and can be inspected, than in Scotland, and witnesses who would for example, testify regarding her condition on arriving at San Francisco could be examined with greater facility and less expense on this coast, either orally or by commission, than in Scotland. Of course as regards the original construction of the ship, there is much to be said in favour of Mr. *Bond's* contention that seeing she was built in Scotland the evidence must be got there; but on the other hand, the ship is here and the actual inspection of her by skilled persons in the light of the evidence will be of much importance in determining any alleged defects. The truth is it will doubtless be a difficult matter to dispose of anywhere satisfactorily, but I am unable to say that it will be more inconvenient here than in the only other place suggested, and therefore I should not refuse to entertain it. This is apart from Mr. *Davis'* submission that "convenience" means not so much locality as the nature of the issues and the facility for their disposition, in regard to which all I need say is that I think the matter should be additionally considered in that light; but it is not suggested by Mr. *Bond* that in this sense there is any lack of convenience here.

Judgment

The result is that the motion will be allowed, with costs thereof, and of those occasioned by the amendment, to the plaintiff in any event. The reply to be delivered in six weeks as requested by Mr. *Bond*.

Motion allowed.

McGREGOR v. THE CANADIAN CONSOLIDATED MINES, LIMITED. (No. 2).

FULL COURT

1907

Jan. 30.

McGREGOR v. CANADIAN CONSOLIDATED MINES

Statute, construction of—Penal statute—Inspection of Metalliferous Mines Act Amendment Act, 1901, Cap. 37, Sec. 12, r. 21a. and 21b.—"Machinery hereinafter mentioned," meaning of.

Rule 21A., of section 25 of the Inspection of Metalliferous Mines Act, as enacted by section 12 of chapter 37 of 1901, provides that "every person.....employed in or about a metalliferous mine, in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four, (1) operates any direct-acting, geared, or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse-power, and shall perform any such duties for more than eight hours in any twenty-four, shall be guilty of an offence under this Act":—

Held, that the phrase "machinery hereinafter mentioned" must be read distributively; or as meaning "any of" the machinery hereinafter mentioned.

Held, also, that the words "preceding section" in rule 21B., refer to the preceding rule.

Decision of DUFF, J., affirmed.

APPEAL from the decision of DUFF, J., reported *ante*, p. 116.

The appeal was argued at Victoria on the 11th of January, 1907, before HUNTER, C.J., MARTIN and CLEMENT, JJ.

Statement

A. H. MacNeill, K.C., for the appellant Company, cited *In re Miles* (1906), 8 O.W.R. 817; *Nicholson* v. *Fields* (1862), 7 H. & N. 810 at p. 811; *Underhill* v. *Longridge* (1859), 29 L.J., M.C. 65; *Coe* v. *Lawrance* (1853), 1 El. & Bl. 516; *Abbey* v. *Dale* (1851), 11 C.B. 378 at p. 391, and *Downie* v. *Vancouver Engineering Works* (1904), 10 B.C. 367 at p. 369.

Argument

Maclean, K.C., D.A.-G., for the Provincial Government.

The Attorney-General for the Dominion was not represented.

Cur. adv. vult.

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HUNTER, C.J., concurred in the reasons for judgment of CLEMENT, J.

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MARTIN, J.: So far as question (b) is concerned my view is the same as that about to be expressed by my brother CLEMENT. As regards (c) I have reached the conclusion, not without some hesitation, that the view of the learned judge appealed from should be affirmed. The appellant's case would be stronger were it not that in order to give due effect to his argument it is necessary to read the word "or" in the beginning of the sixth line as "and." This as it were balances the difficulty the respondent has to meet in asking us to construe the words "the machinery" in the second and third line as meaning "any of" the same, in order to fully support his contention. Such being the case, and reading the section as a whole, I am not prepared to say that the learned judge has gone too far in adopting the more extended of the two interpretations fairly open, bearing in mind that the prime intent is to protect workmen, though I confess I think the rule of construction invoked has been extended to its utmost limit. The appeal should be dismissed.

CLEMENT, J.

CLEMENT, J.: The appeal so far as relates to question (a) was abandoned upon the opening of the argument.

As to (b), I think the decision of Mr. Justice DUFF was right. The words "preceding section" manifestly mean preceding rule, and while the word section is not commonly used in this sense in Acts of Parliament I can see nothing etymologically wrong in so reading it when common sense requires it.

As to (c), it seems to me that the disjunctive operation of rule 21A. in every one of its subsequent phrases in reference to machinery of the classes specified compels us to read distributively the words "the machinery" in the earlier phrase.

Appeal dismissed.

BANK OF MONTREAL v. HARTMAN.

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Interest—Bank Act, Secs. 80 and 81—Bank stipulating for usurious rate—Reduction to maximum legal rate.

In an action to recover principal and interest on certain promissory notes, bearing interest at twelve per centum "as well after as before maturity," defendant pleaded section 80 of the Bank Act:—

Held, reading sections 80 and 81 together, such a contract between the Bank and the creditor is merely invalid insofar as it stipulates for more than seven per cent.

ACTION to recover $5,337.35, principal and interest due upon certain promissory notes discounted by defendant with plaintiffs; tried before MARTIN, J., at Rossland, on the 1st of July, 1905.

Statement

The notes bore interest at the rate of twelve per cent., "as well after as before maturity." As to the interest defendant pleaded the Bank Act, Sec. 80. When the action came on for trial, judgment was confessed for the principal, and the question of the quantum of interest was argued.

Argument

Galt, for defendant: As the claim for twelve per cent. interest was in excess of the rate allowed by the Bank Act, the contract for interest was *nudum pactum*, and the court, in awarding interest by way of damages, could only allow the legal rate of five per cent.

Nelson, for plaintiffs: Under sections 80 and 81 of the Bank Act (which must be read together) an usurious contract as to interest no longer subjected a bank to penalty and forfeiture; that the contract as to interest was only invalid insofar as it stipulated for more than seven per cent., the maximum rate allowed by the Act; that the Bank were entitled to seven per cent. under these sections, and such rate of interest should be allowed.

Galt, in reply, cited *Banque de St. Hyacinthe* v. *Sarrazin* (1892), 2 Que. S. C. 96; Maclaren on Banks and Banking, p. 165.

Judgment

MARTIN, J.: It is contended by counsel for defendant that,

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because the Bank has, contrary to the provisions of section 80 of the Bank Act, stipulated for and taken on the defendant's promissory notes a prohibited rate of interest, twelve per cent., the contract is illegal and void, and there being then no contract of any kind for interest between the parties, the court will not make one for them, and all that the Bank can recover is that rate authorized by the general law of interest, *viz.*, five per cent.

It was held by Mr. Justice Pagnuelo in *Banque de St. Hyacinthe* v. *Sarrazin* (1892), 2 Que. S. C. 96, that the same section in the Revised Statutes, Cap. 120, Sec. 61, was a matter of public order, and it is argued that a contract entered into contrary to public policy is necessarily null and void; citing *Bank of Toronto* v. *Perkins* (1883), 8 S. C. R. 603 at pp. 610 and 616; and *Dunn* v. *Malone* (1903), 6 O. L. R. 484. But however that may be as a rule, the statute here is peculiar, for the next section, 81, of the Bank Act declares that:

"No promissory note, bill of exchange or other negotiable security, discounted by or indorsed or otherwise assigned to the bank, shall be held to be void, usurious or tainted by usury, as regards such bank, or any maker, etc. . . . by reason of any rate of interest taken, stipulated or received by such bank . . . but no party thereto, other than the bank, shall be entitled to recover or liable to pay more than the lawful rate of interest in the Province where the suit is brought, nor shall the bank be entitled to recover a higher rate than seven per cent. per annum."

Judgment

Reading these two sections together, as they must be read, it would be impossible to hold the contract void; the intention is clearly that it shall be invalid only insofar as it stipulates for more than seven per cent.

Judgment will therefore be entered for the plaintiffs with costs, with interest calculated at that rate.

Judgment for plaintiffs.

MACCRIMMON, PELLY AND PELLY v. SMITH, JOHNSTON, COOK AND SMITH.

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Crown lands (Dominion)—Reservation of timber in grant of land—Mortgage by patentee—Subsequent Order in Council rescinding reservation—Effect as to rights of mortgagee in timber—Accretion—Estoppel.

A grant of land issued pursuant to sections 14 and 15 of the Dominion Land Regulations (Cap. 100, Consolidated Orders in Council) contained, *inter alia*, a reservation to the Crown or its assigns of all merchantable timber. Subsequently an Order in Council was passed cancelling such reservation and declaring that all persons who had received homestead entries for lands similarly granted shall be entitled to the timber on their homesteads free of dues. The owner, MacCrimmon, sold the timber to defendants Johnston and Cook, who in turn transferred their interest to defendant Smith. MacCrimmon's mortgagees claiming under a mortgage of the 5th of August, 1893, brought an action for an injunction and damages for trespass:—

Held, reversing the judgment of DUFF, J. (MARTIN, J., *dissentiente*), that the cancellation operated either as an extinguishment of the reserve, or a grant of the right in gross to the owner of the land; that the owner thereby became possessed of both the land and the profit which issued out of it, the profit becoming extinct and falling into the inheritance. That the reserve mentioned in the Crown grant was merely a licence to enter and cut the timber, and was not a reservation such as that in *Stanley* v. *White* (1811), 14 East, 332 at p. 343.

APPEAL from judgment of DUFF, J., in an action tried before him at New Westminster on the 2nd and 3rd of June, 1904.

The plaintiff MacCrimmon was the owner and the plaintiffs Pelly the mortgagees of a lot in the district of New Westminster under mortgage dated 5th August, 1893, securing the payment of $1,500. The plaintiff MacCrimmon entered into an agreement with the defendants Johnston and Cook, by which the timber on the land was sold to the latter, who in turn sold it to defendant Smith. The plaintiffs' mortgagees claimed to be the owners of the land, and that defendants in cutting and removing the timber under the authority of the agreement with the plaintiff mortgagor, were trespassers, and this action was brought for an injunction and damages in respect of the trespasses.

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The rights of the parties turned upon the question as to whether the property in the timber had passed to the mortgagees. The mortgagor acquired title under a grant from the Dominion of Canada, issued under the authority of the R.S.C. (1886), Cap. 56, relating to lands in the railway belt in British Columbia. Pursuant to sections 14 and 15 of the Dominion Land Regulations, Cap. 100 of the Consolidated Orders in Council, the grant contained a reservation of all merchantable timber. Subsequently, on the 3rd of July, 1899, an Order in Council was passed by which the reservation established by these sections was rescinded, and it was provided that all persons who had received homestead entries prior to the date of the Order in Council, should be entitled to the timber on their homesteads free of dues.

Reid, for plaintiffs.
Macdonell, for defendants.

31st January, 1906.

DUFF, J: In my opinion, by the combined effect of sections 14 and 15 of the Dominion Land Regulations, and the provisions of the Crown grant, the property in the merchantable timber on the land comprised in the mortgage deed was reserved to the Crown subject to the provisions of those sections. These regulations being legislative in their character, it is not necessary, in view of their express terms to consider the distinction referred to at p. 147 of Theobald's Law of Land. It follows, I think, that the rule relied upon by Mr. *Reid*, and stated in Robbins on Mortgages, p. 792, under which the mortgagee gets the benefit of any accretion to the security, does not apply. I take it that the rule extends to those cases only in which some interest in the subject of the mortgage is, after the execution of it, acquired by the mortgagor, or some right or servitude by which the mortgagor's property in the subject of the mortgage was burdened is, after the execution of the mortgage, released or extinguished.

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In this case, under the Order in Council of 3rd July, 1899, the mortgagor acquired an estate in fee in a distinct subject, the property in which had been (by virtue of the regulations

referred to and the provisions of the Crown grant) severed from the subject of the conveyance. In acquiring this estate, the mortgagor got, not an accretion to that which he already had, but something which, in a legal sense, was a thing distinct: see Theobald's Law of Land, p. 141. By the mortgage deed the mortgagor purports in terms to convey to the mortgagees without any exception or reservation, the land on which the timber in question was at the time growing. The document must, however, I think be construed with reference to section 5 of the Short Forms of Mortgages Act, and with reference to the expanded form of the covenant for title set forth in the Second Schedule to that Act. So construing it, one must take it that (the timber in question being the subject of a reservation contained in the grant of the mortgaged lands from the Crown) the deed does not apply to it. There is, therefore, no estate by estoppel, and no room for the operation of the principle stated by Mr. Justice Strong in *The Sydney and Louisburg Coal and Railway Company* v. *Sword* (1892), 21 S.C.R. 152 at p. 159.

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The result is that the action is dismissed with costs, and judgment for the defendant Johnston on the counter-claim with costs. Reference as to damages.

The appeal was argued at Vancouver on the 23rd of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

Reid, for appellants (plaintiffs), cited *Herlakenden's Case* (1589), 2 Co. Rep. 443; *Liford's Case* (1614), 6 Co. Rep. 85; *Lacustrine Fertilizer Co.* v. *L. G. and Fertilizer Co.* (1880), 82 N.Y. 476; *Blewett* v. *Tregonning* (1835), 3 A. & E. 554. This timber coming on the land is an accretion: Ashburner on Mortgages, pp. 178-9, Fisher on Mortgages, 5th Ed. 333. By the cancellation of the restrictions in the Crown grant, the Crown virtually planted a forest on that land, and the timber enures to the benefit of the mortgagee: See *Reynolds* v. *Ashby & Son, Limited* (1903), 1 K.B. 87; *Reg.* v. *Kettle*, Australian Mining Digest, 3. Any of the rights pertaining to land may be separately owned, but when all those rights come into one man, then they merge: 1 Cruise's Digest. Whatever right MacCrimmon has he gets it by virtue of the Crown grant. If we

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are entitled to the timber we are entitled to the money coming from the timber. If we do not get it under the provisions of the statutory mortgage we get it under the merger.

Macdonell, for respondents (defendants).

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: This is an action by a mortgagor and the mortgagees as co-plaintiffs against the defendants for wrongfully cutting and taking away timber on the mortgaged premises, the action being brought in the interest of the mortgagees, and the mortgagor being merely joined as co-plaintiff.

The defendants Cook and Johnston pleaded leave and licence, and in the alternative that they took the timber under an agreement for sale between the mortgagor and Johnston. They also counter-claimed for damages for being prevented by the plaintiffs from enjoying their rights under the agreement.

The mortgage, which is in the usual form under the Short Forms Act, was given on August 5th, 1893, and fell due August 5th, 1898, and the principal with accumulated interest was owing when the action was brought, and the acts of trespass complained of were alleged to have taken place between June 1st, 1900, and February 12th, 1904. The Crown grant issued from the Dominion Government to the plaintiff MacCrimmon on November 26th, 1892, and reserved *inter alia*:

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"All merchantable timber growing or being on the said lands with the right to us, our successors and assigns, to enter upon the uncleared portion of the said lands and to cut and remove such timber."

This reservation was made in accordance with the regulations regarding Dominion lands passed on September 17th, 1889, sections 14 and 15 of which enacted as follow:

"Sec. 14. All merchantable timber growing or being upon any land entered or sold within the limits of Dominion lands in British Columbia, and all gold, silver, copper, lead, iron, petroleum, coal or other mines or minerals shall be considered as reserved from the said land, and shall be the property of Her Majesty, except that the homesteader or purchaser, or those claiming under him, may cut and use such merchantable timber as may be necessary for the purpose of building, fencing or road-making on the land so entered or sold, and may also, under the authority of the Crown timber agent, cut and dispose of all timber required to be removed in the actual clearing of the said land for cultivation; but

no merchantable timber (except for the necessary building, fencing or road-making as aforesaid) shall be cut beyond the limit of such actual clearing; and all merchantable timber cut in the process of clearing, and disposed of, shall be subject to the payment of the same dues as are at the time payable by the holders of licences to cut timber.

"Sec. 15. The patents for all lands, hereafter entered or sold as aforesaid, shall contain a reservation of all merchantable timber growing or being on the said lands, which merchantable timber shall continue to be the property of Her Majesty; and any person or persons now or hereafter holding a licence to cut timber on such land, may, at all times during the continuance of such licence, enter upon the uncleared portion of such lands and cut and remove such timber, and make all necessary roads or water-ways for that purpose, and for the purpose of hauling in supplies, doing no unnecessary damage thereby; but the patentees or those claiming under them may cut and use such timber as may be necessary for the purpose of building, fencing or road-making on the lands so patented, and may also, under the authority of the Crown timber agent, cut and dispose of such timber required to be removed in actually clearing the said land for cultivation, but no merchantable timber (except for the necessary building, fencing or road-making as aforesaid) shall be cut beyond the limit of such actual clearing; and all merchantable timber so cut and disposed of shall be subject to the payment of the same dues as are at the time payable by the holders of licences to cut timber."

These sections were afterwards repealed on July 5th, 1899, by an Order in Council which reads as follows:

"Whereas it is deemed expedient in the public interest that the regulations affecting Dominion Lands in the Railway Belt in British Columbia providing for the reservation to the Crown of the merchantable timber on homesteaded lands in the said Railway Belt should be amended so that all persons receiving homestead entry for such Dominion lands may be entitled to all the timber growing upon such homesteads without paying dues therefor:

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"Therefore His Excellency, by and with the advice of the Queen's Privy Council for Canada is pleased to order that the provision in sections 14 and 15 of the Regulations for the disposal of Dominion lands within the Railway Belt in the Province of British Columbia established by the Order in Council of the 17th September, 1887, as well as by the Order in Council of the 17th September, 1889, chapter 100 of the Consolidated Orders in Council of Canada, for the reservation to the Crown of the timber on lands homesteaded in said Railway Belt shall be and the same is hereby rescinded, and all persons who have received homestead entry for lands within such Railway Belt prior to the date hereof or subsequent to this date shall be and the same are hereby entitled to the timber on their homesteads free of dues.

"This provision shall not apply to any timber heretofore granted or in respect of which any licence or permit to cut has been issued to any

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other person or corporation; nor shall it apply to timber for which dues have either been paid or are due to the Crown."

It is contended by the plaintiffs that the effect of the repeal was to vest the timber in the mortgagor, and that it became subject to the mortgagee's security. At the trial it appeared that the defendant Daniel Smith had not been served, and the defendant William Smith, who considered he had a claim to the timber under a tax deed, gave permission to the defendants Cook and Johnston to cut the timber only so far as he was able to give it; and as against him the action was dismissed, and as to this no appeal has been taken.

The other defendants, Cook and Johnston, admittedly took the timber, but justified under a permission alleged to have been given by the mortgagor, but of course that would avail nothing if the timber had fallen into the security. At any rate, this was the only question that was argued before us, and I take it that the decision of this appeal turns on that question only.

At common law standing trees are considered as *partes soli*, for, as the maxim has it, *quicquid plantatur solo solo cedit*. Therefore had there been no reservation of the timber it would have passed by the mortgage of the land. Now what was the nature of the reservation? I think it is impossible to suppose that it was intended to reserve any parts of the trees as *partes soli*, both for the reason that there could be no object in keeping back any of the soil from the settler, especially as it would be practically impossible to determine with certainty what was merchantable timber, and therefore what soil was reserved; and for the reason that there was no necessity to reserve them as *partes soli* so far as regards retaining the full use and benefit of the timber which was the object of the reservation. I think it must be clear that after the timber was logged off, the settler was to have the right to get rid of the roots and stumps, and that they were not reserved as the property of the Crown or its grantee, as if that were so, his homestead would be pockmarked with reservations, and worthless for any purpose. Therefore I think that there was no estate of any kind reserved out of the land itself, but that the expression "merchantable timber" is to be understood in the sense that a lumberman would under-

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stand it, *i.e.*, as not including the roots or stumps, which would be left in the ordinary course of logging, and therefore that the reservation was nothing more than the reservation of a *profit a prendre* in gross, which the Crown could have granted over in fee or for any lesser estate either to the owner of the land or any other person as it saw fit. Now the cancellation of the reserve operated either as a release or a grant of the right in gross to the owner of the land, and from either point of view when this event happened the owner became possessed, or, to use the technical term, seized, of both the land and the profit which issued out of it, and therefore the profit became extinct, and the timber fell into the inheritance and became in law what it had always been in fact, part of the land which had been pledged to the mortgagees, or to put it in another way, the new interest in the trees became a graft on the old interest in the land. Indeed I think if it were not so the beneficial interest in a given piece of land would in progress of time become so sub-divided, and the rights thereto so numerous and complex as to create a condition that would be intolerable.

What authorities there are I think support this conclusion. In Co. Litt. 280 (a) it is said "a man cannot have land and a common of pasture issuing out of the same land, *et sic de cæteris*," which I take to include a profit in gross. Again in *Tyrringham's Case* (1584), 2 Co. Rep. 379 at p. 385, we find this: "It was resolved, that unity of possession makes extinguishment of common appendant," and it is stated to be a rule of law that "when a man has as high and perdurable estate as well in the land as in the rent, common, and other profit issuing out of the same land, there the rent, common, and profit, are extinct." In *Herlakenden's Case* (1589), 2 Co. Rep. 443 at p. 447 it is said:

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> "If I enfeoff you of my land (except the trees) to have and to hold to you and your heirs, now the trees in property are divided from the land, although *in facto* they remain annexed to the land, for if one cuts them down and carries them away, it is not felony: and therefore in such case, if the feoffor grants the trees to the feoffee, they are re-united as well in property as they are *de facto;* and the heir of the feoffee shall have them, and not the executors, for the feoffee had absolute ownership in both, so that it is not any prejudice but rather a benefit to him that they are re-united to the land,"

which statement would go to shew that even if the trees were

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regarded as *partes soli* there was a coalescence of the interest in the trees with that in the land.

Fixtures, as is well known, attached to the freehold during the currency of the mortgage become part of the security in the absence of stipulations to the contrary, so that where there has been an accretion to the land by the act of the mortgagor, the mortgagee has the advantage of it. Then take the case of an accretion to the land by the act of nature. Suppose, for instance, that new soil was deposited on the old, or that a meteorite fell on the land during the currency of the mortgage, could it be contended that such did not form part of the land included in the security? Or suppose that the mortgagor has cattle pasturing over the mortgaged farm. Could he in the absence of agreement collect and remove the manure to a field not included in the security on the ground that it was his personal property? Is it not clear that it became part of the soil and that the mortgagee could prevent him? Then what difference in principle is there whether the estate is augmented by the hand of man or by the act of nature, or by the operation of law? For my part, I am unable to perceive any distinction, and so far as I can ascertain the cases do not suggest any distinction. For instance, if the lord of a manor mortgages it in fee and afterwards takes surrenders to himself in fee of copy-holds held by the manor, they enure to the mortgagee's benefit: *Doe* v. *Pott* (1781), 2 Doug. 710 at p. 720. And even in the converse case where a mortgagor causes a merger by acquiring a larger estate, equity will be astute to lay hold of any circumstance to prevent the merger operating to the injury of the mortgagee, and will consider the security to have been enlarged rather than lost: see *Trumper* v. *Trumper* (1873), 8 Chy. App. 870. It may of course be suggested, although this aspect of the matter evidently did not trouble Lord Mansfield in the case already cited, that as the fee was transferred to the mortgagee, there was no estate left in the mortgagor to cause the merger; but I take it to be too well-settled to require authority that in the eye of a court in which the principles of equity prevail, the mortgagor is regarded as the beneficial owner, and the mortgagee is looked on as having only a charge, no matter what the form of the mortgage is;

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and I think this must be specially so where as here there is a self-executing defeasance clause and no necessity for a reconveyance to restore the estate to the mortgagor on payment.

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Reference was made to section 5 of the Short Forms Act and it was suggested that the proviso helped the respondents. But this is manifestly intended only to prevent, by way of greater caution, the mortgagor from being taken to have mortgaged more than he got from the Crown as well as to protect the interests of the Crown. No doubt any court would have so construed the section without the proviso, but I do not see what bearing it has on what happens when the freehold is fattened during the life of the security. If the section, which, by the way, purports to be inclusive and not exclusive in its terms, has any bearing on the matter, the argument is rather the other way, because it provides that the mortgage shall be deemed to include the "yearly and other issues and profits of the lands." When this *profit a prendre* fell into the mortgagor, what was it if not an issue or profit of the land?

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For these reasons I think that the appeal should be allowed with costs here and below, and a reference had to the District Registrar to assess the damages. It follows that the counterclaim should be dismissed with costs.

HUNTER, C.J.

IRVING, J.: The mortgage under which the plaintiff claims is dated 5th August, 1893. The merchantable timber did not pass to MacCrimmon until the 5th of July, 1899. If we read the mortgage with the assistance of section 5 of the Mortgages Statutory Form Act (R.S.B.C. 1897, Cap. 142) as we are bound to do, it will be seen that this timber, assuming that MacCrimmon could grant what he had not, was not included in the contract of mortgage. As Pelly can make no claim except as the representative of the mortgagor, the right to the timber could not pass by virtue of the intention of the parties. But there is another element to be considered. Certain changes are brought about by operation of law independent of the acts of the parties. The right the Dominion Government stipulated should not belong to MacCrimmon anwers to the description of a *profit a prendre*, that is to say, a right in the land of another, which consists in the taking of some material profit from the land

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granted. This right the Government could exercise or grant in gross to any person, other than the grantee and the heirs of such person, as a sort of fee simple in a *profit a prendre*: see *Bailey* v. *Stephens* (1862), 12 C.B.N.S. 91 at p. 103. But when the right of the Dominion was released to the owner of the land, the *profit a prendre*, or the estate in fee simple, disappeared, the reason being that a man cannot take common or other profit in his own land as a separate right: Leake's Uses and Profits of Land, at p. 359. The operation of law that takes place is called an extinguishment: see Encyclopædia of the Laws of England, Vol. 8, p. 369. "Extinguishment is the annihilation of a collateral thing or subject in the subject itself out of which it is derived."

After the 5th of July, 1899, the right ceased to exist. The right having been annihilated, I do not see how the mortgagor could re-create it out of the land included in the mortgage.

IRVING, J.

The view taken by the learned trial judge is founded no doubt on the remark of Lord Ellenborough, C.J., in *Stanley* v. *White* (1811), 14 East, 343, that a reservation of the trees then growing or thereafter to grow in the soil may be taken to reserve so much of the soil as was necessary for the growth and sustenance of the trees, but I would submit that the language of the Crown grant "saving and reserving, nevertheless, unto us, our successors and assigns.....all merchantable timber growing or being on the said lands with the right.....to enter upon the uncleared portion of the said lands and to cut and remove such timber," reserves nothing more than a right to cut and a licence to enter.

The action should therefore be determined in favour of the the plaintiff and the counter-claim dismissed.

MARTIN, J.

MARTIN, J.: In my opinion this Court should affirm the judgment appealed from for the reasons given by the learned trial judge. I have considered carefully the two cases specially relied upon by Mr. *Reid, i.e., Herlakenden's Case* (1589), 2 Co. Rep. 443 at p. 447 and *Liford's Case* (1614), 6 Co. Rep. 85, particularly at pp. 93-6, but I cannot see that they materially affect the principle the learned judge invoked. I understand the former was cited to him.

Appeal allowed, Martin, J., dissenting.

THE EMPIRE MANUFACTURING COMPANY, LIMITED v. L. LEVY AND COMPANY.

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Practice—County Court—Affidavit of documents—Documents not disclosed in—Application for further affidavit—Sufficiency of affidavit—Marginal Rule 237—Power and discretion of judge under.

In an action on a guarantee, plaintiffs applied for an affidavit of documents. Defendant Rebecca Levy (who carried on business as L. Levy & Co., with her husband L. Levy as manager) admitted that she had certain letters relating to the present action written subsequently to the 16th of February, 1904 (the date on which defendants notified plaintiffs that they, defendants, would no longer be responsible under their guarantee). Plaintiffs having had previous dealings with defendants on the strength of other guarantees given by them, obtained an order for further and better discovery generally. In her affidavit filed pursuant to this order, defendant Rebecca Levy swore that she had no entry in her books of cheques received on account of the previous transactions to that in question in this action; that if the cheques had been indorsed with the name L. Levy & Co. it was done wholly without authority, and she denied having any documents relating to the guarantees. Plaintiffs then obtained an order "that the defendants do within one week from the date hereof make full discovery on oath of all books of account, ledgers, journals, blotters, cash books, bank pass books, promissory notes, cheques, memoranda and other books of account, statements, or writings which now are, or were in use in the business of the defendants in the years 1902, 1903, 1904, 1905, 1906, with liberty to the plaintiffs to apply again as to the other matters mentioned in the notice of application filed and served herein on the 25th day of July, 1906."

An appeal from this order was dismissed.

Per IRVING, J.: The authority conferred by the County Court rules as to ordering discovery is subject to the same limitations as are imposed by the rules of the Supreme Court.

APPEAL from the order of FORIN, Co. J., at Chambers, in Rossland, on 27th July, 1906, on an application for an order directing defendants to file a further and better affidavit of documents. The facts on which the decision turns appear in the headnote. Statement

The appeal was argued at Vancouver on the 7th of November, 1906, before IRVING, MARTIN and MORRISON, JJ.

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EMPIRE MANUFACTURING CO. v. LEVY & CO.

J.A. Macdonald, K.C., for appellants (defendants), referred to marginal rule 237, County Court rules. The decision in *Jones* v. *Monte Video Gas Co.* (1880), 5 Q.B.D. 556, shews in what instances a further affidavit of documents may be ordered.

[MORRISON, J., referred to *Morris* v. *Edwards* (1890), 15 App. Cas. 309].

The rule here is the same as that applied in *Jones* v. *Monte Video Gas Co., supra.* The court will not permit a "fishing" order for discovery. Defendant Rebecca Levy has sworn she has no further documents relating to the matters in question: see *Yorkshire Provident Life Assurance Company* v. *Gilbert & Rivington* (1895), 2 Q.B. 148. The affidavit is conclusive. This is a fishing expedition wholly.

A. H. MacNeill, K.C., for respondents (plaintiffs): As to what is necessary, see *Saull* v. *Browne* (1874), L.R. 17 Eq. 402; *Compagnie Financiere du Pacifique* v. *Peruvian Guano Co.* (1882), 11 Q.B.D. 55; *Lyell* v. *Kennedy* (1884), 27 Ch. D. 1 at p. 21. If there is a reasonable suspicion that an inspection of these documents will put us on the train of discovery, that will entitle us to inspection. The discovery made here is unsatisfactory when in face of defendant's denial we find evidence which contradicts that denial. That is all we have to shew. There is no privilege claimed here as in *Jones* v. *Monte Video Gas Co., supra.* The English rule is if there is a reasonable suspicion; our County Court rule is if the discovery given is deemed unsatisfactory or insufficient. There is no express authority that the judge will grant further discovery if the first is deemed unsatisfactory. This is the first time the rule has been up for discussion.

Argument

Macdonald, in reply: The English rule is set out in *White* v. *Spafford & Co.* (1901), 2 K.B. 241. This is not an order for specific documents; it is "all books," etc. *Jones* v. *Monte Video Gas Co., supra*, has been followed in *Yorkshire Provident Life Assurance Company* v. *Gilbert & Rivington, supra*; in *Bewicke* v. *Graham* (1881), 7 Q.B.D. 400; *Nicholl* v. *Wheeler* (1886), 17 Q.B.D. 101; *Hall* v. *Truman, Hanbury & Co.* (1885), 29 Ch. D. 307; *Attorney-General* v. *Newcastle-upon-Tyne Corporation* (1899), 2 Q.B. 478. The documents referred to in

Compagnie Financiere du Pacifique v. *Peruvian Guano Co.*, *supra*, were specific documents.

MacNeill, referred to *Hutchinson* v. *Glover* (1875), 1 Q.B.D. 138; *Wiedeman* v. *Walpole* (1890), 24 Q.B.D. 537; *Campbell* v. *McArthur* (1876), 7 Pr. 46; *Cameron* v. *Cameron* (1885), 10 Pr. 522.

Cur adv. vult.

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IRVING, J.: L. Levy & Co. is the registered firm name under which Rebecca Levy, wife of Lewis Levy, carries on a general wholesale and retail tobacco business in Rossland. It is managed by Lewis Levy; Julius Levy, a son, assists in the shop. Rebecca Levy (who for convenience I shall call the defendant) takes no part in the management of the business, her whole attention is given to domestic matters. Lewis Levy has no interest in the business, nor is he paid a salary. Julius has no interest in the business, nor is he paid a salary though he has been in the shop about eight years. The profits of the business are applied to the maintenance of the family, that is to say, the defendant, Lewis and the children. The manager has full control of the cigar and tobacco business, and at different times tells his wife "just as a husband tells his wife, how business is going on."

The plaintiffs are wholesale clothing merchants who send to Rossland commercial travellers from time to time. One of their travellers in October, 1903, obtained from B. Bannett of Rossland an order for shirts, etc., to the amount of $650. Before filling the order he asked and obtained from Lewis Levy the following guarantee:

IRVING, J.

"Rossland, B. C., Oct. 22, 1903.

"The Empire Mfg. Co., Ltd.,
"646 Craig Str.,
"Montreal, Que.

"Gentlemen:—We hereby guarantee the account of B. Bannett for goods shipped to him either at Rossland or Fernie for the sum not exceeding six hundred and fifty dollars. In consideration of which we are to receive from you a commission of 7½% seven and one-half per cent. on the dollar after his notes are paid.

"Yours truly,
"L. LEVY & Co."

Goods were shipped to the amount of $464.84 in November,

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1903 and February, 1904, and the plaintiffs were about to send forward some more when L. Levy & Co. in a letter written by Julius Levy (16th February, 1904) informed the plaintiffs that they would not be responsible for any future shipments. Subsequently, B. Bannett assigned and paid a small dividend. The plaintiffs then brought this action against L. Levy & Co. on the guarantee, for $361.01, the balance due to them after giving L. Levy & Co. certain credits.

The dispute note sets up, *inter alia*, the following defences:

"(2.) The defendant specifically denies that it made the guarantee alleged in paragraph 3 of the plaint herein.

"(7.) L. Levy & Company, the defendant herein, is the registered firm name under which Rebecca Levy carried on a general wholesale and retail tobacco business in the City of Rossland in the Province of British Columbia.

"(8.) The defendant says that if the said firm name of L. Levy & Company was affixed to the said guarantee, which it denies, the same was affixed without the consent or knowledge of the said Rebecca Levy, and that she has never since confirmed or ratified the same."

The plaintiffs applied for an affidavit of documents, and Rebecca Levy by affidavit dated 27th June, 1906, admitted that she had in her possession certain correspondence relating to this present action, that is to say, certain letters written subsequent to the 16th of February, 1904. She said "I first discovered that I had these documents after the commencement of the action." She denied having any other documents.

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Now, as the plaintiffs had previous dealings with B. Bannett on the faith of other guarantees signed by L. Levy & Co., and had on 10th July, 1902, and 8th April, 1903, given L. Levy & Co. cheques for $44.39 and $38.43 respectively, on account of commission, the plaintiffs were dissatisfied with the defendant's affidavit. They therefore applied for and obtained an order, dated 10th July, 1906, for further and better discovery generally, and more particularly as to the two prior payments on account of commission. This is apparently an adoption of the practice prescribed by Order XXXI., r. 19, 19a, R.S.C.: see thereon *White* v. *Spafford & Co.* (1901), 2 K.B. 241.

The defendant in her affidavit of 13th July, swore she had no entry in her books of these two cheques, that she knew nothing of them until after this present action was brought, and

that if the cheques had been indorsed with the name of L. Levy & Co. it was wholly without authority. She denied having any documents relating to the guarantees.

The plaintiffs' solicitor applied for and obtained the order of 27th July now under appeal. The order is as follows: [as set out in the headnote.]

Discovery of documents in the County Court is governed by section 87 of the Act, and rule 237; but having regard to section 76 of the Act, I think the power to order discovery in the County Court is subject to the same limitations as are imposed upon judges of this Court (see on this point *Murtagh* v. *Barry* (1890), 24 Q.B.D. 632, where the power to grant a new trial was considered).

Now, this order of the 27th of July, 1906, is a very drastic order. It will be observed that it is not confined to matters in issue. Apparently it contemplated the making of a full list of all books, papers, etc., in use in the plaintiffs' business during the years mentioned, irrespective of the fact that the plaintiffs are not interested in them in any way and consequently the subsequent production and examination of them. I know of no authority for making such an order, and if allowed to stand, it would work much hardship to those engaged in business. I admit that the question of discovery is a matter for discretion in each case, and this Court ought to be slow to interfere with that discretion, nevertheless it should be the duty of this Court to watch with care and some anxiety any attempt to introduce new methods of obtaining discovery of documents.

IRVING, J.

The plaintiffs are entitled to have produced on affidavit the power of attorney given by Mrs. Levy to her husband, referred to by her in her examination, but that document was not mentioned before us. I think this order should be discharged with costs.

MARTIN, J.: In the first place, and in general, I am satisfied that a County Court judge has no greater power over affidavits of documents under rule 237 of that court, than a judge of this Court has under the corresponding rule 354. In the one case the judge makes such order "as may be just," and in the other,

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"as may.....in his discretion be thought fit." The language means the same thing.

Then as to this particular case. On the 22nd of October, 1905, the defendant was examined for discovery, and on the 27th of June following made (pursuant to notice dated 18th May) an affidavit of documents, and after the order of July 10th last, made a further affidavit, dated the 13th of that month, but now appeals from the order of the 27th of July directing a still further affidavit. The validity of that order depends primarily upon the issues, because it is admitted that there are in existence the usual business books of the defendant firm apart from any question directly relating to the guarantee which gave rise to this action. If the only issues were the scope of the authority of the defendant Rebecca Levy's husband, and her ratification, then I am of the opinion that the order could not be supported. But there is another issue quite as important and more difficult, *viz.:* was the husband not only the manager but also a member of the firm, despite the fact that Rebecca Levy was at the time the sole person who was registered as carrying on business under the name of the defendant Company, as set up in paragraph 7 of the dispute note ?

MARTIN, J.

To determine this issue, which is necessarily involved in the allegations contained in the plaint and dispute note, and is sufficiently raised without the necessity for a reply, there being no counter-claim (see County Court rules 161, 178, 180) the ordinary business books of the firm would be liable to inspection to shew who in reality were its members by disclosing the manner in which they had dealt with each other. From this point of view, which was not perhaps clearly brought out on the argument I think the order must be supported, quite apart from any question as to the sufficiency of the affidavit in other respects, because on this head, or issue, there is so far really no affidavit at all, though the plaintiffs are entitled to it. The affidavit of the 13th of July is frankly restrictive in its scope, and drawn to meet two issues only.

It follows that the appeal must be dismissed.

MORRISON, J.

MORRISON, J.: This is an appeal from an order of his

honour Judge FORIN, Judge of the County Court of Kootenay, ordering the defendant to file a further and better affidavit of documents. The action is brought to recover the price of certain goods sold by the plaintiff to the defendant.

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As appears from the material before us, Rebecca Levy alleged she carries on the business of a tobacconist at Rossland, B.C., under the firm name of L. Levy & Co. The business has been, and is carried on under the entire management and control of Rebecca Levy's husband, L. Levy, together with his two sons, Mrs. Levy attending mainly to her household and domestic duties. The plaintiffs are manufacturers of shirts in the City of Montreal, and claim the sum of $361.01 from the defendants under the guarantee set out below [as set out in the reasons for judgment of IRVING, J.]

Rebecca Levy denies any personal knowledge of this document and transaction, and she made an affidavit of documents from the schedule to which it appears there was no reference to any books of account of the defendant firm. The plaintiff then applied for an order that the defendant should file a further and better affidavit of documents, and in support of this application the plaintiffs' solicitor made an affidavit in which he alleged that similar transactions to the one in question had taken place between the parties hereto, and that commissions were paid by the plaintiffs to the defendants for other sales made similarly to this alleged one, and that he believes the defendant keeps books of account in which entries are made which are material to the issues in this action, particularly as to the composition of the defendant firm. The learned judge made the order sought, from which order the present appeal arises.

