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.

VOLUME XIV.

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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. AULAY MORRISON.
THE HON. WILLIAM HENRY POPE CLEMENT.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. ELI HARRISON,	Nanaimo
HIS HON. WILLIAM WARD SPINKS	Yale
HIS HON. JOHN ANDREW FORIN,	West Kootenay
HIS HON. FREDERICK McBAIN YOUNG,	Atlin
HIS HON. PETER SECORD LAMPMAN,	Victoria
HIS HON. PETER EDMUND WILSON,	East Kootenay
HIS HON. JOHN ROBERT BROWN,	Yale
HIS HON. FREDERICK CALDER,	Cariboo
HIS HON. GEORGE FILLMORE CANE,	Vancouver
HIS HON. DAVID GRANT,	Vancouver
HIS HON. FREDERICK WILLIAM HOWAY,	Westminster
HIS HON. WILLIAM WALLACE BURNS McINNES,	Vancouver
HIS HON. CHARLES HOWARD BARKER,	Nanaimo

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K. C.

MEMORANDA.

On the 26th of September, 1908, His Honour George Fillmore Cane, Judge of the County Court of Vancouver, died at the City of Vancouver.

On the 1st of April, 1909, William Wallace Burns McInnes, Barrister-at-Law, was appointed Judge of the County Court of Vancouver, in the room and stead of His Honour George Fillmore Cane, deceased.

On the 28th of April, 1909, His Honour William Wallace Burns McInnes, Judge of the County Court of Vancouver, was appointed a Local Judge of the Supreme Court of British Columbia.

On the 28th of August, 1909, Charles Howard Barker, Barrister-at-Law, was appointed Judge of the County Court of Nanaimo, and a Local Judge of the Supreme Court of British Columbia in the room and stead of His Honour Eli Harrison, resigned.

On the 25th of September, 1909, His Honour David Grant, Junior Judge of the County Court of Vancouver, was appointed a Local Judge of the Supreme Court of British Columbia.

On the 30th of November, 1909, James Alexander Macdonald, one of His Majesty's Counsel learned in the law, was appointed Chief Justice of the Court of Appeal, with the style and title of Chief Justice of the Court of Appeal so long as the present Chief Justice of the Supreme Court of British Columbia continues to hold such office, and thereafter with the style and title of Chief Justice of British Columbia.

On the 30th of November, 1909, the Honourable Paulus Æmilius Irving, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Justice of the Court of Appeal.

On the 30th of November, 1909, the Honourable Archer Martin, one of the Puisne Judges of the Supreme Court of British Columbia, was appointed a Justice of the Court of Appeal.

On the 30th of November, 1909, William Alfred Galliher, Barrister-at-Law, was appointed a Justice of the Court of Appeal.

On the 30th of November, 1909, Denis Murphy, Barrister-at-Law, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Paulus Æmilius Irving, promoted to the Court of Appeal.

On the 30th of November, 1909, Francis Brooke Gregory, Barrister-at-Law, was appointed a Puisne Judge of the Supreme Court of British Columbia, in the room and stead of the Honourable Archer Martin, promoted to the Court of Appeal.

On the 24th of January, 1910, John Donald Swanson, Barrister-at-Law, was appointed Judge of the County Court of Yale, and a Local Judge of the Supreme Court of British Columbia, in the room and stead of His Honour William Ward Spinks, resigned.

On the 15th of February, 1910, the Honourable Clement Francis Cornwall, retired Judge of the County Court of Cariboo, died at the City of Victoria.

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NOTE.—The following Order in Council, bringing in amendments to the Supreme Court Rules, appeared in the British Columbia Gazette of 11th June, 1908.

RULES OF COURT.

Provincial Secretary's Office,
15th May, 1908

HIS HONOUR the Administrator of the Government in Council, under the provisions of the "Supreme Court Act," has directed that the amendments set forth hereunder shall be made to the existing Rules of Court, intituled the "Supreme Court Rules, 1906," and that the amendments shall take effect on the first day of July, 1908.

By Command

A. CAMPBELL REDDIE,
Deputy Provincial Secretary.

(1.) That paragraph (*b*) of Rule No. 225 be rescinded.

(2.) That paragraph (*c*) of said Rule No. 225 be rescinded, and the following paragraph be substituted therefor:—"(*b*). Where the writ of summons is not endorsed under Order XVIIIA, a statement of claim may be served with the writ or notice in lieu of writ; and if not so served it shall be delivered within twenty-one days after appearance, unless otherwise ordered."

(3.) That Rule No. 229 be amended by striking out the words "in all cases in which it is proposed that the trial should be elsewhere than in Victoria."

(4.) That Rule No. 241 be amended by striking out the words "pursuant to an order" in the first and second lines of said rule,

and by striking out the words "within such time (if any) as shall be specified in such order, or, if no time be specified," in the fourth and fifth lines of said rule.

(5.) That Rule No. 367, as made by Order in Council approved on the 21st day of April, 1906, be amended by striking out the word "reasonably" where it occurs therein and substituting therefor "unreasonably."

(6.) That sub-section (1) of Rule No. 370c is hereby rescinded, and the following substituted in lieu thereof:—"In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of a Court or a judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination may be used as evidence at the trial if the trial judge so orders."

(7.) That Rule No. 430 be amended by striking out the word "ten" in the second line thereof, and by substituting therefor the word "four."

(8.) That Rule No. 892 be amended by striking out all the words in said rule from the beginning thereof to and including the word "office" in the third line thereof, and by striking out the word "therefrom" in the fourth line of said rule, and by substituting therefor "from the Registrar's office out of office hours."

(9.) That Rule No. 948 be amended by striking out the words "the long vacation which shall consist of the months of August and September" in the third and fourth lines thereof, and by substituting therefor "the long vacation, which shall consist of the months of July and August."

(10). That item No. 237 in Schedule 1 of Appendix M to said rules, being a tariff of costs, be amended by striking out the words "a day means five hours."

REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY.

REX v. WALKEM.

FULL COURT

1908

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Criminal law—Counselling a person in Canada to submit in the United States to an operation which in Canada would be criminal—Evidence—Corroboration.

Counselling a person in Canada, to submit in a foreign jurisdiction to an operation which, if performed in Canada, would be a crime, is not an offence against the criminal law of Canada.

New trial ordered, MORRISON, J., dissenting.

APPEAL, by way of reserved case, from the judgment of CANE, Co. J., in the County Court Judge's Criminal Court at Vancouver on the 2nd, 5th, 6th, 7th and 8th of May, 1908.

Statement

The accused was tried on two charges, the first being that he "did counsel or procure one Blanche Bond, . . . a single woman, to commit an indictable offence, to wit: the said Blanche Bond then being with child by the said George A. Walkem, to unlawfully permit to be used on her a certain instrument or other means with intent to procure the miscarriage of the said Blanche Bond."

The second charge was that the accused "did unlawfully supply one Blanche Bond, a single woman, then being with child

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by the said George A. Walkem, with a certain drug, to wit: *ergot*, knowing that the same was intended to be unlawfully used by the said Blanche Bond with intent to procure her miscarriage." There was evidence that accused counselled the woman to submit to an operation within the jurisdiction; but she had in fact submitted to an operation in the United States.

The appeal was argued at Victoria on the 11th, 12th and 15th of June, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Martin, K.C., for the accused: The learned judge has convicted the accused for committing a crime in a foreign jurisdiction. This is plain from the question asked, "Is counselling in Canada to submit to an abortion in the United States an offence?" The woman herself, according to her evidence, submitted to the operation in Seattle; the man cannot be found guilty of any crime in Seattle.

Maclean, K.C. (*D.A.-G.*), for the Crown, called upon on the question of the conviction: Accused counselled this woman to permit of an instrument being used upon her.

Martin, continuing: As to corroboration, we submit that, while there is no statute bearing on the point, yet it is practically the law in England that no conviction will be found on the evidence of an accomplice unless such evidence is corroborated. Here the trial judge found corroboration, but we submit that he misdirected himself. On the weight of evidence, it is doubtful if a criminal operation has been performed, *ergo*, there should be a new trial; the woman's condition was consistent with other circumstances than those alleged. The accused must be guilty of the crime charged, or an attempt; neither element is present here.

Argument

Maclean: The *Atwood and Robbin's Case* (1788), 1 Leach, C.C. 464, has never been questioned. A new trial can only be obtained by quashing the conviction, and that can be done only if conviction is illegal. There is no illegal element here. As to corroboration—

[HUNTER, C.J.: Are we not to assume that if the learned judge was satisfied that there had not been corroboration, he would not have convicted?]

The judge below was of opinion that corroboration was not necessary; but in any event, there is ample corroboration. The judge discredited the evidence of the defence, and believed the woman's story; she was before the judge, together with the other witnesses, and she is believed in preference. Her condition being consistent with a different state of facts is not material; it is the accused's state of mind when he took the measures he did take and gave the advice to submit to an operation and take the noxious medicines. That advice and those medicines were given with one object, and that object was the commission of a crime. The interview when the accused, the girl, her brother and a solicitor were present, is corroboration. Counselling a person to commit a crime is illegal at common law, irrespective of where the subsequent proceedings take place. Crime is committed the moment counsel is given, as it is practically a breach of the peace at the place where it is given. The offence is the soliciting, whether or not the act solicited is a crime in the foreign country. Further, there is evidence that she was counselled to submit to an operation in British Columbia.

Argument

Martin, in reply.

Cur. adv. vult.

24th June, 1908.

HUNTER, C.J.

HUNTER, C.J., concurred with CLEMENT, J.

MORRISON, J.

MORRISON, J.: The indictment against the accused upon which he stood his trial before his Honour Judge CANE, contained two counts: [Already set out].

Upon this indictment the accused was tried and convicted upon both counts. The learned judge reserved the three questions following for the opinion of this Court pursuant to section 1,014 of the Criminal Code, 1906, *viz.*:

"(1.) Is counselling a person in Canada as charged herein against the accused to submit in the United States to an abortion by an instrument or other means an offence against the criminal law of Canada, the person counselling and the person counselled being in Canada when said counsel was given?

"(2.) Is there any corroboration whatever of the evidence given in this case by the woman to whom the drug *ergot* is

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alleged to have been supplied and upon whom the abortion is alleged to have been performed, she being a consenting party to the taking of said drug and the performance of said abortion?

"(3.) Was sufficient evidence given that any drug or noxious thing was supplied to said woman by the accused with intent to procure her miscarriage?"

At the same time leave was given the accused to apply to this Court for a new trial pursuant to section 1,021 of the Code, on the ground that the verdict is against the weight of evidence. The facts as substantially found by the learned judge were that Blanche Bond was with child by the accused to the knowledge of the accused, and at a critical stage of pregnancy he advised certain treatment and administered *ergot* pills to her with a criminal intent. Both these expedients having failed, he then counselled her to go to a certain town within the Province to have a criminal operation performed upon her. This she refused to do. There is nothing in the proceedings at the trial as placed before us to preclude the opinion on our part that the learned trial judge relied upon that evidence in finding the accused guilty on the first count of the indictment. That the criminal act was not committed as counselled, or at all, does not avail the accused. When a person with criminal intent solicits or advises another to commit an offence which the other does not commit at all, such soliciting, by whatever means it is attempted, is an act done, and that such an act done is punishable by indictment has been clearly established: *per* Le Blanc, J., in *The King* v. *Higgins* (1801), 2 East, 5 at p. 22. "It would be a slander upon the law to suppose that such an offence is not indictable": Lord Kenyon, C.J., at p. 18.

MORRISON, J.

This brings me to that part of the evidence which relates to what happened in the United States following the counselling to proceed there for the purpose of committing a criminal act, and which was shortly subsequent to the counselling as to Nanaimo.

It is indisputable that the laws of Canada can have no force or effect *proprio vigore* in a foreign country, in this case the United States. And it has been urged upon us that all the evidence as to what took place in Seattle, Tacoma and Portland is

irrelevant and inadmissible and its reception has brought about an illegal trial, a conviction arising out of which cannot stand.