MORRISON, J.

The only point in my opinion involved turns entirely upon this, whether the learned judge has discretionary power under rule 237 of Order XVII. of the County Court rules, and if so whether he properly exercised it. That rule is in the words following.

"Any party to a cause or matter may, by notice in writing, require any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. If the party on which [whom] such notice shall be served shall neglect or refuse to make such discovery within five days after service of such notice,

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or such further time as the Court may allow, or if the party serving the notice shall deem the discovery given unsatisfactory or insufficient, he may apply to the Judge in respect thereto and the Judge may, on such application, make such order in the matter and as to the costs of such application as may be just."

Having regard to the pleadings, affidavits and evidence produced on appeal, I have no manner of doubt but the order for a further and fuller discovery is right. The cases cited by counsel in support of the appeal turned on rules quite different from that pursuant to which the judge here made his order. The privilege of questioning the opposite party on discovery is most essential in the proceedings in an action before trial, the omission of which may result in disastrous consequences. It is permitted to be most inquisitorial, and though it would seem that answers to interrogatories are conclusive, yet an affidavit as to documents is not necessarily so. That is substantially all that *Jones* v. *Monte Video Gas Co.* (1880), 5 Q.B.D. 556, decides. In interrogatories the deponent swears to what he knows: in an affidavit of documents he swears to the relevancy of the documents, as to which he may be in error. The case of *Morris* v. *Edwards* (1890), 15 App. Cas. 309, upholds that case.

In the case of *White* v. *Spafford & Co.* (1901), 2 K.B. 241, 70 L.J., K.B. 658, the question turned exclusively on the word "specific" which appears in the rule there considered, and which is not in rule 237 of the County Court rules. It seems quite clear from the judgments of their Lordships on Appeal in that case, that had the word "specific" not been inserted, they would not have disturbed the order appealed from, which was made in circumstances very similar to those in question here.

I would dismiss the appeal.

Appeal dismissed, Irving, J., dissenting.

GREENBURG v. LENZ *ET AL.*

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GREENBURG v. LENZ

Bill of sale—Invalidity—Transfer of goods in the ordinary course of business —Sale of stock en bloc—Application of Bills of Sale Act.

Plaintiff sold his stock of goods *en bloc*, and defendants attacked the sale on the ground that it was part of a scheme between the vendor and purchaser to defraud certain wholesale houses. A jury found that the transaction was *bona fide*, but on motion for judgment, defendants questioned the validity of the bill of sale on a number of grounds, one of plaintiff's replies to which was that the Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act by section 2 (R.S.B.C. 1897, Cap. 32; B.C. Stat. 1905, Cap. 8, Sec. 3):—

Held, that the words "transfers of goods in the ordinary course of business," were wide enough to include the sale of a stock in trade *en bloc*.

ACTION for conversion of a stock of goods bought by the plaintiff from one Folz, tried before MARTIN, J., and a jury at Rossland, on the 5th of August, 1905. Statement

A. H. MacNeill, K.C., for plaintiff.
Hamilton, K.C., for defendants.

MARTIN, J.: The defence to this action on the facts was that it was a fraudulent transaction and part of a scheme concocted by Folz to defraud certain wholesale houses, and to which plaintiff was a party. The jury, however, found that it was a *bona fide* transaction, and that plaintiff gave full value for the stock; the sale was followed by continuous possession, which was given immediately after the signing of the bill of sale. The defendants' counsel contends that said bill of sale is void, for reasons stated, and that since it is so plaintiff cannot succeed, because once a bill of sale has been given the plaintiff must rely on the written document and cannot fall back on possession as a distinct defence: *Ex parte Parsons* (1886), 16 Q.B.D. 532; *Newlove* v. *Shrewsbury* (1888), 21 Q.B.D. 41 and Phipson on Evidence, 3rd Ed., p. 508. In answer to this plaintiff relies upon the verbal bargain followed by possession and cites *Matheson* v. Judgment

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Pollock (1893), 3 B.C. 74; *Brackman* v. *McLaughlin*, *ib.* 265; he furthermore takes the ground that the transaction in any event is not within the Bills of Sale Act, because it is excluded by section 2 thereof, which says that said Act "shall not include . . . . transfers of goods in the ordinary course of business of any trade or calling . . . ."

This latter point must be decided first, before taking up, if necessary, Mr. *Hamilton's* argument, on the effect on third parties of the amendment of 1904, Cap. 8.

The point turns upon the meaning of the words "ordinary course of business," and while Mr. *Hamilton* admitted that they would extend to something more than sales over the counter, he contended that sales by wholesale in the ordinary way would be a reasonable limitation, and that to sell off the whole stock could not be in the ordinary course of any business. On the other hand, Mr. *MacNeill* took the ground that the words were wide in their application, and extended to all commercial transactions in the ordinary course of business dealings, one of which must necessarily be the disposal of a business *en bloc*, and that a narrow construction would defeat and hamper *bona fide* changes in and sales of businesses which in large centres especially were of every-day occurrence. In support of his contention he cited the decision of the learned Chancellor of Ontario in 1886 in *Clarkson* v. *Rothwell*, which is referred to in an article on Mercantile Preferences in the Canadian Law Times for March, 1891, at pp. 66-8, and in Parker on Frauds on Creditors (1903), at p. 122. That was a decision on the Ontario Act of 1885, respecting Assignments for the Benefit of Creditors, Cap. 26, and the language in section 3 (1) was "nor to any *bona fide* sale or payment made in the ordinary course of trade or calling . . . ." The learned Chancellor's view of the meaning of these words is as follows (I quote from the copy of his judgment which has been obtained for my assistance):

Judgment

"Of course one may say that that means the ordinary dealing of buying and selling over the counter. I am not sure that it is confined to that limited meaning. It may have the larger meaning. Where you are going to deal with a transaction which will have the effect of preferring one of the creditors to the others, you may fairly say that it embraces such a transaction as this; because everyone knows that in dealing with busi-

nesses the great desire is not to break them up and sell piecemeal, but to sell them *en bloc*. Therefore, in dealing with a business, the ordinary course of selling a business is to sell it *en bloc*. That was done in this case. . . . ."

Now, it is true that the learned judge was speaking of a statute the object of which was, as he says, "to destroy fraudulent preference," but at the same time he points out that there was no fraud in the matter, which "is the controlling thing after all," and he refused in the case before him to "upset a fair, straightforward, business-like commercial transaction after it was closed." I do not see why this view should not have a like application to our Bills of Sale Act. There is, of course, a difference in the language of the two sections, but it is, I think, merely one in the form of the words and not in their effect or substance. If anything, the expression "transfers of goods" would be wider than "any sale or payment made"; the word "transfer" imports, in commerce, something more, I think, than "sale"; and it is "any trade" and not merely "trade" as in Ontario. The transaction is, be it noted, not restricted to the "ordinary course of his (the debtor's) business," and, in my opinion, the language relates to the general course of mercantile dealing, and cannot be given an effect in a small town where businesses change hands perhaps infrequently, different from that in a large town where it may happen many times a day. I do not see how a section dealing with the ordinary course of trade all over British Columbia could be construed in that limited and varying local sense. But in any event it is clear to me that where there is any doubt about the matter the court should incline to uphold a *bona fide* transaction.

Judgment

I hold, therefore, that the transaction is outside of the Act, and plaintiff is entitled to judgment with costs.

Judgment for plaintiff.

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CANADIAN BANK OF COMMERCE v. LEWIS

THE CANADIAN BANK OF COMMERCE v. LEWIS AND LEWIS.

Fixtures—Chattels—Bank safe built into rented property—Landlord and tenant, agreement between as to removal of property after termination of tenancy—Effect on such agreement of subsequent sale of premises.

Plaintiff Bank rented a building into which it moved a safe for the purpurposes of its banking business. The landlords at the request of the Bank built around the safe a brick vault. After occupying the building about a year the Bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the Bank and its landlords as to the right to remove the safe after the Bank had left the premises. During the interim between the removal of the Bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe:—

Held, on appeal (MARTIN, J., dissenting), reversing the judgment of HENDERSON, Co. J. (who decided that the safe was a chattel and had been bricked or built in merely for the purpose of its more convenient use as a chattel), that although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when the defendants bought the premises.

APPEAL from the judgment of HENDERSON, Co. J., in an action tried before him at Vancouver on the 16th of January, 1905.

Statement

The facts on which the decisions of the trial judge and of the Full Court were based are shortly set out in the headnote.

The appeal was argued at Vancouver on the 24th of November, 1906, before HUNTER C.J., MARTIN and MORRISON, JJ.

Argument

J. A. Russell, for appellants (defendants), referred to section 3 of the Statute of Limitations, R.S.B.C. 1897, Cap. 123. The safe became a fixture from the time it was put on the premises.

He cited *Haggert* v. *Town of Brampton* (1897), 28 S.C.R. 174; *Stack* v. *Eaton* (1902), 4 O.L.R. 335 at p. 338; *Dickson* v. *Hunter* (1881), 29 Gr. 73 at pp. 86 and 87; *D'Eyncourt* v. *Gregory* (1866), L.R. 3 Eq. 282 at p. 397.

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Fixtures must be removed before the expiration of the lease, or during such time after the expiration of the lease as the lessee may be deemed in occupation: *Pugh* v. *Arton* (1869), L.R. 8 Eq. 626; *Gibson* v. *The Hammersmith Railway Company* (1863), 32 L.J., Ch. 337; *Leader* v. *Homewood* (1858), 27 L.J., C.P. 316; *In re Lavies; Ex parte Stephens & Co.* (1877), 47 L.J., Bk. 22.

Davis, K.C., for respondent (plaintiff Bank): *Stack* v. *Eaton*, *supra*, is a case between vendor and purchaser. The defence of the Statute of Limitations does not apply, as the action could not be brought until a demand had been made. Here the action was brought as soon as it was known that defendants disputed the Bank's title. The safe is *prima facie* a chattel and was put in the vault for the better using of it as a chattel. The agreement between the Bank and its landlords is conclusive.

Argument

Cur. adv. vult.

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HUNTER, C.J.: Action to recover a safe, or the value thereof. In 1887, the plaintiffs' predecessor in title, the Bank of British Columbia, rented a wooden building in which the safe now is, and the then owner, the Canadian Pacific Railway Company, at their request built a brick vault for the purposes of their business. The vault was built down through the floor to the ground, and a cement foundation was constructed for the safe on which it rested of its own weight. The vault was built around the safe, and the latter could not have been removed out of the building except by taking away enough of the brickwork around the door of the vault to permit of its removal, and also by making a sufficient opening through some wall of the building, no doorway being wide enough for the purpose. About the end of 1888 or early in 1889, the Bank of British Columbia vacated the premises leaving the safe inside the vault, but it is claimed that they had an arrangement with the Canadian Pacific Railway

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Company by which they could remove the safe on making good all the damage. There does not appear to have been anything in writing about it, but I see no reason to doubt that the arrangement existed. The Bank also instructed their agents to procure a purchaser, but without result. About 1889 the vault was pulled down by agreement between the then tenants and the Canadian Pacific Railway Company and a mezzanine floor or gallery put across the end of the store, which now partly rests on a prop which stands on the safe. These tenants used the safe from the time they went in in 1891 or 1892 until they left in 1901. In 1903 the defendant purchased the premises from the Canadian Pacific Railway Company through agents, but had no negotiation or arrangement with the vendors about the safe which has always remained on the concrete foundation. It is not seriously disputed that in addition to making an opening in the wall of the building wide enough to permit of the safe being taken out, the floor would have to be materially strengthened as the safe weighs about three tons, and the gallery would have to be taken down or re-propped.

There can, I think, be no doubt that the safe when enclosed in the vault became a fixture, and has remained such ever since, as it is impossible to remove it without tearing out some portion of the building. It seems to me hopeless to contend that it could

HUNTER, C.J.

be taken under a *fi. fa.* goods, or that a chattel mortgagee of the tenant could insist on removing it against the landlord's objection.

Although the safe became a fixture the Bank could of course remove it with the consent of the Canadian Pacific Railway Company as long as they were the only parties to deal with, but I think the right to remove it under the agreement was lost when the next tenant took possession; or at any rate when the defendant bought the premises. It is not pretended that she in any way recognized any right in the plaintiffs in respect of the safe when she bought, and any arrangement between the Canadian Pacific Railway Company and the Bank, not assented to by her, could not of course bind her.

The appeal should be allowed and the action dismissed.

MARTIN, J.: On the two points of the sufficiency of the transfer and the Statute of Limitations, I have no doubt that they should be decided in favour of the plaintiff. But as regards the safe I share the opinion of Mr. Justice King in a somewhat similar case: *Haggert* v. *Town of Brampton* (1897), 28 S.C.R. 174, that "it is impossible to feel confident on such a question." However, after perusing the whole evidence and applying the tests laid down in the last mentioned case, and in *Stack* v. *Eaton* (1902) 4 O.L.R. 335, I cannot bring myself to say that the learned judge has reached a wrong conclusion on the particular circumstances of this case which must determine the annexation: *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328, and therefore his judgment should be affirmed for, substantially, the reasons given by him. I think that a good deal of weight should be attached to the removal of the vault around the safe in 1898, or thereabouts.

MARTIN, J.

MORRISON, J., concurred with HUNTER, C.J.

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Appeal allowed, Martin, J., dissenting.

WILSON, CO. J.
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CROW'S NEST v. MILLS

THE CROW'S NEST PASS COAL COMPANY, LIMITED v. MILLS.

Vendor and purchaser—Contract for sale of land—Misrepresentation by agent of vendors before written contract made—Defence to action for purchase money.

The negotiations between the parties for the sale and purchase of a town lot were comprised in three interviews: (1.) when the defendant agreed to take the lot, when certain representations were made, (2.) when he paid a deposit, at which time no representations were made, and (3.) when he signed the agreement, when certain further representations were made. In an action to compel specific performance of the agreement to purchase:—

Held, on appeal (MARTIN, J., dissenting), that the plaintiff Company having failed to carry out some of the material representations made by its agent at the time of and as an inducement to the defendant to enter into the contract, specific performance would be refused.

APPEAL from the judgment of WILSON, Co. J., in an action tried before him at Fernie on the 11th of July, 1906. The action was brought on an agreement by defendant to purchase a certain lot in the town of Morrissey, and the defence was that the execution of the agreement was obtained by misrepresentation, the facts of which are fully set out in the reasons for judgment.

Statement

H. W. Herchmer, for plaintiffs.
Harvey, for defendant.

WILSON, Co. J.: This is an action brought by the plaintiffs against the defendant to recover the second payment due upon a certain agreement in writing made by the plaintiffs and defendant for the sale and purchase of a lot at Morrissey Mines. The facts, as to the sale, are admitted and the whole case hinges on (1.) the interpretation of the agreement, and (2.) as to whether or not certain false representations were made to the defendant.

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I will deal with the second point first. It is clearly brought out in evidence that when the defendant bought the lot no representations whatever were made by him and he paid his first payment down and both parties were absolutely satisfied with the agreement then made. When, however, the plaintiffs' agent came

to obtain the execution of the formal written agreement of sale, something arose in regard to the construction of some sections of that agreement, and at that time certain representations were made to the defendant by the plaintiffs' agent which procured his signature to the written agreement. These representations, which turned out afterwards to be untrue, were as to the building of 500 coke ovens, only 250 of which were built, as to the building of a station, only a small shelter being built, as to the building of a freight shed, none whatever having been erected. There is a dispute as to the other representations, and as to that the onus being on the defendant, I will find in favour of the plaintiffs.

The case then turns on the point as to whether or not these representations, made to induce the signing of the formal agreement, void that agreement, when the whole terms of sale and the sale itself had been completed (subject to the final payments). At the time the agreement of sale (verbal) was made, when the defendant paid his first instalment of the purchase price, the defendant claims that what he objected to was the default clause in the agreement, and that the plaintiffs' agent told him that the default clause would release him from the agreement if he made no further payments. This the plaintiffs' agent denies, and the onus of proof is therefore in favour of the plaintiffs in the face of the written agreement. As to the other misrepresentations, I cannot see that they can affect this written contract as to the question of payment, as the defendant had already prior to that made his bargain for the purchase of the lot without any representations having been made to him, and was then aware of the terms of payment and was quite satisfied with his bargain at the time of sale.

Now as to the first question as to the interpretation of the agreement, the defendant contends that the agreement became void as soon as default was made in the payments and therefore the plaintiffs have no right of action. With this I certainly do not agree. I certainly think that the agreement must be interpreted as being "voidable" and not "void" and in support of that contention would cite *Davenport* v. *The Queen* (1877), 47 L.J., P.C. 8; *Dumpor's Case* (1603), 1 Sm. L.C., 11th Ed., 54;

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Hughes v. *Palmer* (1865), 34 L.J., C.P. 279 and *Doe d. Bryan* v. *Bancks* (1821), 23 R.R. 318.

Judgment for the plaintiffs, with costs.

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CROW'S NEST v. MILLS

The appeal was argued at Vancouver on the 21st of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

Davis, K.C., for appellant (defendant): We say the learned trial judge is in error on the evidence as to the time of making the misrepresentations complained of. In any event, as a matter of law, it is quite sufficient if the representations were made before the contract was signed. We have here a finding that the misrepresentations procured the signing of the agreement, and on the evidence, therefore, we should have had a finding that the representations were made before the act of buying. The slightest kind of misrepresentation will prevent the court from enforcing a contract: *Cadman* v. *Horner* (1810), 18 Ves. 10; *Turquand* v. *Rhodes* (1868), 18 L.T.N.S. 844.

Argument

J. A. Macdonald, K.C., for respondents (plaintiff company): Defendant is not clear as to when the misrepresentations were made. The original defence was dropped and a new one set up. The station was erected, and there is no allegation of insufficiency. As to the principal being bound by the statements of his agent, see *Helyear* v. *Hawke* (1803), 5 Esp. 72 at p. 74. So far as the representations are concerned, defendant should be kept strictly to his amended pleadings, which do not include the coke ovens. The actual bargain having been made without any representations, it cannot be said that the written contract, made a week afterwards, was induced by representations.

Davis, in reply: The pleadings will be made to conform with the facts in at the close of the case: *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98.

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HUNTER, C.J.: This is an action to recover the sum of $339.30, being the balance of purchase moneys due on an agreement for sale of land. The agreement was executed on May 1st, 1903, and calls for a total payment of $450 of which $150 was paid at the time of execution, the balance being payable in two

equal instalments on November 1st, 1903, and May 1st, 1904. No payment other than the $150 has been made, and the statement of defence sets up misrepresentation *dans locum contractui* by the plaintiffs' agent to the effect that the plaintiffs would build a depot in Morrissey where the land is situate, transport the miners back and forth to the mines from Morrissey free of charge, and build a large number of cottages in the town and rent them to the miners. Evidence was also received at the trial without objection as to misrepresentations about coke ovens, the agent, according to the defendant, stating that the Company would build 500 coke ovens at Morrissey.

The learned judge found that the agent made representations which were not carried out, *viz.*: that 500 coke ovens would be built, whereas only 250 were built; that a station and freight shed would be built, whereas only a small shelter was built and no freight shed; and these findings have not been successfully impeached. The learned judge found that these representations were made after the bargain had been struck, and after the first payment had been made, but in this he seems to have fallen into a mistake. According to the defendant, who appears to have been a credible witness, there were three distinct interviews with the agent, the first being when the defendant agreed to take the lot, when the representations about the coke ovens and depot were made; the second when he paid $150, when no representations were made; and the third when he signed the agreement, when the representations about the station were made, as well as other representations which the learned judge did not find to have been made. But the learned judge having found in spite of the testimony of the agent that the representations about the coke ovens were made, and the only evidence as to when they were made having been that of the defendant, it seems to me that his testimony that they were made when he agreed to take the lot must be accepted, and he also says that he would not have taken it if the agent had said that only 250 ovens would be built. There was therefore proof of a representation *dans locum contractui* which was not carried out, and the action must fail.

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IRVING, J.: Plaintiffs' action for $339.30 is based on a covenant contained in an agreement to purchase a lot in Morrissey, dated 1st May, 1903, entered into by defendant. The defence is that the agreement was obtained by misrepresentations. The following were the misrepresentations mentioned in the pleadings: (1.) That Morrissey was to be the head office and chief place of business of the plaintiff Company. (2.) That the plaintiffs would build a depot in said town, and carry the miners from the town to the mines and back free of charge; and that the plaintiffs would build in the said town a large number of cottages for miners, and rent them to the miners. During the trial, evidence of a third misrepresentation seems to have been given by the defendant, and the plaintiffs apparently accepted the challenge, and gave evidence in answer. We must therefore assume that an amendment was allowed at the trial to raise this third ground, *viz.*: that the plaintiffs were to erect at Morrissey large coke ovens.

The learned County Court judge gave judgment for plaintiffs, holding that although as to building the ovens and the erection of a station there had been misrepresentations, these misrepresentations did not affect this agreement, as they were not made when the verbal agreement for the purchase of the lot was made. The defendant, it would appear from the evidence, made a verbal agreement with Mr. Crahan for the purchase of the lot in question, and paid him a deposit. Some week or so later, the document containing the covenant sued on was signed. At that interview the judge finds that the misrepresentations as to the ovens and the depot were made, and procured the defendant's signature to the contract. I think the evidence establishes that representations as to the ovens and depot were made at the first conversation, before the deposit was paid.

The plaintiffs, by their reply, denied that Crahan was their agent, and also denied that he made the representations. At both interviews Crahan was the plaintiffs' agent. Crahan says: "First conversation with defendant before day of sale, but told him I could not sell. Another conversation with Mills on 1st May." Cross-examined: "Began acting agent 1st May. Was employed by Tonkin (general manager) several weeks before

that. Was during that time arranging preliminaries and advertising. For a month prior to sale was actively engaged."

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The learned trial judge has found that the signature was procured by means of the representations as to the ovens and the depot, that is to say, these representations procured the execution of the document sued on. With that part of his judgment I agree, but I think in writing his judgment he must have forgotten when these representations were made.

To this action, although brought as an ordinary common law demand, the defendant may set up any defence which would be open to him on an action for specific performance. It is well-settled that a defendant may successfully resist specific performance by establishing that the plaintiff has not fulfilled some material representations as to his own future plans or acts made by him at the time of and as an inducement for the contract: see *Beaumont* v. *Dukes* (1822), Jacob, 422 at pp. 424 to 426, a case very much in point; and *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414 at p. 428.

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I would allow the appeal and dismiss the action.

MARTIN, J.: This is an action to recover an instalment of purchase money, with interest, due on a covenant in a contract to purchase certain lots in the townsite of Morrissey. In answer thereto, the defendant sets up by his amended pleading three heads of misrepresentation by the plaintiff Company as follow: That it would (1.) build a depot in the said town of Morrissey; and (2.) would carry the miners from the said town to the mines and back free of charge; and (3.) would build a large number of cottages in the said town and rent them to the miners. Of these three it is contended by the respondent, and in my opinion, rightfully, that only the first can be considered in this Court because the trial judge only found that one to be sustained. He did also find that there was a misrepresentation respecting the building of 250 coke ovens, but as that was not set up in the pleadings it is immaterial, and, with every respect, I cannot exactly see why he passed upon it at all, because there was nothing in the course of the trial so directed to that point as would justify a departure from the record, particularly in so strict a case

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as a specific allegation of misrepresentation. The circumstances are not similar to *Scott* v. *Fernie Lumber Co.* (1904), 11 B.C. 91, where the rule is applied that the issues may be limited by the conduct of the parties.

This leaves only the first head, and on it the evidence does not conflict, and it is that there is a building there which is used as a station and the trains stop at it. There is no description of it except that the plaintiff calls it "a shed to stand under to keep off the rain," but he does not even say whether it is open or closed, or give any idea as to what is wanting in its structure or conveniences, or give any other particulars (as he might easily have done) by which we may judge of its adequacy for such a small place. The plaintiffs' agent gives its measurements, and says it is what he represented. "I did represent as to building of a station and it is there, 25 or 30 feet long and 16 or 18 feet wide." The witnesses used the word "depot" or "station" in the same sense, and the complaint is merely that the defendant did not "build a depot," simply that. But the fact remains that there is a passenger station there of some description, and the

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defendant has not in my opinion satisfied the onus cast upon him to shew its inadequacy. I do not think that the plan materially assists us in the matter, it simply shews the location of the passenger and freight buildings. It is admitted that no freight shed has been put up, but it is quite clear to me at least, that the parties were directing their attention primarily to the passenger accommodation, and the defendant admits that plaintiffs' agent "told me nothing as to what sort of station would be built." Now in the face of such loose and defective evidence, which might have easily have been definite and precise, I cannot bring myself to decide in the defendant's favour by stretching a point to supply his deficiencies, and therefore on my view of the practically undisputed facts I think the appeal should be dismissed with costs.

Appeal allowed, Martin, J., dissenting.

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Mortgagor and mortgagee—Power of sale in mortgage—Orders nisi and absolute—Accounts—Rents, receipt of—Tender—Interest.

A mortgagee having obtained a foreclosure order *nisi*, shortly afterwards, and before the period allowed for making absolute the order *nisi* had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem.

Held (affirming the decision of HUNTER, C.J.), that the mortgagee could not, after the order *nisi* for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the court.

Stevens v. *Theatres, Limited* (1903), 1 Ch. 857, and *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, followed.

APPEAL from the decision of HUNTER, C.J., in an action tried before him at Vancouver on the 21st, 22nd and 23rd of May, 1906. The facts are set out in the reasons for judgment of the learned trial judge. Statement

Davis, K.C., and *Cayley*, for plaintiffs.

Bodwell, K.C., and *Shaw*, for defendants.

HUNTER, C.J.: I shall not need to hear you, Mr. *Davis*. In this case, I have already come to a conclusion, and I do not know that anything would be gained by reserving judgment. In view of the fact that the Court of Appeal will be sitting shortly, and it being the expressed intention of both parties when they opened the proceedings, to take the opinion of that court, I will be acting to the advantage of both, if I give my decision at once. HUNTER, C.J.

The facts, as far as I can see, material to the decision, are really not in dispute. On July 18th, 1898, there was a mortgage

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given by one of the plaintiffs, G. W. DeBeck, to the Canada Permanent to secure repayment of $28,000 and interest at 6½ per cent., which interest was payable half yearly. That mortgage would mature on August 1st, 1903. On the 31st of December, 1903, there was another mortgage given by De Beck of the same property to his co-plaintiff Hamilton, to indemnify him against the liability which he (Hamilton) had incurred to the Bank of Commerce on account of DeBeck. In August, 1899, there was a sum of $910 due, which became in arrear. These arrears were paid up on November 8th, 1899. On February 1st, 1900, there was interest on the delayed payment as well as the sum of $910 due. These arrears were paid. On August 30th, 1900, there was a sum of $910 due. On February 1st, 1901, there were two sums of $910 due, with the sum of $29.50 interest on delayed payments. On July 4th the sum of $325 was paid on account. On August 1st, 1901, there was a sum of $910 due, and, in all, the arrears on August 1st, 1901, amounted to $2,484. This was according to the testimony of Mr. Smellie, manager of the Canada Permanent, and was not disputed. About that time, negotiations were set on foot by the mortgagors to secure a loan to pay off this mortgage; and having these negotiations in view, Mr. Smellie tells us he had a discharge drawn up and sent to his head office for execution on the 26th of July. Those negotiations proved abortive, and the

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discharge was returned to the head office on September 8th. On the 12th of August notice of intention to exercise the power of sale under the mortgage was served upon both of the plaintiffs, and the property was brought to public auction, with the result, however, that there was no sale. On the 7th of September, 1901, the usual foreclosure writ was issued, and on that day Hamilton was served, and on the 9th of September DeBeck was served. On the 20th of September the Canada Permanent Company gave notice to the tenants of the building to pay them the rent, and dispossessed DeBeck. On the 29th of November, DeBeck put in a defence; there was no defence put in for Hamilton. On the 9th of December, the usual order *nisi* was obtained against DeBeck. Somewhere about the beginning of January, 1902, at all events, after the order *nisi* was obtained

against DeBeck, Mr. Smellie tells us he informed DeBeck that he might get a purchaser, and that he would sell if he got a purchaser, and that DeBeck inquired of him whether he could do that, and his answer was "certainly, he could." At all events, the mortgagor, DeBeck, was informed that it was the intention of the Company at that time to exercise the power of sale, and no doubt all parties then knew that the order *nisi* had been obtained. About that time, or shortly after that, an order *nisi* was obtained against Hamilton. On the 27th of January the registrar made his usual report; and that then made July 28th, 1902, the limit of time within which the plaintiff might redeem. The mortgagors, admittedly, did not redeem, and made no attempt to redeem; and, on the other hand, the mortgagees did not attend for payment or apply for any order absolute, and no order absolute was ever taken out. On February 20th, 1902, the Canada Permanent Company gave DeBeck formal notice that notwithstanding the foreclosure proceedings, they would proceed to sell the property if they could find a purchaser. There is no doubt about that notice having been given to DeBeck, but it appears it was not given to Hamilton. On the 1st of April, 1902, an agreement which is in evidence here, was entered into with Mr. Cotton, the co-defendant, by the terms of which he takes the title which the Canada Permanent Company has to give, and it is admitted that Mr. Cotton knew of the pendency of the foreclosure proceedings. In August, 1905, Mr. Cotton applied to register this agreement. The delay in the application, as far as I can recollect, was not explained. However, that is immaterial. In May, 1905, there was a tender made to Mr. Smellie, on behalf of the plaintiffs, of the amount due under the mortgage. The tender was made by certified cheque, and was not objected to upon the ground that it was made by certified cheque, but on the ground that the property had been parted with, and that the plaintiffs had no right to redeem. On the 19th of September of last year, the writ was issued in the present action. Now those, I think, are the material facts; and it seems to me that on those facts, and on the law as it stands, I must give judgment for the plaintiffs, and that I must hold that they have the right to redeem. As I have said, there was no

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order absolute taken out. If the order absolute had been taken out, notwithstanding that fact, according to the decision in *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, the court would have a discretion to allow the mortgagors to redeem, but it is pointed out in that case that it is only when the mortgagor acts promptly. In this case, if the order absolute had been taken out, I think it would have been perfectly idle for the mortgagors at this late date to have attempted to get leave from the court to redeem, or to have the matter opened up. There would have been a lapse of at least three years since the proceedings if the order absolute had been taken out, taking the 28th of July as the date when the time was up. Therefore, under those circumstances, and it not having been shewn that there was any fraud or unconscionable conduct on the part of the Canada Permanent people it would have been useless to suggest to the court that the matter should be opened up. But the fact remains that there was no order absolute taken out; and, according to my view of the matter, if the order absolute is not taken out there is an estate in equity left in the mortgagor. Although the so-called foreclosure order *nisi*, in terms, if read strictly, would have the effect of wiping out the equity of redemption if the money was not paid, that is not in reality the way in which the court regards the matter. The order *nisi* does not take effect until it is made absolute, and that being so, there is no doubt there was an equitable estate left in the mortgagor.

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Now it is admitted that the agreement to sell was entered into on the 1st of April, *i. e.*, on the date on which it purports to have taken place. That was the day after the foreclosure order *nisi* was taken out—before the time for redemption had expired; and I have the express opinion of Mr. Justice Farwell that a sale without the leave of the court under these circumstances is prohibited; and if so, it is inoperative to divest a mortgagor of his estate in equity. It is suggested by Mr. *Bodwell* that the agreement should be considered to have taken effect only when the time for redemption has expired. I do not see how that could be so, because the agreement calls for the payment of a sum of money down, which was paid down; and that, according to the highest authority—that of the House of Lords—at once

vests an estate in the co-defendant Cotton an estate increasing in proportion to the amount of the payments made. I have no doubt there was an actual sale; the mere fact that the actual formal conveyance has not been made, amounts to nothing—it was a sale to all intents and purposes, in equity. And it was a transaction which, according to Mr. Justice Farwell, should not have been entered into during the time allowed for redemption without the leave of the court. And I gather the ground of the judgment to be that where a mortgagee pursues his forensic remedy and obtains judgment, he is bound by the conditions, one of those conditions being that he must re-transfer the property to the mortgagor on being paid within the time allowed; and it follows that he cannot be permitted *sua sponte* to do any act by which he disables himself from carrying out the conditions on which he obtains his relief. That being the case, he cannot be permitted to say that he has done this act which he is prohibited from doing; and therefore this sale must be regarded as inoperative to divest the mortgagor of his equity of redemption. If that decision had stood alone, I think I should have required time to consider whether I am bound by it, and if not, whether the reasoning is not too technical, and whether so to hold does not do unnecessary violence to the principle that a mortgagee may pursue his remedies concurrently; as it does seem rather strange that because a man chooses to pursue his forensic remedy to the extent of getting an interim decree, he thereby disables himself from using his private remedy without the leave of the court. I do not say how I should decide if the matter were *res integra*, I merely say I would take time to consider. But the difficulty is that I find in the report of the case of *Campbell* v. *Holyland* in 26 W.R. 160, that apparently was also the view taken by Jessel, M.R., and I need not say that any statement, even though it may be a dictum, made by a judge so eminent as the late Master of the Rolls about a matter which must have been peculiarly within his cognizance, is not to be lightly disregarded by any judge sitting as a judge of first instance; and he says in that case, "a mortgagee who has obtained such an order might not sell without the leave of the court; that was a matter of common knowledge." In view then, of the

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decision of Farwell, J., fortified as it is by this dictum of Jessel, M.R., as reported in the Weekly Reporter, I think it is impossible for me, sitting here as a judge of first instance to render any other decision; and I must therefore hold that this transaction of April 1st was inoperative to divest the plaintiffs of their right to redeem; and therefore there must be a new period of redemption allowed.

As to the length of time which I should allow, I am ready to hear counsel.

The appeal was argued at Vancouver on the 21st and 22nd of November, 1906, before IRVING, MARTIN and MORRISON, JJ.

Argument

Bodwell, K.C., and *Shaw*, for appellant, referred to *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 859, and *Campbell* v. *Holyland* (1877), 7 Ch. D. 166 at pp. 171, 173, 26 W.R. 160. During the period between the interim order and the order absolute, the power of sale is suspended: *Kelly* v. *Imperial Loan Co.* (1884), 11 A.R. 526, (1885), 11 S.C.R. 516. The idea that the equity of redemption is an estate in the land which must be got in is not a correct understanding. What the mortgagor has is a right to apply to the court for relief against the forfeiture incurred by reason of the conveyance which he makes when he executes the mortgage. If he fails to observe that condition, he has no further right under his contract. In this case, the only way in which the mortgagors can get any remedy is by coming into court, and that application must be refused, because they have waited all the time that the property has been increasing in value, and allowed the mortgagees to deal with it as their own. The learned Chief Justice is wrong in holding that that is not the position in which they are, but that the mortgagor's estate is in him and cannot be divested until the order absolute is taken out. The power of sale here was only suspended, not determined; it was there and they could have exercised it. By the exercise of this power they passed the legal estate; the equitable estate passed as soon as they got power, on the 28th of July, 1902, to attach that to the legal estate, and there was then no need of any further conveyance. See remarks of Strong, C.J., in *Kelly* v. *Imperial Loan Co., supra*, at p. 528.

See also *Skae* v. *Chapman* (1874), 21 Gr. 534 at p. 541. The estate of the mortgagor being a right to apply to the court, it must follow that when the mortgagor has applied to the court and has fixed a time to redeem, unless he takes advantage of that, his right must be taken to be gone; that is to say, it is not necessary for the mortgagee to take out the final order of foreclosure. He cited *Thornhill* v. *Manning* (1851), 1 Sim. N.S. 451 at p. 454; *Sheriff* v. *Sparks* (1737), West Ch. 130; *Platt* v. *Mendel* (1884), 27 Ch. D. 246 at p. 248. When the court has pronounced on that right, it is forfeited. The order absolute is merely authentic evidence that the mortgagor has failed to comply with the only condition on which he had a right to redeem the estate. He gets no further right if the mortgagee delays taking out the order absolute. Here the power of sale has been exercised. The agreement for sale was made on the 1st of April, 1905. This was a perfectly competent act. As a matter of conveyance, it is submitted that if a man makes a conveyance of a piece of property which he does not own, and he afterwards acquires the title, the title passes. If a man has the legal estate, but not the equitable, and subsequently acquires the equitable, it passes: see *Holroyd* v. *Marshall* (1862), 10 H.L. Cas. 191 at p. 209; *Noel* v. *Bewley* (1829), 3 Sim. 103 at p. 116; *Jones* v. *Kearney* (1841), 1 Dr. & War. 134 at p. 158; Dart's Vendors and Purchasers, 7th Ed., pp. 817 to 821.

Argument

Davis, K.C., and *Cayley*, for respondent: The Chief Justice was correct in holding that the taking out of the order absolute was necessary in order to get the estate out of the possession of the mortgagor. The doctrine laid down in *Stevens* v. *Theatres, Limited, supra*, is good law, and when applied to this case, the necessary result is just what the Chief Justice found and that is an agreement for sale which is inoperative; in other words the time for redemption has never come. Here the final accounts were never taken and the time for redemption still exists: see *Heath* v. *Pugh* (1881), 6 Q.B.D. 345 at p. 359 *et seq.*, affirmed (1882), 7 App. Cas. 235. The time never existed here when the mortgagee could have come to court and asked for an order absolute. Wherever rents are received after the decree *nisi*, the accounts are *ipso facto* opened up. Here the

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mortgagee was in receipt of rents. They admit they were not in a position to convey even if we had attended at the end of the six months allowed by the order *nisi*: *Jenner-Fust* v. *Needham* (1886), 32 Ch. D. 582. It is the mortgagee, and not the mortgagor, who must come to the court to get his title: *Coleman* v. *Llewellin* (1886), 34 Ch. D. 143 at p. 146; *Hughes* v. *Williams* (1853), Kay, iv Appendix; *Scott* v. *McDonell*, 1 Ch. Ch. 193; *Cummer* v. *Tomlinson*, *ib.* 235; *Independent Order of Foresters* v. *Pegg* (1900), 19 Pr. 254 at p. 260. The amount we had to pay has never been ascertained: 3 Seton, 1,984; *Prees* v. *Coke* (1870), 6 Chy. App. 645; *Hill* v. *Rowlands* (1897), 2 Ch. 361. The case would be different if the agreement for sale were to a person without notice; here it is not so, because Cotton was cognizant of all the facts. They have put themselves in a position where they are unable to transfer to us when the time for redemption comes.

Argument

Shaw, for appellant, called upon as to tender: The money said to be ready was not Hamilton's or DeBeck's. In order to stop interest, the principal must be always available: Coote on Mortgages, 7th Ed., 1,174; *Gyles* v. *Hall* (1726), 2 P. Wms. 377, cited in *Bank of New South Wales* v. *O'Connor* (1889), 14 App. Cas. 273, at p. 284; *Knapp* v. *Bower* (1871), 17 Gr. 695. As it was not the money of defendants, and as there is no evidence that they paid any interest, or lost anything by the transaction, we submit we are entitled to interest.

Davis, continuing: Hamilton gave all instructions to Murray; the money was lent to Hamilton without security, but that was Murray's business, whose idea was that in the transaction the bank would realize the debt owed it by Hamilton. They are only entitled to interest by virtue of the statute or a contract. Here, on account of the refusal to accept the tender, there was no contract.

Bodwell, in reply.

Cur. adv. vult.

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IRVING, J.: In my opinion the learned Chief Justice arrived at the proper conclusion. The reasoning of Farwell, J., in *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857, seems to me to

conclude the question. I can see no advantage in reproducing here the arguments stated in that judgment.

As to the question of interest, *Knapp* v. *Bower* (1871), a decision of Mowat, V.C., reported in 17 Gr. 695, states the rule to be this—"*prima facie* a tender by a mortgagor stops the interest, and that proof of the money being kept idle is not necessary to exempt the debtor from subsequent interest. But, on the other hand, where the mortgagee shews, by the oath of the mortgagor or otherwise, that the mortgagor used the money, and made a profit on it, the interest is chargeable." In this case I think the facts do not shew that the mortgagors made any use of the money. The appeal must be dismissed.