With deference I submit that having regard to this particular trial, the evidence is relevant and admissible as going to prove guilty knowledge or intention as well as to shew her condition of health. The tendency of such evidence is to prove and to confirm the proof already given that Blanche Bond was *enciente* by the accused. It is not inadmissible by reason of its having a tendency to prove or to create a suspicion of a subsequent felony. Although conduct on other occasions is never admissible to prove the *actus reus* it is admisssible to prove the *mens rea: The Queen* v. *Geering* (1849), 18 L.J., M.C. 215.

Viewing the evidence as a whole and in every sense there is a nexus between the several acts in respect of which the evidence was elicited.

In *The King* v. *Ellis* (1826), 6 B. & C. 145, Bayley, J., at p. 147, said:

> "I think that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts, which were all part of one entire transaction. . . . All the evidence in this case tended to shew that the prisoner was guilty of the felony charged in the indictment."

A transaction may be a continuous one extending over a long period. In such case any words or statements accompanying such continuous transaction at any time during its continuance are admissible as part of it: *Rawson* v. *Haigh* (1824), 2 Bing. 99. Coming to the second question dealing with corroboration. Upon the trial of a charge of this kind the law does not require corroboration. The conviction here cannot be quashed for want of corroboration. There is a clear distinction between corroboration required by law and that required as a rule of prudence or procedure. In the former case a conviction on uncorroborated evidence would be illegal, whereas in the latter case it would be perfectly valid: *The Queen* v. *Stubbs* (1855), 25 L.J., M.C. 16. But counsel contend inasmuch as the learned judge stated he found corroboration that he would not have convicted in its absence, and he proceeded to shew that there is no evidence whatever of corroboration. The transcript of the discussion of

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the question of corroboration between counsel and the learned judge does not sustain this contention.

This is how it terminated:

"COURT: I am not going to put corroboration in there, because the law does not require it.

"*Martin:* But you have required it.

"COURT: I have not, but I have found it for my own satisfaction here, which makes it stronger in my mind. I will put in 'corroboration,' but I tell you I do not think it should be there at all."

As to the third question it has been held that if a man who believes a drug to be a noxious drug and incites a woman to take it, he is guilty of attempting to procure abortion by incitement although as a matter of fact the commission of the offence by the woman is impossible in the manner proposed.

In statutory enactments an appeal from the verdict of a jury on the facts was practically unknown, the exception being when a misdemeanour was tried by the King's Bench. A new trial was granted to a convicted person because the criminal trial being held by a court of civil jurisdiction the prisoner should have the benefit of civil procedure. Though our Code expressly provides for such an appeal yet in such appeals we are bound by the authorities extant in civil cases.

Lord Ashbourne in *Owners of SS. Guildhall* v. *General Steam Navigation Company, Limited* (1908), A.C. 159 at p. 161, said:

MORRISON, J.

"I think the cases should be very rare indeed—I can conceive few cases where I would do it myself—where I would sanction or encourage an appeal on questions of fact which had been fully thought out and examined by the Court of first instance."

Applying those principles to this case, how can it be successfully contended that the learned trial judge convicted against the weight of evidence, especially when it is remembered that there was no jury and that he gave a considered decision? though on the whole case as submitted I think it should be referred back to the learned trial judge for amendment or restatement under section 1,017, sub-section 3. And whilst I think that question (1.) is hypothetical and question (2.) if answered in the negative would not carry the matter any further, being in no way binding on the judge nor affecting in any way the conviction, yet I venture to think that the authorities sustain the contention that the act done of counselling is an

indictable offence by common law regardless of where the crime counselled is committed.

The common law jurisdiction as to crime is still operative even in cases provided by the Code unless there is such repugnancy as to give prevalence to the latter law: *The King* v. *Cole* (1902), 5 C.C.C. 330.

The Code is merely declaratory of the common law. It does not displace it. That was the intention of the English draft criminal code—to sweep away the common law and make all crimes statutory offences. Doubtless that was the reason it did not receive legislative sanction. In Stephen's Criminal Law of England the learned author treats with the phase of counselling as embodied in question (1.) opposing his own doubt and views to the authorities then extant with a scrupulousness which if given the force of law would be less than justice. The uncertainty of views there raised seemed to be adopted by later text writers, but as has been said, text books are written *en suite* and a mere repetition by subsequent writers does not necessarily make those *dicta* law.

Subject to the above observations, I would answer all the questions submitted in the affirmative. And as to the application for a new trial, I would refuse it. All the more so, having regard to section 1,019 of the Code which enacts that no conviction shall be set aside nor any new trial directed although it appear that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless in the opinion of the Court of Appeal some substantial wrong or miscarriage was thereby occasioned on the trial; as well as having regard to the power reposed in the Minister of Justice to review the whole proceedings in case of a conviction and sentence, particularly where there is a question of new evidence involved. The Court, at any rate, should be most careful not to substitute themselves for the jury nor to be astute to invade the functions of the trial judge when acting as a judge and jury.

MORRISON, J.

CLEMENT, J.: This case comes before us upon a reserved case stated by his Honour Judge CANE, in these words: [Already

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set out]. His Honour also gave leave to the accused to apply to this Court under section 1,021 of the Criminal Code for a new trial on the ground that the verdict was against the weight of evidence; but, for reasons which will appear later, it is unnecessary to deal with that aspect of the case or to express any opinion upon the question whether or not it is within our power to entertain such an application upon the ground of discovery of fresh evidence.

So far as concerns the reserved case the matter is put before us in a somewhat unsatisfactory shape. There was evidence before the learned trial judge to the effect that the accused counselled the young woman to submit to an operation for abortion at Nanaimo, but it would appear from the first question reserved (and indeed the learned Crown counsel did not contend otherwise) that the verdict was not based upon this evidence. But it was strongly urged that no matter what our view might be upon the second question the verdict should stand because the trial judge really convicted, as he might, upon the evidence of the young woman, apart from any corroborative testimony. It seems to me that as the power and duty imposed upon a trial judge is to reserve a question of law "arising" upon the trial, we must assume that a decision one way or the other upon such question was material to the determination of the larger question of the guilt or innocence of the accused. We cannot, in my opinion, listen to the suggestion that the question is one of academic interest merely. In view of the result at which I have arrived, it is unnecessary to pursue the matter further than to say that a trial judge should not grant a reserved case upon a question the determination of which either way would not and did not affect his conclusions.

CLEMENT, J.

The first question must in my opinion be answered in the negative. The learned Deputy Attorney-General cited *The King* v. *Higgins* (1801), 2 East, 5, and *The King* v. *Cole* (1902), 5 C.C.C. 330, to which I may add *The Queen* v. *Gregory* (1867), 36 L. J., M. C. 60, as authority for the proposition that it is a misdemeanour at common law to counsel or incite to the commission of a crime, without regard to whether the crime counselled was or was not actually committed; arguing therefrom that the fact

that, as here, the act alleged to constitute the counselled crime was committed abroad and was not therefore a crime of which our Courts could take cognizance, went no further to relieve the accused than if the act counselled had never been committed at all. In my opinion the cases do not touch the real point which this first question raises. They are all cases in which the act counselled was to be performed, if performed at all, within the jurisdiction, that is to say, what was counselled was the commission of an offence against the law of the land, or, to follow the usual phrase "against the peace of our Lord the King, his Crown and dignity." We were referred to no case in which the real point here involved was discussed; but I find the matter dealt with by a very weighty authority, Sir James Stephen, in his History of the Criminal Law (1883), Vol. 2, at p. 12, as "a question of the greatest importance and delicacy . . . . . which has never yet been judicially decided." He propounds the question in this way:

"How far are acts committed abroad, which if committed in England would be crimes, recognized as crimes by the law of England for the purpose of rendering persons in England criminally responsible for steps taken in relation to them, which if taken in relation to crimes committed in England would make them accessories before or after the fact, or which would amount to a conspiracy to commit it?"

And he puts this case, p. 13:

"A, in England, advises B to commit a robbery in France, and supplies him with the means to do so . . . . Is A an accessory before the fact if the robbery is committed, and is he guilty of inciting B to commit a crime if the robbery is not committed?"

CLEMENT, J.

Sir James Stephen entirely refrains from giving a decided opinion upon the point, but a perusal of what he has written leaves very little doubt in my mind that he would answer the question as I have answered it. He says, at p. 13:

"I do not think it proper to give a decided opinion upon this subject, because it is by no means unlikely to be raised judicially, but I will make one or two observations upon it. One strong argument against the criminality of such acts is that the law of England does not deal with crimes committed abroad at all. The law of England does not forbid a Frenchman in France to rob another Frenchman in France . . . . . The argument on the other side is that in all common cases it would be highly expedient that all civilized countries should recognize offences committed in each other's territories, as offences for the purpose in question. But to this it may be replied that this is an argument for the Legislature and not for the judges."

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His statement that "the law of England does not deal with crimes committed abroad at all" agrees with the oft-quoted and never questioned saying of Lord Chief Justice de Grey in *Rafael* v. *Verelst* (1776), 2 W. Bl. 1,055 at p. 1,058: "Crimes are in their nature local, and the jurisdiction of crimes is local." What takes place abroad cannot, in the eye of our law, be an offence against our law (unless indeed made so by statute), except in the one well-known case of "Piracy *jure gentium*": Kenny's Outlines of Criminal Law, 411; Story's Conflict of Laws, 8th Ed., Sec. 620; Bishop's Criminal Law, 7th Ed., Secs. 109, 111; *The Queen* v. *Bernard* (1858), 8 St. Tri., N.S. 887, 1 F. & F. 240; *Regina* v. *Kohn* (1864), 4 F. & F. 68; and see also *Huntington* v. *Attrill* (1893), A.C. 150, *per* Lord Watson at p. 156.

I also find the point referred to in Kenny's Outlines of Criminal Law at p. 413. He says:

> "Doubt has arisen as to whether, even when a man is in England, he could commit any offence against English law by conspiring to commit—or being accessory to the commission of—a crime in some country abroad. For as English Courts have no official knowledge of foreign law they cannot be sure that the act, however wicked, is actually a crime by the law of the particular foreign country concerned."

The argument thus advanced by the learned author does not, I must confess, appeal to me as at all conclusive, for if the difficulty is one of proof merely that may be met. The question is not whether what is counselled is or is not a crime in the eye of the foreign law. It cuts deeper. Is it an offence against our law? To which, after anxious consideration, I would give the answer that nothing beyond our borders can be an offence against our law unless made so by statute; and to counsel the commission of an act abroad is not to counsel the commission of an offence against our law. The fact that there has been such legislation in several instances (see Stephen's History of the Criminal Law, 14) of course strengthens the argument.

CLEMENT, J.

By section 1,018 of the Criminal Code, the Court of Appeal may, if of opinion that the ruling was erroneous and that there has been a mis-trial in consequence, order a new trial. I am clearly of opinion that the ruling upon the point just discussed was erroneous; and, after careful perusal of the evidence, am also of opinion that there was in consequence of that erroneous ruling

a mis-trial on both charges. The *ergot* incident, if I may call it so, was one alleged criminal step in a long story of crime, the whole of which came out in evidence. In view of the fact that there is to be a new trial I refrain from saying anything to prejudice the result, but manifestly there are serious questions as to the admissibility of much of the evidence given at the first trial, if the enquiry is to be limited, as of course it must be limited, to the question of the guilt or innocence of the accused in reference to counselling acts to be done in Canada. Those questions have not been argued before us and I offer no opinion upon them. The trial having proceeded upon both counts together, it was not open to the accused to raise such questions, particularly in view of the ruling upon the larger point already discussed. That to some extent this was the fault of the accused in not asking for a separate trial upon each count of the indictment can hardly be seriously urged as a reason for refusing a new trial, if we are of opinion that there really was a mis-trial. Here there were what may be fairly termed a major and a minor charge; and in my opinion the trial of the major charge was proceeded with under such fundamental error affecting the whole case that justice can be done only by directing a new trial upon both charges.

Appeal allowed and new trial ordered, Morrison, J., dissenting.

HUNTER, C.J.

1908

June 4.

REX v. REGAN.

Criminal law—Certiorari—Idle and disorderly person—Statutory offence—Necessity for person charged to properly account for herself—Police officer—Disclosure of his authority to accused person.