MARTIN, J.: The opening position taken by the appellant on the argument was that the equity of redemption is "not an estate in the land which must be got rid of, but only a right which he (the mortgagor) has, to be enforced through the medium of the court within a certain time." The contention was disputed, and cannot, I think, be supported. In the leading case of *Casborne* v. *Scarfe* (1737), 1 Atk. 603, Lord Hardwicke (p. 605) expressly laid down the law as follows:

"First, an equity of redemption has always been considered as an estate in the land, for it may be devised, granted, or entailed with remainders, and such entail and remainders may be barred by a fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a seisin; the person therefore intitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets."

In *Heath* v. *Pugh* (1881), 6 Q.B.D. 345 at p. 360, Lord Chancellor Selborne said "it is sufficient to quote" the above passage on the point. Subsequently, in *Turn* v. *Turner* (1888), 39 Ch. D. 456 at p. 460, Mr. Justice Kekewich said:

"The Court having decided that the mortgagor has that right to redeem, construes it as really an estate in the land. It is not a legal estate, but what is termed an equitable estate—as much an interest in the land as the real fee simple. It is a fee simple subject to a charge, and is vulgarly styled in legal language the equity of redemption."

This, of course, is a great departure from the original conception of the strict effect of a mortgage: see Coote on Mortgages, 7th Ed., pp. 8, 11, by which the property immediately vested

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absolutely in the mortgagee in default of payment on the very day, but it is undoubtedly the law, even though formerly, as Jessel, M.R., points out in *Campbell* v. *Holyland* (1878), 47 L.J., Ch. 145 at p. 148, 7 Ch. D. 166, 38 L.T.N.S. 128, 26 W.R. 171:

"Mortgages were made in the form of conditional conveyance, the condition being that if the money was not paid on the day, the estate should become the estate of the mortgagee."

Starting from this position, I have examined the authorities cited but cannot reach any other conclusion than that the decision in *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857, should be followed by us as it was by the learned trial judge, and such being the case, it is unnecessary to dwell at length upon the matter, for his judgment should be affirmed.

MARTIN, J.

As regards the question of tender I am satisfied it was not that of the bank as contended, and so far as the interest is concerned, the case of *Knapp* v. *Bowen* (1871), 17 Gr. 695, cited by the appellant, and wherein the subject is best considered, is really, when properly applied to the circumstances and evidence in this case, an authority in favour of the respondent. The appeal must, therefore, in my opinion, be dismissed.

MORRISON, J.

MORRISON, J.: I would dismiss the appeal.

Appeal dismissed.

COEN v. THE NEW WESTMINSTER SOUTHERN RAILWAY COMPANY.

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Railway—Animal killed on track—"Not wrongfully on the railway"—Adjoining owners—Obligation to fence—Railway Act (Dominion), Cap. 29, 1888—B. C. Stats. 1887, Cap. 36; 1889, Cap. 36.

Plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of defendant Company, presumably at a place called Morton's crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farmer's crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing by which the animal was presumed to have reached the track from the public road, but there was a cattle-guard (over which the animals crossed) put there by agreement with Morton. Plaintiff was not an adjoining owner:—

Held, on appeal (MARTIN, J., dissenting), that Morton's crossing being a farm and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle-guard did not relieve the Company from its obligation to provide a fence or gate on the west side of the crossing.

APPEAL from the judgment of IRVING, J., in an action tried before him at New Westminster on the 2nd of May, 1906. The facts sufficiently appear in the headnote. Statement

W. Myers Gray, for plaintiff.
Reid, for defendant Company.

IRVING, J.: By section 25 of the defendant Company's Act of incorporation, Cap. 36, B. C. Stat. 1887, assented to 7th April, 1887, the provisions of the Dominion Consolidated Railway Act of 1879 and the Acts of Parliament of Canada amending the same were made applicable to the defendant Company as if the Company had been incorporated by authority of the Parliament of Canada. The Act of 1879, as the same was amended in 1883 (section 9 of 46 Vict., Cap. 24), required the Company to fence lands when requested to do so by the proprietors of the adjoining lands; until the fences were erected the Company was to be liable IRVING, J.

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for all damage done to cattle by their trains, that is to say, to animals, the property of such adjoining proprietors, or animals on the land with their permission: see *Conway* v. *Canadian Pacific R. W. Co.* (1886), 12 A. R. 708 and *Davis* v. *Canadian Pacific R. W. Co.*, *ib.*, 724. In 1889, by Cap. 36 of that year, section 25 of the defendant Company's Act of incorporation was repealed, and the following sections of the Dominion Railway Act of 1888, 51 Vict., Cap. 29, were made applicable to the defendant Company, namely, sections 194, 195, 196, 197, 198, 199 and 287. Section 194 was discussed in *Westbourne Cattle Co.* v. *Man. & N. W. Ry. Co.* (1890), 6 Man. L.R. 553; and again in *Ferris* v. *Canadian Pacific Ry. Co.* (1894), 9 Man. L.R. 501; and the courts there came to the conclusion that the liability to fence imposed by that Act was only as against owners or occupants of lands adjoining the railway.

Mr. *Reid* contends that as cattle are by virtue of Cap. 77, R.S.B.C. 1897, permitted to run at large, the Act of 1888 should receive in this Province a different construction. I am unable to give effect to that contention. I think we must assume that the Legislature in 1889 knew what construction had been placed upon the statute of 1888, and that in making it part of the defendant Company's Act, it was the intention of the Legislature that the Act should be read in this Province as it was being read in other parts of the Dominion.

IRVING, J.

The facts shew that the plaintiff was not an owner of land adjoining the railway. That his horse strayed from his own yard on to the highway, and thence to the defendant's track. Whether the animal reached the track by means of Morton's private crossing, or by one of the gates to the west of that crossing, I am unable to say. I am inclined to believe that it reached the track by Morton's crossing. If this was in truth the way it went, it strayed on to the track from a piece of Morton's land. Mrs. Morton was an adjoining owner, it is true, but there is no evidence that the horse was there by her permission. The Fence Act says that animals under such circumstances as those under consideration are not to be regarded as trespassers, but I do not think the language used in the statute can be construed as conferring on such animals all the

rights and privileges which the proprietor or owner of the land could grant. Judgment for the defendant Company.

The appeal was argued at Vancouver on the 23rd and 24th of November, 1906, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Bowser, K.C. (*W. Myers Gray*, with him), for appellant (plaintiff): There is no definition of fence in the Dominion Railway Act, therefore reference must be had to the Provincial Act. He also cited the Animals Act, R.S.B.C. 1897, Cap. 7, Sec. 3 and the Fence Act, R.S.B.C. 1897, Cap. 77; *Bacon* v. *Grand Trunk R. W. Co.* (1906), 12 O.L.R. 196. *Westbourne Cattle Co.* v. *Man. & N. W. Ry. Co.* (1890), 6 Man. L.R. 553, cited by the learned trial judge was decided in 1890, while our statute was amended in 1899. See also *Ferris* v. *Canadian Pacific Ry. Co.* (1894), 9 Man. L.R. 501; *Fensom* v. *Canadian Pacific R. W. Co.* (1904), 7 O.L.R. 254; *Carruthers* v. *Canadian Pacific R. W. Co.* (1906), 3 W.L.R. 455. Defendant Company must prove that the horse was wrongfully on the railway. There were no proper cattle-guards. We are not bound by any private agreement between Morton and the Railway Company as to cattle-guards; the Railway should have carried out their statutory duty. See legislation dealing with the location of liability in this connection in 1868, 1879, 1883 and 1888; also *Heydon's Case* (1584), 2 Co. Rep. 18, 14 Camp. R.C. 816, followed in *Lord Henry Bruce* v. *Marquess of Ailesbury* (1892), A.C. 356. He also cited *McIntosh* v. *Grand Trunk Railway Co.* (1871), 30 U.C.Q.B. 601; *Douglass* v. *Grand Trunk R. W. Co.* (1880), 5 A.R. 585. The court may assume, the animal being on the track, she came there by a public crossing. Argument

Reid, for respondent (defendant) Company: There is no evidence to shew how or where the mare got on the track. Plaintiff must establish affirmatively that the animal got on the track through the omission of the railway to fence. The rights against the railway are purely statutory: *The Grand Trunk Railway Company* v. *James* (1901), 31 S.C.R. 420. Coen is not an adjoining proprietor or the occupant of adjoining land, and, further, the Railway Company is under no duty to fence as against the public. The old decisions are on the Act previous

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to the amendment of 1890, which does not apply to this Company. The fact that Morton's land was unfenced does not give the animal any right to be upon the track. Plaintiff was negligent in turning the mare into a yard, the gate of which opened upon the road.

Bowser, in reply

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: Action for the value of a mare alleged to have been killed on the defendants' railway through the defendants' negligence.

The defendants were incorporated by B. C. Statute, 1887, Cap. 36, which Act was amended by B.C. Statutes, 1889, Cap. 36. By section 6 of the last mentioned Act, sections 194, 196 and 198, together with others not material to mention of the then Railway Act of Canada, being Cap. 29 of 1888, were read into the incorporating Act. So far as material, these sections enact as follow:

"194. When a municipal corporation for any township has been organized and the whole or any portion of such township has been surveyed and subdivided into lots for settlement, fences shall be erected and maintained on each side of the railway through such township, of the height and strength of an ordinary division fence, with openings or gates or bars or sliding or hurdle gates of sufficient width for the purposes thereof, with proper fastenings at farm crossings of the railway, and also cattle-guards at all highway crossings suitable and sufficient to prevent cattle and other

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animals from getting on the railway. . . . . .

"2. A hurdle gate has proper fastenings if it is fifteen inches longer than the opening and is supported at each end by two upright posts:

"3. Until such fences and cattle-guards are duly made and completed, and if after they are so made and completed they are not duly maintained, the company shall be liable for all damages done by its trains and engines to cattle, horses and other animals, not wrongfully on the railway, and having got there in consequence of the omission to make, complete and maintain such fences and cattle-guards as aforesaid.

"196. After such fences, gates and guards have been duly made and completed, and while they are duly maintained, no such liability shall accrue for any such damages, unless the same are caused wilfully or negligently by the company or by its employees.

"198. The persons for whose use farm crossings are furnished, shall keep the gates at each side of the railway closed when not in use; and no person, any of whose cattle are killed by any train owing to the non-

observance of this section, shall have any right of action against any company in respect to the same being so killed."

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The learned judge considered that the Legislature must be considered to have imported the Eastern decisions with these sections, but with great respect I am unable to agree. I do not think that the expression "not wrongfully on the railway" means not wrongfully according to the law of Ontario or Quebec or Manitoba, but according to the law of British Columbia; and as the defendants did not shew that the mare was unlawfully at large by reason of some local by-law, or that the plaintiff was guilty of negligence or misconduct, we must assume that she was lawfully at large, which she might be under the conjoint provisions of the Animals Act and Fence Act.

So far as the evidence shews, the mare and colt could only have got on the railway at Morton's crossing, as this was the only one of the three in question that was not provided with gates on both sides of the crossing, the rest of the line being fenced on both sides. There was no fence or gate on the west side of this crossing, which was the side next the Clover Valley road, a public highway, and I think the only reasonable conclusion is that the mare and colt got on the track at this crossing and strayed southwards, after having crossed over a cattle-guard that was not sufficient to stop them. And I do not think the fact that the mare was moving north towards this crossing when she was struck is enough to rebut the inference that she got on at this crossing, as the approach of the train might easily have turned her north.

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Now, Morton's crossing being a farm crossing and not a public crossing, the statute required it to be either fenced off or provided with the statutory gates on both sides. The statute does not require cattle-guards at such places, and the fact that such were put in by agreement with Morton does not relieve the Company from the obligation they were under to the plaintiff to provide a fence or gate on the west side of the crossing.

I gather from the evidence that $250 would be a fair estimate of the value of the mare, and I would enter judgment for that amount with costs here and below.

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MARTIN, J.: To begin with, the question must be decided how did the horse get on the railway track? The only inference fairly open to us from the meagre evidence is, to my mind, that drawn by the learned trial judge, *viz.*: that it got on from Morton's crossing.

This case, it is agreed, has to be decided on section 194 of the Railway Act of 1888, only, and not on the amendment thereof in 1890, Cap. 28, Sec. 2, which, as pointed out in the late case of *Carruthers* v. *Canadian Pacific R. W. Co.* (1906), 4 W.L.R. 441 at pp. 442-3, 8, 51, has really changed the law. It is too late now to depart from the construction placed upon the original section 194 by the Manitoba cases of *Westbourne Cattle Co.* v. *Man. & N. W. Ry. Co.* (1890), 6 Man. L.R. 553, and the Ontario decision of *Rathwell* v. *Canadian Pacific R. W. Co.* (1889), 9 C.L.T. 413 in the County Court of Pembroke. And though it was truly said by appellant's counsel at this bar that the learned trial judge erred in saying that our Provincial Legislature knew in 1888 of the *Westbourne* and *Ferris* cases, the fact being that they were not then decided, nevertheless I think they should be followed for the reason mentioned by Chief Justice Howell in the *Carruthers* case, p. 442. At the same time I feel that the question is a doubtful one, and I can quite believe that if it were brought before a higher court, and freer than we are to consider the authorities *de novo*, other views might prevail.

The result is that on our said section it must be considered that the duty on the defendant Company to fence was one it owed only to adjoining landowners. Now it is admitted that the plaintiff is not an adjoining landowner, and there is a fifteen foot strip of Morton's property between the highway and the railway allowance through which the horse obtained access thereto because of the lack of a gate. But to get over this point the appellant contends that the result of our British Columbia Animals Act, R.S.B.C. 1897, Cap. 7, and the Fence Act, R.S.B.C. 1897, Cap. 77 is to put him in as favourable a position as though the horse was there by permission of Mrs. Morton, who is an adjoining owner. On the other hand it is urged that the effect of that section is to confer no rights upon the owner of the strayed animal, but simply that the trespass which in reality

exists is condoned because the statute says that there shall be no penalty for it. It does not declare that it shall be lawful for animals to stray on to unprotected lands, but merely says if they are found there " no trespass shall be deemed to have been committed and no action for trespass shall be maintainable therefor." This seems to me to be the right view of the matter, because otherwise a landowner finding a stray animal in his grain could not prevent it from doing further damage by driving it off. There is a well-known distinction between the sufferance of an unlawful act, and the existence of the right to recover damages therefor.

There remains then only the other point that the circumstances here were such that the engine driver was guilty of negligence in running down the horse, but on the undisputed but incomplete facts of this case that contention is answered by *Canadian Pacific Ry. Co.* v. *Eggleston* (1905), 36 S.C.R. 641.

MARTIN, J.

The appeal should be dismissed.

MORRISON, J., concurred in the reasons for judgment of HUNTER, C.J.

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Appeal allowed, Martin, J., dissenting.

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THE BRITISH COLUMBIA MILLS, TIMBER AND TRADING COMPANY v. T. HORROBIN, JULIA W. HENSHAW AND JOHN HAROLD SENKLER.

Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132; B.C. Stat. 1900, Cap. 20—Materialman, lien by—Appropriation of payment on account.

Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiffs to supply the lumber and building materials. Previous to this, Horrobin, who was indebted to the plaintiffs, gave them a 30 day note for $1,700, on which, about due date, he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "*re* Mrs. Henshaw." This cheque Horrobin indorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiffs' accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plaintiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, and dismissed the action as against defendants:—

Held, on appeal, that there had been no appropriation by Horrobin, but

Held, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit, the claim had been brought for too much and there should be a reference.

Observations on the effect of granting a lien to a materialman under the amendments of 1900.

Statement

APPEAL from the judgment of HENDERSON, Co. J., in an action tried at Vancouver on the 29th of November, 1905.

The facts are sufficiently set out in the headnote and reasons for judgment.

Marshall, for plaintiff.

Senkler, K.C., for defendants Henshaw and Senkler.

Kappele, for defendant Horrobin.

27th February, 1906.

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HENDERSON CO. J.

HENDERSON, Co. J.: This is an action to enforce a mechanic's lien against the property of the defendant Mrs. Henshaw, a married woman, who is the owner in fee simple subject to a certain mortgage to the defendant John Harold Senkler of the lands sought to be attached, which lands are more particularly known and described as lots 1 and 2, block 57, district lot 185, group 1, in Vancouver district.

The following are the material facts: The defendant Horrobin entered into a contract with the defendant Mrs. Henshaw to erect for her a residence in Vancouver upon the lands mentioned. The plaintiffs supplied a large quantity of materials to Horrobin which were used in the construction of the said residence, the price of such materials being $948.45. At the same time that Horrobin was constructing Mrs. Henshaw's house, he was engaged in the construction under contracts of a number of other houses in the City of Vancouver, and obtained certain materials for the plaintiff Company in respect of said contracts which were worked into these houses. The plaintiff Company kept an accurate account of the materials supplied to each separate house, but made no provision, insofar as their system of book-keeping was concerned, for giving credits for payments made by the several owners, or on their behalf. One account only was kept with Horrobin, which comprised all the different contracts which he had for building houses. On or about the 31st of October, 1904, the defendant Horrobin paid the plaintiff Company the sum of $1,000. I find from the evidence that Horrobin was enabled to pay this amount because of a promised payment by Mrs. Henshaw of $1,200 on account of her contract, which promise was fulfilled on the 12th of November, 1904, so that the sum of $1,000 may be fairly said to have been received by Horrobin from Mrs. Henshaw.

It is contended on behalf of Mrs. Henshaw that this sum of $1,000 should be credited on account of her contract and that therefore the lien should be discharged. It may be remarked here that Horrobin's contract price with Mrs. Henshaw was $3,950 and she has already paid upwards of $4,500 on the contract including extras. Should this action be decided against

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her she will be called upon to pay an additional sum of $948.50. The contention of the plaintiff Company is that the payment of the sum of $1,000 in question was not appropriated by Horrobin on the account for materials, but paid on account of a promissory note for $1,700 made by Horrobin in favour of the plaintiff Company which fell due on the day of the payment by him of the said sum of $1,000. It appears that in the course of Horrobin's dealings with the plaintiff Company he was accustomed to cover his account for materials by giving his promissory note. Horrobin was seriously injured in December, 1904, and has not yet sufficiently recovered to be able to give evidence. He became insolvent shortly after the accident and his estate is now in the hands of an assignee.

I conclude from the evidence that Horrobin's note of $1,700 previously alluded to must have covered a portion of the materials supplied to Mrs. Henshaw and it therefore follows, even adopting the view most favourable to the plaintiffs, that she must be entitled to a credit of some amount, although there is no evidence to enable me to say how much.

There is another view of the case which is entitled to consideration, *viz.*, the plaintiffs are seeking to obtain the benefit of a statute which confers upon a certain class, *i.e.*, materialmen, special privileges. In order to become entitled to the benefits conferred by the Act the plaintiffs must in my opinion shew the utmost good faith. I think they ought, at least, to have kept their accounts in such a manner as to provide for giving credit for payments made on behalf of persons having contracts with Horrobin, the defendant Mrs. Henshaw being one of such persons, in respect of which contracts the Company looked forward to asserting its right to filing liens. No authority exactly on the point in question was cited and I have been unable to find any.

HENDERSON, CO. J.

I have come to the conclusion, not altogether without doubt, that the plaintiffs are not entitled to succeed as against the defendants Mrs. Henshaw and J. H. Senkler, and as against these defendants the action will be dismissed with costs.

Judgment will be entered against the defendant Horrobin for the amount claimed, with costs.

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The appeal was argued at Vancouver on the 28th and 29th of November, 1906, before HUNTER, C.J., IRVING and MORRISON, JJ.

Davis, K.C., for appellants (plaintiffs).
Senkler, K.C., for respondent (defendant, Mrs. Henshaw).

Cur. adv. vult.

21st January, 1907.

B. C. MILLS v. HORROBIN

HUNTER, C.J.: Action to enforce a mechanic's lien against the property of the defendant, Mrs. Henshaw, a married woman, and against the mortgagee, J. H. Senkler. Mrs. Henshaw entered into a contract with her co-defendant Horrobin to build a house on the lots in question, who contracted with the plaintiffs for the furnishing of certain timber and building materials for the house, the completion of the delivery of such materials taking place on the 30th of January, 1905. The amount claimed was $948.45, and on the 16th of February the lien was filed in the County Court at Vancouver. The main defence was payment or satisfaction based on the following facts: On the 26th of September, 1904, Horrobin, who was at the time indebted to the plaintiffs for building materials, supplied for the construction of several houses including Mrs. Henshaw's, gave a thirty-day note to the plaintiffs for $1,700. On or about the due date (October 29th) Horrobin gave the plaintiffs a cheque on his bank for $1,000, thereby overdrawing his account to nearly that amount, which cheque the plaintiffs claim to have applied on account of the note in the absence of any appropriation by the debtor. A few days afterwards, the defendant Senkler's firm on behalf of Mrs. Henshaw, gave Horrobin a cheque on their bank for $1,200 stated on the face of it to be "*re* Mrs. Henshaw," which Horrobin indorsed over to the Bank of Hamilton, thereby making good his overdraft. Now, had the cheque to Horrobin for $1,200 "*re* Mrs. Henshaw" been indorsed over by him to the plaintiffs, it might well have been that that would be sufficient to shew an appropriation by Horrobin of the money to meet the debt for the materials supplied to Mrs. Henshaw; or if it was not sufficient, that it might have afforded foundation for an argument that as the plaintiffs are invoking the equitable juris-

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diction in endeavouring to enforce their lien, seeking equity they should do equity, and therefore that they should credit Mrs. Henshaw with the amount of the cheque. But however that may be, that is not what happened here, because, as already stated, instead of indorsing over the cheque, before he received it Horrobin had paid the plaintiffs $1,000 which he had got from the Bank of Hamilton on the strength of Mrs. Henshaw's promise to give him the cheque, and not having appropriated it to any particular debt, the plaintiffs applied it in reduction of the note then overdue, which they had a legal right to do; and it is not shewn that the plaintiffs knew at the time that Mrs. Henshaw had anything to do with the payment of this $1,000 or that she was the real source of the fund.

Evidence was given that Horrobin told Mrs. Henshaw that he had paid the plaintiffs $1,000 on her account, but of course this was not receivable as against the plaintiffs. Before the trial Horrobin was so severely injured that he was unable to give evidence, so that the statement of the plaintiffs' accountant that he made no appropriation of the payment was not contradicted; but I do not gather that any application was made to postpone the trial in order to obtain his evidence, and therefore I think this defence fails. Another objection was that there was nothing to shew when the completion of the delivery took place; but it was proved by a delivery slip that 2,800 feet of lumber was

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delivered on the 30th of January, 1905, and this evidence was not, so far as I can see, successfully impeached by the defence. It was also argued that no request by the owner was proved, but of course there can be an implied request as well as an express request, and it seems clear that Mrs. Henshaw must be deemed to have authorized Horrobin to procure the materials where he thought fit, as it was under her agreement with him that he was building the house, and the case of *Anderson* v. *Godsal* (1900), 7 B.C. 404, so far as I can see, has no application, as that was a case where the owner had given a working option on a mine, and the lien claimants having done work for the optionee, it was held that they had no claim as against the owner, but only as against the optionee. It was also suggested that a material lien was good only until the materials were put in the building, but

it is clear that by section 7 of the Act of 1900 a lien is given on both the land and building.

The claim, however, was brought for too much, as it was admitted at the trial that there were shortages in delivery amounting to about $50; and it is not any too clear that Mrs. Henshaw was not entitled to the rebate which the course of dealing between the plaintiffs and Horrobin shewed that he was getting. As Mrs. Henshaw was not called on to keep account of what was delivered, and therefore had no way of testing the accuracy of the plaintiffs' accounts, and as she is being made responsible for the contractor's debts, I think it was incumbent on the claimants to be able to shew accurately and beyond doubt what the law called on her to pay. As matters stand, it ought to be referred to the Registrar to take the account if the amount cannot be agreed upon, but as those who seek to take advantage of a law which compels people to pay other persons' debts are entitled only to *strictissimum jus* there should be no costs of the action; but I see no sufficient reason for depriving the plaintiffs of their costs of this appeal, which was prosecuted on the ground that there was no liability. The costs of the reference, if there is one, should be dealt with by the County Court judge.

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The case might well be brought to the attention of the Legislature, and if it be proper for a judge to observe upon the operation of the Act after having had before him an instance of the hardship which it is liable to work, I would say that the Act might well be confined to wage earners only, as I see no more reason why a millman should be given a lien for lumber than that a grocer should have a lien on his customer's breakfast table.

IRVING, J.: In my opinion the amendments of 1900 recognize the right of a materialman to file a lien. Section 9 is apparently intended to give to the person supplying material a lien on the material supplied by him for the price thereof until it is worked into the building, or until he has been paid. After that section 4 becomes operative, and the materialman's right to a lien is against the building. The words "at the request of" in section 4 are satisfied by the evidence in this case. Mrs. Henshaw, by entering into the contract for the erection of this building, re-

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quested the plaintiffs, or authorized Horrobin to request the plaintiffs, to furnish the materials in question.

As to the payment by Horrobin on the 29th of October with the $1,000 obtained it may be conceded from Mrs. Henshaw, the evidence is all one way. Horrobin applied it on his note which fell due that day, and not on account of lumber supplied to Mrs. Henshaw: see the evidence of Pride, the only witness present. But in *Cory* v. *Mecca* (1897), A.C. 286, will be found ample authority for the plaintiffs making the appropriation to the note account, where no appropriation has been made by the debtor at the time of payment.

I am unable to agree with the suggestion that the plaintiffs' method of keeping books indicates want of good faith. Had Horrobin instructed them to apply this $1,000 on Mrs. Henshaw's account, and had they neglected to do so, then there would be good ground for making this charge; but as Horrobin was unable to give any evidence there is no foundation for the suggestion. The appeal should be allowed with costs.

IRVING, J.

MORRISON, J.

MORRISON, J.: I concur with the reasons for judgment of the learned Chief Justice.

THE ELK LUMBER COMPANY, LIMITED v. THE CROW'S NEST PASS COAL COMPANY, LIMITED, DANIEL V. MOTT *ET AL.*

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Vendor and purchaser—Authority to contract on behalf of vendor—Offer to sell—Acceptance—Option—Agreement—Specific performance.

An officer of the defendant Coal Company known as Land Commissioner, gave to defendant M. in June, 1900, the following document:

"*Re* SALE TO YOU OF MILL SITE.

"The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5.00 per acre, payable as follows: When title issued to purchaser. Title to be given as soon as the Company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan."

Affirmed by S. C. of Can. June 24, 1907

M. for a nominal consideration, in October, 1902, assigned this document to B. who in turn assigned it for value to plaintiff Company.

In an action for specific performance of this agreement, plaintiff Company was non-suited at the close of its case, and it was

Held, on appeal, that, one of the conditions on which the document was given being that a mill should be built at an early date, the defendant M., not having done anything in that direction for two years, must be taken to have abandoned any such intention.

Per HUNTER, C.J., (dissenting): It was for the Company to shew that the intention to build a mill was a condition *dans locum contractui*, and the fact that the condition was not inserted in the agreement was sufficient to call upon the Company to make good that defence.

APPEAL from the decision of MORRISON, J., in an action tried before him at Nelson on the 26th of May, 1906, for specific performance of the following agreement:

Statement

"Fernie, B. C., June 5th, 1900.

"D. V. Mott, Esq.,

"Fernie, B. C.,

"Dear Sir,— *Re Sale to You of Mill Site.*

"The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station on the Crow's Nest line to contain at least one hundred acres of land at the price of $5.00 per acre; payable as follows: When title issued to purchaser. Title to be given as soon as the Company is in position to do so. Purchaser to have possession

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at once. The land to be as near as possible as shown on the annexed sketch plan.

"Yours truly,
"W. FERNIE,
"Land Commissioner."

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The plaintiffs claimed under an assignment for value dated the 14th of January, 1904, from one F. J. Burrows, who was the assignee of the defendant Mott for a nominal consideration by a similar instrument dated the 31st of October, 1902. The main grounds of the defence were that Fernie had no authority to enter into the agreement; that the agreement if binding, was entered into on the condition that the property was to be used for a mill site, which condition was not carried out; that the document signed by Fernie is not an agreement for sale but an option which was not accepted within a reasonable time, and which was, in any event, not binding (there being no consideration) and invalid under the Statute of Frauds.

The learned judge dismissed the action at the close of the plaintiff's case, and the plaintiff appealed.

S. S. Taylor, K.C., and *Ross, K.C.*, for plaintiff Company.
J. A. Macdonald, K.C., and *H. W. Herchmer*, for defendants.

The appeal was argued at Vancouver on the 22nd of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument

Wade, K.C., for appellant (plaintiff) Company: There never was any abandonment of the intention to build the mill; in fact there was a tender made of the purchase price to obtain title. Fernie had authority to give the agreement for sale on behalf of the Company. Mott accepted the agreement and all its conditions, and is bound: *Laythorpe* v. *Bryant* (1836), 2 Bing. N.C. 575. He has made sufficient acceptance to be bound: *Martin* v. *Mitchell* (1820), 2 J. & W. 413; *Palmer* v. *Scott* (1830), 8 L.J. (O.S.) Ch. 127; *Dowell* v. *Dew* (1843), 12 L.J., Ch. 158; *Reuss* v. *Picksley*, (1866), 35 L.J., Ex. 218. This was not an option; all that was left to be done was to make a deferred payment. Defendants having held Fernie out as land commissioner are estopped from denying his authority: Ewart on Estoppel, 477. The authority here is not ambiguous: *Ireland* v. *Livingstone* (1872), 41 L.J., Q.B. 201.

J. A. Macdonald, K.C., for respondents (defendants): Fernie's authority as land commissioner is set out in the resolution of the Company appointing him, and by that he was restricted to the sale of lands in Fernie and Morrissey townsites. Until after this dispute arose, the Company had no other lands for sale. Mott should have inquired as to the scope of Fernie's authority. The agreement of the 6th of June was a mere option or offer; it is quite clear it was not accepted. It was made on Mott's promise to build a mill there within a short time; he failed to do so, and therefore became disentitled. The document was assigned, but the offer was not accepted before the assignment. There was no tender of deed and purchase money; in any event the deed tendered was for a different property. There was no authority to Fernie and no holding out of Fernie as authorized to contract for sale of this land: *Chadburn* v. *Moore* (1892), 61 L.J., Ch. 674. The document given here was for a specific purpose: *Dickinson* v. *Dodds* (1876), 2 Ch. D. 463 at p. 472; *Ramsgate Victoria Hotel Co.* v. *Montefiore* (1866), L.R. 1 Ex. 109; *Meynell v. Surtees* (1855), 25 L.J., Ch. 257; *Lord Ranelagh* v. *Meltion* (1864), 34 L.J., Ch. 227; *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414 at p. 428; Leake on Contracts, 4th Ed., pp. 126, 127. The option was not assignable; it was made to Mott, not to his assignees.

Argument

In any event this was a non-suit, and there can at most be a new trial ordered.

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: [After stating the facts, already set out]. The first question that naturally arises is, what is the document? It has been styled in the statement of defence as an option, and constantly referred to as such during the argument; but if it is not what is ordinarily called a unilateral contract, then I never saw one. I say ordinarily called, as in strictness there can be no such thing as a unilateral contract, as all agreements must be at least bilateral; but of course all that is meant is that what one party has agreed to (though perhaps not all that he has agreed to) has been reduced to writing and authenticated by his signature or that of his agent. So far as the document itself

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shews, how can it be said to be an option or an offer to sell? An option presupposes that no agreement has yet been arrived at; it is only an offer or proposal, and therefore only a step in the negotiations; its acceptance is the result of an *aggregatio mentium* or agreement. Now, what does the document say? It first of all calls itself "*re* sale to you of mill site" not "offer to you of mill site." Then it says not that the Company "offers or proposes to sell to you," but "agrees to sell to you." Surely this is good evidence until displaced that an agreement had been arrived at and that the parties meant business and were not amusing themselves with an idle scribble; and although I concede that what purports to be an agreement for sale may be shewn by parol evidence not to have been an agreement, but only an option, still the only evidence relevant to this matter was given by Mott, and he says that he told Fernie that he wanted to secure the title, but that Fernie said the Company were not in a position to give title.

Then as to there being no consideration. Even in those cases where it does not appear in terms, it may be collected from the document as a whole: see *e. g.*, *Newbury* v. *Armstrong* (1829), 6 Bing. 201, M. & M. 339; *Kennaway* v. *Treleavan* (1839), 5 M. & W. 498; but here it appears in terms, as the Company says, in effect "If you pay us $5 per acre when we are able to give title, we will grant you the land." So far as the so-called unilateral character of the contract is concerned, that is no objection, for as Brett, J., says in *Great Northern Railway Co.* v. *Witham* (1873), L.R. 9 C.P. 16 at p. 19: "I do not, however, understand what objection that is to a contract. Many contracts are obnoxious to the same complaint." The objection merely means that only the defendants are bound and not the plaintiff, but that is not necessary, as the statute requires only the signature of the party to be charged, and it is not *per se* a good answer to an action for specific performance that there is not mutuality of remedy. There must be mutuality of agreement (if that expression means anything more than the word agreement itself) but not necessarily mutuality of legal obligation or remedy.

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It cannot be denied that all the particulars necessary to satisfy

the Statute of Frauds appear in the writing. The statute does not require *a full* note or memorandum, nor even *a* note or memorandum, which perhaps might imply a complete note; but *some* note or memorandum, and I think that the authorities have reached this point, that if the note or memorandum contains enough to identify the agreement in suit, it is sufficient. I think, then, that the plaintiffs came into court with a good contract for sale within the Statute of Frauds. But then it is objected that it was made subject to a condition that a saw mill was to be built on the land and that the condition was not fulfilled. Mott does say that he told Fernie that if he could secure a site, he would be able to finance and put up a mill; and that if he got the document it would help him to raise the money for the mill; but it does not clearly appear that this was anything more than an expression of intention, and it was for the Company to shew that it was a condition *dans locum contractui*. At any rate, the circumstances that the condition was not inserted in the document, and that it is improbable that Mott would agree to building a mill before he got title, were sufficient in my opinion to call upon the Company to make good this defence. The fact that the document is headed "*re* sale to you of mill site" is of little moment, as "mill site" may easily be only a convenient phrase to describe the land which was the subject of the dealing, and which was indicated on a sketch plan. Even if it were made out that the agreement was entered into on this condition, whether or not that would be a good defence to a suit for specific performance would depend on this circumstance; but I do not think it necessary at present to go into this any further.

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As to the defence that Fernie had no authority to enter into the agreement, it would be enough to shew that he had apparent authority, and that Mott was treating with him on that basis and had no reason to suppose that he had no authority. It appears that there was a resolution passed by the directors turning over the sale of lands and the management of the townsite, houses, etc., from the general manager to the land commissioner, which Fernie then was. He had an office in the Company's buildings at Fernie, was known as the land commissioner, signed the document as land commissioner and was dealt with by Mott

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as land commissioner on a former occasion. I think that these circumstances were sufficient, it being necessary for the Company to act by an agent as it had lands for sale, to make out a *prima facie* case that Fernie had at least apparent authority to sign the document, and that they called for rebuttal evidence if there was any.

On the whole I think there ought to be a new trial with liberty to the parties to amend as advised; that the plaintiffs should have the costs of the appeal, and that the costs of the first trial should abide the result.

IRVING, J.: The plaintiffs, who claim as assignees of one Daniel V. Mott, ask that an agreement for sale made between Mott and the Company may be specifically performed. The defence is (1.) that Fernie, the agent who executed the document had no authority so to do; (2.) that Mott only obtained an option on, and not an agreement for sale of, the lot in question, and that the option expired before the plaintiffs became interested; and (3.) that in any event the so-called agreement was *nudum pactum*. The evidence shews that the letter in question, which is in the following words: [already set out] was given by Fernie to Mott to assist him (Mott) in getting money from his friends to build a mill on the lot in question. Mott told Fernie that if he (Mott) could secure this site, he would put a mill on it, and it was on the understanding that a mill should be erected there for the convenience of the defendants that the promise to sell was put into writing and handed to Mott. There was no consideration for this promise, and assuming that Fernie had authority to act, the offer might have been withdrawn at any time.

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Passing now to another defence: A condition of the arrangement was that the mill should be built at an early date. The defendants were anxious to obtain lumber, as the Canadian Pacific mill had just been washed out. The plaintiff failed in June, 1900, to obtain the necessary money, and omitted to communicate in any way to Fernie his expectations of being able to do so in the two following seasons. In October, 1902, Mott executed the transfer to the plaintiffs. For two years and up-

wards Mott did nothing. I think he abandoned all intention of erecting a mill on the lot in question. It is well-settled that a defendant may successfully resist specific performance by establishing that the plaintiff has not fulfilled some material representations, as to his own future plans or acts made by him at the time of, and as an inducement for the contract: see *Beaumont* v. *Dukes* (1822), Jacob, 422 at pp. 424 to 426, and *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414 at p. 428. I have omitted to state certain details which were urged on the argument because they do not, in my opinion, amount to acquiescence on the part of the Company. Mott, from first to last, has not performed his part of the agreement. He has no merit in himself to entitle him to a decree for specific performance. The plaintiffs can be in no better position.

I would dismiss the appeal.

MARTIN, J.: The learned trial judge based his judgment on two grounds, lack of Fernie's authority, and failure on Mott's part to carry out the alleged agreement to erect the mill. I have considered both questions carefully, but do not find it necessary to express an opinion on the former point (though I think there is not a little to be said in favour of Fernie's authority being sufficient) because I have reached the conclusion on all the evidence, that the erection of the mill at an early date was the basis upon which the parties dealt with one another, and had it not been for that consideration Fernie would not have given Mott the document relied on; it is immaterial in this view whether it is to be considered as an ordinary agreement for sale or as an option. Not only was the mill not erected at an early date, but not even within a reasonable time, in the circumstances, from any point of view, and therefore it is clear that the plaintiff cannot have a judgment in his favour, *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414. That case was not so strong as this, for there was delay on both sides (pp. 424, 432). Lord Cairns says, p. 428:

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"My Lords, I quite agree that this representation was not a guarantie. It was not introduced into the agreement on the face of it, and the result of that is, that in all probability Lamare could not sue in a Court of Law for a breach of any such guarantie or undertaking; and very probably he

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could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made, and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled."

MARTIN, J.

As regards acquiescence on this particular head, all I need say is that bearing in mind Lindsay's letter of the 10th of December, 1902, and his instruction to Tonkin, the evidence falls far short of fairly supporting it, whatever might be said of it as regards Fernie's authority, on which aspect I express no opinion other than to say that I agree with Mr. *Wade* that the word "commissioner" has, by its association in Canada with officers of great companies exercising extensive powers, *e. g.*, the Commissioner of the Hudson's Bay Company, come to be understood by the public in a corresponding sense, varying according to circumstances.

The appeal should be dismissed.

Appeal dismissed, Hunter, C.J., dissenting.

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Practice—County Court—Amendment of pleadings—Counter-claim, withdrawal or abandonment of to bring action in Supreme Court—Discontinuance—Discretion.

In a County Court action to recover a balance of moneys due under a mining agreement, defendant filed a dispute note containing a counter-claim setting up breaches of the covenants and conditions of the agreement, and asking for damages. Subsequently defendant intimated his desire to amend the dispute note and counter-claim as he had drawn them hurriedly in order to file them for the next sittings of the court. Plaintiff consented, and stated that as the dispute note and counter-claim raised new issues which he could not plead as a counter-claim he wished to amend. Defendant agreed, on condition that he could file an amended defence and counter-claim, but subsequently, on the same day, further intimated that the action ought to be transferred to the Supreme Court, and asked plaintiff to consent to such transfer. Plaintiff declined, and defendant forwarded the dispute note, omitting the counter-claim for which at the same time he issued a writ in the Supreme Court, and sent to plaintiff a discontinuance of the counter-claim in the County Court. Plaintiff replied that it was on account of the counter-claim that he had amended the plaint and added to the claim a claim for damages. At the trial in the County Court defendant moved for leave to withdraw the counter-claim, stated he was not prepared to offer any evidence in support of it, and produced the correspondence. The motion was dismissed:—

Held, that the trial judge was wrong in that (1.) there was no counter-claim before him to deal with.