REX v. REGAN

A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer:—

Held, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself.

APPLICATION for a rule *nisi* to shew cause why a writ of *certiorari* should not issue to quash a conviction by the police magistrate for the City of Victoria on the ground, *inter alia*, that there was no evidence to warrant said conviction and that the accused had not been afforded an opportunity or asked to give an account of herself. Heard before HUNTER, C.J., at Victoria on the 4th of June, 1908.

Statement

The police gave evidence at the hearing before the magistrate as to the character and reputation of a certain house frequented by the accused, which was borne out by the landlady of the house, who also testified that the occupation of the accused in the house was playing the piano. Accused was asked by the detective what she was doing there, and she replied that she was "playing the piano."

Lowe (*Moresby & O'Reilly*), for the motion cited *Regina* v. *Levecque* (1870), 30 U.C.Q.B. 509, and contended that the statutory condition which would warrant the conviction of the accused had not been complied with, inasmuch as the accused had not been expressly asked by the officer to give "an account of herself." No matter how strong the evidence is otherwise if the statute is not complied with the proceedings are void.

Argument

Morphy, contra.

Judgment

HUNTER, C. J.: The statutory conditions have not been complied with inasmuch as the accused was not expressly asked

to give an account of herself. When a person is charged with an offence of this nature under the Code, the person asking the accused for an account of herself should first disclose the fact that he is a police officer and then ask for the account.

Conviction quashed.

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REX v. SHEEHAN.

HUNTER, C.J.
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July 29.
REX
v.
SHEEHAN

Criminal law—Vagrancy—Means of support—Gambling—Evidence—Criminal Code, Sec. 207 (a.)

Accused, when arrested, had on his person $27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and other criminal classes:—

Held, that although he might be convicted under sub-section (*b.*) of section 238 of the Code, yet he could not, on the evidence, be convicted of being a loose, idle, disorderly person, with no visible means of support, and that evidence that the money found on his person was obtained by gambling, was immaterial to the charge in this case.

APPLICATION to quash a conviction made by the police magistrate for the City of Victoria on an information charging the accused with being a loose, idle and disorderly person who, not having any visible means of maintaining himself, unlawfully lived without employment in the said City, on the ground, *inter alia*, that there was no evidence to warrant said conviction and that such conviction was made without jurisdiction inasmuch as no offence was disclosed in such evidence. A motion to shew cause why a writ of *habeas corpus* should not issue also came on for hearing at the same time, before HUNTER, C. J., on the 29th of July, 1908.

Statement

Evidence was given before the magistrate of the accused's habits and mode of life, to the effect that he associated with gamblers and other criminal classes; that he "followed the race

HUNTER, C.J. track" for a living, and that when arrested, he had $27.20 on his person.

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July 29.

REX v. SHEEHAN

Lowe (*Moresby & O'Reilly*), for the applications: There is no evidence which will warrant the conviction of the accused under sub-section (*a.*) of section 238 of the Code. He referred to *Regina* v. *Bassett* (1884), 10 Pr. 386.

Helmcken, K.C., for the Crown and the magistrate.

Judgment

HUNTER, C.J.: The conviction must be quashed, as there was no evidence to warrant the conviction of the accused under sub-section (*a.*) of section 238 of the Code. The accused had means of support, having $27.20 at the time of arrest, and while he might have been convicted under another sub-section of same section, still he could not be on this charge on the evidence. On a charge under the particular sub-section proceeded under, evidence that the money on his person at the time of his arrest was obtained by gambling was immaterial.

Conviction quashed.

DARNLEY v. CANADIAN PACIFIC RAILWAY COMPANY.

MARTIN, J.

1908

Sept. 23.

DARNLEY v. CANADIAN PACIFIC RY. CO.

Workmen's Compensation Act, 1902—B.C. Stat. Cap. 74—Employment obtained by infant misrepresenting his age—Whether this constitutes "serious and wilful misconduct"—Release signed by infant.

The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 1902, it not appearing that the accident in question was "attributable solely" to such misrepresentation.

An infant having been injured in the course of employment so obtained, signed a release, but subsequently tendered repayment of the consideration for the release:—

Held, that this was not a bar to his recovering.

CASE stated for opinion of a Supreme Court judge under the provisions of the Workmen's Compensation Act, 1902, and Rules, by CANE, Co. J. The stated case was argued before MARTIN, J., at Vancouver on the 4th of June, 1908, and was as follows:

(1.) I find that the applicant was injured while in the respondents' employ; at his ordinary work, on the 1st day of July, 1907, at Hammond station on the respondents' line of railway in the Province of British Columbia.

(2.) I find that the injury was an "accident" as contemplated in the above-named statute.

(3.) I find that the applicant was rendered unfit for his ordinary employment for 14 weeks and would be entitled to the maximum payment ($10) per week, or $140, which should be paid in cash, together with all costs.

Statement

Were I therefore to make an award, it would be in favour of the applicant and to the effect above named, but I find the following additional facts:

(1.) I find that the applicant in his application to the respondents for employment signed a declaration stating that he was born on the 27th day of January, 1885, making him over 21 years of age at the date of his application, he then well knowing such statement to be false.

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(2.) I find by his own admissions he made this false statement for the purpose of deceiving the respondents, who, he well knew, would not employ a minor at this work.

(3.) That by his mother's evidence he was born on the 27th day of January, 1887.

(4.) That the Company believed his declaration made on the 25th of May, 1907.

(5.) That on the 24th day of October, 1907, he told the respondents of this accident, without disclosing the falsity of his declaration of May 25th, 1907, and upon signing a full and complete release to the respondents from any liability, received from the respondents $21 for the purpose of going south into the United States (this in lieu of a pass which the respondents could not issue for the United States).

(6.) I find that the transaction of hiring was induced by the false statement of the applicant as to the date of his birth contained in his written application for employment, dated the 11th day of May, 1906, such being a printed form furnished by the respondents and filled out in the applicant's handwriting, and had it not been for this misrepresentation, the applicant would not have been employed by the respondents and thus he would not have met with the accident.

Statement

(7.) I find that the applicant had for some years been working for himself and was old enough and astute enough to deceive the respondents, and cannot now set up his infancy to set aside the release he signed on the 24th of October, 1907: see *Cory* v. *Gertcken* (1816), 2 Madd. 40; *Clements* v. *London and North-Western Railway Co.* (1894), 63 L.J., Q.B. 837; *Bartlett* v. *Wells* (1862), 31 L.J., Q.B. 57; *De Roo* v. *Foster* (1862), 12 C.B.N.S. 272; *Wright* v. *Snowe* (1848), 2 De G. & Sm. 321; and *Ex parte Unity Joint-stock Mutual Banking Association* (1858), 3 De G. & J. 63.

Under consideration of these additional facts, I have come to the conclusion I ought not to make such award.

And I submit for the opinion of a Supreme Court judge "Am I right in holding that the release with all the surrounding circumstances disentitles the applicant to an award in his favour?"

Argument

W. S. Deacon, for applicant: The arbitrator was wrong in holding that the applicant's misrepresentation as to his age was

misconduct which disentitled him to an award. The accident was not solely attributable to the misrepresentation he made before the employment was undertaken and was unconnected with the happening of the accident. He referred to sub-clause (*c.*) of sub-section 2 of section 2 of the Workmen's Compensation Act; *Stephens* v. *Dudbridge Ironworks Co.* (1904), 73 L.J., K.B. 739 at p. 741; *Confederation Life Association* v. *Kinnear* (1896), 23 A.R. 497; *Stikeman* v. *Dawson* (1847), 1 De G. & Sm. 90; *McIntosh* v. *Firstbrook Box Co.* (1905), 10 O.L.R. 526.

The infant's release does not bind him, he having returned any advantage derived from the settlement: Pollock on Contracts, 7th Ed., pp. 55; 76-80; Leake on Contracts, 5th Ed., 381.

McMullen, for respondents: There was no real contract of hiring by reason of the applicant's fraudulent misrepresentation as to his age. Had he not made that misrepresentation he would not have been employed and hence would not have met with the accident in question: Pollock on Contracts, 5th Ed., 52; *Robinson* v. *W. H. Smith and Son* (1901), 17 T.L.R. 235; *Ex parte Jones* (1881), 18 Ch. D. 109 at p. 120; *McIntosh* v. *Firstbrook Box Co.* (1905), 10 O.L.R. 526; *Clements* v. *London and North-Western Railway Co.* (1894), 63 L.J., Q.B. 837; *Flower* v. *London and North-Western Railway Co.*, *Ib.* 547.

Argument

23rd September, 1908.

MARTIN, J.: On the authorities cited I am of the opinion that the mere fact that if the plaintiff had told the truth about his age he would not have been employed is not "serious and wilful misconduct" to which his injury in the course of that employment can be "attributed solely" as is required by sub-section (*c*).

With respect to the release he signed while still under age, and the payment of $21 to him thereunder, that should not have prevented him from recovering the compensation he was entitled to under the Act, seeing that it was admitted on the argument that he tendered the $21 back to his employers, and his equitable obligation will, in the circumstances, be satisfied by deducting that sum from the proposed award of $140.

Judgment

It follows that the question submitted to me by the learned arbitrator (under section 4 of the Second Schedule) should be answered in the negative.

Order accordingly.

HUNTER, C.J.

1908

June 29.

LITTLE v. HANBURY.

Contract—Negotiation—Incompleteness—Acceptance of offer not proved.

LITTLE v. HANBURY

Defendant telegraphed "Propose to go in from Alert Bay over to west coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply." Plaintiff telegraphed in reply: "Five dollars per day and expenses"; upon which the defendant telegraphed "All right please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt this wire; collect":—

Held, that there was no contract. The telegram from plaintiff to defendant was not an acceptance of defendant's offer, but was merely a quotation of terms and could not bind plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied.

Harvey v. *Facey* (1893), A.C. 552, followed.

Statement

ACTION tried before HUNTER, C.J., at Victoria on the 29th of June, 1908, for recovery of damages for breach of contract. The facts on which the decision turns are set out in the headnote.

Fell, for plaintiff.

Langley, for defendant.

Judgment

HUNTER, C.J.: The principles governing cases of this character are quite clear; and the latest case, *Harvey* v. *Facey* (1893), A.C. 552, so far as I can see places the matter beyond any doubt.

The first telegram which it is alleged led up to the contract sued on here, is a telegram sent by Hanbury to this effect:

"Propose to go in from Alert Bay over to west coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply."

That seems to me to be a proposal by Hanbury to Little that if he will come at once he will give him a month's engagement conditional upon the terms being satisfactory. To that telegram

he receives answer from Little which so far as the evidence shews contains nothing more than this, $5 per day and expenses.

Now, that is only an answer to a portion of the telegram, that is to say, it is an answer telling the amount *per diem* which he will expect to receive if he comes. He does not indicate in any way whatever, whether he is able to come at once or what time he would come. So that, to that extent the proposal is unanswered. And therefore at that point I do not think there is a concluded agreement. Then Hanbury replies, "All right." Now that, of course, is clearly assent to the payment of $5 per day and expenses if the man comes in pursuance of the arrangement. But then Hanbury says he must start on Friday. That it seems to me is importing a new term into the negotiations, a term about which the other man had been absolutely silent; and it seems to me at that point there is no concluded agreement; and at that stage of the matter it required some answer from Little one way or the other as to whether he would be able to start Friday, or some date that would be suitable to Hanbury. And it seems to me on the principles decided in *Harvey* v. *Facey*, *supra*, that it is impossible for me to say there was a concluded agreement at the time that Hanbury sent the telegram.

Then as to Hanbury making some offer of settlement, I do not think he has done anything which in law will estop him from setting up this defence that there is no concluded agreement.

Judgment

However, as it is quite possible that other judges may take a different view from me upon the interpretation of these telegrams, it would be proper for me in the event of this going to the Court of Appeal to assess the damages, which I do, at $100. With regard to the credibility of the plaintiff's testimony, I think that it would not be improper for me to characterize him as a blundering and stupid witness. Still I think I would be quite justified in believing his statement that on receipt of this telegram he at once terminated his engagement with the Cannery Company, and in that way, he was prejudiced by the receipt of the telegram.