(2.) That the arrangement arrived at was the ordinary consent to amend pleadings as the solicitor may be advised, and that the essence of such an arrangement is that the parties are to begin *de novo*.

(3.) That defendant had the right, if he chose, to discontinue the counter-claim and select his own forum.

(4.) That the proper course in the circumstances was that each party should withdraw the amended pleadings and that each should be left to his rights as they existed before the pleadings were delivered.

Per MARTIN, J., (dissenting): Since the counter-claim was originally properly on the files it was incumbent upon the defendant to shew that it had been got rid of either by the method provided by the rules or by consent.

APPEAL from a ruling of FORIN, Co. J., in an action tried be- Statement

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fore him at Kaslo on the 22nd of August, 1906. The facts sufficiently appear in the headnote.

The appeal was argued at Vancouver on the 19th of November, 1906, before HUNTER, C.J., MARTIN and MORRISON, JJ.

R. M. Macdonald, for appellant: Apart altogether from the agreement there is no reason why defendant should not be allowed to withdraw his counter-claim if he comes forward promptly. In an inferior court, leave should be granted as of right. And so when a plaintiff amends his plaint, the defendant ought to be entitled to amend his defence as he may be advised. Necessarily the dispute note is part of the defence. As to the distinction between a cross-action and a counter-claim see *Neck* v. *Taylor* (1893), 1 Q.B. 560; *Sykes* v. *Sacerdoti* (1885), 15 Q.B.D. 423. As to bringing the claim in the Supreme Court, see *Webster* v. *Armstrong* (1885), 54 L.J., Q.B. 236. Power to amend, when it is unrestricted, implies power to discontinue: *Bourne* v. *Coulter* (1884), 53 L.J., Ch. 699.

Argument

Davis, K.C., for respondent: *Bourne* v. *Coulter*, *supra*, is distinguishable. A party cannot abandon a counter-claim so as to bring an action on it again. Amendment is quite different from abandonment. The counter-claim arises out of the same matter as the action, which is founded on a certain agreement, and the court will not allow defendant to abandon his counter-claim to enable him to bring another action in another court. He must abandon it altogether. There can be but one action and one trial on the same matter, and the judge has discretion to permit him to abandon. Defendant should have applied earlier, and before the pleadings were closed; and before trial. The intention of the correspondence was to amend the dispute note and counter-claim; not to amend the dispute note and drop the counter-claim.

Macdonald, in reply.

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: At the hearing I was of the opinion that this appeal should be allowed.

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The appeal is from the dismissal of a counter-claim by the learned judge of the County Court of Kootenay under the

following circumstances. The plaintiff filed a plaint claiming to recover the sum of $562.40 as being the balance of moneys due under the terms of an agreement for his labour in extracting ore from a portion of the defendant's mineral claim. The defendant filed a dispute note, which besides denying the claim, set up breaches of several of the covenants and conditions of the agreement; and the dispute note also contained a counter-claim for damages for breach of covenants to open and maintain in good repair, and to work the premises in a good and miner-like manner to his satisfaction. This dispute note was filed on the 12th of July, and on the 16th of July the defendant's solicitor wrote to the plaintiff's solicitor stating that he desired to amend the dispute note and counter-claim as he had drawn them in a hurry to deliver them in time for the next sitting of the court. The plaintiff's solicitor answered on July 18th that he was agreeable to the other filing such amended defence as he might deem expedient, and stating that he wished to amend the plaint as the defence and counter-claim raised issues which should be disposed of, and which he could not plead as a counter-claim to the other's demand, and asked the other's consent to the amendment without an order.

To this the defendant's solicitor replied on the 19th consenting to the plaintiff's solicitor amending the plaint as he might be advised, he himself to have liberty to file an amended defence and counter-claim, and asking that the amended plaint be delivered as soon as possible as the time was fixed for the 1st of August and he would have to confer with his client after receiving the plaint. On the same day the defendant's solicitor wrote another letter stating that it occurred to him that the action ought to be transferred to the Supreme Court, giving his reasons, and asked if the plaintiff's solicitor would consent. On the 25th of July the plaintiff's solicitor filed his amended plaint. On the 26th, owing to a letter from the plaintiff's solicitor stating that he was ill, the defendant's solicitor wrote that he would have the trial postponed, and again asked if he would consent to the transfer to the Supreme Court. This request was again repeated on the 30th. On August 1st, the plaintiff's solicitor wrote that he could not consent, giving his reasons. On the 2nd

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the defendant's solicitor replied that he would not move without the consent, and enclosed his amended dispute note which did not include any counter-claim, and a cheque for the amount of the plaintiff's claim. To this the plaintiff's solicitor wrote inquiring whether the cheque was also meant to settle the counter-claim. The defendant's solicitor replied that he had started an action in the Supreme Court in respect of the counter-claim, and stated that he thought the plaintiff's solicitor would understand from the amended defence that he did not propose to proceed with the counter-claim in the County Court. On the 7th of August the plaintiff's solicitor wrote stating that he would oppose any application to withdraw the counter-claim out of the County Court and would move to have it dismissed. On the 9th, the defendant's solicitor replied that he considered that under the arrangement he had the right to drop the counter-claim, and in order to put the matter beyond question enclosed a discontinuance. On the next day the plaintiff's solicitor acknowledged receipt of the discontinuance, and stated that it was on account of the counter-claim that he amended the plaint, and added a claim for damages to the claim for debt, and that his understanding was that the counter-claim was not to be dropped but amended. To this the defendant's solicitor replied that owing to the misunderstanding he was willing that the plaintiff's solicitor should take the cheque in satisfaction of

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the claim for debt, and amend the plaint by withdrawing the claim for damages, and counter-claim for the same in the Supreme Court, in other words, that he should receive the full amount claimed in the original plaint. The plaintiff's solicitor did not accept this proposal, and the defendant's solicitor moved at the trial for leave to withdraw the counter-claim, bringing the correspondence before the learned judge, and stated that he was not prepared to offer any evidence in support of it, which motion was dismissed and on motion by the plaintiff's solicitor the counter-claim was dismissed with costs.

In so dealing with the matter, I think the learned judge was wrong for a variety of reasons. In the first place, there was no counter-claim before him to deal with. The parties had by consent substituted new pleadings for the original ones, and al-

though it is true that amended pleadings may not be filed in the County Court without leave of the judge, the new pleadings were merely irregular and not nullities, so that the judge could not disregard them *ex mero motu suo*, but could set them aside only on motion by one of the parties. Nor can it be said that because Mr. *Macdonald* asked leave to withdraw what did not exist, that that gave the judge any jurisdiction, because as has often been said, it is the judge's business to see through fallacies.

In the next place, I do not see how it can be open to doubt that the arrangement arrived at was anything else than the common every-day consent to amend the pleadings as the solicitor may be advised. A counter-claim is just as much part of the defendant's pleading as his defence, and it might just as well be argued that a solicitor could be held to a particular paragraph of his defence as that he could be held to his counter-claim. The essence of such an arrangement obviously is that the parties are to begin *de novo*, and that the former pleadings are to be treated as wiped out.

In the next place, I cannot understand why a solicitor should be held to a pleading which he at once notifies the other side was filed without full consideration, and in a hurry to get the pleading in in time for the next sitting of the court when it is not pretended that there was any *mala fides*, or that any legal prejudice had been occasioned to the plaintiff which could not be compensated for by costs.

HUNTER, C.J.

Then I am unable to follow Mr. *McAnn's* reasoning when he says he was prejudiced by the dropping of the counter-claim. Surely the defendant had the right, if he chose, to discontinue the counter-claim and seek his own forum as the law allowed him to do, in which case the plaintiff could have filed any counter-claim that was open to him.

Then again, seeing that the parties were not *ad idem*, I fail to see the justice in Mr. *McAnn* being permitted to avail himself of the benefit of the agreement, and at the same time insist on the defendant being held to his own interpretation of it to the defendant's disadvantage. It must be obvious that the proper course under such circumstances was that both should withdraw their amended pleadings, and that each should be left

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to his rights as they existed before they were delivered. Then again, I could understand the case being tried on either the original or the amended pleadings, although irregular; but it is somewhat novel to try it on an amended plaint which introduced a new cause of action, and the old dispute note, although an amended dispute note was before the court and not moved against.

Other reasons might be given, but I think these are sufficient to dispose of this appeal, which should be allowed with costs, with a declaration that there was no counter-claim before the learned judge for adjudication, while neither party should get any costs below.

HUNTER, C.J.

The learned judge gave as his reason for dismissing the counter-claim that there should not be multiplicity of actions, but I observe that in this action there has been multiplicity of appeals.

MARTIN, J.: In my opinion, we would not be justified in setting aside the order made by His Honour. The case to me is clear, and it is that since the counter-claim was originally properly on the files, it was incumbent on the defendant, when the day of trial came, to shew that it had been got rid of, either by the method provided by the rules (which was not done) or by consent. So far as the alleged consent is concerned, I think the correspondence does not support the defendant's contention, and therefore he must fail. The appeal should be dismissed.

MARTIN, J.

MORRISON, J.

MORRISON, J., concurred with HUNTER, C.J.

Appeal allowed, Martin, J., dissenting.

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Mining law—County Court—Mining jurisdiction—Working agreement or lease—Use of timber on claim—Ore-bins and tramway, right to use of.

Defendant, by an agreement under seal, purported to lease to plaintiff a portion of a quartz mine, the plaintiff covenanting, *inter alia*, to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant and to insure by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. Defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to plaintiff:—

Held, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns, and was not a lease.

Plaintiff claimed damages for being prevented by defendant from using the timber on the claim in his operations under the agreement, for tearing up and removing the ore-track and trestle which were alleged to be the only means for working the ore, and also for preventing plaintiff from using certain ore-bins and a track in connection with same at the mouth of the level:—

Held, that as the agreement was silent concerning the use of the timber, track, trestle and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was.

APPEAL from a judgment of FORIN, Co. J., in an action tried before him and a jury at Kaslo, on the 23rd of September, 1906.

Statement

The appeal was argued at Vancouver on the 19th and 20th of November, 1906, before HUNTER, C.J., MARTIN and MORRISON, JJ.

Argument

W. A. Macdonald, K.C., for appellant, on the construction of the lease, cited *Midland Railway Co.* v. *London and North-Western Railway Co.* (1866), 15 L.T.N.S. 264; *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173 at p. 195. Plaintiff, to succeed, must satisfy the court that the necessity for these rights was absolute for his purposes under the lease. He cited *The Earl of Cardigan* v.

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Armitage (1823), 2 B. & C. 197. The implied power given in the mining lease is a reasonable access to the demised premises to get out the mined product.

[MARTIN, J.: He is to do the work in a miner-like manner.]

That refers to the manner of working. He must provide his own powder and tools and therefore his own timber. There is a covenant that he is to timber. If it had been contemplated by the parties that he was to have the timber off the claim, they would have said so. The right to take timber is not necessary to the lease, and therefore cannot be implied; if such right does exist it is appurtenant to the whole claim, but not to a portion of the mine when sub-leased: *Archibald* v. *The Queen* (1891), 2 Ex. C.R. 374.

Argument

Davis, K.C., for respondent: The finding of the jury is conclusive. These rights go with the lease, although they are not specifically mentioned. The business of mining involves putting timber into the mine in accordance with the proper and regular way of mining: see *Jones* v. *Hunter* (1896), 1 N.B. Eq. 250; Woodfall on Landlord and Tenant, p. 150.

Macdonald, in reply: There is no such condition here as there was in *Jones* v. *Hunter*, *supra*.

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.

HUNTER, C.J.: The amount involved in this appeal is not large, but the principles are important. The defendant entered into an agreement under seal with the plaintiff, whereby he purported to lease a portion of a quartz mine to the plaintiff, the term commencing November 22nd, 1905, and ending June 30th, 1906; and among other covenants entered into by the plaintiff were covenants to open and maintain in good repair one hundred feet of No. 6 level from the mouth inwards; to remove all broken ore, and to sort out and preserve for shipment such material as could be profitably sorted, and place all concentrating ore on the dump as directed by the defendant, to work the area in a good and miner-like manner to the satisfaction of the defendant, and to insure by means of timbering, or stowage of waste, or both, as required from time to time by the defendant, the safety of the workings and their permanency, etc. The plaint,

among other things, seeks to recover damages from the defendant for preventing him from using the timber on the surface of the claim to do his timbering, for tearing up and removing the ore-track and trestle, alleged to be the only means provided for working the ore in question, and also for preventing the plaintiff using the ore-bins and track in connection therewith at the mouth of said level.

The defence was that the agreement or lease gave none of the rights contended for, and denied doing anything which prevented the plaintiff from carrying out his contract.

The learned judge held as a matter of law that the plaintiff had all these rights under the instrument, and that he was denied their enjoyment, and left to the jury only the computation of damages, which they assessed at $400.

In so dealing with the case I think he was in error. The first thing to determine is the nature of the instrument. It is styled an agreement, and then purports to lease

"For the purpose of mining and taking ore therefrom, that part of the property of the Whitewater Mines, Ltd., described as follows: Beginning at a point in the roof and at the mouth of number six level, thence westerly along the roof of No. 6 level 580 feet; thence upward and due north to the floor of No. 5 level; thence easterly along the floor of number five level to the surface; thence downward along the apex of the vein to point of beginning, out of all of which area the lessor reserves a pillar six feet high up the dip from roof of number six level, excepting such openings as may be necessary to gain access to the ground above such pillar."

It will be observed that only the length and the height of the area to be mined is given, and nothing is said as to the width, so that there is no defined area *qua* land of which exclusive possession is given. If, on the other hand, it is intended to demise the ore as it lay *in situ* for a certain distance and height of the lode, nothing would have been easier than to say so. But it is evident from the other portions of the instrument that the property in the ore was not intended to be given to the plaintiff, as he is to "sort out and preserve for shipment such material as can be sorted to a profitable grade, and place all concentrating ore on the dump, as shall be directed by the lessor, such concentrating ore to become the property of the lessor"; and also "to remove to Whitewater station, the ore prepared for shipment, load the

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same into cars, and, using all diligence in this respect, ship such ore to such consignees as the lessor may, from time to time direct, handing to lessor at the time of shipment a copy of the shipping bill." The defendant is also to receive the returns from all ore shipped, and is first to make certain deductions, and keep certain percentages according to a scale from the amounts received and then pay the balance to the plaintiff.

It seems to me that these provisions are inconsistent with the essential feature of a lease, whether of the land or the ore, *i.e.*, exclusive possession, and it is perhaps needless to say that the presence of words of demise does not of itself determine the question, but the instrument is to be taken as a whole: see *e.g.*, *Taylor* v. *Caldwell* (1863), 3 B. & S. 826. Further, the instrument cannot be construed as a licence coupled with a grant, as the ore is always in the control of the defendant. It seems to me, therefore, that the instrument is essentially nothing more than a contract to win the ore for a sliding percentage of the returns; and if this is so, then we need not concern ourselves with any question about implied covenants for quiet enjoyment, there being no express covenant of that sort in the document.

Now, the document is absolutely silent concerning the use of the timber, track, trestle or ore-bins which the plaintiff complains he was prevented from using. That being the case, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was: see *Lindley* v. *Lacey* (1864), 17 C.B.N.S. 578, *per* Erle, C.J., at p. 585; Taylor on Evidence, 10th Ed., s. 1,135; Leake on Contracts, 5th Ed., pp. 125-6, and cases cited. Had the jury found that there was no such agreement, then that would settle the question as regards the timber. But as regards the track, trestle and ore-bins, they should then have been further asked whether the acts complained of in relation to these things materially prejudiced the plaintiff in the performance of his contract, it being at the same time explained to them, if they found there was no collateral agreement, that the plaintiff had no legal right to the maintenance of the *status quo* in respect of these appliances, and that he could not complain if other facilities equally advantageous were provided. As I think for these

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reasons that there ought to be a new trial, it would not be advisable to comment on any of the evidence.

The appellant should have the costs of the appeal, and the costs of the former trial should abide the result.

MARTIN, J.: First, so far as the finding of damages is concerned, no good cause has been shewn for interfering with the view the jury took of them, subject to the legal objection that follows.

Second, as regards the learned trial judge's ruling on the point of law on the implied covenants in the lease relating (a) to the timber; (b) to the tramway; and (c) to the ore-bins, as complained of in grounds 3, 4 and 5 of the notice of appeal.

As to (c), having regard to clause 3 and 9 of the lease, I think the learned judge was right, for they distinctly contemplate the use of the ore-bins—the words "sort out and prepare for shipment" in clause 3, and "remove to Whitewater station the ore prepared for shipment," etc., in clause 9 point to such user. The case of *Jones* v. *Hunter* (1896), 1 N.B. Eq. 250 at p. 256, and the authorities cited later, generally support my view on this head and on the next one. As regards (b), the matter is not so clear, and I have some doubt about it, but not enough to disturb the view of the learned trial judge, particularly when the amount involved is so small, only $25. Having regard to the circumstances, I think it may fairly be said that the use of the tramway for the purpose of the lessee getting timber into the mine under his lease must necessarily be appurtenant thereto.

Then as to (a), the use of the timber. That raises a much wider and more difficult question. The lessor here is himself the lessee of all this extensively developed property which we understand is a Crown granted one, and therefore the owners have the "use of all the timber thereon, for the purpose of winning and getting from and out of such claims the minerals contained therein . . ": Mineral Act, Sec. 26, and there is no evidence that the claim was located on land occupied under a timber lease, in which case the timber is reserved—section 45. It is not in evidence that the lessor is himself entitled to the timber, but his counsel stated that it was assumed he was, and no objection was

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taken to the statement. Mr. *Macdonald* cited in support of his main contention against implication the following cases: *Earl of Cardigan* v. *Armitage* (1823), 2 B. & C. 197 at pp. 324-7, 26 R.R. 313; *Churchward* v. *The Queen* (1865), L.R. 1 Q.B. 173 at pp. 194-5; *Midland Railway Co.* v. *London and North-Western Railway Co.* (1866), 15 L.T.N.S. 264; *Archibald* v. *The Queen* (1891), 2 Ex. C.R. 374 and *Hill* v. *Ingersoll Road Co.* (1900), 32 Ont. 191 at p. 201.

The respondent's counsel conceded that if the case were being tried in England he could not succeed, but asks for a different judgment here on two grounds: (1.) that by our said Act the timber is now a statutory appurtenance to a mine; and (2.) that the plaintiff has already given two leases of substantially the same area to the defendant, and that in working them he had been allowed to use the timber without hindrance, and therefore the same course should be presumed here, and he should not have been prevented, as he undoubtedly was, from that user under this third lease. But this is not the exact position, because on p. 27 the plaintiff admits that the last lease he had was not from the plaintiff personally, but from the Whitewater Mines, Ltd., though the plaintiff was manager thereof at the time. I note that although the plaintiff's counsel cross-examined on one of these leases, full, or even necessary, particulars are not before us of either of them, and the evidence being so indefinite on this point (2.) I cannot safely found my judgment on it.

MARTIN, J.

Then as to (1). Said section 26 in its latter part also extends the said timber rights conferred upon Crown grantees to "the lawful holder by record of a claim . . . . during the continuance of his record," but I fail to see that because the grantee or lawful holder has certain statutory rights they necessarily enure to the benefit of his lessee, and also further descend to his sub-lessee. No such custom in this Province was sought to be proved, and it certainly is not necessary for the working of mines such as the one in question, that it should be so. Where, as here, portions of the mine are leased to different persons all carrying on their operations simultaneously, including a portion being worked by the lessor, it would not be even in the reasonable contemplation of all concerned that they all should have an unfet-

tered right to cut timber at discretion. I say this with every respect to the contrary opinion of the learned trial judge, whose large experience in a mining country gives weight to his view. And at the same time I acknowledge I can imagine circumstances where it would be a necessary implication that timber on the claim should be cut by a lessee. The question is an interesting one on which I cannot say I have as strong an opinion as I should like, and the said unusual features of this lease render it more difficult to say what should be implied than in the case of a lease of an entire mine to one person, cases on which are to be found in the books, but they throw no light on the exact point here, though I have vainly consulted many authorities for that purpose, including those of the mining States of America.

The matter is still further complicated by the fact that many necessary things, even the use of the tunnel, are manifestly left to implication in the meagre and one-sided lease now before us, which contains many covenants by the lessee but none by the lessor, so the rule of restricting the parties to their express agreement cannot be wholly enforced: *Aye* v. *The Philadelphia Company* (1899), 20 Morr. 177. A covenant for quiet enjoyment, for example, must be implied, as well as for the right of entry: *Knotts* v. *McGregor* (1900), *ib.* 432; and compare one not to mine coal so as to injure the surface: *Mickle* v. *Douglas* (1888), 17 Morr. 137. There is also much to be said, especially in the formative conditions of a new country, in favour of the opinion of the court in *McNish* v. *Stone* (1879), *ib.* 22, that a lease (there to bore for an oil well) "must be construed with reference to the known character of the oil business, and the evident intention of the parties."

MARTIN, J.

But the result in the present circumstances must, in my opinion, for the reasons first mentioned, be that the damages awarded, $125 on this head, for timber, cannot stand, and the appeal should be allowed to the extent of reducing the verdict by that amount.

MORRISON, J., concurred in the reasons for judgment of HUNTER, C.J.

MORRISON, J.

New trial ordered, Martin, J., dissenting.

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IKEZOYA *ET AL.* v. CANADIAN PACIFIC RAILWAY COMPANY.

Appeal—Jurisdiction—Habeas Corpus—56 Geo. III., Cap. 100, Secs. 3 and 4—Order discharging prisoner—Immigration Act, R.S.C. 1886, Cap. 65; 1902, Cap. 14—Proclamation issued pursuant to—Effect of—Appealability from decision of immigration officer—Supreme Court Act, B.C. Stat. 1903-4, Cap. 15, Sec. 86.

A proclamation was issued and published in the Canada Gazette, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, Cap. 14, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited:—

Held, on appeal (affirming the order of MORRISON, J.), that the statute and the proclamation issued thereunder, merely authorizes the deportation of the diseased person; that it does not take away the right of the court to decide the question of fact on a proper application, and the judges are bound to inquire into the matter on an application for *habeas corpus*.

Parliament not having made the examination by the immigration officer final, the statute is not to be construed as ousting the jurisdiction of the court to examine into the legality of the detention on a proper application.

Effect of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, discussed.

Statement

APPEAL from an order made by MORRISON, J., at Vancouver, on the 31st of October, 1905. Plaintiffs were four Japanese passengers from Yokohama to Vancouver. On arrival at the latter port, they were inspected by the medical officer of the Immigration Department, who concluded that three of them were suffering from trachoma, but were permitted to land for treatment. After a certain time, the officer decided to deport them, three of them on account of the disease, and the fourth, a child of one of the others, on the ground that it might become a public charge owing to the condition of its eyes. The evidence of three medical practitioners was produced on the application to the effect that the plaintiffs were not then suffering from any

contagious disease, and on this evidence MORRISON, J., ordered their release from custody. They then departed and at the time of the appeal, their whereabouts was unknown. The Dominion Government appealed on the construction of the amendment to the Immigration Act in 1902, and the proclamation issued pursuant thereto, advancing the contention that the finding of the officer appointed by the Minister of the Interior was final, and was not reviewable by the court.

The appeal was argued at Victoria on the 8th of January, 1907, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Davis, K.C., in support of the appeal, referred to the Proclamation, Canada Gazette, Vol. 36, p. 495, and *Cox* v. *Hakes* (1890), 15 App. Cas. 506. We cannot ask the court to reverse the finding of fact by the learned judge below. The question is one of jurisdiction; whether the decision of the Minister of the Interior, or his officer, is reviewable by a judge of this Court.

Macdonell, contra, cited *Ex parte Beeching* (1825), 4 B. & C. 136; Paley on Convictions, 8th Ed. 436; *United States* v. *Jung Ah Lung* (1888), 124 U.S. 621. In any event we have our rights absolutely under the Habeas Corpus Act. The respondents here have been found not suffering from the disease alleged and therefore are not rightly liable to detention.

Argument

Davis, in reply, referred to *Nishimura Ekiu* v. *United States* (1891), 142 U.S. 651. The whole matter is left to the opinion of the Minister of the Interior to judge whether a person comes within the operation of the proclamation.

[HUNTER, C.J.: What have you to say as to the application of this provision to British subjects returning to Canada?]

It is of course a great hardship that anyone should be sent out of the country on account of disease, if he is not suffering. This proclamation leaves the matter in the hands of the Minister of the Interior, and if the Government make a mistake, the only effect is the great hardship which is inflicted.

[HUNTER, C.J.: Does that deprive him of access to the courts?]

Cur. adv. vult.

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HUNTER, C.J.: On the argument at the original hearing I was of the opinion that the decision in *Cox* v. *Hakes* (1890), 15 App. Cas. 506, was not conclusive as the appealability of an order for discharge in *habeas corpus*, and after consideration I remain of that opinion.

I think there is an essential difference between the Imperial Act on which *Cox* v. *Hakes* was decided, and our own Supreme Court Act, the former Act merely constituting a Court of Appeal to hear appeals from any judgment or order save as otherwise provided; while in addition to a jurisdictional section creating the Full Court, our Act contains an express provision by which an appeal shall lie from every judgment, order or decree made by the court or a judge, excepting certain specified classes of orders, of which the order made in *habeas corpus* is not one.

The danger of applying a decision on an older statute to one of a similar, but not identical character, has been often pointed out, notably by Jessel, M.R., in *Hack* v. *London Provident Building Society* (1883), 23 Ch. D. 103 and in *Ex parte Blaiberg, ib.* 254 at p. 258; and in the case of an enactment which is evidently intended to be a code, the code should be allowed to speak for itself: see *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107; *Robinson* v. *Canadian Pacific Railway Co.* (1892), A.C. 481.

HUNTER, C.J.

The majority of the Lords overruling the Court of Appeal in *Cox* v. *Hakes*, felt themselves at liberty to read into the clause constituting the Court of Appeal an implication that the judgments and orders from which the court was to hear appeals were to be inherently appealable, and as they considered that orders for discharge were not inherently appealable, and that there was no recorded instance where they had ever been appealed against, that it was not intended by the statute to confer jurisdiction to entertain appeals from such orders. But I am at a loss to understand how such reasoning can be applied to an enactment which in terms makes all orders appealable with a few exceptions. If one were asked to draft a general comprehensive appeal clause which would include such orders, I do not see how one could use language more clear or more comprehensive than that found in

the statute; and to accede to the respondents' argument would be to substitute the conclusion of the Lords as to the meaning of a statute of doubtful import for the plain and unambiguous language of our own code.

So far as concerns the argument that there is a difficulty about making an effective order, I see no good reason why the court should not make an order that the person discharged, whether before the court or not, be remanded to the custody out of which *ex hypothesi* he should not have been taken, and leaving such order to be executed by the sheriff, or any other officer of the court who may be available. Of course if the person is not within the jurisdiction, the order cannot be carried out, but I do not see what bearing that circumstance can have on the construction of a plain and unambiguous enactment. In the particular case the court may not make the order for remand if it is for any reason clear that it would be futile, but that has nothing to do with the question of the competency of the appeal.

With regard to the question as to whether the persons apprehended were in fact suffering from disease, it was conceded that it was impossible to successfully assail the learned judge's conclusion, and the only other question argued was as to the validity of the order in council which purports to empower the Minister of the Interior, or any person nominated by him, to pass on the immigrant's condition. The statute merely authorizes the deportation of the diseased person, and there is nothing in it which takes away the jurisdiction of the court to decide the question of fact on a proper application, and the judges are bound to examine into the matter on an application for a *habeas corpus*. While it is not perhaps necessary to say that the order in council is *pro tanto ultra vires*, and while it may be conceded that the only rational way of working out the provisions of the statute is by means of medical examination, it is clear that Parliament has not made such examination final and conclusive, and has not barred the immigrant from applying in the ordinary way to the courts for relief against erroneous decisions of the immigration officers.

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I therefore think the appeal should be dismissed.

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IRVING, J.: As the decision in this case concerns the liberty of the subject, I wish to add a few words. The object of the writ of *habeas corpus* is the protection of the liberty of the subject by affording a practical means of effecting the release of persons illegally detained, whether under pretext of public or private authority, or under no pretext at all. To the superior courts of the sovereign has been committed the power of determining the question whether or not a person is properly detained. Every day instances of the exercise of this power are to be found in the issue of the writ to keepers of the gaols to bring up a person committed by a magistrate, or a person held for extradition: *In re Castione* (1891), 1 Q.B. 167; or, this is rarer, where a person is detained illegally in military custody: *Ex parte Hall* (1887), 19 Q.B.D. 13; or, on the ground of lunacy: *Rex* v. *Turlington* (1761), 2 Burr. 1,115; *The Queen* v. *Pinder*; *In re Greenwood* (1855), 24 L.J., Q.B. 148, to determine whether the functionary committing or holding the applicant has authority to commit or hold.

In all these cases the court will make an inquiry as to the propriety of the detention; sometimes the ground of complaint is want of authority on the part of the person making the order, or it may be alleged (as in this case) that the detention is made altogether without cause, that is to say, that the officer to whom is delegated the duty of making the examination of the suspected persons has made a mistake.

IRVING, J.

The applicants for the writ in the present instance were examined by doctors, other than the Government health officer, and upon the evidence of these doctors MORRISON, J., came to the conclusion that the applicants were not suffering from any of the diseases mentioned in the Act, and therefore ordered them to be discharged.

This appeal was taken from that decision. It was first of all objected that as the men had been released, there was no appeal, but for the reasons given during the argument and since set out in the judgment just read, I agree that we have jurisdiction.

Then it was said that by the proclamation, the power of determining whether or not the applicants came within the Act was for the Minister of the Interior or his officer to determine, and

that the decision was not reviewable by this Court. The proclamation goes beyond the Act, and insofar as it exceeds the statute it is *ultra vires*. As to so much of the proclamation as is within the statute, I cannot find anything which purports to take away the jurisdiction of this Court to examine into the causes of the detention of any person held under the authority thereof. There is very strong presumption against the intention of Parliament to interfere with the vested rights of the subjects or to disturb the existing jurisdiction of the superior courts. As the Act does not contain any expression that the writ was not to issue to examine into the causes of detention of a person held by an officer under this Act, I think the power still remains with this Court and that the learned judge had jurisdiction.

IRVING, J.

I think it proper to add that having regard to the inconvenience and danger which would result from the issue of the writ on a groundless application, a very strong case should be made by the applicant before the rule is allowed to go: see *Rex* v. *W. Clarke* (1762), 3 Burr. 1,362.

CLEMENT, J.: Counsel for the appellants in these three cases frankly admits that he cannot ask this Court to reverse the finding of fact by my brother MORRISON, *viz.*: that the three Japanese in question were not suffering from disease within the statute; and he rests his case solely upon the contention that the learned judge had no right to inquire into the truth of the facts set forth in the return to the writ of *habeas corpus*, *viz.*: that they were so suffering. The short answer to this contention is that section 3 of the Habeas Corpus Act of George III., expressly provides that "it shall be lawful for the Justice or Baron before whom such writ may be returnable, to proceed to examine into the truth of the facts set forth in such return, by affidavit or by affirmation . . . . and to do therein as to justice shall appertain." The fact necessary to warrant deportation under the statute in question is that the person to be deported should be suffering from disease as therein mentioned; not that some particular official should have declared him to be so suffering. Parliament has not yet gone to that length.

CLEMENT, J.

The appeal should be dismissed with costs.

Appeal dismissed.

affirmed (1909) A.C. 361.

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BLUE v. RED MOUNTAIN RY. CO.

BLUE AND DESCHAMPS v. THE RED MOUNTAIN RAILWAY COMPANY.

Railway right of way, what constitutes—Damages by fire caused by sparks from locomotive—Railway Act—Dom. Stat. 1903, Cap. 68, Sec. 239. Jury—Non-direction—Misdirection.

Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the road-bed itself:—

Held, that it must be considered that the company have occupied the full statutory allowance.

Held, also, following *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362, that non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case, the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being no evidence on which the jury could find that such point was within the right of way, the learned judge would not have been justified in charging to that effect.

The jury, after answering several of certain specific questions, gave a general verdict of $18,000, in objection to which section 239 of the Dominion Railway Act was set up on appeal:—

Held, that there being a finding that the defendant Company left inflammable material on their right of way, the section could not be invoked, as the limit only applies where there is no negligence.

APPEAL from the judgment of MORRISON, J., in an action tried before him and a jury at Rossland on the 8th, 9th, 10th, 11th and 12th of May, 1906.

Statement

The facts on which the decision of the Full Court turns are set out in the reasons for judgment.

The appeal was argued at Vancouver on the 6th, 17th and 18th of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

A. H. MacNeill, K.C., for appellant (defendant Company).

J. A. Macdonald, K.C., and *Hamilton, K.C.*, for respondents (plaintiffs).

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: Jury action to recover the value of timber, cordwood, tram roads, bridges, etc., destroyed by fire alleged to have been started on or near the defendants' right of way from a locomotive belonging to the defendants.

A number of questions were submitted to the jury after hearing counsel, of which they answered only the following four, *viz.*:

"(5.) Is the rocky bluff mentioned in the evidence within the right of way of the defendants? Yes.

"(6.) If you find that the fire which was burning on the upper side of the track on August 23rd and 24th was set by locomotive No. 9, at what point did such fire commence? On the rocky bluff.

"(7.) Was the fire on the St. Louis mineral claim set by sparks from the fire which originated near the railway? Yes.

"(8.) Were the defendant Company guilty of any negligence? If so, in what did such negligence consist? Yes; in leaving inflammable material on the right of way."

But they also found a general verdict for the plaintiffs for $18,000.

The learned counsel for the appellant Company strenuously contended that the jury could not reasonably find that the fire which caused the damage originated from the fire which indisputably started on or near the right of way, but we were all of opinion at the hearing that the verdict could not be set aside on that ground and it only remains to consider the other objections. The first one was that the jury were wrong in finding that the rocky bluff on which the fire was started was within the right of way, and it was contended that as the Company had never filed any plans of their right of way, either at Victoria or Ottawa, the right of way must be considered to be only the road-bed itself. This of course would mean that the road-bed would be of varying width, that it would be wider where there was an embankment than where it was on level ground, which would seem unreasonable, as it would not provide the necessary room or facilities to maintain the road-bed or to make changes or repairs. Suppose, for instance, that it was found necessary to put a culvert under an embankment, would not the Company be the first to object if it were told to confine its operations within the "toe of the slope?" Again, it is obvious that it is expedient, especially in the case of mountain roads, to take the full statutory

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allowance, as it is often found necessary or advantageous to shift the road-bed a few feet either way for the purpose of altering grades or curves, as well as to make provision for establishing turnouts and switches as the traffic develops. Moreover, speaking generally, it is plain that the due protection and maintenance of the track would be practically impossible if the right of way were confined to the road-bed itself, and it must also be plain that the obligation to fence would be made unnecessarily awkward unless a uniform width were taken. But there was some evidence that the Company never considered that its right of way was limited to the road-bed itself, as Morgan, the superintendent of both the Canadian and American portions of the system, admits that the American end of the right of way is 200 feet wide where it turns through Government land, and 100 where it has been purchased; and Renwick, P.L.S., says he surveyed the right of way in question, and that he marked out 100 feet on each side of the centre line, but he did not get his instructions from the defendant Company. Suppose, however, we disregarded all this, then the Company, who alone had knowledge of the matter, left the jury in the dark and put them in the dilemma of choosing between the proposition that the right of way was confined to the road-bed, and the more reasonable one, having regard to the circumstances, that they had taken, or at all events had occupied, the full statutory allowance.

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Then as to the jury's finding that the place where the fire started was within the right of way: there does not seem to have been the care taken in measuring the distance that there ought to have been, but one witness, Rolf, swears that he took the measurement of the place which Curry pointed out, and found it to be 53 feet 8 inches following the slope of the ground from the track, by which it appears he meant the nearest rail, and gave it as his judgment that it was about 48 feet on the level. He also took a line through three points on the edge of what appeared to be the cleared right of way, the two points furthest from each other being 456 feet apart, and the three points being respectively 52, 45 and 53 feet distant from the centre of the track, and found the place in question to fall between a line joining these three points and the track, and while

no doubt more satisfactory measurements could have been made, still I cannot say that this evidence, coupled with the view, was not sufficient to enable the jury to find as they did.

It was also argued that there was misdirection, and while certain passages of the charges might be open to objection if taken by themselves, it is familiar law that the judge's charge is not to be minutely criticized, and that too much stress is not to be laid on isolated passages if the charge as a whole puts the case fairly before the jury. For instance, the learned judge said:

"You viewed that locality; it is for you to say whether, even disregarding all the evidence you heard, whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and did come to the ground very near the St. Louis buildings. Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard."

But the very next sentences prevented the jury from getting a wrong notion of what he meant:

"Do you believe that the evidence which you heard on behalf of the plaintiffs with respect to that fire having jumped is conclusive? Do you on the other hand believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and the high wind; a voluminous fire with a lot of material carried in the air. Applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber?" etc.

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Then it was urged that the learned judge virtually assumed throughout his remarks that the rocky bluff was within the right of way, but I think it is evident that he used the term "right of way" as a convenient expression to describe the strip of land over which the Company had been either exercising acts of ownership or availing itself of its statutory powers in respect of clearing the timber, and it must be remembered that he was left in the dark just as much as the jury as to what was the real right of way. At any rate, in question 5 he left it explicitly to

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the jury to find as a fact whether or not the rocky bluff was within the right of way.

As to the objection that there was non-direction, it is well-settled that this is not a ground for a new trial unless it causes a verdict against the weight of evidence: see *Ford* v. *Lacey* (1861), 30 L.J., Ex. 351; *The Great Western Railway Company of Canada* v. *Braid* (1863), 1 Moore, P.C.N.S. 101; *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 262; and the only non-direction specifically complained of is that the learned judge should have charged that there was no evidence on which the jury could find that the rocky bluff was within the right of way, but as we have just seen he would not have been justified in charging to that effect.

It was also urged that under section 239 of the Railway Act the damages could not exceed $5,000, but the finding that the defendants left inflammable material on the right of way disposes of this objection, as that is the limit where there is no negligence.

With certain exceptions, statutory and other, not necessary to notice here, the common law rule is that fire must be kept in by him who uses it, and the Railway Company is freed from liability for damages arising from its escape only so far as the Legislature has said so: see *Jones* v. *Festiniog Railway Co.* (1868), L.R. 3 Q.B. 733; *Powell* v. *Fall* (1880), 5 Q.B.D. 597; and liability for negligence is distinctly preserved by the section.

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It was also argued that the section inferentially confines all liability for damage, whether it arises through negligence or not, to those cases where it occurs upon or along the route of the railway, and that as the plaintiff's property did not lie upon or along the route of the railway, but was three miles off, there was no liability, but I am clear that the section does not put any limit either as to amount or place when the action is founded on negligence. But supposing it did, and that no negligence was proved, and it was necessary to decide the question as to whether the plaintiffs' property lay along the route of the railway, I should say that it did. The word "along" does not mean only adjoining or contiguous to, as does the word "alongside," but in the neighbourhood of, or near or close to, and I think that property within the range of mischief caused by the operation of the rail-

way, was intended to come within the scope of this word; and I think that this view also gathers force from the fact that the expression used is not simply "along" but "upon or along."

It was also objected that the verdict was excessive, and the evidence of Hilligoss, a cruiser for the Great Northern Railway Company, was referred to, but he admits that the plaintiffs were in a much better position than himself to estimate the quantity destroyed, and I am unable to find any ground for saying that the amount assessed is unreasonable.

I think the appeal must be dismissed.

IRVING, J., concurred with HUNTER, C.J.

IRVING, J.

MARTIN, J.: At the outset it is urged that there was no evidence to support the fifth finding of the jury that the fire originated on the right of way. I think there was, but in view of my opinion that there should be a new trial for misdirection, I refrain, for obvious reasons, from here canvassing the evidence.

Misdirection is contended for on two heads, but the only one which it is necessary to consider is that regarding the extension of the fire from the right of way to the plaintiffs' property. The passage complained of is as follows:

"You viewed that locality; it is for you to say whether, even disregarding all the evidence you heard, whether that fire had come over from the fire which had worked up from the Red Mountain railway, whether it could possibly or probably have leaped over and did come to the ground very near the St. Louis buildings. Whether the fire which burned all these limits was a continuation of that fire which started down there so small and innocently at the Red Mountain track. It is for you to say whether you can determine that for yourselves, regardless of what was said for or against. If you cannot decide from your own inspection, then you must call to your assistance the oral testimony, the evidence of those whom you have heard, that it was the same fire that started from the railway that destroyed Blue & Deschamps' timber?

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"Do you believe that the evidence which you heard on behalf of the plaintiffs with respect to that fire having jumped is conclusive? Do you on the other hand believe the evidence of the defendants that it was a physical impossibility that that space could have been jumped, under the conditions of this draw, and the high wind; a voluminous fire with a lot of material carried in the air. Applying your own common sense and experience and knowledge of fires, and what you have heard, and the conditions prevailing during a large conflagration, are you prepared to say

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that it was impossible that this Jumbo fire should have extended over and done the damage to the plaintiffs' timber? Does it appear to you impossible?"

It is urged that the fair construction of that language is that the jury could only understand that their duty was first to decide the question on the result of their own view, apart from any inspection, and in case they could not decide from their own inspection, then only were they entitled "to call to (their) assistance the oral testimony, the evidence of those whom (they) had heard"; and that they must have received that definite impression despite the subsequent reference to "what you saw and . . . . heard," which could only relate to their secondary state, *i.e.*, failure to decide on the view merely.

This whole subject of the requirements of a charge was recently fully considered in the case of *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362, affirming a decision of this Court, 10 B.C. 473, wherein it was held that the non-direction in that case was so defective as to amount to misdirection. In view of the said full consideration by both courts, it would be superfluous, if not worse, for me to go over the ground again, and I shall content myself with saying that after applying the rules there laid down to this case, and giving every possible effect to the principle, "the whole of the summing-up must be considered in order to determine whether it afforded a fair guide to the jury, and too much weight must not be allowed to isolated and detached expressions" (cited at p. 372 from *Clark* v. *Molyneux* (1877), 3 Q.B.D. 237 at p. 243), I can only, with some reluctance, reach the same conclusion that was reached in that case, *viz.*: that on a material point the "question left by the judge to the jury was put in an inaccurate shape." The expressions here were far from being detached or isolated, but given directly on a main point on which the chief conflict of evidence occurred. As a matter of precaution, I note that the reference in the appeal book on p. 385, line 9, to "part of the proof" being the view, is directed to another question, the width of the right of way. Such being the case, the situation is governed by the remarks of Lord Blackburn, cited at p. 374 by Mr. Justice Killam, in the *Prudential Assurance Company* v. *Edmonds* (1877), 2 App. Cas. 487:

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"When once it is established that a direction was not proper, either wrong in giving a wrong guide, or imperfect in not giving the right guide to the jury, when the facts were such as to make it the duty of the judge to give a guide, we cannot inquire whether or no the verdict is right or wrong as having been against the weight of evidence or not, but there having been an improper direction there must be a *venire de novo*.

It is admitted that the defendant's counsel did not at the trial take any exception on this point to the charge, though he did on others. In such case, he could not have a new trial were it not for the new proviso in section 66 of the Supreme Court Act. That section was, as a matter of precaution, alternatively considered by me in *Alaska Packers* v. *Spencer* (1904), 10 B.C. 473 at p. 490, though I am of the opinion, which was affirmed on appeal, that even under the old practice the charge could not stand. And it was also later considered, and its application restricted in certain circumstances, *i.e.*, by agreement or course of conduct at the trial, by this Court in *Scott* v. *Fernie* (1904), 11 B.C. 9.

There is no doubt in my mind that the proviso applies to such a case as the present, and it comes to a question of costs of the abortive trial, for those of this appeal in such conditions are directed to be paid by the appellant. In the exercise of our discretion as to said costs, I think we should direct that they should be paid forthwith to the respondents after taxation.

MARTIN, J.

So far as regards the view that was had herein, I do not wish to be understood as holding that the jury would not have been entitled in the circumstances to rely to a considerable extent thereon: they would have been, but not primarily and to the exclusion of other evidence. In this relation I refer to *Jenkins* v. *Bushby* (1891), 1 Ch. 484, wherein, as Lord Justice Kay said, the Court of Appeal considered a view to be "material, if not essential," and repeat what I recently said in this Court in *Star* v. *White*, on November 15th last (not yet reported*) and in *Marshall* v. *Cates* (1903), 10 B.C. 153. The case of the *London General Omnibus Company, Limited* v. *Lavell* (1900), 17 T.L.R. 61, which was cited to the contrary, is very restricted in its application, for the learned trial judge there acted on a view merely, without any evidence on the point at issue, *i.e.*, the mis-

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leading of the public by omnibuses resembling the plaintiffs'. See note thereon in Taylor on Evidence, 10th Ed., 396, and indeed the whole chapter on "Evidence Addressed to the Senses" is instructive on the point.

The result is that the appeal should be allowed, the judgment set aside and a new trial ordered, but the appellant must pay the costs above and below as hereinbefore mentioned.

Appeal dismissed, Martin, J., dissenting.

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Shipping—Negligence—Collision with vessel at anchor—Proximate cause of injury.

A tug attached to a scow loaded with coal approached a bridge the piers of which were being repaired by a railway contractor. The fairway was partly obstructed by a scow connected with the work, but the captain of the tug, after viewing the situation, was of opinion he could get through. In doing so, he brushed slightly against the scow, at the further end of which, on a boom stick in the water, was the plaintiff, engaged in an endeavour to swing or push the scow further around and out of the way of the tug. Plaintiff was crushed against a pile by the scow and severely injured:—

Held, reversing the decision of MORRISON, J., that the master of the tug was negligent in not stopping and then making certain that it was safe to proceed.

Statement

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 12th and 13th of December, 1906. The facts appear in the judgment of HUNTER, C.J.

The appeal was argued at Vancouver on the 27th and 28th of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

Argument

Lucas, for appellant (plaintiff): It was necessary for us to moor our barge at that particular place for the purposes of our

work. He cited *The Cynthia* (1876), 2 P.D. 52. Even if there was a remote possibility of collision the captain of the Bermuda should have kept away. The Bermuda, with scow attached was in the position of a single vessel; she was in control and should have guarded against accident to the barges whether they were wrongfully moored there or not. Defendants might be excused if the circumstances were in the nature of inevitable accident, but no such circumstances here: *The Merchant Prince* (1892), P. 179. He also cited *Clark* v. *Chambers* (1878), 3 Q.B.D. 327; *Inman* v. *Reck* (1868), 37 L.J., Adm. 25; *The Hamburg Packet Co.* v. *Desrochers* (1902), 8 Ex. C.R. 263; *The "City of Peking"* (1888), 14 App. Cas. 40; *The Indus* (1886), 12 P.D. 46; *Cayzer* v. *Carron Company* (1884), 9 App. Cas. 873; *Stoomvaart Maatschappy Nederland* v. *Peninsular and Oriental Steam Navigation Company* (1880), 5 App. Cas. 876; *The Batavier* (1845), 10 Jur. 19; *Rose* v. *Miles* (1815), 4 M. & S. 101, 16 R.R. 405; *Plathner* v. *The F. & P. M. No. 1* (1891), 45 Fed. 703 at p. 704.

[IRVING, J.: *Davies* v. *Mann* (1842), 10 M. & W. 546, is applicable and seems conclusive to the facts stated].

J. A. Russell, for respondents (defendant Company): The Bermuda gave warning to clear the fairway; the engines were then stopped for ten or fifteen minutes, and all proper precautions were taken in the matter of look-outs. There was no evidence of authority given the railway company to do this work, or to block the fairway. The scow had no right to be where she was; she was not moored, and the rule as to vessels at anchor does not apply here. There was no warning given the Bermuda not to come on. We are to avoid the ordinary risks which would follow damaging the scow. Plaintiff was negligent in being in that dangerous position without notice to us, and his fellow servants in not giving notice that he was there. In any event, not being connected with the scow, he had no right to be there: *The Bernina* (2.) (1887), 12 P.D. 58; *Child* v. *Hearn* (1874), L.R. 9 Ex. 176; *Grieve* v. *Ontario, Etc., Steamboat Co.* (1854), 4 U.C.C.P. 387. Plaintiff, by the exercise of common precaution, could have avoided the accident, and his employers' negligence is his.

Argument

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HUNTER, C.J.: Action for personal injuries alleged to have been sustained by the negligence of an employee of the defendant. The plaintiff was engaged as a labourer on a scow which was unloading rock close to one of the piers of a bridge which was being constructed for a railway company across False Creek near the City of Vancouver. The waters of False Creek are navigable under two spans of the bridge, but at the time of the accident the northerly span was blocked by scows, while the fairway through the south span was partly blocked by mooring piles having been driven near each pier, and partly by the scow on which the plaintiff was employed. The normal width of this fairway is 82 feet, but at the time of the accident was reduced by reason of the said obstruction to about 64 feet, the scow projecting into the fairway about ten feet and being moored to a pile. About 2 p.m. of the day in question (February 1st, 1905), the defendants' tug with a barge loaded with coal lashed alongside, approached the south span on a flood tide, and in attempting to get through, brushed against the scow with the result that the plaintiff, who was, at the other end on a boom stick, trying in obedience to orders to push the scow around, was crushed against a pile, and suffered severe internal injuries, being laid up in the hospital for about nine months. It is undisputed that the weather was fair, and that when the captain of the tug came through the Cambie street bridge at a distance of between a quarter and half a mile from the bridge in question, both spans appeared to him to be blocked. The captain says that when he approached within 300 yards of the bridge he saw that the south fairway was only partially blocked, and that he blew the whistle, slowed down and finally stopped the engines, as he says to give them a chance to do something. Drifting on, and turning a sharp curve as he got closer, he thought that the opening was wide enough to get through, and accordingly tried to get through; but in doing so, in order to prevent the tug from striking the northerly pier of the span, swung over and brushed the scow. He admits that he had not the same control over the tug as if she had been free of the barge; that the latter with her load weighed about 400 tons; and that while going ahead he

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could keep the tug approximately straight on her course, but when going astern the rudder would have no control whatever. He also says that the only men he could see were on the scow and that he could not see the plaintiff on the boom stick; and that he had no idea that he was endangering either life or property in endeavouring to get through. The opening was, as already stated, about 64 feet in width, while the tug and barge had a total width of at least 50 feet. The action was dismissed by the learned trial judge, and plaintiff appealed.

It seems to me that under these circumstances the captain put himself in a dilemma. Either the fairway was wide enough to get through without doing any damage, in which case he was an unskilful navigator; or, knowing that he was handling an unwieldy craft over which he had very indifferent control, and that he had not a full view of the fairway, and that he had to turn a sharp curve to properly enter the passage, he should have stopped and made certain that it was safe to go on.

It was strenuously argued by Mr. *Russell* that the scow was in motion at the time of the accident; but although the plaintiff was endeavouring to push the scow around and it was apparently slightly shifted by reason of his efforts, I think it must be regarded as having been at rest so far as concerns the tug's movements, just as much as a vessel riding at anchor, as the foreman says it occupied the same position on the return of the tug, and the captain made no point of it in giving his evidence. The scow then being at rest, the law is clear that the tug was bound to avoid it if possible; and it avails nothing that the scow was lying partly in the fairway as it was plainly visible to the tug for a long enough time to enable her to avoid it.

In the case of *The Egyptian* (1863), 1 Moore, P.C.N.S. 373 at p. 374, Sir John Romilly in delivering judgment against the appellants, says:

"The proximate cause of the collision was the breaking of the cable of the steamer as she was taking steps for the purpose of mooring for the night. In the High Court of Admiralty the plaintiffs, the owners of the schooner, gave no evidence; they rested on the fact that their vessel was at anchor; that its position was well known to those on board the 'Egyptian'; and that the burthen of proof lay on the 'Egyptian' to show that the collision was the consequence of an inevitable accident. Accordingly

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the appellants have undertaken this burthen, and insist that the evidence establishes that the collision was caused by an inevitable accident, namely, the breaking of the cable"; etc.

In the case of *The "Meanatchy"* (1897), A.C. 351 at p. 354, Sir F. Jeune, in delivering the judgment, says, "When a vessel under way comes into collision with a vessel at anchor exhibiting a proper light" (here it was broad daylight) "it is obvious that she has a heavy burden cast on her to justify her conduct."

In the *Batavier* (1845), 10 Jur. 19, Dr. Lushington says:

"The presumption of law, where a vessel at anchor is run down by another, I take to be this: that the vessel running down the other must shew that the accident did not arise from any fault or negligence on her own part, and, for this reason, that the vessel at anchor has no means of shifting her position, or avoiding the collision; and it is the duty of every vessel, seeing another at anchor, whether in a proper or improper place, and whether properly or improperly anchored, to avoid, if it be practicable and consistent with her own safety, any collision. This is the doctrine not merely of maritime law, but of common sense; it is the doctrine which prevails on roads; where, supposing a carriage be standing still on the wrong side, it is no justification for another running against it, though the latter be on the right side. It is always incumbent on the person doing the damage, to shew that he could not avoid it, without risk to himself."

See also same case 2 W. Rob. 407.

In an Irish case, *The Secret* (1872), 26 L.T.N.S. 670 at p. 673, Townsend, J., says:

"Inevitable accident is where the collision could not have been prevented by proper care and seamanship in the particular circumstances of the case. The defendant was bound in order to support a defence of inevitable accident to shew that everything was done which could and ought to have been done with safety to the Secret to avoid a collision with the Industry. Much controversy has been raised respecting the place where the Industry was run aground, but whether her berth was properly or improperly chosen, I apprehend that it was the bounden duty of the Secret to avoid any collision whatever. This is the doctrine of maritime law; what particular measures should be taken depends altogether on the particular circumstances of the case."

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See also *per* Dr. Lushington in *The Victoria* (1848), 3 W. Rob. 49 at p. 52; and *The Lochlibo*, *ib.* at p. 318.

The same rule appears to be laid down in the Federal courts of the United States. In *The "Virginia Ehrman"* (1877), 97 U.S. 309 at p. 315, in delivering the judgment of the court, Clifford, J., says: "Vessels in motion are required to keep out of the way of a vessel at anchor if the latter is without fault" (*i.e.*, as I

understand it, without fault contributing to the collision, such as having no lights at night) "unless it appears that the collision was the result of inevitable accident; the rule being that the vessel in motion must exonerate herself from blame, by shewing that it was not in her power to prevent the collision by adopting any practicable precautions," and cites a number of English and American authorities. In *Plathner* v. *The F. & P. M. No. 1* (1891), 45 Fed. 703 at p. 704, Jenkins, J., says:

"Such action would possibly have proved inconvenient in the navigation of his vessel, in swinging her around the bend; but he had no right to avoid such inconvenience to the injury of another. He had no right to come into probable dangerous proximity. He had no right to take any chance whereby the property of others would be endangered."

It was urged that the scow was only slightly pushed or shoved aside, and that there was nothing in the nature of a collision. In my opinion the law does not recognize any such distinction, except only in degree, and it would be unfortunate if the court were to lend any countenance to the idea that a moving vessel may interfere even in the slightest degree with one that was at rest and escape responsibility for ensuing damage. The application of the maxim *de minimis* is quite sufficient to dispose of frivolous and vexatious actions, and would adequately protect those vessels which inadvertently come in contact with others at rest and cause no appreciable damage. Suppose that the tug had brushed against a yacht, and although the yacht had suffered no damage, a man standing on a chair in the cabin trimming a lamp was knocked off and injured, could it be said that the gentleness of the collision would be a defence? I think, then, that the captain of the tug had a plain course to pursue, which was to make certain that he could go through without doing any damage, and failing that, to delay his passage until it was safe to proceed, and to avail himself of his proper remedy by action if he was damnified by the delay in unblocking the fairway: *Rose* v. *Miles* (1815), 4 M. & S. 101, 16 R.R. 405.

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But, even if we consider that the scow was unlawfully impeding navigation, which, in my opinion, it was not proved that it was under the circumstances, and that for that reason there was a lower standard of duty imposed on the tug than if the scow were not projecting into the fairway, she was at least bound to

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use ordinary care and skill to avoid a collision, but I fail to see how it can be said that the captain, who with an unwieldy cargo confessedly approached the passage way which he saw was partially blocked, and whose real condition he did not know until he had actually started to enter it when it would, in all probability, be too late to avert a collision if it proved to be too narrow, or his vessel was not under perfect control, used ordinary skill or care under such circumstances.

The general principle is that even if the plaintiff is at fault, unless his fault contributes directly to the injury, he is not prevented from recovering against the defendant if the latter's negligence is the decisive cause of the accident: see *e.g.*, *Davies* v. *Mann* (1842), 10 M. & N. 546; *Mayor of Colchester* v. *Brooke* (1845), 7 Q.B. 339.

It was argued that the plaintiff's injuries were too remote a consequence for which to hold the defendants responsible. It seems to me, however, that they were among the natural and primary, and not the remote and secondary consequences of the collision—just as in the case of the yacht already suggested. The plaintiff was at his lawful work in connection with the scow, when hurt, and one of the consequences to be expected in the event of a collision was that some person who was at work on or close to the scow would be injured. And I apprehend that there is no doubt that the defendants are responsible for the

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negligence of those in charge of the tug, but if authority is needed for this, I may refer to the judgment of the United States Supreme Court in *The "Atlas"* (1876), 93 U.S. 302 at p. 311:

> "Damage is sometimes said to be done by the ship, but that is a mere form of expression; the truth being, that it is either done by the owner, or by the master and crew employed by the owner, who is responsible for their conduct; because, being employed by the owner, they are his agents."

Then as to damages: the plaintiff as already stated suffered very severe injuries which laid him up for several months and according to his physician, whose skill or knowledge was not challenged, are likely to be followed by a permanent disability which would render him less fit for work than before. The medical expenses alone amount to $355; his earning capacity was about $50 per month, so that I do not think the defendants

would have any ground of complaint if the damages were assessed at $1,750.

I therefore think that the plaintiff is entitled to judgment for this amount, with costs here and below.

IRVING, J., concurred with HUNTER, C.J.

MARTIN, J.: Since the facts herein are practically undisputed, I am quite at liberty to draw such inferences therefrom as appear to me to be warrantable, and in fact I must do so because we are without the benefit of the reasons which governed the learned trial judge in dismissing the action.

After reading carefully all the evidence in the appeal book, I have come to the conclusion that the master of the Bermuda did not in all the circumstances exercise reasonable care and caution; in other words, that he was negligent. He did use due care in regard to the safety of the tug and scows, but not in regard to those persons whom he saw at work upon the scow engaged in unloading rock from it to fill up the pier. The cross-examination of the master, mate and deck-hand by Mr. *Bird* at, particularly, pp. 30, 32, 33, 42, 43, 45, 48, 49, 50 and 53 of the appeal book clearly brings out the fact that the master and mate knew the men were so engaged and yet did not take sufficient precautions in the circumstances. I am satisfied that he did not blow his whistle more than once, and his statement that he "probably blew one long whistle followed by two or three toots" is not sufficiently definite to carry conviction, particularly since he adds that it "is probable" that the men on the pier and scow did not hear it. The defendant's other witnesses only speak of one whistle, and at p. 50 the master conveys that impression. It was his duty in the dangerous circumstances, as suggested by counsel on p. 48, to have at least sounded such a prolonged succession of blasts as would have been sufficient to direct the attention of any reasonably careful man to the approach of the tug and her attached scow. The stopping of the engines and approaching by slowly drifting with the tide were not enough precautions to have taken, even though the fairway was obstructed to a greater extent than was necessary in the presumably lawful construction of the pier. Nor can I understand

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why he did not hail the men to make sure of their safety. His explanation that he had no idea that anyone was so engaged that he could be hurt in brushing aside the scow is not satisfactory, because the circumstances put him on his inquiry as to that very possibility.

I prefer to rest my decision upon this sound ground, for I am not at all prepared to subscribe to the extreme way the liability of the tug was contended for by appellant's counsel, *viz.*: that simply because it touched the scow, when obstructing the narrow fairway, it was *per se* liable for all consequences, including those which it was impossible to foresee or contemplate. None of the cases cited supported such a far-reaching proposition.

MARTIN, J.

The appeal should be allowed, but seeing that the appellant sues *in forma pauperis*, there will be no costs.

Appeal allowed.

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Public officer, duty of—Provincial Secretary, refusal of to submit petition of right to Lieutenant-Governor for fiat—Crown Procedure Act, R.S.B.C. 1897, Cap. 57, Sec. 4—Withdrawal of case from jury—New trial—Damages, nominal.

The refusal by a Provincial Secretary to submit a Petition of Right to the Lieutenant-Governor for his fiat under the provisions of the Crown Procedure Act, Sec. 4, is an actionable wrong, but

Held, on the facts, that a new trial should not be ordered, notwithstanding that the case had been withdrawn from the jury.

Per HUNTER, C.J.: The statute prescribes no time within which the petition must be submitted and as the defendant did submit it after action brought, this was a sufficient compliance by him with the statute, though he had at the same time advised the Lieutenant-Governor not to grant the fiat.

Per IRVING, J. (dissenting): The refusal to submit the petition being an invasion of the plaintiff's rights, which could be compensated only by damages, the case should have been allowed to go to the jury.

Per MARTIN, J.: A new trial should not be granted, because only nominal damages would be recoverable.

Reversed by S.C. of Can. June 24, 1908

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APPEAL from the decision of MORRISON, J., in an action tried before him and a special jury at Vancouver on the 11th of July, 1906.

Plaintiff claimed damages from defendant, who was Provincial Secretary, for his refusal to submit to the Lieutenant-Governor for His Honour's fiat a petition of right in accordance with section 4 of the Crown Procedure Act. The subject-matter of the petition was a claim of the plaintiff for the renewal of a certain timber licence. Defendant discussed the matter in Executive meeting with his colleagues, and it was then decided that they could not advise His Honour to grant a fiat. A letter to that effect was sent to plaintiff's solicitor, further stating that the same matter had been before the Executive the previous year and a similar decision reached. Plaintiff's solicitors then wrote defendant asking whether his letter was to be understood as a refusal to submit the petition to the Lieutenant-Governor, which the defendant answered in the affirmative. Thereupon the action was commenced, but before delivery of defence, defendant formally submitted the petition to His Honour, at the same time advising him to refuse his fiat, and giving as the reason that the Chief Commissioner of Lands and Works had not in point of fact refused to renew the plaintiff's licence, and His Honour thereupon refused his fiat, and defendant, with his defence, paid into court the sum of $5 to satisfy plaintiff's claim, setting up in his defence such submission after action. The action then went to trial and resulted in the learned trial judge taking the case from the jury at the close of the defendant's evidence, dismissing the action and giving the plaintiff his costs up to the time of delivering the defence.

Statement

The appeal was argued at Vancouver on the 27th of November, 1906, before HUNTER, C.J., IRVING and MARTIN, JJ.

W. S. Deacon, for appellant (plaintiff): It was an actionable wrong for the defendant to decline to submit the petition; there was a duty cast upon him by the Crown Procedure Act, R.S.B.C. 1897, Cap. 57, Sec. 4; see also Hardcastle, 3rd Ed., p. 302 and *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214. Apart from this, however, there is a duty imposed by implication. On

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the importance of not interfering with petitions of right, see Blackstone's Commentaries, Book 1, p. 143; Book 3, p. 255. The right to proceed by petition of right is just as absolute as any other, although the fiat must first be obtained, and the person through whom the petition is to be presented has no more right to refuse to present it than the registrar of the court has to refuse to issue a writ: *In re Nathan* (1884), 12 Q.B.D. 461 at p. 479, 53 L.J., Q.B. 229. The Attorney-General has a right to advise the refusal or granting of a fiat, but none to refuse to present the petition asking for such fiat: *Eastern Archipelago Co.* v. *The Queen* (1853), 2 El. & Bl. 856 at p. 914; 23 L.J., Q.B. 82; *Ryves* v. *The Duke of Wellington* (1846), 9 Beav. 579, 15 L.J., Ch. 461. There is the statute of 13 Edw. I., Cap. 30, which gives an action on the case to every person aggrieved by the failure to perform a statutory duty. See also *Irwin* v. *Grey* (1862), 3 F. & F. 635; *Ferguson* v. *Earl of Kinnoull* (1842), 9 Cl. & F. 251; *Green* v. *Buckle*, 1 Leo. 323; *Ashby* v. *White* (1703), 1 Sm. L.C., 11th Ed. 240; *Clifton* v. *Hooper* (1844), 6 Q.B. 418, 14 L.J., Q.B. 1; *The Queen* v. *The Select Vestrymen of St. Margaret, Leicester* (1838), 8 A. & E. 889 at p. 904; *Cook* v. *Lister* (1863), 13 C.B.N.S. 543. It is not necessary to the cause of action that the withholding should be malicious: *Pickering* v. *James* (1873), 42 L.J., C.P. 217; Beven on Negligence, p. 351. As to damages, see *Wills* v. *Carman* (1888), 14 A.R. 656 at p. 663, *Mereset* v. *Harvey* (1814), 5 Taunt. 442.

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Davis, K.C., for respondent (defendant): The evidence shews that there were not only no damages, but that there could not have been any; in any event, the most he could hope for would be nominal damages. The Government are the responsible parties; their judgment cannot be questioned, and they cannot be asked what their advice to the Governor was, or their reasons for it.

[HUNTER, C.J.: The Governor could have granted his fiat himself.]

Although, theoretically, he has that power, it is one which he probably would not exercise. The plaintiff knew before the trial that the matter had been presented to the Lieutenant-Governor, and that he had refused his fiat. Therefore, he knew

when bringing the action what his actual position was.

[HUNTER, C.J.: No one knows for a certainty that at the time the petition was sent in he was not in a mind to grant a fiat, although six weeks later he was not in a mind to grant it.]

We know that the Executive dealt with the matter before, but as soon as our attention was called to the fact that the plaintiff was insisting on a mere matter of form, we complied with that matter of form; and when we shew that if the petition had been presented to the Lieutenant-Governor on the day that it arrived, the decision would have been the same, how can it be said that the plaintiff has suffered any damage? There is no rule of law that a petition must be presented within a certain time; it doubtless must be within a reasonable time, but six weeks is not an unreasonable period. We have submitted the petition and therefore plead r. 282.

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As to costs: we should have been given them: see r. 284, also r. 976. It was not an action against the Crown, but against the defendant as an official.

Deacon, in reply: As to damages: our right is to have the jury assess them.

Cur. adv. vult.

21st January, 1907.

HUNTER, C.J.: This is an action for damages against the defendant, for that, being Provincial Secretary, he wrongfully refused to submit a petition of right to His Honour the Lieutenant-Governor in accordance with the provisions of section 4 of the Crown Procedure Act, the material part of which reads as follows:

"4. The said petition shall be left with the Provincial Secretary, in order that the same may be submitted to the Lieutenant-Governor for his consideration, and in order that the Lieutenant-Governor, if he shall think fit, may grant his fiat that right be done."

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The petition of right was in respect of the plaintiff's claim for the renewal of a timber licence which had been refused by the Chief Commissioner of Lands and Works, and was left with the defendant on the 24th of April, 1906, for presentation to His Honour.

The matter of the petition was brought up by the defendant in the Executive Council, which decided that it could not advise

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His Honour to grant his fiat, and a letter was sent to the plaintiff's solicitors to this effect on the 2nd of May, which also stated that practically the same matter had been before the Council during the previous year, and that the Council saw no reason to change the decision.

On the 4th of May, in answer to an inquiry by the plaintiff's solicitors as to whether the defendant's letter of the 2nd was to be understood as a refusal to submit the petition to His Honour, the defendant wrote in the affirmative. Thereupon a cause of action arose by reason of the defendant's refusal to submit the petition; and while no doubt His Honour would, in the ordinary course, have acted on the advice of his Council and refused his fiat if the petition had been submitted, still there was the possibility that if the matter had been laid before him he might have taken the responsibility, which he could legally do, of refusing to act on the advice, and granted his fiat; so that if the matter stood here the plaintiff would have had a good cause of action for at least nominal damages.

The defendant, however, after the action was commenced, and the day before the delivery of his defence, *viz.*: on the 21st of June, submitted the petition to His Honour, who refused his fiat, and with the defence paid $5 into court to satisfy the plaintiff's claim. The plaintiff refused to accept this, but proceeded to trial with the result that his action was dismissed, but the

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learned trial judge gave him his costs up to the time of the delivery of the defence. In this I think the learned judge was right.

There is no time specified by the statute within which the Provincial Secretary is required to submit the petition; and that being so, the statute must be construed as allowing a reasonable time within which to submit it. The Secretary, and the other members of the Council, have other and just as important duties to perform as the submission of petitions; and the Council have both the right and duty to tender their advice on the question as to whether the fiat should be granted; and, of course, before submitting the petition, it is necessary that they should have a reasonable time to consider the matter before offering their advice to His Honour as to what should be done. Therefore, it cannot be said that the defendant has unreasonably delayed the

performance of his duty by not submitting the petition until the 21st of June; and if it had not been for his letter of the 4th of May, there would have been no cause of action.

The defendant, however, when he found that the plaintiff was insisting on the carrying out of a formality, as the event afterwards proved, quite properly submitted the petition, and as he did so within a reasonable time after it was left for submission he has satisfied the statute—if not the plaintiff.

The appeal should be dismissed.

IRVING, J.: It is conceded that the refusal of the defendant to submit the petition to His Honour gave the plaintiff a good cause of action, but it is said that the subsequent submission of the petition before the pleadings were closed, together with the payment into court of $5, made the trial of the action unnecessary, frivolous and vexatious, and that therefore this appeal is unnecessary and should be dismissed.

IRVING, J.

With every respect, I cannot see the matter in that way. The plaintiff's civil rights have been invaded; that invasion can only be compensated by damages, and as in my opinion the jury in a case of this kind could, if they thought fit—I do not say they should or would—properly award exemplary damages, it follows that the learned judge should have permitted the case to go to the jury.

I would allow the appeal.

MARTIN, J.: Assuming that the plaintiff is right in his contention that before action brought there was such a refusal to submit the petition as would ground an action, nevertheless, under rule 282 the defendant has set up, and proved at the trial, that he did after action and before plea duly submit the petition, and with that plea he alternatively paid into court the sum of $5 to answer damages.

MARTIN, J.

What is complained of is that in such circumstances the learned trial judge did not let the jury pass upon the question of damages, for he took the view that the plaintiff had not made out his case, and therefore withdrew it from the jury and dismissed it, giving the plaintiff his costs up to the delivery of the statement of defence.

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A new trial is asked for. Mr. *Davis'* contention is that the circumstances being such that it would be impossible in any event for more than nominal damages to be awarded, this Court will not direct such a new trial to be had, for it would only be going through a form and putting the parties to useless expense to require the jury to bring in at the direction of the trial judge a verdict for nominal damages.

It is undoubtedly the fact that if a judge were required to charge a jury on the question of damages according to the evidence in this case he could only direct them that they should assess them as nominal, which means, as Mr. Justice Maule said in *Beaumont* v. *Greathead* (1846), 2 C.B. 494 at p. 499, "a sum of money that may be spoken of, but that has no existence in point of quantity." They are, he also says, "a mere peg on which to hang costs." The sum of one dollar has long been regarded in this Court as such damages: *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2) 39, 1 M.M.C. 31; and in *Beaumont* v. *Greathead*, the Court of Common Pleas in Term refused to direct the jury to enter a verdict for nominal damages, because even where the creditor was entitled to them for the detention of a sum of money, the acceptance by the creditor before action of the debt barred his action for such damages. There is much in the principle involved in that decision which supports the respondent's contention. It is an error to assume that in all cases the jury alone must dispose of the question of damages and that the court has no power at all over them. The case of *Feize* v. *Thompson* (1808), 1 Taunt. 121, is a decision exactly in point, and in it the jury was unable to agree upon the proper proportion of a sum due to the plaintiff, but the court *in banc* (Mansfield, C.J., Heath and Chambre, JJ.) decided that even where a jury refused to give any damages, because of lack of evidence as to the precise amount, nevertheless the court could order a verdict to be entered for the plaintiff with 6d. damages—Mansfield, C.J., saying, p. 123:

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> "If the Court can put themselves in the place of a jury and say what the damages shall be, which the jury have refused to assess, that case (one cited by Heath, J.) appears to be rightly decided; and we may here follow the precedent which it establishes."

That case, with others to a similar effect, is considered in *Wills* v. *Carman* (1888), 14 A.R. 656, at pp. 661-2, 669-70, which case was cited to us as one supporting the appellant's view, but after a careful perusal of it, having regard to the exact circumstances of the case at bar, it does not do so, because they are such that the jury can exercise no discretion, but simply enter one only possible verdict according to direction. Such being the situation, I agree with Williams, J., in *Dods* v. *Evans* (1864), 15 C.B.N.S. 621, that the "matter is to be looked at as if that had been done which might and ought to have been done, *viz.*: the inquisition amended by adding a finding of nominal damages upon the second and third breaches."

So far as *Wills* v. *Carman* is concerned, I should add that even if it were a direct authority on the point (which it is not, in my opinion), we would not be bound by it, but by the English cases cited. The judgments in it, however, are complicated and interwoven with the consideration of other special issues peculiar to libel actions, and I further note that Mr. Justice Patterson dissents from the two members of the court above mentioned, while the fourth member thereof, Mr. Justice Osler, took still another view of the case and did not think it necessary to consider the point before us. The uncertain nature of these judgments is pointed out by Mr. Justice Rose in *Bush* v. *McCormack* (1891), 20 Ont. 497, at p. 499.

MARTIN, J.

This Court has in regard to juries already in effect applied the principle of assuming that what must inevitably be done in matters of formal procedure will be done, and therefore relieving suitors from the useless expense and delay of further employing its machinery unnecessarily. It was in effect so applied in the case of *Yorkshire Guarantee Corporation* v. *Fulbrook & Innes* (1902), 9 B.C. 270, wherein instead of directing a new trial in a case where the jury had disagreed, the court ordered judgment to be entered in favour of the plaintiff because the only substantial defence was fraud, and if that issue went back to be retried the ruling would have to be given, which should have been given at the abortive trial, that there was no evidence to support it. In the case at bar the same direction would have to be given as regards any other damages except nominal. The decisions in

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Bryant v. *North Metropolitan Tramways Company* (1890), 6 T.L.R. 396, and *Allcock* v. *Hall* (1891), 1 Q.B. 444, may also be referred to. As Lord Justice Lindley said, at p. 447, "Nothing will be gained by ordering a new trial."

It follows from all the foregoing that the proper course for us to adopt is to refuse to order a new trial merely to assess nominal damages, and therefore this appeal should be dismissed. It is unnecessary to make any other order because the respondent's counsel does not ask for a formal judgment in his favour, but simply that by the refusal of a new trial the useless litigation should be put an end to.

Then as to costs: we are informed by respondent's counsel (and his statement was not contradicted) that there is a cross-appeal on this question, and he argued that the judgment was wrong in dismissing the action without giving costs to the defendant, while allowing the plaintiff his costs up to the time of the service of the statement of defence. So far as the latter direction is concerned, he cannot now complain because the counsel then appearing acceded to it at the trial. But as regards the subsequent costs which he did ask for, I see no good reason, with every respect to the learned trial judge, why he should not have been given them. The only suggestion for that not having been done is because defendant is a public officer, but I cannot see that a different principle should be laid down for that reason; to do so would not in my opinion be "good cause," which is required by rule 976. After the statement of defence was delivered the action became a hopeless one, except for the recovery of nominal damages, and more than enough to satisfy them were then paid into court. The case is a stronger one than *Richards* v. *Bank of B. N. A.* (1901), 8 B.C. 209, wherein it appears I came to a wrong conclusion in depriving a plaintiff of his costs. Compare also *Gibson* v. *Cook* (1897), 5 B.C. 534.

MARTIN, J.

The cross-appeal should be allowed.

Appeal dismissed, Irving, J., dissenting.

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Contract—Specific performance—Option to purchase mineral claim—Time of the essence—Tender of instalment of purchase money.

Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time is to be of the essence of the contract, yet by the nature of the property dealt with, it is clear that time shall be of the essence.

Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to find the payee and tender him the money.

Decision of HUNTER, C.J., affirmed.

APPEAL from the decision of HUNTER, C.J., reported *ante* p. 9.

The appeal was argued at Victoria, on the 19th of June, 1906, before IRVING, DUFF and MORRISON, JJ. Statement

Bodwell, K.C., for appellants.

W. J. Taylor, K.C., for respondent.

Cur. adv. vult.

16th July, 1906.

IRVING, J.: The learned Chief Justice found as a fact that there had been no attempt on the part of the respondent to avoid the plaintiffs on the day appointed for payment, and he held as a matter of law that time must be considered of the essence of the contract, and dismissed the action.

Having regard to the fluctuating nature of the property (*Macbryde* v. *Weekes* (1856), 22 Beav. 533; *Parker* v. *Frith* (1819), 1 Sim. & S. 200), and to the fact that the plaintiffs were seeking to exercise an option (*Barrell* v. *Sabine* (1684), 1 Vern. 268; *Lord Ranelagh* v. *Melton* (1864), 2 Dr. & Sm. 278; *Dibbins* v. *Dibbins* (1896), 2 Ch. 348), I am of the opinion that his decision as to the law was right, and as I see no reason to differ with him on the question of fact, I think the appeal should be dismissed. IRVING, J.

Mr. *Bodwell* called our attention to Fry on Specific Performance, and asked us to relieve against the consequence

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of the plaintiffs' delay, but the same reasons which compel us to regard time as of the essence prevent us, in the absence of any facts raising an equity in the plaintiffs' favour, from entertaining any application to extend the time.

DUFF, J.: In contracts between vendors and purchasers, that is to say, where such contracts consist of reciprocal promises, stipulations as to time are not generally deemed to be of the essence of the contract. This rule has, however, no application to cases where the performance of the condition in respect of which the limitation as to time is imposed is required to bring into being the relation of vendor and purchaser. It has long been settled that time is of the essence of such a stipulation when it forms part of a condition imposed on the exercise of an option to purchase land; and, consequently, if the conditions be not complied with by the day fixed, there is no contract of sale binding the vendor, and the option is lost.

Of the many statements of the principle I select a passage from the judgment of Kindersley, V.-C., in *Lord Ranelagh* v. *Melton* (1864), 2 Dr. & Sm. 278 at p. 281:

> "I apprehend the rule of law applicable to cases like the present is perfectly clear. No doubt, if an owner of land and an intending purchaser enter into a contract constituting between them the relation of vendor and purchaser, and there is a stipulation in the contract that the purchase money shall be paid and the contract completed on a certain day, this Court in ordinary cases has established the principle that time is not of the essence of the contract, and that the circumstances of the day fixed for the payment of the money and completion of the purchase being past does not entitle either party to refuse to complete. On the other hand it is well settled that where there is a contract between the owner of land and another person, that if such person shall do a specified act, then he (the owner) will convey the land to him in fee; the relation of vendor and purchaser does not exist between the parties unless and until the act has been done as specified. The Court regards it as the case of a condition on the performance of which the party performing it is entitled to a certain benefit; but in order to obtain such benefit he must perform the condition strictly. Therefore, if there be a day fixed for its performance, the lapse of that day without its being performed prevents him from claiming the benefit. Applying that rule to the present case: if the agreement fixes a day for the payment of the money, then it is clear that if that day is past without the payment, the right to compel a conveyance is lost."