I think the action must be dismissed with costs.

Judgment for defendant.

CLEMENT, J.

1908

May 9.

ROYLANCE v. CANADIAN PACIFIC RAILWAY COMPANY.

Master and servant—Workmen's Compensation Act, 1902—Injury affecting claimant's earning power—Estimating compensation—Injury partial, though permanent.

ROYLANCE v. CANADIAN PACIFIC RY. CO.

In estimating compensation under the Workmen's Compensation Act, for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, and his earning power consequently reduced.

ACTION for damages at common law and under the Employers' Liability Act, tried before CLEMENT, J., at Nelson, on the 9th of May, 1908.

Statement

The plaintiff who was employed by the defendant Company as a switchman, had his hand caught between the coupling parts of two cars, with the result that the thumb of his right hand was so badly crushed that it had to be amputated. At the conclusion of the plaintiff's case counsel for the defendants moved to dismiss the action on the ground that no claim was established either at common law or under the Employers' Liability Act. In the course of the argument on this application the following discussion took place. In the result the action was proceeded with and judgment was given at the conclusion of the case in favour of the plaintiff for $1,500 at common law, with costs.

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

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

Judgment

CLEMENT, J.: It just occurs to me that I would not give more than $1,500 under the common law, and I would give that amount under the Workmen's Compensation Act. In view of that is it worth while to go on? . . . . Of course there is the difference of weekly payments or payment in a lump. I am satisfied that his earning power is permanently lessened. He

will be partially incapacitated through life. . . . . Do you contend that it is not a case of partial incapacity continuing through life for which he would be entitled to weekly payments until they amounted to $1,500? I suppose it does not make any difference to the Company whether they pay in a lump sum or $10 a week.

Macdonald: His earning capacity has not been injured, his convenience in doing his work has.

CLEMENT, J.: It is one of those things that are very hard to determine, but if he went applying for work and the foreman noticed he had lost a thumb and it was a choice between him and another applicant the probability is he would be passed over. . . . . Looking at it in a common sense way I think his earning power is to some extent minimized through life.

Macdonald: Not for the work he was engaged in at that time. We know nothing about him being an electrician. If we happened to have a civil engineer working as brakeman and he was injured he could not come into Court and claim compensation on the basis of his earning power as a civil engineer, and say he was only doing this other work temporarily.

CLEMENT, J.: All that would mean is, if I am right in saying there has been to some extent a diminution in his earning power through life, it might be difficult to compute exactly. I might have to make the payments less than $10 a week and running over a longer time, but I feel sure that they would total up to $1,500 in the end. Here is a man aged 26; I certainly think his earning power through life is going to be diminished fully $1,500.

Judgment

Macdonald: I thought what we had paid in was ample. ($400).

CLEMENT, J.: You have a different idea from mine as to the effect of the loss of a thumb upon a man's earning power. In dozens of walks of life that he might go into, that would be sufficient in competition with other men to prevent him from getting a position. Under the Workmen's Compensation Act I think the loss of a thumb is worth $1,500 . . . . The thumb of the right hand of a working man is worth $1,500.

Judgment for plaintiff.

IRVING, J.

1908

April 3.

FULL COURT

June 24.

MASON v. MESTON.

MASON v. MESTON.

Municipal law—Alderman—Contract or agreement with the Corporation—Debt due to Corporation—Compromise of—Disqualification—Penalty—Bona fides—Supreme Court Act—Discretion.

Defendant, having a judgment against him by the City for taxes in a test case, entered into an understanding with the City whereby in consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected an alderman:—

Held, that this agreement came within the disqualification clause of the Municipal Clauses Act.

Held, further, that as in this case the defendant had acted *bona fide*, the Court would exercise its discretion under the Supreme Court Act, to relieve against the penalty.

Statement

APPEAL from the judgment of IRVING, J., in a *qui tam* action, tried at Victoria on the 2nd and 3rd of April, 1908, for the recovery of penalties and the disqualification of the defendant in circumstances set out in the reasons for judgment.

Higgins, and *Morphy*, for plaintiff.

Elliott, K.C., and *Shandley*, for defendant.

IRVING, J.: It has been the policy of the Legislature to insert in Acts relating to municipalities, safeguards against interested action on the part of the members of the council; these safeguards have taken the form of provision disqualifying persons from sitting in the council where they have any personal interest which may clash with their duties as members of the council.

IRVING, J.

In the 19th section of our Municipal Clauses Act, sub-section 4, it is declared that a person shall be disqualified having directly or indirectly any contract with the municipality; by sub-section 9, having any unsettled disputed account against or due by the municipality; and by sub-section 10, having by himself or through his partner any contract whatever or interest in any contract with or for the municipality either directly or indirectly.

It is said that the defendant in this case had a contract or is interested in a contract with the municipality within the meaning of sub-sections 4 or 10. His position is this: Some years ago judgment was obtained against him for some $1,600, which judgment was registered against his lands. He immediately applied to the council for some settlement, but before agreement was reached a settlement was offered him that he should pay 50 cents on the dollar, and costs. Before he had carried out that settlement by payment, he was elected to sit in the municipal council. It is said that this judgment and the dealing between him and the council with reference to the payment of 50 cents on the dollar in lieu of the full judgment is a contract within the meaning of that section.

Mr. *Elliott*, I must say, very pertinently asks, if the contract includes that, what was the sense of the statute providing against any unsettled or disputed account? Those words he argues shew that "contract" does not include a case of this kind. But there seems to me to have been a dealing between the council and the defendant with reference to the payment of this debt or liability, which amounts to a contract; there was an agreement, a bargain, an arrangement; and it related to the public affairs, and that seems to fall within the word contract.

Now the rule established by the leading case of *Cumber* v. *Wane* (1732), 1 Str. 426, was that that could not be a contract to accept a lesser sum in payment, that the absence of consideration prevented there being a contract, that is to say, it would be a *nudum pactum*. This is well illustrated in the case of *Foakes* v. *Beer* (1884), 9 App. Cas. 605.

That the judgment creditor had agreed that in consideration of payment at once of a portion of the judgment debt, and on condition that the balance should be paid off by instalments, to take no proceedings to enforce the judgment. The particular sum provided for in the agreement was paid, then the creditor sought to recover interest, and the question was whether the agreement barred their claim. The House of Lords said this was a *nudum pactum*, and no answer upon the proceeding of the judgment, that is to say, the *nudum pactum* was no contract.

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The difficulty I felt and I do still feel to a certain extent, is that there was no contract in the sense in which we generally use that word; but in 1903 our Legislature undertook to alter the rule of law in *Cumber* v. *Wane*, *supra*, and they declared that part performance of an obligation either before or after breach thereof, when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, should be held to extinguish the obligation. Now, as I understand it, by that section it was intended to alter the law as it was declared to exist in *Cumber* v. *Wane*, and as it was applied in the House of Lords in *Foakes* v. *Beer*, *supra*. The Legislature here has said when you make an agreement to accept a lesser sum for a greater, that shall be sufficient, even if there is no consideration to extinguish the obligation.

IRVING, J.

What they have said in effect is, you can make a contract, although there is no consideration for it; what has hitherto been held to be no consideration, or an impossible consideration, or could not be a consideration, shall now be regarded as a consideration, and the new arrangement with or without any consideration, shall be binding. And what they have said, is in this case the arrangement or the agreement entered into between these two people, although there was no consideration, shall be held sufficient to extinguish the obligation that Mr. Meston was under. And that being so, it seems to me right to hold that this was a contract. And for that reason I think that the plaintiff is entitled to succeed upon that point.

The appeal was argued at Victoria on the 8th and 9th of June, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Argument

Elliott, K.C., for appellant (defendant): This is not a contractual relationship with the corporation; it is one of debtor and creditor, and that does not disqualify a person as an alderman. While *Macnamara* v. *Heffernan* (1904), 7 O.L.R. 289, is the case on which the contention of the plaintiff is based here, yet we say that no contractual relationship exists here. If it did, then no taxpayer owing taxes to the city is eligible to be an alderman.

Higgins, and *Morphy*, for respondent (plaintiff), called upon: The judgment is a contract; and even if not, we have the agreement made between the solicitors of the parties to the action by which the defendant undertook to pay half the taxes in consideration of an extension of time. Also while defendant was an alderman, we say that he used his position to obtain extensions.

As to remission of penalties, the Court of course has power under the Supreme Court Act, but this should have been done by the trial judge. After judgment in the Court below, the penalties became merged in the judgment.

Elliott, in reply.

Cur. adv. vult.

24th June, 1908.

HUNTER, C.J.: This is a *qui tam* action brought to recover penalties against the defendant for having sat as an alderman in the City of Victoria when it is alleged he was disqualified under the Municipal Clauses Act, the disqualification alleged being that he was indebted on a judgment obtained against him for unpaid taxes.

Now if the matter rested there, I should find it a question of very considerable difficulty to arrive at the conclusion that he had come within the disqualifying section. If one looks at the books on contracts, with the exception of one or two works I have at present in mind, he will find no allusions whatever to judgments as contracts. In one or two works judgments are referred to as contracts of record. To term a judgment a contract of record is simply applying the old legal nomenclature coming down from the time of Coke, and perpetuated by Blackstone. But I think it is difficult for anyone to maintain that when the statute uses the word contract a person of ordinary intelligence would understand by that that it was intended to include judgments. While the old nomenclature describes a judgment as a contract of record, in strictness it is not so; because a judgment founded on contract converts into an involuntary obligation what was originally a voluntary obligation. The true view of the matter to my mind is that a judgment is an obligation of record, or a debt of record, as the case may be, but

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not a contract of record, as I fail to see in what particular it conforms to what we ordinarily understand by contract.

Therefore, in my opinion, having regard to the rule that a statute ought to be construed in the way in which people of average intelligence would understand it, I think it would be a very strained and far-fetched construction of the statute to say that the word contract included judgment, especially as the statute does not in terms make it a disqualification for nomination or election as alderman simply because the candidate is indebted to the corporation. If it were intended to disqualify every person indebted to the corporation, nothing would have been easier than to have said so, and therefore that cannot be presumed to be the intention.

The difficulty, however, in this case, is that before this gentleman stood for nomination, an arrangement had been come to between him and the municipality by which this judgment would be reduced and an extension of time given for its payment. Now that, it seems to me, after giving the matter as much consideration as I have been able, is within the range of the mischief which the statute seeks to prevent, the principle of the statute being that any person who has put himself in such a position with regard to the municipality whereby his interest may conflict with his duty is ineligible as an alderman. And this is the principle which has always been in force, because in the earliest case that I know of on the subject, that of *The Queen* v. *Francis* (1852), 21 L.J., Q.B. 304, it was held that although the particular contract could not have been enforced against the municipality by reason of its not having been under seal, yet the arrangement was within the mischief of the statute. And it is reasonable that it should be so for although a candidate may be enjoying the advantage of a contract which he could not enforce if a technical defence were set up, still by virtue of his position he might persuade the other members of the council not to raise that defence in case he chose to sue; and therefore it comes within the mischief of the statute. And I cannot see how it can be said that this arrangement, by which there was a stipulation entered into for the release of one-half of the taxes and for an extension of the time of payment, taking the ordinary meaning

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of the term contract, is not within the scope of the disqualification clause.

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I have perused most of the cases, and while I have struggled to find some substantial distinction between those cases and this, I must say that the Sons of Zeruiah be too hard for me, and I must come to the conclusion that the defendant has brought himself within the disqualifying provisions of the statute.

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However, as far as I can see, there is no evidence whatever of bad faith on the part of the defendant, and that being so, I think the power of the Court to relieve against penalties—which jurisdiction as far as I know exceeds that of any other jurisdiction, as it is given in sweeping and absolute terms—ought to be invoked. But having regard to the peculiar circumstances, I do not think we can fairly exercise it except upon the condition that the defendant pays the costs.

HUNTER, C.J.

MORRISON, J.: I agree.

MORRISON, J.

CLEMENT, J.: I concur.

CLEMENT, J.

Appeal allowed.