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And another from the speech of Lord Cottenham in *Joy* v. *Birch* (1836), 4 Cl. & F. 57 at p. 89:

"It is a well-established rule, that under a clause of repurchase of this description, being for the purpose of determining an interest, the terms of the proviso of repurchase must be strictly complied with. That doctrine was clearly laid down in *Barrell* v. *Sabine* (1684), 1 Vern. 268, and it was confirmed in a case, in this House, of *Ensworth* v. *Griffiths* (1706), 5 Bro. P.C. 184. In *Davis* v. *Thomas* (1830), 1 Russ. & M. 806, Sir John Leach said: 'Where there is no stipulation for penalty or forfeiture, but a privilege is conferred, provided money be paid within a stated time, there the party claiming that privilege must shew that the money was paid accordingly.' In *Barrell* v. *Sabine* it was held, 'that where there is a clause or provision in the conveyance for the vendor to repurchase, the time limited for that purpose ought to be precisely observed.' It was therefore necessary for the party claiming the right to repurchase strictly to comply with the terms of the provision; he was bound to give a regular notice, and he was also bound to pay according to that notice, unless he was prevented from doing so by the situation of the party to whom the notice was given, or who was to receive the money. He was bound therefore to shew that he paid the money, or did do that which was equivalent in law to payment."

By this situation of the parties Lord Cottenham obviously refers to his absence beyond the four seas.

And at p. 91:

"It was incumbent on the plaintiff to prove not merely that the notice was left at the house of the defendant, but to shew something more, namely, that he did make a payment, or that he did that which the law considers equivalent to payment, namely, that he had made a sufficient tender of the money; that he had done all that it was incumbent on him to do to entitle himself to the benefit of his contract."

DUFF, J.

See also *Barrell* v. *Sabine* (1684), 1 Vern. 268; *Ensworth* v. *Griffiths* (1706), 5 Bro. P.C. 184; *Davis* v. *Thomas* (1830), 1 Russ. & M. 506; *Brooke* v. *Garrod* (1857), 2 De G. & J. 62; *Weston* v. *Collins* (1865), 11 Jur. N.S. 190; Dart's Vendors and Purchasers, 7th Ed., 272-3.

The plaintiff must therefore shew either that he paid, or tendered to the defendant the sum stipulated for on the day fixed, or that something has occurred since the contract relieving him from the exigency of the stipulation as to time. There was no payment or tender in fact, and the learned Chief Justice has found (and with his finding I agree) that the plaintiff failed to prove facts justifying the inference that the plaintiff

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was prevented from complying with the condition by the acts of the defendant.

Counsel for the appellant mainly rested his case upon the contention that the facts afforded a ground for equitable relief. Now, courts of equity have often afforded relief from the stringency of such stipulations, but it is important to remember that this relief is afforded, not on the ground that the strict enforcement of the conditions of the contract would bear hardly on one of the parties; not on any ground of mercy, or on the grounds upon which the court acts in relieving from penalties and forfeitures; in other words, a court of equity has no jurisdiction to make a new contract between the parties. Such relief is afforded only on the ground that the conduct of one of the parties raises an equity which entitles the other to prevent him insisting that the condition has not been performed. The course of conduct between the parties, for example, may be such that from it the court will imply an agreement to extend the time: *Const* v. *Harris* (1824), Turn. & R. 496 at p. 523. Fraud, or intentionally misleading, or other acts preventing the party bound by the condition complying with it, may found the equity: *Brooke v. Garrod, supra*, at p. 67. Again, one of the parties may, by the conduct of the other, without any fraud or misconduct, be led into the belief that the rights of the other party will not be strictly enforced; and in such a case, if it be inequitable that these rights should not be enforced, the court will not give effect to them: *Bruner* v. *Moore* (1904), 1 Ch. 305; *Hughes* v. *Metropolitan Railway Co.* (1877), 2 App. Cas. 439, *per* Lord Cairns at p. 448; *Birmingham and District Land Company* v. *London & Northwestern Railway Co.* (1888), 40 Ch. D. 268. It cannot be argued that in this case there was any agreement to extend the time fixed for the performance of the condition in question, or that the plaintiff had any belief or expectation that the condition would be strictly enforced; and the facts do not I think supply any foundation for the contention that the defendant acted inequitably in insisting that it should be literally complied with. The decision of Spragge, V.-C., in *McSweeney* v. *Kay* (1868), 15 Gr. 432, may be sustainable on the facts; but the observations of the Vice-Chancellor, insofar as they indicate

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that in his opinion in contracts of sale providing for repurchase the court has a general power to modify the rigour of the provisions as to time upon which the privilege of repurchase is conditioned, are obviously at variance with the decisions to which I have referred, which, indeed, do not appear to have been brought to his attention. The observations of Lord Cairns and of Sir John Rolt in *Tilley* v. *Thomas* (1867), 3 Chy. App. 61, have, for the reasons already indicated, no application to an agreement of the character now under consideration.

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MORRISON, J., concurred in dismissing the appeal.

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Appeal dismissed.

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Mining law—Placer claim—Location under obsolete Act—Relocation under existent Act on discovery of error—Formal abandonment, whether necessary in such circumstances—Representation—Work done on adjoining claim—Placer Mining Act, R.S.B.C. 1897, Cap. 136; B.C. Stat. 1901, Cap. 38.

Where a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, and no formal abandonment is necessary.

Adopting the principle laid down in *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2) 39, work done by a miner making a cut through an adjoining claim, with the consent of the owners, for the better working of his own claim, must be held to be a representation of his own claim.

Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims:—

Held, that the object of the statute requiring due marking had been accomplished.

TRIAL before MARTIN, J., at Nelson, on the 8th of December, 1905.

Statement

On the 3rd of December, 1904, the plaintiff located a placer

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claim situate on 49 Creek near Nelson, B.C., which claim he called the Owl. This claim he recorded at Nelson on the 6th of December, 1904. Upon the 11th of September, 1905, the defendant located over this claim a placer claim called Golden Dawn, which he recorded on the same day.

The defence was that the plaintiff had located the ground covered by the Owl on the 1st of December, 1904, under the same name, *viz.:* Owl, which was in existence when the plaintiff on the 3rd of December, 1904, located the Owl first above named. Further defences were set up on the trial as follows: the plaintiff had not represented and *bona fide* worked the Owl claim since the location thereof, and it had lapsed; to which the plaintiff urged that while he had not been actually mining on the claim, he built trails and a cabin upon the same, and was engaged in digging a cut through the adjoining claims with the consent of the owners, which cut was necessary in order that he might get a tail race for his flumes, etc., and thus mine the Owl claim. In reply to the defence first named, he said that the Owl located on the 1st of December, 1904, was improperly located, and hence not a placer claim, and need not be abandoned in order that the Owl located on the 3rd of December, 1904, and now claimed under, might be located.

Statement

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

A. M. Johnson, for defendant.

9th December, 1905.

MARTIN, J.: Several questions on the Placer Mining Act are raised herein, and I shall dispose of them in their order.

First. It is objected that the plaintiff has not "represented and *bona fide* worked . . . continuously, as nearly as practicable during working hours" the placer claim the Owl, in question, while he was engaged in building his cabin on the claim in which to live while working it. This point has already been answered in favour of the plaintiff by the judgment of this Court in *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2) 39 at pp. 41-2, 1 M.M.C. 31 at p. 34, wherein it is laid down as follows:

Judgment

"It was said that the work to be done on a claim (which is to be worked continuously) must be miner-like work—that building a house is not miner-like work at all; and, moreover, that the house in question was not on the Kootenay Chief ground at all, though not far off. Now, of course, in

Cornwall or Northumberland, building a house is not miner's work—it is not mining at all. In old and highly organized countries the landlord mines with hired labour, and puts up houses for his men. Yet the cost of those houses is just as much part of his mining capital invested in the mines, and the houses are just as useful for working the mines as pumps and furnaces with which the water is removed or the ore roasted. And among the hills of British Columbia the first thing a miner does (when he intends continuous working) is to secure, or build if necessary, a cabin in a spot convenient as possible to his claim. It is not necessary that it should be actually on his ground. There may be overwhelming advantages in wood and water a quarter of a mile off. It is quite sufficient if it be in a place manifestly convenient for the workers. The building of a cabin on first settling down to the serious working of a mineral claim is therefore just as much miner's work in reference to the holding and working the claim as is, afterwards, the sinking of a shaft or the driving a tunnel, or building a pump."

That case was decided on the following sections of the Act of 1882:

"48. Every free miner shall, during the continuance of his certificate, have the exclusive right of entry upon his own claim, for the miner-like working thereof, and the construction of a residence thereon, and shall be entitled exclusively to all the proceeds realized therefrom; provided, that his claim be duly registered, and faithfully and not colourably worked; but he shall have no surface rights therein. Provided also, that the Gold Commissioner may, upon application made to him, allow adjacent claim-holders such right of entry thereon as may be absolutely necessary for the working of their claims, and upon such terms as may to him seem reasonable.

"51. A claim shall be deemed to be abandoned and open to the occupation of any free miner when the same shall have remained unworked on working days by the registered holder thereof for the space of seventy-two hours, unless sickness or other reasonable cause be shewn.

Judgment

"52. Every full sized claim or full interest as defined in this Act shall be represented and *bona fide* worked by the owner thereof, or by some person on his behalf."

Second. It is submitted that because the plaintiff had already located a claim covering the same ground, on December 1st, he could not relocate it subsequently (on December 3rd), without complying with section 7 of the Placer Mining Act Amendment Act, 1901, *i.e.*, in this case he should have posted formal notice of abandonment on the four corner posts of his claim because it had not yet been recorded. What happened is peculiar. The plaintiff essayed to make a valid location of a "creek claim" under the repealed section 20 of the statute of 1897, which gave him a

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claim 100 feet square. What he did amounted to making a valid location under that Act, but when he came to record the location he found out from the mining recorder that the law had been changed and that by the Act of 1901, then in force, he was entitled to a claim 250 feet square which could only be obtained by conforming to the formalities of that statute which differed from the former under which he had made his location. He thereupon decided to proceed no further with his abortive attempt under the former statute, and proceeded to locate under the existing one. In such circumstances I am of the opinion that he did right in treating the result of his former misconceived efforts as a nullity, and consequently it was unnecessary to comply with said section 7. There was no bar to his doing so, because no valid claim had been located by him on that creek, and therefore he was justified in beginning *de novo* to locate one. Though it does not, in this view, strictly affect the question, yet I also point out that said section 7 provides that after observance of its conditions the locator "shall thereupon be entitled to locate and record another placer claim upon other ground in lieu of the abandoned claim," etc. It would, I think, be found difficult to apply such language to the exceptional facts of this case because it was the same ground that was relocated by the same locator.

Judgment

Third. It is urged that the relocated claim is invalidated because in placing a necessary post on and about the centre of the common boundary line between the Owl and the Eagle claims, which line was exactly co-terminous in each claim, one post was used to do duty for both claims. On one side of the post was written the name of the Owl claim, and on the other that of the Eagle. It is contended that the Act requires the erection of a complete and distinct set of posts for each claim, and that no post can perform a joint duty. Before adopting such a very technical construction such an intention of the Legislature must clearly appear, but I can find nothing in the Act which positively requires it. What was done was at once convenient and plain and the notice on the post shewed the two claims it pertained to, so that the object of the Act in requiring due marking of the boundary had been accomplished.

Finally, the claim is sought to be invalidated on the ground that it was not continuously worked, or worked at all, for many weeks while the owners were working on the rock cut (drain) on the Hawk claim, just below the Owl, on the same creek. It is clear from the evidence that it was necessary for the miner-like working of the Owl that a rock cut and drain should be constructed through the Hawk. That work was consequently undertaken by the Owl's owners on a grub stake agreement with the owner of the Hawk, and the plaintiff relies upon section 49 of the Placer Act which provides that

"A tunnel or drain shall be considered as part of the placer claim, or mine held as real estate, for which the same was constructed."

There was no necessity for the plaintiff to resort to section 48 and obtain and record the licence of the Gold Commissioner, for that section was passed to protect the rights of other owners and the Crown, while here the plaintiff had obtained the leave and licence of the party concerned. If a drain is to be considered as part of the placer claim, then the miner-like and necessary work done on it applies to and must be held to be a representation of the claim. There is nothing new in the idea that certain work done off a claim and in connection with it must be so regarded, because in *Woodbury* v. *Hudnut, supra*, the cabin was not built on the claim in question. The principle was sought to be distinguished because here the plaintiff was also working the Hawk under the agreement as well as making the drain. But surely because the owners concerned took advantage of the occasion to work that part of the Hawk through which the rock-cut and drain were constructed, and so save the gold therein, the plaintiff has not lost his statutory right to have such drain regarded as part of his claim? Of course if I were satisfied that this was merely a colourable scheme to work the Hawk and let the Owl lie idle that would be a very different matter.

Judgment

It follows that the plaintiff's location, being a valid one, has been trespassed upon by the defendant, and for that trespass damages must be awarded, but only nominal, *i.e.*, $1, according to *Woodbury* v. *Hudnut*, as there is no evidence of special damage shewn, and there will be a perpetual injunction restraining future trespass, as prayed.

Judgment for plaintiff.

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Practice—Order for sale of real estate pendente lite—Order 50, r. 1, effect of.

Rule 1 of order 50 provides, in part "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold the court or a judge may order the same to be sold":—

Held, that this is a general power, to be exercised by the Court or a judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action.

In re Robinson (1885), 31 Ch. D. 247, not followed.

MOTION on behalf of the defendant for an order authorizing and approving a sale of land proposed to be made by the defendant. The facts, so far as material to the application, are as follows: John Rainey died intestate being the owner in fee simple of the lands in question. The defendant obtained letters of administration of the personal estate of the deceased, alleging himself to be a son of the deceased. The plaintiff, a brother of the deceased, alleged that the defendant was not a son of the deceased, that the plaintiff was one of the next of kin of the deceased and brought this action against the defendant, personally and as administrator, for revocation of the letters of administration and for a declaration that the defendant had no title to the lands in question and that the plaintiff was entitled to a one-quarter undivided interest therein. The defendant, pending the action, had obtained conveyances from the other three brothers of the deceased of all their interest in the lands in question.

Statement

The motion was argued before HUNTER, C.J., at Vancouver on the 20th of November, 1906.

Wade, K.C., for defendant: Assuming that the plaintiff succeeds in establishing his claim that he is entitled to an undivided one-quarter interest in the land, the defendant is nevertheless entitled to three-quarters undivided interest therein by virtue of the conveyances to him from the other brothers of the deceased. The proposed sale is at a good price and the plaintiff cannot be

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prejudiced, because the money will be placed in court to be paid to him if he succeeds in establishing his title. The proposed sale is necessary in order to prevent the property being sold under mortgage and the Court has jurisdiction under Order 51, r. 1, to make the order asked for.

Craig, for plaintiff: The Court cannot try the action on this application, but must, for the purpose of the application, assume that the plaintiff is entitled to a one-quarter undivided interest in the lands: *Prince* v. *Cooper* (1853), 16 Beav. 546. Order 51, r. 1, does not confer jurisdiction to enable the Court to convey the plaintiff's lands without his consent. The rule is intended only to enable the Court, pending an action, to approve a sale which the applicant has title to make; as for instance, to approve a sale made by a trustee. This is practically an application to compel the plaintiff to execute a conveyance, because, unless the plaintiff does execute a conveyance, title cannot be conferred on the purchaser without a vesting order being made. No case has been made out for a vesting order. An order approving the proposed sale will be abortive. Order 51, r. 1, applies only where a sale is necessary or expedient for the purpose of the action: *In re Robinson* (1885), 31 Ch. D. 247. In any event, an order should not be made directing a proposed sale negotiated privately by the defendant, to be completed by the plaintiff. The plaintiff should not be compelled to shew that the price is inadequate; he is entitled, if the land is to be sold, to have it sold publicly according to the usual practice of the Court. The granting of this application would entirely deprive the plaintiff of the benefit of the Partition Act.

Argument

7th December, 1906.

HUNTER, C.J.: Mr. *Craig* contends that *In re Robinson* (1885), 31 Ch. D. 247, is a binding authority on me to refuse to approve the proposed sale. I am unable to follow this decision, assuming it to be in point, as it seems to me to violate the principles laid down by numerous law Lords as to the construction of statutes in general and codes in particular, notably by Lord Herschell in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 and by Lord Halsbury in *Salomon* v. *Salomon & Co.* (1897), A.C. 22 at p. 34, which principles I have had before now frequent occasion

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to apply, as for instance in *Calder* v. *The Law Society* (1902), 9 B.C. 56; *Hinton Electric Co.* v. *Bank of Montreal* (1903), *ib.* 545 and *Hopper* v. *Dunsmuir* (1903), 10 B.C. 17. Here I am asked to read into the rule the words "for the purposes of the suit only" in limitation of words otherwise sweeping and general, which according to Lord Halsbury I must decline to do. I may add that it would be very unfortunate if the power of the Court in such a jurisdiction as this, where the value of real estate fluctuates in the most extraordinary manner, should be fettered in the way contended for. On the material filed it is clear that the weight of evidence is in favour of the conclusion that the amount offered is such as a trustee would be justified in accepting.

Judgment

I therefore approve the sale, and direct that the surplus, after paying off the mortgage and taxes, be paid into court. Costs reserved.

Order accordingly.

COTTON *ET AL.* v. THE CORPORATION OF THE CITY OF VANCOUVER.

IRVING, J.

1906

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COTTON v. VANCOUVER

Municipal law—Streets, property of Corporation in—Vancouver Incorporation Act, 1900, Sec. 218—"Vest," meaning of.

Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . . in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved).

In an action for an injunction to restrain the Corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted that a proper construction of the word "vest" as used in section 218, did not authorize the Corporation to dig to an excessive depth:—

Held, adopting the ruling in *Roche* v. *Ryan* (1891), 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well, but

Held, on the evidence, that it had not been shewn by the plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain.

MOTION to continue an injunction restraining the Corporation of the City of Vancouver from constructing, at a depth which was alleged to be injurious to adjoining property, a drain in a street in the municipal limits, argued before IRVING, J., at Vancouver on the 4th of September, 1906. Statement

Wilson, K.C., for plaintiffs.

Cowan, K.C., for defendant Corporation.

11th December, 1906.

IRVING, J.: The plaintiffs, who are owners of a building on the north side of Pender street and on the south side of the lane lying between Hastings and Pender streets, seek an injunction restraining the defendants from constructing in the said lane a drain at what they (the plaintiffs) call an excessive depth, that is to say, some twelve or sixteen feet below the surface of the lane, and in proximity to the basement of the plaintiffs' building. The plan of construction proposed is that the drain should be Judgment

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dug from 19 to 26 feet below the surface by alternate tunnels and open cuts, the tunnels to be about 30 feet in length and the open cuts about 20, with manholes every 30 feet. To drain the plaintiffs' building, and the other buildings on the south side of the lane it would only be necessary to dig to the depth of from 9 to 10 feet, and a drain placed at that depth would not require any rock to be blasted. The excessive depth, or what the plaintiffs call the excessive depth, that is to say, the difference between 19 and 26 feet and 9 and 10 feet is required, in order that the buildings on the north side of the lane, that is to say, the buildings facing on Hastings street may be drained through this same drain. The plaintiffs contend that the proper place for the construction of a drain for these buildings is along Hastings street; that the Corporation has no right to dig down to this excessive depth in the lane in order to save the expense of pulling up Hastings street and putting a drain there. Their contention in short is that this is an extraordinary exercise of the powers of the Corporation to the detriment of their property, and should not be permitted; and they refer me to the case of *Knight* v. *Isle of Wight Electric Light and Power Co.* (1904), 73 L.J., Ch. 299 at p. 300, 20 T.L.R. 173 at p. 174. This was a case of nuisance where it was held that the vibration, noise and smell were so great as to justify the interference of the Court. The plaintiffs urge the blasting of the rock in the lane is a nuisance, but I have no trouble in disposing of that ground of complaint:

Judgment

> "It frequently happens that the owners or occupiers of land cause, in the execution of lawful works in the ordinary user of land, a considerable amount of temporary annoyance to their neighbours, but they are not necessarily on that account held to be guilty of causing an unlawful nuisance. The business of life could not be carried on if it were so. For instance, a man who pulls down his house for the purpose of building a new one no doubt causes considerable inconvenience to his next door neighbours during the process of demolition; but he is not responsible as for a nuisance if he uses all reasonable skill and care to avoid annoyance to his neighbour by the works of demolition. Nor is he liable to an action, even though the noise and dust and the consequent annoyance be such as would constitute a nuisance, if the same, instead of being created for the purpose of the demolition of the house, had been created in sheer wantonness or in the execution of works for a purpose involving a permanent continuance of the noise and dust. For the law, in judging what constitutes

a nuisance, does take into consideration both the object and duration of that which is said to constitute the nuisance."

Then turning to the other ground upon which the injunction is sought, *viz.:* that danger is reasonably to be apprehended: the plaintiffs rely chiefly on section 218 of the Vancouver Incorporation Act, 1900, Cap. 54. By that section it is enacted as follows:

"218. Every public street, road, square, lane, bridge or other highway in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved), and such public street, road, square, lane or highway shall not be interfered with in any way or manner whatsoever, by excavation or otherwise, by any street railway, gas or waterworks company, or any companies or by any company or companies that may hereafter be incorporated, or any other person or persons whomsoever, except having first made application and received the permission of the City Engineer in writing."

There was much discussion as to what this section meant. The plaintiffs' contention is that it only gives or vests in the Corporation the surface of the street as street, with a depth sufficient to enable the Corporation to do that which is done in every street, that is to say, to raise the street, lay down sewers and water pipes; and that the sinking to an excessive depth is not authorized by this construction of the word "vest."

A number of English cases were cited in support of that contention, but I have arrived at the conclusion that this limitation is not at all applicable to the section in question. There is a marked difference between our Act and the English Acts referred to by Mr. *Wilson*. By our Act, everything is vested in the Corporation, unless expressly reserved; nothing, therefore, will be reserved by implication. In *Roche* v. *Ryan* (1891), 22 Ont. 107, Street, J., came to the conclusion that the word "vest" was not a vesting of the surface merely; that the word was wide enough to include the freehold as well as the surface; that where the individual who had laid out the lane had reserved no right in the soil, the soil and freehold were vested in the municipality. I think that the argument is applicable to section 218. The defendants, then, own the street.

Judgment

They are authorized by section 125, sub-section 43 to make by-laws as to laying down drains and sewers under such lands as

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the Council may deem necessary; but as this is one of the ordinary uses of a street or lane (*Coverdale* v. *Charlton* (1878), 48 L.J., Q.B. 128) no by-law appears to be necessary where they own the street and the work is wholly within their own property: *Corporation of the City of New Westminster* v. *Brighouse* (1891), 20 S.C.R. 520, and note the language at the end of subsection 43.

On the evidence I do not feel convinced that the apprehended mischief will occur.

Judgment

Apparently, the cases require the plaintiffs to make out on their application for an injunction that substantial injury, irreparable injury will be sustained by them, as the inevitable consequence of the drain being placed where it is proposed to place it. The evidence does not satisfy me that such is the fact, so the injunction must be refused, with costs.

Injunction refused.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

CALORI v. ANDREWS (p. 236).—Affirmed by Supreme Court of Canada, 7th May, 1907. See 38 S.C.R. 588.

ELK LUMBER COMPANY, LIMITED, THE v. THE CROW'S NEST PASS COAL COMPANY, LIMITED, DANIEL v. MOTT *et al.* (p. 433).—Affirmed by Supreme Court of Canada, 24th June, 1907.

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. MCGREGOR (p. 257).—Reversed by the Judicial Committee of the Privy Council, 22nd July, 1907.

NORTON v. FULTON (p. 476).—Reversed by Supreme Court of Canada, 24th June, 1907.

Case reported in 11 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council.

ATTORNEY-GENERAL OF BRITISH COLUMBIA, THE v. LUDGATE AND THE ATTORNEY-GENERAL OF CANADA: DEADMAN'S ISLAND CASE (p. 258).—Affirmed by the Judicial Committee of the Privy Council, 27th July, 1906. See (1906), A.C. 552.

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See CROWN LANDS.

ACTION, LIMITATION OF — *Private and Public Acts, construction of—B.C. Stat. 1896, Cap. 55, Sec. 60—R.S.B.C. 1897, Cap. 58—(Lord Campbell's Act)—Public Authorities Protection Act, 1893 (Imperial).*] Deceased, a workman employed by the defendant Cook on a contract work for the defendant Company, was instantly killed by coming in contact with a live wire. The accident occurred on the 6th of August, 1904, and the writ in the action, brought under the provisions of Lord Campbell's Act, was issued on the 15th of July, 1905. Defendant Company set up, as a bar to the action as against them, section 60 of their Act of incorporation, which limits the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway, or works or operations of the Company:—*Held*, on appeal, affirming the decision of MORRISON, J., that Lord Campbell's Act is a special Act; creating a special cause of action; and this special cause of action, so specially provided for, does not come within the scope of a general limitation clause in a private Act, passed for the benefit of a private corporation. Effect of the Public Authorities Protection Act, 1893 (Imperial), discussed. GREEN *et al.* v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED, AND EDWARD COOK. - 199

ADMIRALTY LAW—*Exchequer Court of Canada—Admiralty jurisdiction—Action for balance of contract price for building ship—Counter-claim for moneys expended in repairs owing to alleged defective work—Striking out.*] Plaintiffs built a ship in Paisley, Scotland, for a company in Vancouver, B. C. On her way out certain repairs were made, amounting to £3,638. The first instalment of the purchase price not being paid, action was commenced by seizure of the ship. Defendants counter-claimed for the above-mentioned sum, the expenditure of which they alleged was rendered necessary by the defective work and material in her construction and equipment. On a motion to strike out this counter-claim as not being a subject of admiralty jurisdiction:—*Held*, that, the counter-claim not being one made by the builders of the ship, and not being made against the ship, the motion to strike it out must be allowed. Jurisdiction of the Exchequer Court of Canada considered. BOW, MCLACHLAN & CO. v. THE "CAMOSUN." - - - - - - - - - 283

ADMIRALTY LAW—*Continued.*

2.——*Rule 63 (Admiralty), scope of to include an equitable set-off—Counter-claim—Evidence—Trial—Balance of convenience.*] In an action in the Exchequer Court of Canada (Admiralty jurisdiction) for the price of a ship, where the circumstances entitle the defendant to a reduction of the amount claimed, if such claim can be substantiated, the court will not exclude the proposed set-off. Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience is in favour of trying out any disputes concerning those repairs at the place where the ship is rather than at the place where she was built. BOW, MCLACHLAN & CO. v. THE "CAMOSUN." (No. 2). - - - 368

APPEAL—*Costs of—Statutes, construction of—Supreme Court Act, 1904, Sec. 100—Railway Act, 1903 (Dominion), Secs. 162 and 168—"Event" read distributively—"Issue" as distinguished from "event"—Costs of and*

APPEAL—*Continued.*

incidental to arbitration.] Sam Kee, having obtained an award from arbitrators appointed under the Railway Act, 1903 (Dominion), which award, by reason of section 162 of the Railway Act, 1903, entitled him to the costs of the arbitration, the Railway Company appealed to the Full Court, advancing several distinct grounds of appeal, on all of which, with the exception of the rate of interest allowed by the Arbitrators, they failed, the interest being reduced to the statutory rate, from six per cent. to five per cent.:—*Held* (IRVING, J., dissenting): (1.) That the word "event" in section 100 of the Supreme Court Act, 1904, may be read distributively. (2.) That section 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the Full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by section 100 of the Supreme Court Act, 1904. (3.) That the success of the appellant Company on the question of interest was merely an "issue" arising on the appeal, and not an "event" on which it was taken. VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY v. SAM KEE. 1

2.——*Ground not distinctly raised at trial—Question of fact.*] D., who was with others jointly indebted to the plaintiff on certain promissory notes in relation to the transfer of a business as a going concern, did not in his pleadings, nor at the trial, until the close of the evidence in the case for both sides, raise the point that he claimed a lien on certain merchandise in stock, which was sold by the plaintiff, the proceeds of which ought to have been, but were not, applied in reduction of the debt:—*Held*, that where a point is one of fact, or of mixed law and fact, it cannot be raised in the Court of Appeal for the first time unless the court is satisfied that by no possibility could evidence have been given which would affect the decision upon it; but where the point is wholly one of law, such, for instance, as the construction of a statute, it may be raised for the first time on appeal subject to such terms, if any, as the court may see fit to impose. STONE v. ROSSLAND ICE AND FUEL COMPANY *et al.* 66

3.——*Jurisdiction.* - - - 454
See HABEAS CORPUS.

4. *Security for costs.* - - 355
See PRACTICE. 3.

APPROPRIATION OF PAYMENT. - - - - - - - - 426
See MECHANICS' LIEN.

ARBITRATION—Costs of. - - 1
See APPEAL.

ATTACHMENT OF DEBTS. - 226
See PRACTICE. 6.

BANKS AND BANKING—*Interest—Bank Act, Secs. 80 and 81—Bank stipulating for usurious rate—Reduction to maximum legal rate.*] In an action to recover principal and interest on certain promissory notes, bearing interest at twelve per centum "as well after as before maturity," defendant pleaded section 80 of the Bank Act:—*Held*, reading sections 80 and 81 together, such a contract between the Bank and the creditor is merely invalid insofar as it stipulates for more than seven per cent. BANK OF MONTREAL v. HARTMAN. - - - - - - 375

BILLS OF SALE—*Invalidity—Transfer of goods in the ordinary course of business—Sale of stock en bloc—Application of Bills of Sale Act.*] Plaintiff sold his stock of goods *en bloc*, and defendants attacked the sale on the ground that it was part of a scheme between the vendor and purchaser to defraud certain wholesale houses. A jury found that the transaction was *bona fide*, but on motion for judgment, defendants questioned the validity of the bill of sale on a number of grounds, one of plaintiff's replies to which was that the Bills of Sale Act did not apply, as this was a transfer of goods in the ordinary course of business, excluded from the operation of the Act by section 2 (R.S.B.C. 1897, Cap. 32; B.C. Stat. 1905, Cap. 8, Sec. 3):—*Held*, that the words "transfers of goods in the ordinary course of business," were wide enough to include the sale of a stock in trade *en bloc*. GREENBURG v. LENZ *et al.* - - - - - - - 395

CHAMPERTY AND MAINTENANCE—*Damages for wrongfully maintaining action against plaintiff—English criminal law in Canada, introduction of—Common interest in suit—Parties interested in litigation—Litigious rights—Illegal consideration.*] An action lies for unlawful maintenance, notwithstanding that the plaintiff was unsuccessful in the action maintained, on proof of special damage:—*Held*, on the evidence, *per* IRVING and MORRISON, JJ. (HUNTER, C.J., *dissentiente*), that in this case, the plaintiff had suffered no damage. Decision of DUFF, J., reversed. NEWSWANDER v. GIEGERICH. - - 272

COAL MINES ACT—Leases and licences under. - - - - - - - 129
See MINING LAW. 3.

COMPANY LAW—*Control of company—Purchase of mineral claim by directors for illegal object—Fraudulent scheme—Knowledge of by vendor—Duty of directors—Illegal conduct of—Meetings of directors—Quorum.*] As fiduciary donees of their powers, the directors of a company are bound to exercise them *bona fide* for the purposes for which they were conferred; and generally the corporate body to which they owe this duty is entitled, in the case of a breach of it, to invoke the remedial action of the court. A director acting in a certain way, with the primary object of deriving an improper personal advantage, financial or otherwise, cannot save himself by shewing that his action was also of benefit to the company. If the circumstances are such that his actions are equivocal, and open to two constructions, he must, seeing that he is in a fiduciary capacity, be prepared to shew beyond all reasonable doubt the single-mindedness of his intentions. Decision of IRVING, J., affirmed. MADDEN *et al.* v. DIMOND *et al.* RUDOLPH v. MACEY. - - - - - - - - 80

CONSTITUTIONAL LAW. - 257
See STATUTE, CONSTRUCTION OF. 4.

CONTRACT. - - - - - 186
See PARTNERSHIP.

2.——*Specific performance—Option to purchase mineral claim—Time of the essence—Tender of instalment of purchase money—Intoxication.*] Where the contract is for the sale of property of a fluctuating value, such as mineral claims, although there is no stipulation that time shall be of the essence of the contract, yet by the very nature of the property dealt with, it is clear that time shall be of the essence. Where the transaction is an option, or unilateral contract, for that reason time is to be taken as intended to be of the essence. Where there is a stipulation to pay money on a particular day, and no place is agreed upon, it is the duty of the payor to seek out and find the payee if he is within the jurisdiction. Decision of HUNTER, C.J., affirmed. MORTON AND SYMONDS v. NICHOLS. - - 9,485

COUNTY COURT—Mining jurisdiction. - - - - - - - - 447
See MINING LAW. 5.

COSTS—*Action by Attorney-General—Payment of costs by relator or Attorney-General—18 & 19 Vict., Cap. 90 (Imperial), whether in force in British Columbia.*] In an action by the Attorney-General at the relation of a private individual, the Crown sues as *parens patriæ*, and the only object of inserting the name of the relator in the proceedings is to make him responsible for costs. The Act 18 & 19 Vict., Cap. 90 (Imperial), is not in force in British Columbia, and the machinery by which the Act is to be worked out could not be applied here. ATTORNEY-GENERAL *ex rel.* KENT v. RUFFNER AND BLUNCK. - - - - - - 299

2.——*"Event," what constitutes—Supreme Court Act, 1904, Sec. 100.*] By section 100 of the Supreme Court Act, 1904, the Legislature expressly intended to provide an automatic code for the disposition of the costs of all trials, hearings and appeals in the Supreme Court, and to sweep away all discretion save in relation to the specific exceptions set out in the said section 100. HOPPER v. DUNSMUIR. - - - 18

3.——*Security for.* - - - 355
See PRACTICE. 3.

CRIMINAL LAW—*Evidence—Complaint in case of rape—Questions put to complainant by her aunt the following day—Admissibility of.*] Where the complainant makes a statement, to a third party, not in the presence of the accused, such statement may be given in evidence, provided it is shewn to have been made at the first opportunity which reasonably offered itself after the commission of the offence, and has not been elicited by questions of a leading and inducing or intimidating nature. REX v. JIMMY SPUZZUM. - - - - - - - - - - 291

2.——*Indian, sale of liquor to—Who is an Indian—Person following Indian mode of life—Indian Act, amendment of 1894, Cap. 32, Sec. 6—Mens rea.*] A quarter-breed is as much entitled to purchase liquor as a white man, provided he does not come within the purview of the amendment to the Indian Act enacted by section 6, Cap. 32, 1894. In this case, there being nothing to shew that the defendant knew or had cause to suspect that the person to whom he sold the liquor was reputed to belong to a particular band, or followed the Indian mode of life, the defendant only acted reasonably in the circumstances. REX v. HUGHES. - 290

CRIMINAL LAW—*Continued.*

3.——*Perjury, Criminal Code, Sec. 145—Crime alleged to have been committed on examination for discovery in a civil suit—Criminal Code.*] The accused having been charged with perjury committed on his examination for discovery before the Registrar in a civil suit, elected to take speedy trial. On his election, his counsel took the objection that perjury could not be assigned on examination for discovery:—*Held*, that as every statement made upon oath by the person examined during his examination for discovery, forms part of his evidence at the trial, it is evidence given in a judicial proceeding within the meaning of section 145 of the Criminal Code. Discretion of Court exercised by refusal to hear charge of perjury while civil proceedings are pending. REX v. T.—— - - - - - 223

CROWN LANDS—(*Dominion*)—*Reservation of timber in grant of land—Mortgage by patentee — Subsequent Order in Council rescinding reservation—Effect as to rights of mortgagee in timber—Accretion—Estoppel.*] A grant of land issued pursuant to sections 14 and 15 of the Dominion Land Regulations (Cap. 100, Consolidated Orders in Council) contained, *inter alia*, a reservation to the Crown or its assigns of all merchantable timber. Subsequently an Order in Council was passed cancelling such reservation and declaring that all persons who had received homestead entries for lands similarly granted shall be entitled to the timber on their homesteads free of dues. The owner, MacCrimmon, sold the timber to defendants Johnston and Cook, who in turn transferred their interest to defendant Smith. MacCrimmon's mortgagees claiming under a mortgage of the 5th of August, 1893, brought an action for an injunction and damages for trespass:—*Held*, reversing the judgment of DUFF, J. (MARTIN, J., *dissentiente*), that the cancellation operated either as an extinguishment of the reserve, or a grant of the right in gross to the owner of the land; that the owner thereby became possessed of both the land and the profit which issued out of it, the profit becoming extinct and falling into the inheritance. That the reserve mentioned in the Crown grant was merely a licence to enter and cut the timber, and was not a reservation such as that in *Stanley* v. *White* (1811), 14 East, 332 at p. 343. MACCRIMMON, PELLY AND PELLY v. SMITH, JOHNSTON, COOK AND SMITH. - 377

DAMAGES—Exemplary—Excessive. - - - - - - - - 23
See TAXES.

DISCOVERY. - - - - - 387
See PRACTICE. 7.

DIVORCE. - - - - - - 60
See PRACTICE. 2.

EVIDENCE. - - - - - 291
See CRIMINAL LAW.

FIXTURES. - - - - - 398
See LANDLORD AND TENANT.

HABEAS CORPUS—*56 Geo. III., Cap. 100, Secs. 3 and 4—Order discharging prisoner—Immigration Act, R.S.C. 1886, Cap. 65; 1902, Cap. 14—Proclamation issued pursuant to—Effect of—Appealability from decision of immigration officer — Supreme Court Act, B.C. Stat. 1903-4, Cap. 15, Sec. 86—Appeal —Jurisdiction.*] A proclamation was issued and published in the Canada Gazette, empowering the Minister of the Interior, or any officer appointed by him for the purpose, in pursuance of the amendment to the Immigration Act, 1902, Cap. 14, to prohibit the landing in Canada of any immigrant or other passenger suffering from any loathsome or infectious disease, and who, in the opinion of the Minister, or such officer, should be so prohibited:—*Held*, on appeal (affirming the order of MORRISON, J.), that the statute and the proclamation issued thereunder, merely authorizes the deportation of the diseased person; that it does not take away the right of the court to decide the question of fact on a proper application, and the judges are bound to inquire into the matter on an application for *habeas corpus*. Parliament not having made the examination by the immigration officer final, the statute is not to be construed as ousting the jurisdiction of the court to examine into the legality of the detention on a proper application. Effect of *Cox* v. *Hakes* (1890), 15 App. Cas. 506, discussed. IKEZOYA *et al.* v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - 454

INCOME—*Taxation of — What constitutes income—Outgoings, meaning of under the Act—Interest paid by bank to depositors in Ontario — Taxation — Assessment Act, 1905, Cap. 2.*] By the assessment Act (B.C. Stat. 1905, Cap. 2) it is provided that Banks shall be taxed upon their actual gross income derived from business transacted within the Province, subject to certain deductions which are set out in Form 1 of the Act. Form 1 provides, *inter alia*, a deduction on account of outgoings or necessary expenses incurred and actually paid by the Bank in the production of income. The Bank of Hamilton operates two branches in British

INCOME—*Continued.*

Columbia, and there was charged as a deduction a certain sum which was ascertained by deducting four per cent. on the average of the weekly sums which, in the books of the head office, were debited to these branches. In ascertaining the profits made by the different branches, the practice of the head office was to charge against each branch this four per cent. The evidence did not shew whether this sum (debited weekly against the branches in the books of the head office) in fact corresponded with the amount of money employed by the Bank in its banking business in British Columbia in obtaining income. The charge of four per cent. was made up of two items: three per cent. was charged as representing the interest paid to depositors in Ontario on moneys borrowed from them by the Bank, and one per cent. was a charge representing the general expenses of the Bank in connection with deposit accounts, including, as appeared from the affidavit of the general manager, a certain allowance made for the loss arising from the fact that a considerable sum of money on which interest was paid by the Bank remained unproductive. The principal question argued on the appeal was whether these deductions should have been allowed by the Court of Revision:—*Held*, that had there been proper evidence before the Court of Revision that the moneys debited by head office to the British Columbia agencies were moneys on which the head office paid depositors in Ontario three per cent., and that said moneys had actually been employed in the British Columbia business, then the said three per cent. should have been deducted from the gross income as an outgoing in the production of income, but that there was not sufficient evidence of these facts before the Court of Revision to warrant the allowance of this deduction. *Held*, also, that said deduction of one per cent. was rightly not allowed by the Court of Revision as it included elements which did not properly enter into the computation of the statutory deductions. IN RE BANK OF HAMILTON. - - - - - **207**

JURY — *Non-direction — Misdirection.*] *Held*, following *Spencer* v. *Alaska Packers Association* (1904), 35 S.C.R. 362, that non-direction is not a ground for a new trial unless it causes a verdict against the weight of evidence; and in this case, the only non-direction specifically complained of being that the jury should have been charged that a certain point was not within the railway right of way, and there being

JURY—*Continued.*

no evidence on which the jury could find that such point was within the right of way, the learned judge would not have been justified in charging to that effect. BLUE AND DESCHAMPS v. THE RED MOUNTAIN RAILWAY COMPANY. - - - - **460**

2.——*Special, right to—Jurors Act, R.S. B.C. 1897, Cap. 107—Jurors' Act, 1860—6 Geo. IV., Cap. 50.* - - - - **148**
See TRIAL. 2.

3.——*Withdrawal of case from—New trial—Damages—Nominal.*] The refusal by a Provincial Secretary to submit a Petition of Right to the Lieutenant-Governor for his fiat under the provisions of the Crown Procedure Act, Sec. 4, is an actionable wrong, but *Held*, on the facts, that a new trial should not be ordered, notwithstanding that the case had been withdrawn from the jury. *Per* IRVING, J. (dissenting): The refusal to submit the petition being an invasion of the plaintiff's rights, which could be compensated only by damages, the case should have been allowed to go to the jury. *Per* MARTIN, J.: A new trial should not be granted, because only nominal damages would be recoverable. NORTON v. FULTON. - - - - - - **476**

LAND ACT—*R.S.B.C. 1897, Cap. 113, Sec. 54.*] Section 54 of the Land Act, which vests in the holder of a special timber licence all rights of property in all trees, timber and lumber cut within the limits of the licence during the term thereof, does not give any estate in the land itself chargeable under the Mechanics' Lien Act. RAFUSE v. HUNTER. MACDONALD v. HUNTER. - - - - - - - - **126**

2.——*R.S.B.C. 1897, Cap. 113, Secs. 7, 8, 13, 17, 19, 95—Pre-emption record, status to attack—Power of Commissioner to cancel—Unoccupied Crown lands—Collusion between pre-emptors.*] Butters obtained a pre-emption record of the land in dispute in 1901. Bessette applied for a record in respect of the same land in 1904. In the year 1893, one Kitchen had obtained a pre-emption record of this land and made certain improvements thereon to the value of about $1,000. In March, 1900, Kitchen applied for and obtained a pre-emption record of certain other lands, and in April, one Boutilier obtained a pre-emption record of a certain portion of the lands in question. Boutilier abandoned his pre-emption right, and Kitchen and Butters entered into an agreement whereby Kitchen agreed that

LAND ACT—*Continued.*

Butters pre-empt the land on his paying for the improvements $200 in cash and the balance when he should realize the same out of the land, and Kitchen, until so paid, should retain an interest in the land. Bessette's application, which set up non-occupation of the land by Butters, and collusion between Butters and Kitchen, was refused by the Assistant Commissioner, who found against the charge of collusion, and on that of non-occupation, he came to the conclusion that there was no provision in the Land Act for cancelling a certificate of improvements when once issued. On appeal to MORRISON, J., this decision was affirmed:—*Held*, by the Full Court, that the arrangement entered into between Butters and Kitchen was, in the circumstances, not such as to preclude Butters from making the statement set forth in Form 2 of the Land Act, as the term "collusion" as used in the Form means collusion with somebody to defeat the provisions of the Act. The Legislature has refrained expressly from conferring upon the Commissioner any jurisdiction to cancel a record on the ground that the original application for the record contains false statements of fact. *Semble*, it is a condition of the power conferred by section 13 that the Commissioner shall find a cessation of occupation in fact, and the section has no application to any question arising under section 7 or section 8. *Hereron* v. *Christian* (1895), 4 B.C. 246, dissented from. Decision of MORRISON, J., affirmed. IN RE BESSETTE. - - - - - - - - 228

LAND REGISTRY ACT—*B.C. Stat. 1906, Cap. 23, Sec. 68—Statute, construction of—Mandamus.*] Section 68 of the Land Registry Act, Cap. 23 of 1906, dealing with the sub-division of land into town or other lots, provides, *inter alia*, that, in case a lot borders on the shores of any navigable water, streets leading to and continuing to such water, must be shewn at a not greater distance apart than 600 feet:—*Held*, that the object of the section was to require land abutting on navigable waters to be sub-divided so as to provide straight and continuous access to the water at intervals of not less than 600 feet. *Per* MARTIN, J.: The section does not apply unless the streets leading to the water reach it. IN RE LONSDALE ESTATE. - - - - 366

LANDLORD AND TENANT—*Agreement between as to removal of property after termination of tenancy—Effect on such agreement of subsequent sale of premises—Fixtures*

LANDLORD AND TENANT—*Cont'd.*

—Chattels—Bank safe built into rented property.] Plaintiff Bank rented a building into which it moved a safe for the purposes of its banking business. The landlords at the request of the Bank built around the safe a brick vault. After occupying the building about a year the Bank moved into premises of its own, and the building and safe were used by succeeding tenants until the sale of the property to defendants, who knew nothing of an alleged agreement between the Bank and its landlords as to the right to remove the safe after the Bank had left the premises. During the interim between the removal of the Bank and the sale, certain improvements were effected in the building, one of which was the pulling down of the vault and the construction of a mezzanine floor which was partly supported by the safe:—*Held*, on appeal (MARTIN, J., dissenting), reversing the judgment of HENDERSON, Co. J. (who decided that the safe was a chattel and had been bricked or built in merely for the purpose of its more convenient use as a chattel), that although the safe when enclosed in the vault, became a fixture, and although it could have been removed with the consent of the original owners of the building, yet the right of removal was lost when the defendants bought the premises. THE CANADIAN BANK OF COMMERCE v. LEWIS AND LEWIS. - - - - - - 398

LIEUTENANT-GOVERNOR IN COUNCIL—The powers of the Lieutenant-Governor in Council do not extend to the prohibition of the grant of licences over reserved lands. A grant of the power to regulate, or to impose conditions or restrictions does not import a grant of the power to prohibit. BAKER *et al.* v. SMART *et al.* LECKIE *et al.* v. WATT *et al.* - - 129

MASTER AND SERVANT—*Company—Liquidation of operating as a discharge of servants.*] Plaintiff was engaged as accountant of defendant Company in April, 1904. In the following August, the debenture holders seized the property and put in charge a receiver and manager, to whom plaintiff delivered the books of account, plaintiff himself having actually made the seizure. He afterwards continued in the same position as before the seizure, but was paid by the receiver:—*Held*, reversing FORIN, Co. J. (who found that the seizure was fictitious), that there had been an actual seizure known to the plaintiff, and that, following *Reid* v. *Explosives Company*

MASTER AND SERVANT—*Continued.*

(1887), 19 Q.B.D. 264, the appointment of a receiver and manager operated as a discharge of the servants of the Company, and the plaintiff could not recover. ROLFE v. CANADIAN TIMBER AND SAW MILLS, LIMITED. - - - - - - - 363

2.——*Compensation for injuries—"Serious and wilful misconduct"—"Serious neglect," meaning of—"Dependants"—Dependency on son's earnings — Workmen's Compensation Act, 1902, Cap. 74, Sec. 2, Sub-Sec. 2 (c).*] Misconduct is not "serious" merely because the actual consequences in the particular case are serious; the misconduct must be serious in itself. Any neglect is "serious neglect" within the meaning of the Act which, in the view of reasonable persons in a position to judge, exposes anybody, including the person guilty of it, to the risk of serious injury. If the danger to be apprehended is a danger of serious injury, or if the injury to be feared is of such a character that it may be described as serious, then the case is within the language of the Act. HILL AND ANOTHER v. GRANBY CONSOLIDATED MINES, LIMITED. - 118

3.——*Monthly hiring, with contingent yearly hiring — Reasonable notice, what constitutes.*] Plaintiff was employed by defendant Company as their manager at a salary of $200 per month until a mill, which they were constructing, was completed and working, when he was to be engaged at a salary of $2,500 per annum, payable monthly. He worked under the $200 per month arrangement for a certain time, and for a portion of a month after the mill had been completed, when he was dismissed without notice:—*Held*, affirming the judgment of LEAMY, Co. J., and the verdict of the jury, that it is usually an implied term of hiring in similar cases that the service could be determined by a reasonable notice, and the jury here having fixed on three months, that was a reasonable notice in the circumstances. HENDERSON v. CANADIAN TIMBER AND SAW MILLS, LIMITED. - - 294

4.——*Workmen's Compensation Act, 1902, Cap. 74, Second Schedule, Sec. 8—"Dependants."*] Section 8 of the Second Schedule to the Workmen's Compensation Act, 1902, provides for the recording of any award of compensation, or of any matter decided under the Act, in the County Court for the district in which any person entitled to such compensation resides:—*Held*, on the facts, that the applicants had not proved

MASTER AND SERVANT—*Continued.*

that they were dependants of the deceased, but, *Semble*, the principle governing Lord Campbell's Act governs in the Workmen's Compensation Act, *viz.*: given the wrongful act in respect of which the deceased, had he lived, would have had a right of action, the statute intends, in case of death, to make the wrongdoer liable in damages to those who, irrespective of race or residence, stood to the deceased in any of the relationships mentioned in the Act. VARESICK AND ANOTHER v. THE BRITISH COLUMBIA COPPER COMPANY, LIMITED. - - - 286

MECHANIC'S LIEN—*Materialman, lien by—Appropriation of payment on account—R.S.B.C. 1897, Cap. 132; B.C. Stat. 1900, Cap. 20.*] Defendant Horrobin contracted to build a house for defendant Henshaw. Horrobin contracted with plaintiffs to supply the lumber and building materials. Previous to this, Horrobin, who was indebted to the plaintiffs, gave them a 30 day note for $1,700, on which, about due date, he paid them $1,000 on account, in doing which he overdrew his bank account by about that sum. A few days afterwards he was paid the sum of $1,200 by cheque, stated on its face to be "*re* Mrs. Henshaw." This cheque Horrobin indorsed over to his bank, making good his overdraft, which he had obtained on the strength of the promise of defendant Henshaw's payment. Plaintiffs applied the $1,000 payment to the reduction of the overdue note. Horrobin, through injuries received from a fall, was unable to give evidence at the trial, so that the statement by plaintiffs' accountant that there was no appropriation by Horrobin of the $1,000 to defendant Henshaw's account, was not contradicted. Plaintiffs placed a lien on the building for $948.45. The trial judge came to the conclusion that the $1,700 note must have included some of the materials supplied for the house in question, and that defendant Henshaw was entitled to a credit of some amount which the accounts ought to shew, and dismissed the action as against defendants Henshaw and Senkler:—*Held*, on appeal, that there had been no appropriation by Horrobin, but *held*, on the facts, that as there had been a shortage in delivery of lumber entitling defendant Henshaw to a certain credit, the claim had been brought for too much and there should be a reference. Observations on the effect of granting a lien to a materialman under the amendment of 1900. THE BRITISH COLUMBIA MILLS, TIMBER AND TRADING COMPANY v. T. HORROBIN, JULIA W. HENSHAW AND JOHN HAROLD SENKLER. - - - 426

MECHANIC'S LIEN—*Continued.*

2.——*Misdescription of land — Right to amend lien—Interest of timber licensee in land—Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132; Sec. 13, Cap. 20, 1900.*] Where the land sought to be charged by lien is misdescribed in the lien affidavits, the Court will not give leave to amend by correcting the description, as that would in effect be creating a lien, and the statute provides a specific mode for creating a lien. RAFUSE v. HUNTER. MACDONALD v. HUNTER. - - - - - - - - - 126

MINING LAW—*Adverse action—Mineral Act Amendment Act, 1898, Cap. 33, Sec. 11—Effect and intention of—Failure of plaintiff to prove title—Admission by him that the evidence on which he relies to defeat his adversary's claim will also defeat his—Jurisdiction of trial judge to proceed under section 11 after such admission—Finding of trial judge—Credibility of witnesses—Trial.*] At the commencement of the trial of an action brought to enforce an adverse claim under the provisions of section 37 of the Mineral Act, plaintiff, claiming in respect of two mineral claims, admitted inability to support the allegation that the boundaries of such claims embraced any part of the area within the limits of the claim sought to be adversed, and could not pretend to claim any right to any part of the land or minerals within the limits of such claim. The trial judge proceeded to hear evidence as to defendants' right to the ground, under the provisions of section 11 of the Mineral Act Amendment Act, 1898, Cap. 33, and dismissed the action, but found that defendants had not affirmatively proved their title to the adverse claim. Counsel for defendants did not on this admission, move for dismissal:—*Held*, by the Full Court (MARTIN, J., *dissentiente*), that as soon as this admission was made by the plaintiff, it was open to the defendants to move for dismissal for the reason that there was no ground in controversy within the meaning of section 11, and that they were not bound in the circumstances to bring forward their title for investigation. That section 11 was designed, where there is a real controversy within the meaning of section 37 of the Mineral Act, to get rid of the rule theretofore acted upon that the plaintiff must succeed on the strength of his own title, and that the defendant might rely on the weakness of his adversary's title; and to substitute as a new rule for determining the title to mining claims that each party is to bring forward the evidence of his own title, thereby putting both parties on an

MINING LAW—*Continued.*

equality as regards the onus of proof. The section presupposes a real controversy, a genuine *lis*, and not a challenge by a party who comes into Court and admits no title in himself. *Per* DUFF, J.: On an appeal from a judgment by a trial judge, sitting alone, the hearing of the appeal is a rehearing of the cause; and where, giving to the views of the trial judge as to the credibility of particular witnesses the weight which is justly due to such views, the court of appeal cannot reconcile his decision with the inferences to be drawn from admitted facts, or from facts proved by credible witnesses or documents, that Court should not generally regard itself as bound by his conclusions. *Semble*, the Court will not allow itself, by means of sham proceedings, to be made an instrument to effectuate a fraudulent design. VOIGT v. GROVES *et al.* - - - - - 170

2.——*Adverse claim—Official Administrator, status of in administering estates of free miners dying intestate—Duty of Administrator to perform the conditions of the Mineral Act—Mineral Act, R.S.B.C. 1897, Cap. 135, Secs. 16 (g.), 24, 28, 53, 98—Mineral Act Amendment Act, 1898, Cap. 33, Secs. 5 and 11.*] The Official Administrator administering the estate of a free miner dying intestate is a statutory officer simply, and his interest in or possession of a mineral claim in such capacity cannot be regarded as an interest or possession of the Crown. The Official Administrator, not having maintained the assessment work on a mineral claim, the ground was relocated and recorded by another person under the name of the Parkside mineral claim and assessment work done on it. The original claim, known as the June, was, subsequently to such relocation, sold by the Official Administrator to plaintiff, who performed and recorded the annual assessment work:—*Held*, in an action brought to adverse an application for a certificate of improvements to the Parkside claim, that the June claim had lapsed, and that the ground was open to location under the Mineral Act. *Semble*, section 5 of the Mineral Act Amendment Act, 1898, does not affect the decision in *Peters* v. *Sampson* (1898), 5 B.C. 405. Where, before the issue of a certificate of work a third interest intervenes to the area in question, section 28 of the Mineral Act does not apply. In his declaration the locator of the Parkside did not set forth all the words which were put upon the initial post at the time of location:—*Held*, upon the evidence, applying the curative force of

sub-section (*g.*) of section 16 (as enacted by section 4 of Cap. 33, 1898), that the defect complained of was not a substantial non-compliance with the provisions of section 16; and that the rule to be followed in such cases is that the words on the initial post shall be quoted in the affidavit with sufficient accuracy to enable the identification of the record as the record of the particular location to which it refers, and to prevent fraudulent substitution of other language for the language placed upon the posts at the time of location. WINDSOR v. COPP. - - - - - - - - - - 213

3.——*Coal Mines Act, R.S.B.C. 1897, Cap. 137, Secs. 3, 9, 12—Prospecting licences—Leases—Issue of more than one licence for the same area—Powers of Chief Commissioner of Lands and Works—Minister of Crown and statutory officer—County Court, jurisdiction of under section 9—Prohibition.*] The Legislature has not, by section 12 of the Coal Mines Act, authorized the establishment of any regulations, conditions or restrictions depriving a licence granted pursuant to sections 2 and 3 of its characteristic of exclusiveness over the area to which such licence applies. The Chief Commissioner cannot modify the conditions precedent prescribed by sections 2 and 3. In performing their functions under the statute, the Chief Commissioner and the Assistant Commissioner do not act as agents of the Crown but as mandataries of the statute. Section 12 does not contemplate the granting of licences by the Lieutenant-Governor in Council; it contemplates the application to and the granting of a licence by the Chief Commissioner under sections 2 and 3. The powers of the Lieutenant-Governor in Council do not extend to the prohibition of the grant of licences over reserved lands. A grant of the power to regulate, or to impose conditions or restrictions does not import a grant of the power to prohibit. *Per* IRVING, J.: Section 9 of the Coal Mines Act is limited to disputes between adverse claimants in respect of (1.) the right or title to a licence acquired or sought to be acquired; or (2.) in respect of right or title to any claim acquired or sought to be acquired under the Act. *Semble*, the word "claim" stands for "area of land," and is equally applicable to the area of land included in a licence as it is to that included in a lease. BAKER *et al.* v. SMART *et al.* LECKIE *et al.* v. WATT *et al.* - - 129

4.——*Contract, construction of—Working agreement—Option to purchase—Ownership of ore—"Net proceeds"—Evidence of usage.*] Under an option to purchase a mineral claim, and develop the same during the term of the option, one of the conditions was that "if any ore is shipped from the property the net proceeds are to be deposited to the credit of the vendors . . and to be applied in part payment to the vendors." Defendant contended that the words "net proceeds" as used in the option, meant a sum to be arrived at after deducting from the gross proceeds the cost of mining, delivery at the smelter and of smelting:—*Held*, on the facts, that the defendant's rights in respect of the ore extracted from the property were limited to the right to ship the ore for the purposes of conversion and were subject to the condition that the proceeds of such conversion should be applied in accordance with the terms of the agreement above mentioned. Pending the payment of the purchase price provided for in the option, the defendant acquired no right of property in the ore *in situ*, and none after extraction from the mine. The operation of developing the property was, pending the payment of the purchase price, to be done by defendant for the owners of the property, and in shipping or dealing with the ore, he was to deal with it as a trustee for the plaintiffs, and the proceeds would be in his hands as such trustee. GROBE *et al.* v. DOYLE. - - - 191

5.——*County Court—Mining jurisdiction—Working agreement or lease—Use of timber on claim—Ore-bins and tramway, right to use of.*] Defendant, by an agreement under seal, purported to lease to plaintiff a portion of a quartz mine, the plaintiff covenanting, *inter alia*, to open and maintain in good repair 100 feet of No. 6 level from the mouth inwards, to remove all broken ore and to sort out and preserve for shipment such material as could be profitably sorted, to place all concentrating ore on the dump as directed by defendant, to work the demised area in a good and miner-like manner to the satisfaction of the defendant and to insure by means of timbering, etc., as required by defendant, the safety of the workings and their permanency. Defendant was to receive the returns from all ore shipped, first making certain deductions, to keep certain percentages from the amounts received, and pay the balance to plaintiff:—*Held*, that these provisions constituted a contract merely to win the ore for a sliding percentage of the returns, and was not a lease. Plaintiff claimed damages for being prevented by defendant from using

MINING LAW—*Continued.*

the timber on the claim in his operations under the agreement, for tearing up and removing the ore-track and trestle which were alleged to be the only means for working the ore, and also for preventing plaintiff from using certain ore-bins and a track in connection with same at the mouth of the level;—*Held*, that as the agreement was silent concerning the use of the timber, track, trestle and ore-bins, it should have been left to the jury to find whether there was a distinct collateral agreement concerning these matters, and if so, what it was. HALPIN v. FOWLER. (No. 2). - **447**

6.——*Extralateral rights—Trespass workings—Continuous or faulted veins—Evidence—Inspection—Conflicting theories.*] In a contest to determine the question as to whether a particular vein, called the Star vein, was continuous, or whether it was faulted by another vein styled the Black or Barren Fissure, the Court, after inspection of the mine, in presence of an engineer chosen by each party, ordered certain work to be done with a view to ascertaining which theory was correct. The facts that in three different places identically the same material was found in the Star vein and in the Fissure; that ore was found in the first 280 feet of the Fissure of the same character as that in the Star vein, and distributed over its entire width; that experiments destroyed the theory of junction or cut off in all slopes and levels in the mine where it was alleged that such existed; that in all pits dug on the apex the same vein matter was visible; that assay ore was found in a pit on the apex corresponding to the middle of the barren vein; that the defendants had followed up their vein into and along the Black Fissure for over 1,000 feet without cross-cutting, were sufficient to warrant the conclusion that the two veins were continuous in fact, and that one vein did not fault the other; and outweighed the circumstance that the Fissure was barren for about 1,000 feet, and that it presented a shattered and contorted appearance in making a sharp curve around a dyke of porphyry. STAR MINING AND MILLING COMPANY v. BYRON N. WHITE COMPANY. - - - - - - - - - - **162**

7.——*Placer claim—Location under obsolete Act—Relocation under existent Act on discovery of error—Formal abandonment, whether necessary in such circumstances—Representation—Work done on adjoining claim—Placer Mining Act, R.S.B.C. 1897, Cap. 136; B.C. Stat. 1901, Cap. 38.*] Where

MINING LAW—*Continued.*

a placer claim has been erroneously located pursuant to the provisions of an obsolete statute, it is permissible to relocate it in accordance with the existent statute, and no formal abandonment is necessary. Adopting the principle laid down in *Woodbury* v. *Hudnut* (1884), 1 B.C. (Pt. 2) 39, work done by a miner making a cut through an adjoining claim, with the consent of the owners, for the better working of his own claim, must be held to be a representation of his own claim. Where one post was made to do joint duty on the common boundary line of two claims, the names of the two claims being written on the side of the post facing the respective claims:—*Held*, that the object of the statute requiring due marking had been accomplished. WHEELDON v. CRANSTON. - - **489**

8.——*Statute, construction of—Penal statute—Inspection of Metalliferous Mines Act Amendment Act, 1901, Cap. 37, Sec. 12, r. 21a. and 21b.—"Machinery hereinafter mentioned," meaning of.*] Rule 21A., of section 25 of the Inspection of Metalliferous Mines Act, as enacted by section 12 of chapter 37 of 1901, provides that "every person.....employed in or about a metalliferous mine, in which the machinery hereinafter mentioned shall be operated for more than twenty hours in any twenty-four, (1) operates any direct-acting, geared, or indirect-acting hoisting machine exceeding fifty horse-power, or (2) operates any stationary engine or electric motor exceeding fifty horse-power, and shall perform any such duties for more than eight hours in any twenty-four, shall be guilty of an offence under this Act":—*Held*, that the phrase "machinery hereinafter mentioned" must be read distributively; or as meaning "any of" the machinery hereinafter mentioned. *Held*, also, that the words "preceding section" in rule 21B., refer to the preceding rule. Decision of DUFF, J., affirmed. MCGREGOR v. THE CANADIAN CONSOLIDATED MINES, LIMITED. (No. 2). - - - - - - - - - - **373**

MINISTER OF CROWN AND STATUTORY OFFICER—In performing their functions under the statute (Coal Mines Act), the Chief Commissioner and the Assistant Commissioner do not act as agents of the Crown but as mandataries of the statute. BAKER *et al.* v. SMART *et al.* LECKIE *et al.* v. WATT *et al.* - - - - **129**

2.——The authority to seize, under section 4, is not conferred upon the Crown.

MINISTER OF CROWN AND STATUTORY OFFICER—*Continued.*

The Chief Commissioner acts thereunder, not as the organ of the Crown, but as the grantee of legislative authority, and does not purport to act other than as a statutory officer. The timber in question, consequently, not being in the possession of the Crown, there was no seizure by the Crown. EMERSON v. SKINNER. - - - **154**

MORTGAGE —*Mortgaged premises built partly on one lot not included in mortgage deed—Rights of mortgagee—Purchaser for value—Notice—Registered title — Lands, registration of — Land Registry Act — R.S.B.C. 1897, Cap. 111.*] Plaintiff owned lot 19, and defendant owned lot 20 of a certain sub-division in the City of Vancouver. Lots 19 and 20 were at one time owned by the same person, who built a house partly on both lots. The plaintiff Company brought an action for a declaration that the house belonged to it, and based its action on the fact that the original owner of the two lots had obtained a loan on lot 19 for the purpose of constructing the building in question, and that, being the owner of the two lots, the plaintiff Company was entitled to the whole building, claiming that the defendant, who is now the owner of lot 20, had constructive notice of the claim of the plaintiff Company:—*Held*, that, under sub-sections 3 and 4 of section 43 of the Land Registry Act the defendant, being a purchaser for valuable consideration and claiming under the registered owner of lot 20, was not in any way affected by any relation that might exist between the original owner of lots 19 and 20 and the plaintiff Company in connection with said building having been erected with the proceeds of a loan obtained by the said original owner from the plaintiff Company. CANADIAN BIRKBECK INVESTMENT AND SAVINGS COMPANY v. RYDER. - - - - **92**

MORTGAGOR AND MORTGAGEE—*Power of sale in mortgage—Orders nisi and absolute — Accounts — Rents, receipt of — Tender — Interest.*] A mortgagee having obtained a foreclosure order *nisi*, shortly afterwards, and before the period allowed for making absolute the order *nisi* had expired, entered into an agreement for the sale of the mortgaged premises to a purchaser who had knowledge of the foreclosure proceedings. The order absolute was never taken out. The agreement for sale was not deposited for registration for some three years after it was entered into, but a few months before its deposit for registration, a tender was made on behalf of plaintiffs of the amount due under the mortgage, which was refused on the ground that the property had been parted with and that the plaintiffs had lost their right to redeem. *Held* (affirming the decision of HUNTER, C.J.), that the mortgagee could not, after the order *nisi* for foreclosure, and before it was made absolute, exercise his power of sale without the leave of the Court. *Stevens* v. *Theatres, Limited* (1903), 1 Ch. 857, and *Campbell* v. *Holyland* (1877), 7 Ch. D. 166, followed. DEBECK v. CANADA PERMANENT LOAN AND SAVINGS COMPANY. - - - **409**

MUNICIPAL LAW—*Member of Council contracting with municipality—Whether contract is void—Municipal Clauses Act, R.S. B.C. 1897, Cap. 144, Secs. 21 and 22 — Penalty—Action to recover back money paid —Statement of claim disclosing cause of action.*] R. being reeve of plaintiff municipality, did certain work repairing a stone crusher, for which work the municipal council voted him $75, such sum being shewn in the accounts as expenses. Subsequently, he spent considerable time, at the request of the council, in advocating the passage through the Legislature of a loan bill, in respect of which time he was voted $100. An action was brought for the recovery of these two sums of money as illegal payments in contravention of section 21 of the Municipal Clauses Act, and also for penalties under section 22 for sitting and voting as reeve after the receipt of these respective sums. The claim for penalties was abandoned at the trial, and the action resolved itself into a question of law as to whether the statement of claim disclosed a cause of action in the circumstances:—*Held*, that the statement of claim did not disclose a cause of action, so the contract was not made void by the statute, and there were no grounds alleged on which it might be declared void in equity. The statute does not prohibit the making of a contract, although it imposes a penalty for acting or voting subsequently thereto. THE MUNICIPALITY OF THE DISTRICT OF SOUTH VANCOUVER v. RAE. (No. 2). - **184**

2.——*Municipal Elections Act, R.S.B.C. 1897, Cap. 68, and B. C. Stat. 1902, Cap. 20, Sec. 4—Qualification of voters—Owner of real estate—Land Registry Act, B. C. Stat. 1906, Cap. 23.*] In order to qualify as a voter at municipal elections under section 6 of the Municipal Elections Act, as enacted by section 2 of the Municipal Elections Act

MUNICIPAL LAW—*Continued.*

Amendment Act, 1902, with respect to real estate, it is necessary that the applicant should be the registered owner of such real estate under section 74 of the Land Registry Act, Cap. 23, 1906. *Re* KASLO MUNICIPAL VOTERS' LIST. - - - - - 362

3.——*Reeve, authority of to bring action in name of municipality—Resolution of Council —Substantial compliance with.*] A municipal council having resolved to join in an action already launched against defendant, the reeve, after consultation with the solicitor, gave instructions to commence an independent action on behalf of the municipality. *Held*, that as the municipal council had shewn an intention to sue defendant, the action of the reeve was a substantial if not a strict compliance with that intention. MUNICIPALITY OF SOUTH VANCOUVER v. RAE. - - - - 64

4.——*Section 79 Municipal Clauses Act, R.S.B.C. 1897, Cap. 144—By-law—Majority of three-fifths of votes polled for—Section 88 —Persons entitled to appear on proceedings to quash.*] Certain persons not qualified, and others, not authorized, having voted on a City by-law granting electric lighting and water franchises:—*Held*, that the by-law was defective and must be quashed. *Held*, further, that only the applicant to quash and the Corporation, have a status before the Court on proceedings to quash. MACLEAN v. THE CORPORATION OF THE CITY OF FERNIE. - - - - - - - - - - 61

5.——*Streets, property of Corporation in —Vancouver Incorporation Act, 1900, Sec. 218—"Vest," meaning of.*] Section 218 of the Vancouver Incorporation Act, 1900, provides, in part, that every public street . . . in the City shall be vested in the City (subject to any right in the soil which the individuals who laid out such road, street, bridge or highway may have reserved.) In an action for an injunction to restrain the Corporation from digging and blasting for the construction of a drain on a street within the corporate limits, plaintiffs submitted that a proper construction of the word "vest" as used in section 218, did not authorize the Corporation to dig to an excessive depth:—*Held*, adopting the ruling in *Roche* v. *Ryan* (1891), 22 Ont. 107, that the word "vest" was not a vesting of the surface merely, but is wide enough to include the freehold as well, but *Held*, on the evidence, that it had not been shewn by the plaintiffs that substantial or irreparable injury would be sustained by them through the construction of the drain. COTTON *et al.* v. THE CORPORATION OF THE CITY OF VANCOUVER. - - 497

MUNICIPAL LAW—*Continued.*

6.——*Tax-imposing powers of Council— "Profession," whether including barrister— "Practising," what acts will constitute— Penalty.*] The profession of a barrister is included in the term "profession" in clause 26 of section 171 of the Municipal Clauses Act, as amended in 1902, Cap. 52, and section 173 as amended in 1903, Cap. 42. *Semble*, one appearance in the town where the barrister has his office, in Court as counsel for a client, is sufficient to constitute an offence under the statute, although, following *Apothecaries Co.* v. *Jones* (1893), 1 Q.B. 89, acting in several instances would constitute only one offence in respect of which only one penalty could be imposed. It is not necessary that the tax-imposing by-law should fix a penalty; section 175 of the statute does that, and provides the manner in which it may be recovered. THE CORPORATION OF THE CITY OF VICTORIA v. BELYEA. - - - - - - 112

NEW TRIAL—For assessment of damages. - - - - - - - - 23
See TAXES.

PARTNERSHIP—*Action for price of work done—Plaintiff contracting in partnership name—Failure to register declaration of partnership pursuant to sections 74, 75 and 76 of the Partnership Act, R.S.B.C. 1897, Cap. 150 — Effect on contract — Penalty.*] Plaintiff sued the defendant for a balance due on a printing contract. Plaintiff carried on business under the name of the Victoria Printing and Publishing Company, during the term of the said contract, until after his action was launched, and in excess of a period of three months, without having complied with the provisions of sections 74 and 75 of the Partnership Act; which requires (Sec. 74) every person trading alone under a firm or company name implying a plurality of partners, to file a declaration to that effect with the Registrar of the County Court of the county in which the business is being conducted; and (Sec. 75) that such declaration shall contain certain particulars and be filed within three months of the adoption of such firm or company name. Defendant contended that plaintiff's action was barred by his non-compliance with sections 74, 75 and 76, and that he therefore could not enforce the contract:—*Held*, by the Full Court, affirming the finding of the trial judge in favour

PARTNERSHIP—*Continued.*

of the plaintiff, that while the plaintiff came within the wording of the statute, and became liable to the penalty provided for not registering, yet the penalty is imposed for something not contemplated by the contract in this case, and he was therefore entitled to recover. SMITH v. FINCH. - - - - - - - - **186**

PERJURY. - - - - - **223**
See CRIMINAL LAW. 3.

PETITION OF RIGHT. - - **476**
See PUBLIC OFFICER.

PRACTICE—*Adding parties—Consent of parties added as plaintiffs—Consent signed by attorney—Sufficiency of power—Trial of action before referee—Powers of referee as to amendments — Reviewing referee's order.*] An action, involving mainly the taking of accounts, was referred to the District Registrar, the referring order giving that officer all the powers of a judge as to certifying and amending. On this authority the District Registrar, on application, added certain parties plaintiff, upon plaintiff filing a consent thereto of the parties so added. The writ of summons and statement of claim were afterwards amended. Defendant Hambly took out a summons to strike out the amendments to the writ and pleadings on the ground that the amendments were made without an order of the Court or a judge thereof, and that as to the plaintiffs added, no proper consent signed by them had been filed. The documents purporting to be consents were filed by the plaintiff under a power of attorney authorizing him to sue for, recover and receive the amount of a certain judgment debt recovered in another action:—*Held*, that the action in which the consents were filed was a new action, that the power of attorney was, in the circumstances, insufficient, and that the amendments made in pursuance of such consents so filed must be struck out. *Held*, also, that the order conferring on the District Registrar power to amend, would also authorize him to add parties. *Held*, also, that the application to strike out the amendments made by the District Registrar was not an appeal, but a substantive application to strike out certain amendments made by the District Registrar. But, *semble*, on the authority of *Hayward* v. *Mutual Reserve Association* (1891), 2 Q.B. 236, an appeal from the official referee lies to a judge in Chambers. HILL v. HAMBLY AND ANOTHER. - - - - **253**

PRACTICE—*Continued.*

2.——*Affidavit of documents—Discovery tending to shew adultery—Divorce.*] In a petition for dissolution of marriage, the respondent applied for an affidavit of documents:—*Held*, on the respondent filing an affidavit shewing that discovery is not sought for the purpose of proving the adultery of the petitioner, but for the purpose of discovering documents relating to the matters in question, other than the misconduct of the petitioner, that discovery ought to be ordered. LEVY v. LEVY. - **60**

3.——*Appeal—Security for costs—Companies Act, 1897, R.S.B.C. Cap. 44, Secs. 110 and 114—Supreme Court Act, B. C. Stat. 1904, Cap. 15, Sec. 101, as amended by Cap. 15, Sec. 2, 1905.*] Defendants applied under section 114 of the Companies Act, for the costs of the action which had been decided in their favour, and also for the costs of the appeal from that decision. The judgment appealed from was given in February, 1905; in March, 1905, defendants were aware of the plaintiff's inability to pay the costs of the action unless an appeal resulted in their favour. Taxation took place the 27th of June, 1906, and the application for security was made on the 30th of July, 1906:—*Held*, on appeal, that the application was made too late, plaintiffs having in the meantime perfected all necessary steps for taking an appeal. *Held*, as to the costs of the appeal, that section 101 of the Supreme Court Act, which limits the security that may be required for costs of appeal to $200, governed. Decision of HUNTER, C.J., affirmed. STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (Foreign.) (No. 2.) - - - - - - **355**

4.——*Arbitrator's fee under Workmen's Compensation Act, 1902, B. C. Stat. 1902, Cap. 74 — Arbitration Act, Schedule to (R.S.B.C. 1897, Cap. 9).*] The schedule to the Arbitration Act does not apply to arbitrations under the Workmen's Compensation Act, and the arbitrator's fee must be dealt with by a practice analogous to that prevailing prior to the Arbitration Act on a reference directed by the Court. CHISHOLM v. CENTRE STAR MINING COMPANY. - - - - - - - - - - - **16**

5.——*Attachment of Debts Act, 1904, B. C. Stat. Cap. 7, Secs. 2 and 3—"District Registrar"—Interpretation Act, R.S.B.C. 1897.*] In an action in the Supreme Court for an account of certain rents and profits, plaintiff obtained an order attaching all

PRACTICE—*Continued.*

debts, obligations and liabilities payable or accruing due from the garnishee to the defendant, to answer a judgment to be recovered by the plaintiff against the defendant up to the amount of $6,245. The order was made and issued by the Deputy District Registrar at Vancouver, acting under the provisions of section 3 of the Attachment of Debts Act, 1904. Defendant applied to MORRISON, J., in Chambers, to set aside the order, but this summons was dismissed, and defendant appealed:—*Held*, by the Full Court, that as the term "District Registrar" is expressly defined by the Attachment of Debts Act, 1904, to mean District Registrar of the Supreme Court, therefore District Registrars are *personæ designatæ*, and it was not intended to confer on their deputies the power to make attaching orders; that the provisions of the Interpretation Act do not apply, as a general interpretation statute cannot be invoked to control the plain intendment of a special statute. *Per* IRVING, J.: The Attachment of Debts Act, 1904, contemplates the attachment of a definite, ascertained amount, and a mortgagor suing for an account of moneys received by a mortgagee in possession cannot make the affidavit required by the statute as to the "actual amount of the debt." RICHARDS v. WOOD. SHAW, Garnishee. - - - **182**

6.——*Attachment of debts — Judgment creditor — Judgment obtained in Supreme Court, sought to be attached in County Court —Jurisdiction.*] On proceedings under the Attachment of Debts Act in the County Court, to attach a debt due on a judgment obtained in the Supreme Court, an order absolute attaching the said debt was made. On an application for a writ of prohibition to the County Court judge, prohibiting him from dealing with said Supreme Court judgment:—*Held*, that where the claim sought to be attached is not one upon which the County Court would have jurisdiction to adjudicate in a suit brought to enforce it, the machinery of the Attachment of Debts Act cannot be applied. BELYEA v. WILLIAMS. RICHARDS, Garnishee. - - - **226**