Solicitors for appellant: *Elliott & Shandley.*
Solicitor for respondent: *Geo. A. Morphy.*

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LOCKHART v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED *ET AL.*

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LOCKHART
v.
YORKSHIRE
GUARANTEE
CORPORATION

Mortgage, redemption of—Sufficiency of notice of exercising power of sale—Notice unsigned—Conditional—Waiver of—Mortgagee—Selling on credit—Sale carried out by mortgagees in form as absolute owners not as mortgagees under a power of sale—Non-disclosure of sale.

In an action by the purchaser of the equity of redemption in mortgaged premises to redeem the same upon the ground, *inter alia*, that no proper or sufficient notice of exercising power of sale had been served upon him :—

Held, *per* IRVING and CLEMENT, JJ. (MARTIN, J., dissenting), no objection to the validity of such notice that it was expressed to be a notice by the agent of the mortgagee: or that it was unsigned, it having been mailed to the plaintiff accompanied by a letter signed by the agent in his own name; nor was such notice conditional by reason of a statement in such letter that if the plaintiff refused to sign a certain document "the only course open to me is to serve you with the enclosed notice of my intention to sell"; nor was it a valid objection to the sufficiency of such notice that the unsigned document stated such sale would be after the expiration of one calendar month while the signed letter accompanying it informed the plaintiff "I purpose to sell as soon as possible"; nor was such notice waived or abandoned by the mortgagee having served a fresh notice of exercising power of sale some two years subsequently.

The above notice was served on the plaintiff in October, 1897, and by articles of agreement dated the 8th of December, 1899, and expressed to be made between the defendant Corporation as vendors and the defendant Lemon as purchaser, the defendant Corporation agreed to sell the mortgaged premises for $1,200:—

Held, not a valid objection to such sale that it did not purport to be in pursuance of the power contained in the mortgage; nor that the mortgagee agreed to sell as absolute owner; nor that such sale was on credit.

Held, also, that neither the non-disclosure by the mortgagee of said sale of the 8th of December, 1899, nor the service in January, 1902, of a fresh notice of exercising power of sale, entitled the plaintiff to redeem but,

Held, affirming HUNTER, C.J., that the plaintiff was entitled to an account of such sale.

Judgment of HUNTER, C.J., decreeing an account, but refusing redemption affirmed.

APPEAL from the judgment of HUNTER, C.J., in an action tried before him, at Vancouver, on the 21st and 22nd of October, 1907.

The plaintiff claimed, *inter alia*, redemption of the mortgaged premises, or alternatively an account of the impeached sale made by the defendant Corporation to the defendant Lemon in the event of such sale being held valid. The learned trial judge held such sale valid and dismissed the plaintiff's claim for redemption, but allowed the alternative relief claimed.

The plaintiff was the purchaser of the equity of redemption of premises mortgaged to the defendant Corporation and which mortgage he covenanted with his grantors to assume and pay off. The mortgage fell in arrear and during the year 1897 the mortgagees' agent wrote to the plaintiff enclosing him form of conveyance and requesting him to convey the mortgaged premises to the mortgagee. This the plaintiff wrote refusing to do. The mortgagees' agent then on the 13th of October, 1897, wrote to the plaintiff as follows:

Statement

"I am in receipt of yours of the 6th instant. So long as I was unable to find a purchaser for the property covered by your mortgage, I was willing to merely collect the rent, applying it on the arrears of interest; but as I have now a buyer in view I do not feel justified in letting the opportunity pass, and propose to sell on the best terms possible. I had hoped that you would simplify matters by giving me the deed asked for, but if you refuse to do this, the only course open to me is to serve you with the enclosed notice of my intention to sell, and to deal with the property as I think proper without reference to your interests.

"If you will execute the deed sent you, and forward it to me, I will as previously stated give you the benefit of any surplus over and above our claim, but in any case I propose to sell as soon as possible.

"Yours respectfully,

"W. FARRELL,

"Per G.A.B."

The notice enclosed with the above letter was as follows:

"To C. B. Lockhart, of the City of Vancouver and Province of British Columbia.

"I, William Farrell, agent of the Yorkshire Guarantee and Securities Corporation, Limited, hereby give you notice that I demand payment of the sum of eight hundred dollars ($800) and interest thereon from the first day of August, one thousand eight hundred and ninety-five due to it the said Yorkshire Guarantee and Securities Corporation, Limited, upon

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a certain indenture of mortgage executed by John W. Weart and John P. Nightingale to the said Yorkshire Guarantee and Securities Corporation, Limited, and dated on or about the first day of November, one thousand eight hundred and ninety-two, for securing the payment of eight hundred dollars ($800) and interest thereon as therein mentioned, on the following properties, namely: All those parcels or tracts of land and premises situate lying and being in the Province of British Columbia and more particularly known and described as city lot numbered eight (8) in block numbered seventy-one (71) according to the sub-division of district lot numbered five hundred and forty-one (541) in the City of Vancouver, and the south-east quarter of the south-west quarter of lot three hundred and thirty-six (336), group one (1) in the district of New Westminster.

"And take notice that unless payment of the said mortgage money and interest, costs and expenses be made within one calendar month from the time of your being served herewith, I the said William Farrell will proceed without any consent or concurrence on your part and without any further notice to you to enter into possession of the said premises and to receive and take the rents and profits thereof, and whether in or out of possession of the same to make lease or leases of the same as I the said William Farrell shall see fit; and to sell and absolutely dispose of the said lands by auction or private sale, or partly by auction and partly by private sale as I the said William Farrell may deem proper, either for cash or upon such terms of credit as I may think proper and to convey and assure the same when so sold, unto the purchasers thereof, as I shall direct or appoint.

" Dated at Vancouver, this twelfth day of October, A.D. 1897."

This notice was not signed by any person.

In December, 1899, the mortgagees sold by private contract to the defendant Lemon, entering into a written agreement with Lemon as follows:

Statement

"Articles of agreement made the eighth day of December, 1899, between The Yorkshire Guarantee and Securities Corporation, Limited, a body corporate, of Huddersfield, England (who and whose successors and assigns are hereinafter included in the word vendor and are hereinafter called the vendor) of the one part; and

" Merrill S. Lemon of the City of Vancouver in the Province of British Columbia (who and whose heirs, executors, administrators and assigns are hereinafter included in the word purchaser and are hereinafter called the purchaser) of the other part.

" Whereas the vendor has agreed to sell to the purchaser and the purchaser has agreed to purchase of and from the vendor the following lands, hereditaments and premises, namely:

" All that certain parcel or tract of land and premises situate lying and being composed of lot numbered eight (8) in block numbered seventy-one (71) according to the sub-division of district lot number five hundred and forty-one (541) group 1, Vancouver district, according to a map or plan of

the sub-division of said district lot five hundred and forty-one (541) deposited in the Land Registry Office at the City of Vancouver in the Province of British Columbia and numbered 210 at or for the price or sum of twelve hundred dollars payable in the manner and on the days and times hereinafter mentioned, that is to say, the sum of two hundred dollars on or before the execution of this agreement (the receipt of which the vendor doth hereby admit and acknowledge) and the balance as follows:

"Payments of twelve dollars ($12) or more to be made on the first day of each and every month until the whole of the said purchase money has been fully paid and satisfied, the first of such payments to be due and payable on the first day of January, A.D. 1900. The purchaser doth hereby covenant, promise and agree to and with the vendor that the purchaser will pay the sums of money above mentioned on the days and times above mentioned and will further pay interest on all moneys for the time being due hereunder by quarterly payments on the first days of March, June, September and December in each and every year at the rate of eight per cent. per annum until all moneys payable hereunder shall be fully paid and satisfied, said interest to be calculated on the amount of the purchase money outstanding at the commencement of each quarter. Provided always that the purchaser may at any time pay the whole or any part of the purchase money from time to time due as aforesaid in sums of not less than twelve dollars with interest thereon up to the date of such payment or payments; that the purchaser will well and truly pay or cause to be paid to the vendor the said sums of money above mentioned, with interest as above provided, at the office of the Company in the City of Vancouver in the Province aforesaid; that the purchaser will pay and discharge all taxes, rates and assessments wherewith the said land may be rated or charged from and after the first day of August, 1898, and will also pay any special tax now payable or that may be imposed by the Dominion of Canada or the Provincial Government, or any legal tax or impost which may hereafter be imposed or which is now imposed upon these presents or upon the interest or balance of the purchase money payable hereunder and will pay the cost of keeping the buildings insured for an amount not less than six hundred dollars ($600) from the said first day of August, 1898, until the expiration of this agreement.

Statement

"And the vendor doth hereby covenant to and with the purchaser that on payment of all moneys payable by the purchaser under these presents the vendor will convey or cause to be conveyed to the purchaser by good and sufficient deed or deeds all those pieces or parcels of land hereinbefore described, together with all appurtenances thereto belonging or appertaining, freed and discharged from all encumbrances, except taxes from the said first day of August, 1898, but subject to the conditions and reservations in the original grant thereof from the Crown; which deed or deeds shall be prepared by the vendor at the expense of the purchaser, and the purchaser shall pay therefor the sum of $5. The purchaser hereby agrees

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to accept the production of the certificate of title issued to the vendor by the District Registrar of Titles of the district in which the said lands, hereditaments and premises are situated of the same, as conclusive evidence of the vendor's title thereto, and the purchaser shall not require evidence of prior title, neither shall he require to have handed or produced to him any deeds or documents other than the conveyance of the property to him from the vendor. The purchaser shall be at liberty to occupy and enjoy the said premises as from the said first day of August, 1898, subject to impeachment for voluntary or permissive waste, until default shall be made in payment of any instalment of the purchase money, or interest thereon, on the days and times and in manner aforesaid, or until the purchaser shall fail to comply with any of the conditions of this agreement casting an obligation on him. And the purchaser doth hereby attorn and become tenant at will of the vendor from the said first day of August, 1898, at a rent equivalent to the amount of the instalments of the purchase money and interest payable on the days and times as hereinbefore mentioned until the said sum of twelve hundred dollars shall be fully paid and satisfied. And the purchaser doth hereby declare that it shall be lawful for the vendor at any time after default shall have been made in any payment due hereunder to enter upon and take possession of the said premises whereof the purchaser has attorned tenant and to determine the tenancy created by said attornment. And the purchaser doth hereby covenant, promise and agree that on default being made as last aforesaid he will peaceably and quietly yield up possession of the said premises to the vendor, freed and discharged of all claims by and from the purchaser under and by virtue of these presents or any matters and things arising thereout.

Statement

"And these presents further witness that in consideration of the vendor having agreed to sell the said premises to the purchaser in manner aforesaid, the purchaser doth hereby covenant, promise and agree to and with the vendor that if the purchaser shall fail in making any payments, either of principal, interest or taxes due under the terms of this agreement the purchaser will on the demand of the vendor, make such payment, and the purchaser doth hereby bind his estate and effects with the payment of the same;

"Provided always that so long as the purchaser shall punctually pay the moneys payable as provided by this agreement, the vendor will not determine the said tenancy. But it is expressly understood that time is to be considered the essence of this agreement and that unless the payments hereinbefore provided for are punctually made at the times and in manner hereinbefore mentioned, or the purchaser shall otherwise fail to properly perform the terms of this agreement casting an obligation on him, these presents shall, at the option of the vendor, be null and void and of no effect and the vendor shall be at liberty to sell and convey the said lands to any purchaser thereof, and all moneys then paid hereunder by the purchaser shall be absolutely forfeited to the vendor;

"And it is expressly agreed by and between the parties hereto that this agreement shall not be registered or recorded as a charge or otherwise against the said premises."

The defendant Corporation did not disclose to the plaintiff the fact that such sale had been made. In January, 1902, the defendant Corporation served a fresh notice of exercising power of sale and this led to a correspondence between the plaintiff and the defendant Corporation in which the plaintiff inquired if the property had been sold but the mortgagees declined to give any information as to the sale. They however stated an amount at which they would permit the plaintiff to redeem.

The plaintiff appealed from the judgment refusing redemption and the appeal was argued at Victoria on the 16th and 17th of January, 1908, before IRVING, MARTIN and CLEMENT, JJ.

Statement

W. S. Deacon, for appellant: The notice is not signed by anyone: Jones on Mortgages, 5th Ed., Sec. 1,843; Hunter on Sales, 72; and even if it be considered a notice, it is one given not by the mortgagee but by an agent: *In re Rumney and Smith* (1897), 66 L.J., Ch. 641 at p. 643. Further, it is really a conditional notice and at the time it was given the mortgagees had received from Lemon sufficient to discharge the mortgage and in law the mortgage was therefore assigned to Lemon and the notice should have been given by Lemon, or at least he should have joined in it: Jones on Mortgages, Sec. 1,902; Hunter on Sales, pp. 26, 80, 180; Am. & Eng. Ency. of Law. Vol. 28, pp. 786, 787, 789; Bell and Dunn on Mortgages, 174. Then the notice, if given, was waived by demanding payment of the mortgage money in the following January, when a fresh notice was given by the Corporation.

Argument

As to waiver see Armour on Titles, 3rd Ed., 415. Further, it was a sale on credit and there was no power to sell on credit. There was here no credit of the moneys received as in *Davey* v. *Durrant* (1857), 1 De G. & J. 535 at p. 553. See also *Beatty* v. *O'Connor* (1884), 5 Ont. 735; *Rodburn* v. *Swinney* (1889), 16 S.C.R. 297 at p. 303. The agreement shews that the mortgagees sold as absolute owners and not in pursuance of their power of sale: *Kelly* v. *Imperial Loan, &c., Company* (1885), 11 S.C.R. 516; Farwell on Powers, 2nd Ed., 156.

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The mortgagee must be candid and open with the debtor.

Davis, K.C., for respondent (defendant) Corporation: This is a redemption action pure and simple; not one for an accounting of moneys received. The second notice was perfectly good to support the sale which was made, although there is no objection to be made to the first notice. He referred to *Major* v. *Ward* (1847), 5 Hare, 598. Plaintiff was not made a victim of sharp practice or technical strictness; he frankly admits that he is unable to redeem the property, at the same time, by the defendants arranging with their vendee for power to redeem, they gave plaintiff further time. As to the latter's complaint of his inability to get information, we submit that if a mortgagee has given a proper notice of sale, and has sold under that notice, he may absolutely refuse to give the mortgagor any notice whatever as to the purchaser. He may be subject to close and strict scrutiny, but so long as his actions are sufficient in law they may not be upset. Then there are no technical rules governing notice of sale. The mere conveyance to the mortgagor of the intention of the mortgagee to sell after a certain period is sufficient. Here the notice in the mortgage is of the most general kind; so much so that we submit even verbal notice would have been good. In any event this is a question of fact for the trial judge, and he has found the notice to be good. The second notice was only given as a matter of precaution. On the question of waiver, see *Laxton* v. *Rosenberg* (1886), 11 Ont. 199 at p. 208; *Earl of Darnley* v. *Proprietors, &c., of London, Chatham, and Dover Railway* (1867), L.R. 2 H.L. 43; *Stackhouse* v. *Barnston* (1805), 10 Ves. 453 at p. 466; *Hedges* v. *The Metropolitan Railway Company* (1860), 28 Beav. 109 at p. 115; *Selwyn* v. *Garfit* (1888), 38 Ch. D. 273 at p. 284; *Beaudry* v. *The Mayor, &c., of Montreal* (1858), 11 Moore, P.C. 399 at p. 426.

Argument

Deacon, in reply.

Cur. adv. vult.

29th April, 1908.
26th September, 1908.

IRVING, J.

IRVING, J.: The Chief Justice found that the unsigned notice accompanied by the letter of the 13th of October, 1897, was received by the plaintiff. In that finding I agree. The evidence

of the post office officials is sufficient to justify the inference that the letter addressed by the defendants to the plaintiff was delivered to the plaintiff. The fact that the envelope was delivered to him personally, and that he made no complaint to the post office or the defendants as to the absence of the contents, satisfies me that they were duly enclosed in the envelope and read by the plaintiff at the time of the receipt by him of the envelope.

In determining the sufficiency of any notice one must have some rule or test upon which to base one's decision. The object of the notice was to afford the mortgagor a chance to protect himself. He, when he gave the power of sale, stipulated for a time within which he might do what he could to stop the threatened sale. This he may do by redeeming or by finding a transferee or a purchaser of his own (*Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395 at p. 398). If the notice, by which expression I include the letter covering the unsigned notice as well as the unsigned notice itself, substantially fulfilled these objects, then it was sufficient, although it might not have been couched in the most correct terms.

The following cases illustrates the proposition that the Court will not set aside a sale for trifling defects in the notice: *Metters* v. *Brown* (1863), 9 Jur. N.S. 958, 33 L.J., Ch. 97. By a clerical error the notice stated the mortgagee would sell six months from date of the deed, instead of six months from the service of the notice. The sale which did not take place till six months after the service of the notice was held good. Sir J. Stuart, V.-C., said, p. 960:

IRVING, J.

"The ground alleged on the face of the bill to support that part of the prayer is, that no notice whatever of the intention to sell was given to the plaintiff. This argument has led to a critical examination of the language of the power and of the notice. The language cannot certainly be said to be very accurate. The difficulty seems to be to put a right construction upon the words 'after the expiration of the said notice.' The notice which was in fact given was not a literal compliance with the terms of the power; but the substantial meaning of the power was, that at the time of the sale there should be a default, and six months' previous notice of the intention to sell. The words 'after the expiration of the said notice,' it is contended, must mean 'at the expiration of the time fixed for the payment of the amount due.' But that interpretation does not appear to be

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accurate. The intention certainly was, in order to guard the rights of the mortgagor, that there should be six months' notice of the intention on the part of the mortgagee to sell. All that the power can be held to mean is, that previously to any sale, six months' notice of the intention to sell must be given. It has also been contended that the effect of the notice was to require the money to be paid at a particular time. That, in my opinion, is not a just view. The plain meaning of the words is, that there must be six months' notice given of the intention to sell. The notice was, in fact, a requisition to pay, as well as a notice of an intention to sell. It was as if the mortgagee had said, 'Take notice, if you do not pay me on or before a certain day, I will sell the property'; but no time was fixed for the sale. That was, in my opinion, unnecessary, because, after the expiration of six months, the mortgagee was entitled to sell at any time, unless the money was paid. There is nothing, I think, in the case to justify me in holding that there is any defect in the notice as to date, time of service, or language. The Court, moreover, is always slow to interfere against a *bona fide* purchaser; and I am not aware of any case in which the Court has done this, where there has been an absence of fraud."

Kennedy v. *De Trafford* (1896), 1 Ch. 762, affirmed (1897), A.C. (H.L.) 180, a letter written by the mortgagees' solicitors in the following terms:

"Our clients' instructions are to realize this security if they can obtain principal, interest and costs. Is Mr. Carswell's trustee" (that is Kennedy) "prepared to pay them off? If not we shall forthwith endeavour to effect a sale by private treaty. We are writing a similar letter to Mr. Dodson," is spoken of by Lord Herschell as a "distinct notice." I am not prepared to say that this was the only notice given in that case,

IRVING, J.

but, the charge being that the mortgagors had not put up the premises for sale by auction (p. 185) that they had only inserted two advertisements inviting a sale by tender; the expression used by Lord Herschell is referred to as shewing what is sufficient notice of the terms on which the mortgagee will sell by private treaty. The fact that the plaintiff made no answer is referred to at p. 186. This decision does not illustrate my proposition as clearly as I thought it did when I first read it, owing to the question about the prior notice, but it is of some value on the other question.

Fenwick v. *Whitwam* (1901), 1 O.L.R. 24. Here the notice was addressed to the mortgagor, then resident abroad, and to his agent, and two subsequent mortgagees, in this way:

"A.B., now of Indiana, but formerly of St. Thomas, G.A.M. his agent, E.M. and W.M., J.M. and J.A." It said, "I, Charles Whitwam, hereby

give you notice," etc., and was signed " E. Horton, Solicitor for Charles Whitwam, mortgagee."

It was held a good notice to A.B. the mortgagor; J.M. and J.A. had respectively assigned to G.A.M. The notice was held a good notice to G A.M. in respect to all claims which he had or professed to have in the matter, notwithstanding the fact it was not addressed to him except as agent for another. The writing informed him it was the intention of the mortgagee to sell and that was all that was required.

As to the certainty of this notice—a notice to quit or " I shall insist on double rent" has been held sufficient: *Doe, Matthews* v. *Jackson* (1779), 1 Doug. 175. In *Ahearn* v. *Bellman* (1879), 4 Ex. D. 201, it was suggested that as the notice to quit contained the following clause:

" And I hereby further give you notice that should you retain possession of the premises after the day before mentioned the annual rental of the premises now held by you from me will be £160, payable quarterly, in advance,"

it thereby made the notice bad; but Bramwell and Cotton, L. JJ., thought it good. Bramwell, L.J., at p. 205, said:

" I will say a word about notices in general. Let us suppose a purchaser were to buy goods, and part of the contract was that the vendor upon receiving notice would send them by the London and North Western or the Great Northern Railway. The purchaser writes to the vendor, 'Take notice you are to send the goods by the London and North Western, and my reason for doing that is that their terminus is nearer my place of business, and therefore it will cost me less to cart them home, but if you, the vendor, like to pay me a shilling a ton you may send them by the Great Northern.' Would that not be a good notice to send the goods by the London and North Western? Clearly it would, and yet it would give the vendor an option; but if he does not exercise that option he is to send them by the London and North Western. So in this case, unless the tenant does accept the option for a new term it would be a notice to quit the premises."

IRVING, J.

That case was followed in *Bury* v. *Thompson* (1895), 1 Q.B. 696, where the test laid down is, is the writing so expressed as to convey to a person of ordinary capacity notice of the writer's intention of exercising his right?

Then does this notice do that? I think it does, and that it is not objectionable because the notice was conditional upon the mortgagor not signing the deed. The whole correspondence

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shews that the mortgagor intended to sell, and to sell at once, that is, as soon as possible having regard to the time specified in the notice annexed to the letter.

The 8th of December, 1899, was the date of the agreement to sell to Lemon, on credit, but the Chief Justice has in his decree fixed that date as the day of the sale, in my opinion, rightly so. As to the contention that a sale on credit is not a sale we have several authorities that giving time to the purchaser is a matter between the mortgagee and the purchaser. As between the mortgagor and the mortgagee, it is a mere matter of accounting for the whole amount as money received: see *Davey* v. *Durrant* (1857), 1 De G. & J. 535, where the original contract for sale by the mortgagee was on credit; and also *Thurlow* v. *Mackeson* (1868), L.R. 4 Q.B. 97.

In *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395, where an agreement was entered into in November to sell at a future time, Lindley, L.J., said, pp. 412-3:

> "If when the time came for completion, that price had become inadequate, he (the mortgagee) might perhaps have been chargeable with wilful default (if) there was undervalue either at the time the agreement was made or when it was carried out."

Then it was argued that as Lemon knew nothing about the power of sale, and as the sale to him did not purport to be under the power of sale, the sale was therefore invalid. But in *Kelly* v. *Imperial Loan Co.* (1884), 11 A.R. 526, (1885), 11 S.C.R. 516, it was held that a sale by mortgagees should be deemed good, and as given under the power of sale contained in the mortgage, when as a matter of fact, the mortgagees supposed they were proceeding under the authority conferred on them by a decree of foreclosure.

IRVING, J.

As to the effect of releasing block 2, the reasoning of Mowat, V.-C., in the case of *Crawford* v. *Armour* (1867), 13 Gr. 576, is applicable. The plaintiff here had assumed the whole responsibility for the debt and therefore when the defendants released block 2 they were only anticipating the action which he (the plaintiff) had agreed to have performed.