7.——*County Court — Affidavit of documents—Documents not disclosed in—Application for further affidavit—Sufficiency of affidavit—Marginal Rule 237 — Power and discretion of judge under.*] In an action on a guarantee, plaintiffs applied for an affidavit of documents. Defendant Rebecca Levy (who carried on business as L. Levy & Co., with her husband L. Levy as manager) admitted that she had certain letters relating to the present action written subsequently to the 16th of February, 1904 (the date on which defendants notified plaintiffs that they, defendants, would no longer be responsible under their guarantee). Plaintiffs having had previous dealings with defendants on the strength of other guarantees given by them, obtained an order for further and better discovery generally. In her affidavit filed pursuant to this order, defendant Rebecca Levy swore that she had no entry in her books of cheques received on account of the previous transactions to that in question in the action; that if the cheques had been indorsed with the name L. Levy & Co. it was done wholly without authority, and she denied having any documents relating to the guarantees. Plaintiffs then obtained an order "that the defendants do within one week from the date hereof make full discovery on oath of all books of account, ledgers, journals, blotters, cash books, bank pass books, promissory notes, cheques, memoranda and other books of account, statements, or writings which now are, or were in use in the business of the defendants in the years 1902, 1903, 1904, 1905, 1906, with liberty to the plaintiffs to apply again as to the other matters mentioned in the notice of application filed and served herein on the 25th day of July, 1906." An appeal from this order was dismissed. *Per* IRVING, J.: The authority conferred by the County Court rules as to ordering discovery is subject to the same limitations as are imposed by the rules of the Supreme Court. THE EMPIRE MANUFACTURING COMPANY, LIMITED v. L. LEVY AND COMPANY. - - - **387**

8.——*County Court—Amendment of pleadings—Counter-claim, withdrawal or abandonment of to bring action in Supreme Court—Discontinuance—Discretion.*] In a County Court action to recover a balance of moneys due under a mining agreement, defendant filed a dispute note containing a counter-claim setting up breaches of the covenants and conditions of the agreement, and asking for damages. Subsequently defendant intimated his desire to amend the dispute note and counter-claim as he had drawn them hurriedly in order to file them for the next sittings of the Court. Plaintiff consented, and stated that as the dispute note and counter-claim raised new issues which he could not plead as a counter-claim he wished to amend. Defendant agreed, on condition that he could file an amended defence and counter-claim, but subsequent-

ly, on the same day, further intimated that the action ought to be transferred to the Supreme Court, and asked plaintiff to consent to such transfer. Plaintiff declined, and defendant forwarded the dispute note, omitting the counter-claim for which at the same time he issued a writ in the Supreme Court, and sent to plaintiff a discontinuance of the counter-claim in the County Court. Plaintiff replied that it was on account of the counter-claim that he had amended the plaint and added to the claim a claim for damages. At the trial in the County Court defendant moved for leave to withdraw the counter-claim, stated he was not prepared to offer any evidence in support of it, and produced the correspondence. The motion was dismissed:—*Held*, that the trial judge was wrong in that (1.) there was no counter-claim before him to deal with. (2.) That the arrangement arrived at was the ordinary consent to amend pleadings as the solicitor may be advised, and that the essence of such an arrangement is that the parties are to begin *de novo*. (3.) That defendant had the right, if he chose, to discontinue the counter-claim and select his own forum. (4.) That the proper course in the circumstances was that each party should withdraw the amended pleadings and that each should be left to his rights as they existed before the pleadings were delivered. *Per* MARTIN, J. (dissenting): Since the counter-claim was originally properly on the files it was incumbent upon the defendant to shew that it had been got rid of either by the method provided by the rules or by consent. HALPIN v. FOWLER. (No. 1). - - - **441**

9.——*County Courts Act, B. C. Stat. 1905, Cap. 14, Secs. 68 and 70—Application of section 70—Venue—Change of—General right of judge to make a change.*] The plaintiff's right to select the place of trial is not to be lightly interfered with, and the onus is on defendant to shew that the preponderance of convenience is against the place selected. Where an action is brought by a relative of the registrar, and it is clear that the registrar is not the real plaintiff, the defendant is not entitled to invoke section 70 of the Act. PHAIR v. SUTHERLAND. - - - - - **293**

10.——*Order for sale of real estate pendente lite—Order 50, r. 1, effect of.*] Rule 1 of Order 50 provides, in part, "If in any cause or matter relating to any real estate, it shall appear necessary or expedient that the real estate or any part should be sold, the Court or a judge may order the same to be sold":—*Held*, that this is a general power, to be exercised by the Court or a judge according to the circumstances, and is not meant to apply only where a sale is necessary or expedient for the purposes of the action. *In re Robinson* (1885), 31 Ch. D. 247, not followed. RAINEY v. RAINEY. **494**

11.——*Rule 34 of Workmen's Compensation Rules, 1904, object of—Security for costs.*] The object of rule 34 of the Workmen's Compensation Rules, 1904, is to make the proceedings under it subject to the same rules as an action. CIZOWSKI *et al.* v. WEST KOOTENAY POWER AND LIGHT COMPANY, LIMITED. - - - - - **63**

12.——*Writ issued in name of firm of solicitors instead of a member of the firm.*] It is quite permissible to issue a writ in the name of a firm. The English practice followed. PROTESTANT ORPHANS' HOME *et al.* v. DAYKIN *et al.*] - - - - - **128**

13.——*Writ issued against extra-provincial, unlicensed company, under Part VII. of the Companies Act, R.S.B.C. 1897, Cap. 44—Computation of time for entering appearance—Application for leave to serve ex juris—Rules of Court, application of to proceedings under Part VII.*] Section 146 of the Companies Act, R.S.B.C. 1897, Cap. 44, defines an unlicensed and unregistered extra-provincial company. Section 147 provides that any writ or summons . . . may be served as against the company by delivering the same at Victoria to the Registrar of the Supreme Court. Section 148 enacts that it shall be the duty of such Registrar to cause to be inserted in four regular issues of the British Columbia Gazette, consecutively following the delivery of such writ or summons to him, a notice of such writ or summons with a memorandum of the date of delivery, stating generally the nature of the relief sought, the time limited and the place mentioned for entering an appearance. Section 149 enacts that after such four issues the delivery of such process to the Registrar as aforesaid shall be deemed, as against the defendant company, to be good and valid service of such writ or summons:—*Held*, in the case of an issue of an ordinary eight-day writ under Part VII., that it is the duty of the Registrar to notify the defendant in the publication in the Gazette that the time for appearance is eight days after the fourth publication. *Per* IRVING, J.: As the writ is a writ for service on a foreign

PRACTICE—*Continued.*

corporation, without the jurisdiction, application to a judge for leave to issue the writ and proceed under the Act is necessary before any writ is issued. The judge in giving leave would limit the time within which appearance should be entered. Decision of MORRISON, J., reversed. YOUDALL v. THE TORONTO AND BRITISH COLUMBIA LUMBER COMPANY, LIMITED. - - 72

PROMISSORY NOTES—*Extension of time for payment—Release of co-maker—Surety—Collateral security—Credit for sums realized.*] D. on being sued on certain promissory notes to which he was a party, defended the action, setting up an arrangement between himself and the Fuel Company that he was to be a surety merely for them to the plaintiff; and that as the plaintiff was aware of this at the time he accepted the notes, he, D., was relieved by the plaintiff giving the Fuel Company an extension of time. *Held*, on the facts at the trial (affirmed on appeal) that, in order that D. escape his liability on this ground he must shew that there was a binding agreement arrived at between his creditor and himself for valuable consideration, and that in the circumstances there was here no such agreement. Decision of IRVING, J., affirmed. STONE v. ROSSLAND ICE AND FUEL COMPANY *et al.* - - - - - 66

PUBLIC OFFICER—*Duty of—Provincial Secretary, refusal of to submit petition of right to Lieutenant-Governor for fiat—Crown Procedure Act, R.S.B.C. 1897, Cap. 57, Sec. 4—Withdrawal of case from jury—New trial—Damages, nominal.*] The refusal by a Provincial Secretary to submit a Petition of Right to the Lieutenant-Governor for his fiat under the provisions of the Crown Procedure Act, Sec. 4, is an actionable wrong, but *held*, on the facts, that a new trial should not be ordered, notwithstanding that the case had been withdrawn from the jury. *Per* HUNTER, C.J.: The statute prescribes no time within which the petition must be submitted, and as the defendant did submit it after action brought, this was a sufficient compliance by him with the statute, though he had at the same time advised the Lieutenant-Governor not to grant the fiat. *Per* IRVING, J. (dissenting): The refusal to submit the petition being an invasion of the plaintiff's rights, which could be compensated only by damages, the case should have been allowed to go to the jury. *Per* MARTIN, J.: A new trial should not be granted, because only nominal damages would be recoverable. NORTON v. FULTON. - - - - - - 476

RAILWAY—*Animal killed on track—"Not wrongfully on the railway"—Adjoining owners—Obligation to fence—Railway Act (Dominion), Cap. 29, 1888—B. C. Stats. 1887, Cap. 36; 1889, Cap. 36.*] Plaintiff's mare and colt strayed from his yard on to the public road, and reached the track of defendant Company, presumably at a place called Morton's crossing. The mare was overtaken by a train and killed as she was running towards the crossing. This was a farmer's crossing, which, under the statute, should have a gate on each side. There was no gate or fence on the west side of the crossing by which the animal was presumed to have reached the track from the public road, but there was a cattle-guard (over which the animals crossed) put there by agreement with Morton. Plaintiff was not an adjoining owner:—*Held*, on appeal (MARTIN, J., dissenting), that Morton's crossing being a farm and not a public crossing, the statute required that it be either fenced off or provided with gates on both sides; and that the placing of the cattle-guard did not relieve the Company from its obligation to provide a fence or gate on the west side of the crossing. COEN v. THE NEW WESTMINSTER SOUTHERN RAILWAY COMPANY. - - - - - 419

2.—*Injury to passenger—Action—Limitation clause in Incorporation Act—"By reason of the railway"—"Works or operations of the Company"—Section 42 British Columbia Railway Act (R.S.B.C. 1897, Cap. 163)—Consolidated Railway Company's Act, 1896, Cap. 55, Secs. 53 and 60.*] Plaintiff, on the 26th of December, 1903, was injured on defendants' tramway in Vancouver, in stepping off a movable platform provided by defendants for the accommodation of passengers transferring at one of the junctions. The platform was necessary to enable passengers to alight, owing to the height of the car steps above the surface of the street, and was so placed that there was very close to it, and not easily observable by passengers leaving the car, a large hole, into which plaintiff stepped, severely injuring her knee. On the 24th of December, 1904, she brought an action to recover damages for her injuries. Defendant Company set up, *inter alia*, section 60 of their Act of incorporation, Cap. 55 of the Statutes of British Columbia, 1896, which enacted that "all actions or suits for indemnity sustained by reason of the tramway or railway, or the works or operations of the Company, shall be commenced within six months next after the time when such supposed damage was sustained." *Held* (affirming the decision of DUFF, J.), that the words "by reason

RAILWAY—*Continued.*

of the tramway or railway or the works or operations of the Company," should be read *separatim*, as describing different branches of the Company's undertaking, and that the section does not apply to a case like that at bar, which was based on the defendant Company's duty to carry the plaintiff safely. SAYERS v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - . 102

3.——*Right of way, what constitutes—Damages by fire caused by sparks from locomotive—Railway Act—Dom. Stat. 1903, Cap. 68, Sec. 239—Jury — Non-direction — Misdirection.*] Where a railway company cleared a right of way, but had not filed any plans of same under either the Dominion or Provincial Railway Acts, and, in an action for damages caused by fire alleged to have been set alight by sparks from one of their locomotives, contended that the right of way must be considered to be confined to the road-bed itself:—*Held*, that it must be considered that the company have occupied the full statutory allowance. The jury, after answering several of certain specific questions, gave a general verdict of $18,000, in objection to which section 239 of the Dominion Railway Act was set up on appeal:—*Held*, that there being a finding that the defendant Company left inflammable material on their right of way, the section could not be invoked, as the limit only applies where there is no negligence. BLUE AND DESCHAMPS v. THE RED MOUNTAIN RAILWAY COMPANY. - - - 460

RIPARIAN OWNERSHIP—*English law relating to riparian rights, introduction of into British Columbia. Per* DUFF, J., at the trial: The enactments dealing with the introduction into the colonies of British Columbia and Vancouver Island, of the general body of English law, clearly do not amount to a declaration of the non-existence of the law regulating rights in those colonies. ESQUIMALT WATERWORKS COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VICTORIA. - - - - - - - 302

RIPARIAN RIGHTS — Doctrine in — Whether in force in British Columbia. - - - - - 34
See WATER RECORD.

SALE OF LAND—*Contract for—Misrepresentation by agent of vendors before written contract made—Defence to action for purchase money.*] The negotiations between the parties for the sale and purchase of a town lot were comprised in three interviews:

SALE OF LAND—*Continued.*

(1.) when the defendant agreed to take the lot, when certain representations were made, (2.) when he paid a deposit, at which time no representations were made, and (3.) when he signed the agreement, when certain further representations were made. In an action to compel specific performance of the agreement to purchase:—*Held*, on appeal (MARTIN, J., dissenting), that the plaintiff Company having failed to carry out some of the material representations made by its agent at the time of and as an inducement to the defendant to enter into the contract, specific performance would be refused. THE CROW'S NEST PASS COAL COMPANY, LIMITED v. MILLS. - - 402

2.——*Contract for—Specific performance—Statute of Frauds (29 Car. II., Cap. 3)—Sufficient memorandum — Principal and agent—Authority, ratification of—Negotiations by cablegram and letter—Description of purchaser.*] A., who temporarily resided in England, had had certain dealings with a firm of real estate agents, C. & Co., in Vancouver, who cabled to him enquiring the lowest price, cash, he would accept for a certain lot in Vancouver. He replied "$13,000 net." C. & Co. cabled back that the best offer they could get was $12,000, net to him, and asking if they could accept. A. made no reply. Subsequently C. & Co. cabled that they had sold the lot for $13,000 net, had accepted, without stating purchaser's name, a deposit of $500, and asking confirmation by cable. A. cabled "writing acceptance." The letter following upon this stated that his reason for cabling in those terms was that he "wanted it distinctly understood that I could not complete the deal until I returned." . . . . "It would be impossible to close before, as the title deeds belonging to the property were left in Toronto. I will accept the offer on the following terms, that is, the adjustments to be calculated to the first of April. After that time the purchaser can collect the rents. The premises are leased for a year from last fall. Kindly make it known to the purchaser so that there will not be any misunderstanding, be sure and tell the purchaser that I cannot give him possession of the premises, he will simply have to accept the present tenant, of course I accept the thirteen thousand dollars net cash offer, with the understanding that I am not to be called upon to produce any title papers other than these in my possession, no doubt you have explained all this to your client." . . . "Kindly write and let me know if your client accepts these terms." C. & Co.

SALE OF LAND—*Continued.*

handed this letter to plaintiff's solicitors, who accepted "unreservedly the stipulations made by Mr. Andrews," but added, "We are ready at any minute to pay this money over to Mr. Andrews as soon as proper title is evidenced to our satisfaction." C. & Co. communicated this to A. The latter in reply repeated, in effect, the terms of his former letter. There was some evidence at the trial about a proposed change in the terms of payment from a cash basis to instalments:—*Held*, (IRVING, J., *dissentiente*), that A.'s letter following his cable "writing acceptance," read with C. & Co.'s cable announcing sale at $13,000, and the letter of plaintiff's solicitors to C. & Co. constituted a memorandum of a contract between the plaintiff and defendant sufficient to satisfy the Statute of Frauds. That the letter of plaintiff's solicitors to C. & Co. contained an unqualified acceptance of the terms proposed in A.'s letter to C. & Co., and did not import the proposal of a fresh term. CALORI v. ANDREWS. - 236

SHIPPING — *Negligence — Collision with vessel at anchor—Proximate cause of injury.*] A tug attached to a scow loaded with coal approached a bridge the piers of which were being repaired by a railway contractor. The fairway was partly obstructed by a scow connected with the work, but the captain of the tug, after viewing the situation, was of opinion he could get through. In doing so, he brushed slightly against the scow, at the further end of which, on a boom stick in the water, was the plaintiff, engaged in an endeavour to swing or push the scow further around and out of the way of the tug. Plaintiff was crushed against a pile by the scow and severely injured:—*Held*, reversing the decision of MORRISON, J., that the master of the tug was negligent in not stopping and then making certain that it was safe to proceed. PADULAROGA v. THE CANADIAN CANNING COMPANY, LIMITED. - - 468

SPECIFIC PERFORMANCE. - 433
See VENDOR AND PURCHASER.

STATUTE—6 Geo. IV., Cap. 50. - 148
See TRIAL. 2.

56 Geo. III., Cap. 100, Secs. 3 and 4. 454
See HABEAS CORPUS.

17 & 18 Vict., Cap. 113. - - - 97
See WILL.

18 & 19 Vict., Cap. 90. - - - 299
See COSTS.

STATUTE—*Continued.*

56 & 57 Vict., Cap. 61. - - - 199
See ACTION, LIMITATION OF.

B.C. Stats. 1885, Cap. 30, Sec. 9; 1892, Cap. 47. - - - - - - - - 302
See WATER AND WATERCOURSES.

B.C. Stats. 1887, Cap. 36; 1889, Cap. 36. 419
See RAILWAY.

B.C. Stat. 1896, Cap. 55, Secs. 53 and 60. 102
See RAILWAY. 2.

B.C. Stat. 1896, Cap. 55, Sec. 60. - 199
See ACTION, LIMITATION OF.

B.C. Stat. 1898, Cap. 33, Sec. 11. - 170
See MINING LAW.

B.C Stat. 1898, Cap. 33, Secs. 5 and 11. 213
See MINING LAW. 2.

B.C. Stats. 1899, Cap. 77, Sec. 2; 1900, Cap. 24. - - - - - - - - 34
See WATER RECORD.

B.C. Stat. 1900, Cap. 20. - - 426
See MECHANIC'S LIEN.

B.C. Stat. 1900, Cap. 20, Sec. 13. - 126
See MECHANIC'S LIEN. 2.

B.C. Stat. 1900, Cap. 54, Sec. 218. - 497
See MUNICIPAL LAW. 5.

B.C. Stat. 1901, Cap. 37, Sec. 12, r. 21*a*. 116
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B.C. Stat. 1901, Cap. 37, Sec. 12, r. 21*a* and 21*b*. - - - - - - - - 373
See MINING LAW. 8.

B.C. Stat. 1901, Cap. 38. - - 489
See MINING LAW. 7.

B.C. Stats. 1902, Cap. 20, Sec. 4; 1906, Cap. 23. - - - - - - - - 362
See MUNICIPAL LAW. 2.

B.C. Stat. 1902, Cap. 74. - - - 16
See PRACTICE. 4.

B.C. Stat. 1902, Cap. 74, Sec. 2, Sub-Sec. 2 (*c*). - - - - - - 118
See MASTER AND SERVANT. 2.

B.C. Stat. 1902, Cap. 74, Second Schedule, Sec. 8. - - - - - - 286
See MASTER AND SERVANT. 4.

B.C. Stat. 1903-4, Cap. 15, Sec. 86. - 454
See HABEAS CORPUS.

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B.C. Stat. 1904, Cap. 7, Secs. 2 and 3. 182
See PRACTICE. 5.

B.C. Stat. 1904, Cap. 15, Sec. 100. - 1
See APPEAL.

B.C. Stat. 1904, Cap. 15, Sec. 100. - 18
See COSTS. 2.

B.C. Stat. 1904, Cap. 15, Sec. 101; 1905, Cap. 15, Sec. 2. - - - 355
See PRACTICE. 3.

B.C. Stat. 1904, Cap. 54. - - 257
See STATUTE, CONSTRUCTION OF. 4.

B.C. Stat. 1905, Cap. 2. - - 207
See INCOME.

B.C. Stat. 1905, Cap. 8, Sec. 3. - 395
See BILLS OF SALE.

B.C. Stat. 1905, Cap. 14, Secs. 68 and 70. 293
See PRACTICE. 9.

B.C. Stat. 1906, Cap. 42. - - 154
See STATUTE, CONSTRUCTION OF. 5.

B.C. Stat. 1906, Cap. 23, Sec. 68 - 366
See LAND REGISTRY ACT.

Canadian Stat. 1888, Cap. 29. - 419
See RAILWAY.

Canadian Stat. 1890, Cap. 31, Secs. 80 and 81. - - - - - - - - 375
See BANKS AND BANKING.

Canadian Stat. 1894, Cap. 32, Sec. 6. 290
See CRIMINAL LAW. 2.

Canadian Stat. 1902, Cap. 14. - 454
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Canadian Stat. 1903, Cap. 58, Secs. 162 and 168 - - - - - - - - 1
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Canadian Stat. 1903, Cap. 68, Sec. 239. 460
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Criminal Code, Sec. 145. - - 223
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R.L. 1871, No. 30. - - - - 148
See TRIAL. 2.

R.S.B.C. 1897, Cap. 1. - - - 182
See PRACTICE. 5.

R.S.B.C. 1897, Cap. 9. - - - 16
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R.S.B.C. 1897, Cap. 32, Sec. 2. - 395
See BILLS OF SALE.

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R.S.B.C. 1897, Cap. 44. - - - 72
See PRACTICE. 13.

R.S.B.C. 1897, Cap. 44, Secs. 110 and 114. 355
See PRACTICE. 3.

R.S.B.C. 1897, Cap. 57, Sec. 4. - 476
See PUBLIC OFFICER.

R.S.B.C. 1897, Cap. 58. - - 199
See ACTION, LIMITATION OF.

R.S.B.C. 1897, Cap. 68. - - 362
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R.S.B.C. 1897, Cap. 107. - - 148
See TRIAL. 2.

R.S.B.C. 1897, Cap. 111. - - 92
See MORTGAGE.

R.S.B.C. 1897, Cap. 113, Sec. 54. - 126
See LAND ACT.

R.S.B.C. 1897, Cap. 132. - - 126
See MECHANIC'S LIEN. 2.

R.S.B.C. 1897, Cap. 132. - - 426
See MECHANIC'S LIEN.

R.S.B.C. 1897, Cap. 135, Secs. 16 (*g.*) 24, 28, 53, 98. - - - - - - 213
See MINING LAW. 2.

R.S.B.C. 1897, Cap. 136. - - 489
See MINING LAW. 7.

R.S.B.C. 1897, Cap. 137, Secs. 3, 9, 12. 129
See MINING LAW. 3.

R.S.B.C. 1897, Cap. 144, Secs. 21 and 22. 184
See MUNICIPAL LAW.

R.S.B.C. 1897, Cap. 144, Sec. 79. - 61
See MUNICIPAL LAW. 4.

R.S.B.C. 1897, Cap. 150, Secs. 74, 75 and 76. 186
See PARTNERSHIP.

R.S.B.C. 1897, Cap. 163. - - 102
See RAILWAY. 2.

R.S.B.C. 1897, Cap. 179, Secs. 80, 87, 88. 23
See TAXES.

R.S.B.C. 1897, Cap. 190. - - - 34
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R.S.B.C. 1897, Cap. 190. - - 302
See WATER AND WATERCOURSES.

R.S.C. 1886, Cap. 65. - - - 454
See HABEAS CORPUS.

STATUTE, CONSTRUCTION OF—
Penal statute—Inspection of Metalliferous Mines Act Amendment Act, 1901, Sec. 12, r. 21A —"Machinery hereinafter mentioned," meaning of.] In construing a penal statute, the rule to be followed is that by which that sense of the words is to be adopted which best harmonizes with the context and promotes in the fullest manner the policy and object of the Legislature. The paramount object in construing penal as well as other statutes, is to ascertain the legislative intent; and the rule of strict construction is not violated by permitting the words to have their full meaning, or the more extensive of two meanings, when best effectuating the intention. *Semble*, the phrase "machinery hereinafter mentioned" in r. 21A of section 25 of the Inspection of Metalliferous Mines Act, as enacted by Cap. 37 of 1901, means "any of the machinery hereinafter mentioned." MCGREGOR v. THE CANADIAN CONSOLIDATED MINES, LIMITED. - - **116**

2.——*Succession Duty Act, R.S.B.C. 1897, Cap. 175.* - - - - - - **97**
See WILL.

3.——*Supreme Court Act, 1904, Sec. 100—Railway Act, 1903 (Dominion), Secs. 162 and 168.*] *Held* (IRVING, J., dissenting): (1.) That the word "event" in section 100 of the Supreme Court Act, 1904, may be read distributively. (2.) That section 162 of the Railway Act, 1903 (Dominion), does not apply to costs of appeals to the Full Court from the award of arbitrators, but that such appeal is an independent proceeding, and is therefore governed by section 100 of the Supreme Court Act, 1904. VANCOUVER, WESTMINSTER AND YUKON RAILWAY COMPANY v. SAM KEE. - - - - - - **1**

4.——*Vancouver Island Settlers' Rights Act, 1904, B.C. Stat. 1904, Cap. 54—Constitutional law.*] Section 3 of the Vancouver Island Settters' Rights Act, 1904, enacts that upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of the Act, shewing that any settler occupied or improved land within the said railway land belt prior to the enactment of chapter 14 of 47 Victoria (the Settlement Act), with the *bona fide* intention of living on the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant of the fee simple in such land shall be issued to him or his legal representative free of charge and in accordance with the provisions of the Land Act in force at the time when said land was first so occupied or improved by said settler.

STATUTE, CONSTRUCTION OF
—Continued.

Section 4 provides that the rights of such grantees shall be asserted by and defended at the expense of the Crown:—*Held*, reversing the decision of MARTIN, J., that, notwithstanding the decision of the Privy Council in *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429, the Legislature considered that there may be persons who have valid claims to lands within the Company's land grant, but who by reason of poverty or limited means, are unable to assert their rights; that it decided to enable such rights, if any, to be effectively asserted by authorizing Crown grants in fee which grants would transfer any interest left in the Crown and throw the onus of the litigation on the Railway Company while the rights, if any, of the grantee are to be upheld by the Province, but that there is nothing in the operative clauses of the Act which in terms purports to declare the title in the land to be in the Crown, or attempts to deprive the Company of any interest vested in it under its patent from the Dominion. *Held*, further, on the evidence, affirming the finding of MARTIN, J., in this respect, that the defendant had no legal authority for his entry upon and occupation of the lands in question when he went upon them in 1879, that he was never recorded as a pre-emptor, and that, therefore there was no valid alienation of the land in question taking it out of the grant to the railway. There being no interest left in the Crown, in right of the Province, to convey, the grant given to the defendant by the Province was inoperative. ESQUIMALT AND NANAIMO RAILWAY COMPANY v. MCGREGOR. - - - - - **257**

5.——*When to be held retrospective—Timber Manufacture Act, 1906, Cap. 42—Timber cut on Crown lands—Prohibition as to export—Authority and status of Chief Commissioner of Lands and Works under the Act—Maxim, "the King can do no wrong."*] Section 2 of the Timber Manufacture Act, 1906, provides that all timber cut on ungranted lands of the Crown, or on lands thereafter granted, shall be used or manufactured in the Province. Section 4 gives to the Chief Commissioner of Lands and Works, his officers, servants and agents, power to do all things necessary to prevent a breach of section 2, including seizure and detention of all timber so cut until security shall be given to His Majesty that such timber will be used and manufactured as provided by section 2. Plaintiff had in his possession, and was about to export, a quantity of logs, cut before the passing of the Act, which were seized by

STATUTE, CONSTRUCTION OF — *Continued.*

the Provincial Timber Inspector:—*Held*, by the Full Court, affirming the decision of HUNTER, C.J., that the rule requiring the courts not to construe Acts of the Legislature to the prejudice of existing proprietary rights, if the language bears another sensible meaning, excludes from the operation of this statute all timber cut before the passing of it. The authority to seize, under section 4, is not conferred upon the Crown. The Chief Commissioner acts thereunder, not as the organ of the Crown, but as the grantee of legislative authority, and does not purport to act other than as a statutory officer. The timber in question, consequently, not being in the possession of the Crown, there was no seizure by the Crown. The maxim, "the King can do no wrong," considered. EMERSON v. SKINNER. - **154**

STATUTE OF FRAUDS. - - **236**
See SALE OF LAND. 2.

SUCCESSION DUTY. - - - **97**
See WILL.

TAXES—*Distress for—Assessment Act, R.S. B.C. 1897, Cap. 179, Secs. 80, 87, 88—Notice of sale—"At least ten days"—"Ten clear days" — Time, computation of — Damages, exemplary, excessive—New trial for assessment of damages.*] The provision in section 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser *ab initio*. Section 87 does not create the relationship of landlord and tenant between the parties; nor does it give a lien upon goods such as the preferential charge upon lands under section 80. THE CANADIAN CANNING COMPANY, LIMITED v. FAGAN AND FOSTER. **23**

TENDER OF PURCHASE MONEY. **9, 485**
See CONTRACT. 2.

TIME—*Computation of—"At least ten days" —Ten clear days.*] The provision in section 88 of the Assessment Act directing that the collector of taxes shall give at least ten days' public notice of the time and place of sale of goods for delinquent taxes, means "ten clear days," and the party making a distress on less notice becomes a trespasser *ab initio*. THE CANADIAN CANNING COMPANY, LIMITED v. FAGAN AND FOSTER. - - - **23**

2.——*Computation of for entering appearance.* - - - - - - - **72**
See PRACTICE. 13.

TRIAL—*Balance of convenience.*] Where the ship was built in Scotland, and certain repairs were effected on her way out to the British Columbia coast, the balance of convenience is in favour of trying out any disputes concerning those repairs at the place where the ship is rather than at the place where she was built. BOW, MCLACHLAN & CO. v. THE "CAMOSUN." (No. 2). - **368**

2.——*Change of venue—Special jury, right to—Jurors Act, R.S.B.C. 1897, Cap. 107—Jurors' Act, 1860 — 6 Geo. IV., Cap. 50.*] Plaintiffs named Nelson as the place of trial, the action having been commenced in the Vancouver registry. The defendants applied to have the venue changed to Vancouver and for an order that the action be tried by a special jury if the plaintiffs desired a jury. No affidavit was filed alleging any ground for supposing that a fair trial could not be had at Nelson, but it was urged that there was no provision by which a special jury could be had:—*Held*, by the Full Court, that the defendants could obtain a special jury at Nelson, and that in any event the application was rightly dismissed as no ground had been shewn for supposing that a fair trial could not be had. Decision of MARTIN, J., affirmed. FERNIE LUMBER COMPANY, LIMITED v. CROW'S NEST SOUTHERN RAILWAY COMPANY *et al.* - - **148**

VENDOR AND PURCHASER—*Authority to contract on behalf of vendor—Offer to sell—Acceptance—Option—Agreement—Specific performance.*] An officer of the defendant Coal Company known as Land Commissioner, gave to defendant M. in June, 1900, the following document: "*Re* Sale to You of Mill Site. The Crow's Nest Pass Coal Company hereby agree to sell to you a piece of land at or near Hosmer Station on the Crow's Nest line, to contain at least one hundred acres of land, at the price of $5.00 per acre, payable as follows: When title issued to purchaser. Title to be given as soon as the Company is in a position to do so. Purchaser to have possession at once. The land to be as near as possible as shewn on the annexed sketch plan." M. for a nominal consideration, in October, 1902, assigned this document to B. who in turn assigned it for value to plaintiff Company. In an action for specific performance of this agreement, plaintiff Company was nonsuited at the close of its case, and it was *Held*, on appeal, that, one of the conditions on which the document was given being that a mill should be built at an early date, the defendant M., not having done anything in that direction for two years, must be taken to have abandoned any such inten-

VENDOR AND PURCHASER—*Cont'd.*

tion. *Per* HUNTER, C.J., (dissenting): It was for the Company to shew that the intention to build a mill was a condition *dans locum contractui*, and the fact that the condition was not inserted in the agreement was sufficient to call upon the Company to make good that defence. THE ELK LUMBER COMPANY, LIMITED v. THE CROW'S NEST PASS COAL COMPANY, LIMITED, DANIEL V. MOTT *et al.* - - - - - - 433

2.——*Contract for sale of land—Misrepresentation by agent of vendors before written contract made.* - - - - - 402
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VENUE—Change of. - - - 148
See TRIAL. 2.

2.——*Change of—General right of judge to make change—Section 70, County Courts Act, B.C. Stat. 1905, Cap. 14.*] Where an action is brought by a relative of the registrar, and it is clear that the registrar is not the real plaintiff, the defendant is not entitled to invoke section 70 of the Act. PHAIR v. SUTHERLAND. - - - - - 293

WATER RECORD—*Grants of water rights to power company and municipality, conflict of—Riparian rights, doctrine of—Whether in force in British Columbia — Apprehended damage—Water Clauses Consolidation Act, 1897, R.S.B.C. 1897, Cap. 190—B.C. Stats. 1899, Cap. 77, Sec. 2, and 1900, Cap. 44—Damages.*] Having regard to Lord Blackburn's examination of *Bickett* v. *Morris* in *Orr Ewing* v. *Colquhoun* (1877), 2 App. Cas. 839 at p. 852 *et seq.*, and the remarks of Fitzgibbon and Barry, L.JJ., in *Belfast Ropeworks Co.* v. *Boyd* (1888), 21 L.R. Ir. 560, the law is not that any sensible interference with the bed of a stream is *per se* actionable, but that there must be either actual damage, or a reasonable possibility of damage, to give a good cause of action; and that in determining whether the defendant has discharged the onus, regard must be had to the circumstances of the case. *Held*, further, that in this particular case the defendants had discharged the onus, having regard to the evidence taken since the trial by leave of the Full Court. THE WEST KOOTENAY POWER AND LIGHT COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF NELSON. - - - - - 34

WATER AND WATERCOURSES.—*Prior rights—Riparian ownership—English law relating to riparian rights, introduction of into British Columbia—Appropriation of waters—Authorization of user of water by records or grants—Statutes, construction of—Water Privileges Act, 1892—Water Clauses Consolidation Act, 1897, R.S.B.C., Cap. 190—Esquimalt Water Works Act, 1885—Expropriating statutes, effect of general Acts on earlier special Acts—Municipal Corporation, rights of—Water companies.*] By section 9 of the plaintiff Company's charter of 1885, they were empowered from time to time and at all times thereafter to survey, set out and ascertain such parts of the land within a prescribed area as they might require for the purposes of their undertaking, to divert and appropriate the waters of Thetis lake and Deadman's river and its tributaries as they should judge suitable and proper, and to acquire any interests in the said lands or waters, *viz.*: Thetis lake or Deadman's river, or any privileges that might be required for the purposes of the Company. By section 10 of the same Act, "the lands, privileges and waters which shall be ascertained, set out, or appropriated by the Company for the purposes thereof as aforesaid, shall thereupon and forever after be vested in the Company." By an amending Act of 1892, passed on the 23rd of April, 1892, the provisions of the principal Act as to appropriation and diversion were extended so as to embrace Goldstream river and its tributaries, except that there is no express vesting clause similar to that contained in said section 10. It is also provided that the power to divert and appropriate water from this river and its tributaries is to be subject "to any grant of rights, privileges or powers arising under the provisions of the Corporation of Victoria Water Works Act, 1873"; and by section 9, that nothing in the Act is to be construed as in any way limiting or derogating from any grant or privilege accorded to the City under the provisions of the said Act. By section 10 it is stated that the powers as to Goldstream are conferred only on the condition that the Company will supply, on terms which are specified, a maximum quantity of 5,000,000 gallons *per diem* to the City if so required. The Company in 1892 commenced operations on Goldstream river by clearing the banks and building dams for the purpose of making reservoirs and other improvements. In 1897 the Water Clauses Consolidation Act was passed, by which all unrecorded and unappropriated water and water-power, declared by the Water Privileges Act, 1892, to be vested in the Crown,

WATER AND WATERCOURSES—*Continued.*

WATER AND WATERCOURSES —*Continued.*

were brought under one comprehensive code for administrative purposes. Between 1892 and 1898 the Company had purchased from various owners the lands along the Goldstream river and contended in the action that it had thus become entitled to the riparian rights of such owners:—*Held*, that the Water Privileges Act, 1892, vested in the Crown the right to the use of all the water in Goldstream river. The Company's Act of 1892 merely gave it a right to take what was necessary for its purposes, and by taking possession of the source of the river it could not claim the exclusive use of the water from the source of the river to its mouth. The Water Clauses Consolidation Act, 1897, was intended to control the acquisition and use of waters not appropriated on or before the 1st of June, 1897, and prescribed a method by which the right to use such waters, as well recorded as unrecorded, could be obtained. The Act intended that existing companies should be limited strictly to their corporate powers. The purchase of lands by the Company gave it no greater right than the owners possessed, *viz.*: a right to the uninterrupted, undiminished and unpolluted flow of the water past their lands for the purposes incidental to their ownership. The Company purchased those lands solely by virtue of the limited authority given it by its Act of incorporation, and for the purposes only of that Act. Under the provisions of the Water Clauses Consolidation Act, 1897, the City have a right to the waste or unrecorded waters of Goldstream river, and under the Corporation of Victoria Water Works Act, 1873, they have a right to the compulsory acquisition of the whole of the interests of the Company on the said river. *Per* HUNTER, C.J.: Having regard to the nature of the undertaking and the conditions imposed, the Legislature, when it conferred the right "from time to time and at all times hereafter" to divert and appropriate the waters of Goldstream, granted an exclusive licence, subject only to the rights conferred on the City by its Act of 1873 and amending Acts. That right having sprung into existence, should not, in the absence of clear and unmistakable language, be prejudiced by any subsequent legislation. That the option as to how or where the water is to be taken, is left entirely with the Company, which is given the exclusive use and control of the stream. Judgment of DUFF, J., reversed (HUNTER, C.J., (*dissentiente*). ESQUIMALT WATERWORKS COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VICTORIA. - - - 302

WILL—*Construction of—Fund created for payment of "funeral, testamentary expenses and debts"—Taxes—Succession duty—Succession Duty Act, R.S.B.C. 1897, Cap. 175—Locke King's Act, 17 & 18 Vict., Cap. 113.*] The testatrix made a will in 1896 leaving certain lands to devisees therein named. Between the date of the will and her death, in 1900, municipal and Provincial taxes had accumulated on the devised lands. The parties taking the lands under the will claimed the right to have the taxes paid out of moneys which had been realized by the executors from the other parts of the estate, on the ground that the residuary fund was, by the will, expressly made liable as a fund for the payment of her funeral, testamentary expenses and debts. On this state of facts the following questions were submitted:—(1.) Do the succession duties payable under the Succession Duty Act in respect of the real estate of the said deceased form part of the testamentary expenses of the deceased and become payable out of the residuary estate, or are they to be charged against the different properties devised under the will? (2.) Are the taxes payable to the City of Victoria and the Provincial Government debts of the deceased and payable out of the residuary estate, or are they to be charged against the different properties in respect of which the said taxes have been assessed? *Held* (1.) That the succession duty payable under the Succession Duty Act (R.S.B.C. 1897, Cap. 175), in respect of the real estate of a deceased person, does not form part of the testamentary expenses of the deceased, but is chargeable against the different properties devised under the will. (2.) The taxes due by deceased are payable out of the residuary estate, and not chargeable against the different properties in respect of which said taxes have been imposed. (3.) To allow taxes to fall into arrear does not charge land by way of mortgage so as to bring it within the operation of Locke King's Act (17 & 18 Vict., Cap. 113). Decision of IRVING, J., affirmed. *In re* ESTATE OF ELIZABETH WATKINS, DECEASED. - 97

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2.——"By reason of the railway." 102
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3.——"Claim." - - - - - 129
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4.——"Dependants." - 118, 286
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5.——"*Event*" *read distributively*—"*Issue*" *as distinguished from* "*event.*" 1
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6.——"*Event,*" *what constitutes.* - 18
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7.——"*Funeral, testamentary expenses and debts.*" - - - - - - - - 97
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8.——"*Machinery hereinafter mentioned,*" *meaning of.* - - - - - - - 116
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9.——"*Machinery hereinafter mentioned,*" *meaning of.* - - - - - - - 373
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11.——"*Practising,*" *what acts will constitute.* - - - - - - - - 112
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12.——"*Profession,*" *whether including Barrister.* - - - - - - - 112
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13. "*Serious and wilful misconduct*"—"*Serious neglect,*" *meaning of.* - 118
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14.——"*Vest,*" *meaning of, as applied to streets.* - - - - - - - 497
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15.——"*Works or operations of the Company.*" - - - - - - - - 102
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