The plaintiff's 8th ground of appeal that the sale of the 8th of December, 1899, was not disclosed to the plaintiff is met by the

decision in the case of *Kennedy* v. *De Trafford* (1897), A.C. 180. In that case the property was mortgaged by two persons, Kennedy's predecessor in title and Dodson, who were tenants in common. Under the power of sale it was sold to Dodson who requested the mortgagees not to mention his name as the purchaser (1896, 1 Ch. 773). Kennedy regarded the sale to Dodson under the circumstances as a breach of faith on the part of the mortgagees. This is the way Lord Herschell dealt with the objection, p. 188:

"My Lords, it is said in the present case, and I think that is the only other point that is urged, that it was concealed by the vendors, the mortgagees, from Kennedy that Dodson was the person who was purchasing, although they informed Kennedy that the purchase was being made and they informed him of the terms on which it was being made. It seems to me to be utterly unimportant. If there was no fiduciary relation there was no obligation to reveal the name; there was no right in the other party to know it; there was no duty upon them to communicate it."

Connected with this is a charge of holding back a statement of the accounts.

In *Farrar* v. *Farrars, Limited* (1888), 40 Ch. D. 395 at p. 411, when the mortgagee received a written offer in November, 1885, for part of the property mortgaged, he communicated the fact to "the mortgagors and to the second mortgagee, and he stated that he should accept the offer unless he was paid off before the following Thursday. The mortgagors' solicitors asked for a detailed account of the amount then due to the mortgagees. Mr. Farrar replied that he could not give a detailed account, but that he should say that, without reckoning the costs, it would be between £9,800 and £9,900. The mortgagors' solicitors again pressed for a detailed account, and it was promised as soon as it could be made out. The account was not in fact sent until May, 1886."

IRVING, J.

This offer was not accepted, but in December, 1885, a contract to sell was made. It was held that this delay in sending the account did not invalidate the sale. It is to be observed (1.) that the demand in the *Farrar* case for accounts was made before the six months' notice which the mortgagee was bound to give had expired; and (2.) that as the mortgagors knew the state of accounts they were not misled or put off by not getting the accounts; in the present case no demand for accounts was made until long after the sale of December, 1899, and therefore there can be no suggestion here that the plaintiff was misled.

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In my opinion the sale of December, 1899, was valid and the subsequent proceedings by the Yorkshire Guarantee Company cannot undo it.

As to the award of costs occasioned by Morton bringing in Weart and Nightingale as third parties, the learned Chief Justice having dismissed the action against Morton with costs the third party proceedings became unnecessary. He therefore dismissed Weart and Nightingale from the action with costs to be recovered by them against Morton; he (Morton) in turn to recover his own and these further costs from the plaintiff. It is objected that the Chief Justice should not have saddled the plaintiff with these further costs, but we cannot deal with that point as Morton is not a party to this appeal.

IRVING, J.

MARTIN, J.: A number of objections are raised to the sufficiency of the first notice of sale, dated October 12th, 1897, upon which the learned trial judge based his judgment in favour of the defendants, but it is not necessary to consider them all, because I am of the opinion that, with all respect for contrary opinions, the notice was at best a conditional one, even if it can be held to be a notice at all in the proper sense of the word. But I agree that it must be held to have come to the plaintiff's knowledge.

MARTIN, J.

The notice, so-called, is, in the first place, at best merely conditional, because it expresses an intention to sell only in case of not receiving the deed (after execution) which the mortgagor already had in his possession. It might be said that in such case the mortgagor would know that the result of his refusal would be to bring on a sale, but the letter itself stated what the consequence would be, *viz.*: "if you refuse to do this, the only course open to me is to serve you with the annexed notice of my intention to sell . . . . etc."

Now, clearly, the condition of a future refusal necessarily intervened between the expressed intention and the service to be thereafter effected, and if the plaintiff refused, but not otherwise, it was for the mortgagee to take the next specified step, *i.e.*, serve him with a notice in the form "annexed," because the mortgagee had nominated himself to be the actor in such case,

viz.: in "the only course open to me." The whole tenor of the letter is a declaration of the intention of the mortgagee to serve a notice at a future time under stated conditions; it certainly was not a service at the time nor did it purport to be so; and it would require a distortion of the ordinary sense of ordinary words to make it so. The fact that the notice was not signed lends additional weight to this view, because a mortgagor receiving it would in such circumstances naturally regard it as being something in the nature of the form of notice that would later be served in the event of his refusal to send the deed. And this view is still further strengthened by the additional fact that the notice says that the sale will only be made "after one calendar month from the time of your being served herewith," while the letter says, "I purpose to sell as soon as possible," *i.e.*, after due service of a positive and unequivocal notice. Now, whatever may be said about a notice of intention to exercise a power of sale it should at least be definite (*Newman* v. *Jackson* (1827), 12 Wheat. 570), and free from all ambiguity, so that the mortgagor may not only not be placed in a position of doubt and embarrassment, but may, on the contrary, know exactly what is going to happen, and, if he can, provide for it. But this notice, if it is to be regarded as a notice at all, and not a mere expression of future intention to perform an act upon a specified default (which is all I think it amounts to) is at least (apart from all other objections of a more or less technical nature) so uncertain and ambiguous that I do not think any mortgagor should reasonably be required to shape his conduct upon it. As it stands, even read with the letter, something more is needed to complete it and make it effective.

MARTIN, J.

None of the cases cited in support of a contrary view are, I think, when carefully examined, really of any assistance to it, but rather the contrary.

As to the subsequent proceedings I cannot see how they can, in the circumstances, uphold the judgment. I must say I agree with the argument of the appellant's counsel that the concealment of the true state of affairs by the defendant Company was a course which is not commendable, and has led to difficulties, the suggestion that it was adopted because of the uncertainty as

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to whether or no the plaintiff had received the first notice, so-called, is untenable because, *inter alia*, it was not a notice at all. The situation was one which called for frankness on the part of the Company.

As to Morton, the judgment dismissing the action against him should stand, as also the direction as to costs; there is really no objection taken in the notice of appeal to the same.

I regret that press of work and illness have delayed the completion of these reasons for judgment.

CLEMENT, J.

CLEMENT, J.: I agree that the notice of October, 1897, was a good notice, duly received by Lockhart, and that therefore the position of the defendant Fisher is impregnable, in other words, plaintiff is not entitled to redeem. His rights as against the Company are fully protected by the judgment of the Chief Justice, and the appeal should, therefore, be dismissed.

Appeal dismissed, Martin, J., dissenting.

Solicitors for appellant: *Wade, Deacon & Deacon.*
Solicitors for respondents: *Davis, Marshall & Macneill.*

REX v. PERTELLA. REX v. LEE CHUNG.

CLEMENT, J.

1908

Nov. 6.

Criminal law—Charge to jury—Exception to—When to be taken—Application for a case stated—Criminal Code, Secs. 1,014 and 1,021.

After verdict, but before sentence, it is too late to move for a reserved case.

Section 1,014, sub-section 2 of the Code provides that the Court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal . . .:—

Held, that this means that any reservation of a case after verdict must be of the Court's own motion.

REX v. PERTELLA

REX v. LEE CHUNG

CRIMINAL trials held by CLEMENT, J., at Vancouver Fall Assizes on the 22nd of October, 1908. The facts are set out in the reasons of the learned trial judge. Statement

A. D. Taylor, K.C., for the Crown.
Farris, for Lee Chung.
Woods, for Pertella.

6th November, 1908.

CLEMENT, J.: Trials before me upon indictments for murder. In neither case was any objection taken to my charge to the jury. Verdict, "guilty," in each case. After verdict, but before sentence, in the case of Lee Chung, counsel for the accused stated that he wished to move for a reserved case and also for leave to appeal, to which statement I replied that it was of course open to him to move for leave to appeal upon the one ground specified in section 1,021 of the Criminal Code, *viz.*: that the verdict was against the weight of evidence; but that it was too late to move for a reserved case: *Ead v. The King* (1908), 40 S.C.R. 272. In Pertella's case, no suggestion was made to me until after sentence. Judgment

Now in both cases I am asked, not for leave to appeal, but to state a case for the Court of Appeal, the objection which it is now sought to raise being to certain portions of my charge to the jury in each case. It is hardly argued that in the face of

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Judgment

the unanimous judgment of the Supreme Court of Canada in *Ead* v. *The King*, *supra*, I can entertain the applications; but I am strongly urged to listen to counsel as *amici curiæ* suggesting doubts as to the correctness of my charge. I do not think I should do so. If such a practice should be allowed to grow up, it would simply undermine the foundation upon which rests the legislation embodied in section 1,014 of the Criminal Code. As interpreted by the Supreme Court, that section means that any reservation of a case after verdict must be of the Court's own motion; and it seems to me that to allow counsel to be heard in any capacity would be in reality to entertain an application which the statute does not permit to be made. Naturally, if counsel for the accused is heard, counsel for the Crown should also be heard—each nominally as *amicus curiæ*. I cannot, for myself, lend any sanction to such a flimsy disguise. The law throws the responsibility upon me and I am in effect forbidden to entertain any application at the instance of either the Crown or the accused. Of course, if I may say it with propriety, the very fact that the Court in such case is without assistance should induce greater care and caution in the discharge of the responsibility cast upon the Court to review for itself the proceedings throughout the trial, including the directions given to the jury upon both law and facts. As put by Idington, J., at p. 279, speaking for the Court in the case above mentioned, "it is better that a number of cases barely arguable be remitted by this means to an appellate tribunal than that a trial judge should feel oppressed by the risk of being responsible for an illegal conviction."

Application refused.

EMBREE v. McKEE.

FULL COURT

1908

Nov. 11.

EMBREE v. McKEE

Contract—Construction of—Informal agreement—Parol evidence—Intention of parties—"More or less."

Where there is an informal agreement, and such agreement is embodied in an informal memorandum in writing, parol evidence may be given to shew what the parties were dealing about.

APPEAL from the judgment of HOWAY, Co. J., in an action tried before him at New Westminster on the 12th of March, judgment being delivered on the 16th of March, 1908. Plaintiff bargained for the sale of certain hay to defendant, and the following receipt was given: "Received from D. A. McKee, ten dollars on a/c of seventy-five tons of hay more or less at $17.50 per ton delivered on cars. L. W. Embree, D. A. McKee." Evidence was given at the trial that the hay in question was "all the hay in Brown's barn, less some 30 tons, which had been sold by plaintiff, and that the supposition was that the barn contained something over 100 tons. It in fact contained about 122 tons. Plaintiff delivered 74 tons and 1,465 lbs. and contended that was a sufficient compliance with the terms of his contract. The learned trial judge admitted extrinsic evidence to shew the intention of the parties, and came to the conclusion that "75 tons more or less" was a compendious way of saying "all the hay in Brown's barn, except 30 tons," and gave judgment accordingly. Plaintiff appealed.

Statement

The appeal was argued at Vancouver on the 11th of November, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Sir C. H. Tupper, K.C., for the appellant (plaintiff): We delivered 1,400 lbs. over the 75 tons contracted for. There is no ambiguity about the words "75 tons, more or less": see *Macdonald* v. *Longbottom* (1859), 1 El. & El. 977; *Cross* v. *Eglin* (1831), 2 B. & Ad. 106. The words "more or less" mean reasonably close to the amount named. The judge did not go on the written contract, but went outside it to the conversation

Argument

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between the parties. There is nothing in the agreement about the hay in Brown's barn. We say that 75 tons and 1,400 lbs. was a generous compliance with the terms of the contract.

Reid, K.C., for respondent (defendant): There is an ambiguity here, and evidence must be admitted to point out the actual property the parties were negotiating for: *Bank of New Zealand* v. *Simpson* (1900), A.C. 182.

[IRVING, J., referred to Phipson on Evidence, 4th Ed., p. 115.]

Tupper, in reply, referred to *Allen* v. *Pink* (1838), 4 M. & W. 140, *per* Lord Abinger at p. 144. The agreement was complete. It was not concerning, on its face, any particular hay: see *Angell* v. *Duke* (1875), L.R. 10 Q.B. 174, *per* Lord Cockburn at p. 177. The learned judge below followed cases dealing with real estate where the document was ambiguous.

Argument

IRVING, J.: We are all of opinion that this appeal should be dismissed. The rule of construction with reference to reducing an agreement to writing is applicable where the writing is required by law. There you cannot vary the matter, but where there is an informal agreement, such as it seems to me this was, and where, as in the receipt in question here, there is embodied the informal statement of the contract, then you can go into parol evidence to shew what the parties were dealing with. Here the parties were dealing for all the hay in Brown's barn, with the exception of about 30 tons, and the belief was that there were about 100 tons or a little over. I think the judge was right in letting in parol evidence, and that the judgment should be affirmed.

IRVING, J.

MORRISON, J. MORRISON, J.: I concur.

CLEMENT, J. CLEMENT, J.: I agree.

Appeal dismissed.

Solicitors for appellant: *Tupper & Griffin.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

WILLIAMS v. HAMILTON AND FORBES & FRANKLIN.

FULL COURT

1908

Nov. 12.

WILLIAMS v. HAMILTON

Vendor and purchaser—Contract for sale of land—Purchaser dealing with agent—Offer—Acceptance—Correspondence.

Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400; $900 or $950 cash, balance C.P.R., subject to owner's confirmation, and telegraphed defendant Hamilton, "Deposit on lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply: "$1,400 O.K. Letter instructions," at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver:—

Held, affirming the judgment of HUNTER, C. J. (MORRISON, J., dissenting), (1.) That the agents were not authorized to sell; (2.) that there was no completed contract; and (3.) that there was no memorandum to satisfy the Statute of Frauds.

APPEAL from the judgment of HUNTER, C. J., reported (1907), 13 B.C. 268.

Statement

The appeal was argued at Vancouver on the 12th of November, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Macdonell, and *Brown*, for appellant (plaintiff): Forbes & Franklin knew that the papers could not be delivered until March. They were then only empowered to receive offers. They did so, and said, in effect, if the principal confirms this, the deal will be closed.

[CLEMENT, J.: The agent signed nothing after having received instructions to sell.]

Argument

He accepted our offer. The principal confirmed that and constituted Forbes his agent. The telegram "$1,400 O.K." was an acceptance, and the letter of instructions referred to was only as to the whereabouts of the papers.

Martin, K.C., and *Craig*, for respondents (defendants), were not called upon.

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IRVING, J.: On three grounds (1.) that the agents were not authorized to sell; (2.) that there was no completed contract; and (3.) that there was nothing to satisfy the Statute of Frauds, I think the plaintiff fails and the appeal should be dismissed.

MORRISON, J.: I regret that I cannot follow my learned brethren in their interpretation of the documents before us in this case. In my opinion the telegram and letter contained the terms of a contract, and after the acceptance by Williams of the proposition that the $1,400 should be net to Hamilton, there was nothing more that Forbes & Franklin had to do but accept it. No further negotiations were necessary, and there was no possible object for Forbes & Franklin recommunicating with Hamilton. It seems to me that the case of *Calori* v. *Andrews* (1906), 12 B.C. 236, wherein the whole matter is discussed and the authorities considered, is very much in point. I think there was a contract and the appeal should be allowed.

MORRISON, J.

CLEMENT, J.: I quite concur with what my brother IRVING has just said. We are concluded by the decision of our own Court in *Jull* v. *Rasbach* (1908), 13 B.C. 398, in which the Chief Justice gave the leading judgment. There was no point of time in this case when it could be said the agents were authorized to enter into an open contract of sale which would bind their principal. The appeal should be dismissed.

CLEMENT, J.

Appeal dismissed, Morrison, J., dissenting.

Solicitor for appellant: *J. N. Ellis.*

Solicitor for respondents, Hamilton and Forbes: *Joseph Martin, K.C.*

Solicitor for respondent, Franklin: *J. H. MacGill.*

ESQUIMALT AND NANAIMO RAILWAY COMPANY v. HOGGAN.

FULL COURT

1908

March 16.

ESQUIMALT AND NANAIMO RY. CO. v. HOGGAN

Costs—Indemnity for—Where party attacked is protected against—Vancouver Island Settlers' Rights Act, 1904.

In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. Plaintiff Company applied to strike out the statement of defence on the ground that the matters raised therein had been disposed of in the plaintiff Company's favour in a former action of *Esquimalt and Nanaimo Railway Company* v. *Hoggan* (1894), A.C. 429. The application was dismissed and plaintiff Company appealed:—

Held, on appeal (affirming the ruling of IRVING, J.), as to costs, that defendant was not in a position to claim any costs against plaintiff Company as his rights were being asserted by and defended at the expense of the Crown.

APPEAL from an order of IRVING, J., made by him at Victoria, on the 27th of February, 1906. The action was for a declaration of title to certain minerals under lands comprised in the Esquimalt and Nanaimo Railway Company's land grant. It was defended under the provisions of the Vancouver Island Settlers' Rights Act, 1904, which declared the title in fee simple to certain lands alienated from the grant to be vested in the grantees in the Act referred to. The Act also provided that any action attacking such rights should be defended by and at the expense of the Crown. An application to strike out the statement of defence above set out was dismissed. Statement

The appeal was argued at Vancouver in April, 1906, before HUNTER, C.J., DUFF and MORRISON, JJ., but the Court reserved the question of costs on the motion for judgment.

Luxton, K.C., for appellant (plaintiff) Company: The question of costs is one of indemnity to the successful party: *Richardson* v. *Richardson* (1895), P. 346 at p. 348; *Humphreys* v. *Harvey* (1834), 1 Bing. N.C. 62 at p. 67. The losing party is not liable to one who is indemnified from costs: *Meriden Britannia Co.* v. Argument

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Braden (1894), 16 Pr. 346, (1896), 17 Pr. 77; *Walker* v. *Gurney-Tilden Co.* (1899), 19 Pr. 12. The costs here are not in the discretion of the Court, but are disposed of by the statute. A special provision as to costs must be followed: *Reeve* v. *Gibson* (1891), 1 Q.B. 652 at p. 660. See also *Regina* v. *Little* (1898), 6 B.C. 321; *In re Todd* (1900), 7 B.C. 115.

A. E. McPhillips, K.C., for respondent (defendant), submitted that the Crown now being a party to the proceedings the ordinary rule governs and the defendant should be held entitled to his costs. He referred to *Johnson* v. *Regem* (1904), 73 L.J., P.C. 113.

Cur. adv. vult.

On the 16th of March, 1908, the opinion of the Court was handed down by

Judgment

HUNTER, C.J.: Having regard to the principles laid down in the English Court of Appeal in *Richardson* v. *Richardson* (1895), P. 346 at p. 348, and by the Ontario Court of Appeal in *Meriden Britannia Co.* v. *Braden* (1894), 16 Pr. 346 at p. 410, (1896), 17 Pr. 77, the defendant is not in a position to claim any costs against the plaintiffs, as his rights are being asserted by and defended at the expense of the Crown.

Solicitors for appellants: *Pooley, Luxton & Pooley,*
Solicitors for respondent: *McPhillips & Heisterman.*

ENTWISLE v. LENZ & LEISER.

MARTIN, J.

1908

Sept. 21.

FULL COURT

Nov. 13.

ENTWISLE v. LENZ & LEISER

Statutes, construction of—Judgments Act, B.C. Stat. 1908, Cap. 26, Sec. 3—Land Registry Act, B.C. Stat. 1906, Cap. 23, Sec. 74—Non-registration of conveyance—Execution debtor—Dry legal trustee.

Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of section 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that section 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands, governed.

Held, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff.

Levy v. *Gleason* (1907), 13 B.C. 357, explained.

APPEAL from the judgment of MARTIN, J., in an action tried before him at Nelson on the 29th of February, 1908. The facts sufficiently appear in the headnote. Statement

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

W. A. Macdonald, K.C., for defendants.

21st September, 1908.

MARTIN, J.: Two questions are raised herein, the first being as to whether or no this action is maintainable, the contention of the defence being that in order to get rid of the registered judgment the special procedure of the Judgments Act, 1899, Secs. 8 to 10, must be resorted to. In any event I cannot see that such procedure would prevent a land owner from resorting to this Court to remove a cloud, such as the judgment is, from his title, but apart from that the said sections relate to proceedings taken at the instance of a "judgment creditor," which the plaintiff herein is not; therefore this question must be answered in his favour. MARTIN, J.

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The second question is, does a judgment duly registered against land registered in the name of a judgment debtor "form a lien and charge" thereon, ". . . . the same as though charged in writing by the judgment debtor under his hand and seal" (section 3 of the Judgments Act, 1899) even though the said debtor had already conveyed all his interest therein to a third party who was in possession but had not registered his conveyance as contemplated by section 74 of the Land Registry Act, 1906? The defendants' contention is that the effect of said section 74 in such circumstances must be that the holder of the unregistered conveyance can only take subject to the judgment.

The plaintiff's contention, founded upon *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282, at pp. 288-9, is that at the time of the registration of the judgment the lands in question were not "the lands of the judgment debtor" under said section 3, and "an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor," unless as the Court said, this rule "had been displaced by some statutory provision to the contrary." It is urged by the defendants that the positive language of section 74 has that effect, and reliance is placed upon the recent decision of the Chief Justice in *Levy* v. *Gleason* (1907), 13 B.C. 357, wherein, at p. 359, he says:

MARTIN, J.

"If it were not for section 74 of the Land Registry Act of 1906, I would have to accede to Mr. *Belyea's* argument that I am bound by the decision of the Full Court to hold that this transaction divested the defendant of any beneficial ownership in this parcel and therefore that he was disqualified at the time of his election, the law *quoad hoc* being in other respects unchanged since this decision.

"But I see no escape from Mr. Elliott's contention that the effect of section 74 of the Land Registry Act is to make registration of conveyances taking effect after June 30th, 1905, in accordance with the Act a *sine qua non* of the vesting of any interest, legal or equitable, in the grantee, and as Mr. Gleason remained the registered owner at the time of his election he has satisfied the new interpretation which must now be put on the qualification requirements.

"The new Act now makes it no concern of any stranger to the transaction as to what its real nature may be; for all purposes *quoad* such stranger the registered owner is the only owner, beneficial or otherwise, although no doubt rights capable of enforcement by the Courts may be created *inter partes* by unregistered instruments."

This decision of this Court is, of course, binding on me, and as the judgment debtor is a "stranger" to the holder of the unregistered conveyance, it does support in principle the defendants' contention to such an extent that I feel I must, after a consideration of all the authorities cited, give judgment in their favour, though I share the view expressed by Mr. Justice CLEMENT in *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111 at p. 113, that the section in question should "be construed by the Court of Appeal."

The appeal was argued at Vancouver on the 13th of November, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

S. S. Taylor, K.C., for appellant (plaintiff): Our contention is that the execution creditor can get, under his judgment, only that interest in land which the debtor can honestly dispose of at the time of registration of the judgment. We are within the exception in *Levy* v. *Gleason* (1907), 13 B.C. 357. McArthur, in giving us that conveyance, gave us the right to have it registered in our name, and prevented McArthur from honestly disposing of it again. The document is good *inter partes*. There is nothing in the Land Registry Act which defeats title through non-registration: see *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282; Coutlee, 242. There is nothing in either the Land Registry Act or the Judgments Act giving to the judgment in question the priority claimed. We have now secured our registration, and under the ruling in *Westfall* v. *Stewart and Griffith* (1907), 13 B.C. 111, it dates back to the time we were entitled to apply for registration. Argument

[HUNTER, C.J.: The point is whether the expression "lands of the judgment debtor" means lands to which he is entitled, or lands of which he is the registered holder.]

Higgins, for respondents (defendants): The question arises under section 3 of the Judgments Act. It is quite true that it does not refer to the registered lands; it refers to the lands of the person against whom the judgment is registered. When we registered this judgment, the lands in question were in McArthur's name. As to *Levy* v. *Gleason* and *Westfall* v. *Stewart and Griffith*, *supra*, section 55 of the Land Registry Act was not

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discussed in either case. The conveyance took effect on the date of application, 25th of July, 1908. Our judgment is declared by section 3 of the Judgments Act, to be a mortgage against that land. All that Entwisle got by the conveyance was a right to apply for registration; he did not apply until the 25th of July, and it was only then that his rights as owner would begin to run, because in face of the declaration in section 74 of the Land Registry Act, he could have no interest, either at law or in equity, until he effects registration.

HUNTER, C.J.: In this case the facts are not in dispute and, stated shortly, are that execution creditors are seeking under the colour of the Judgments Act and of the Land Registry Act to enforce a registered judgment against their execution debtor in respect of property in which the execution debtor is merely a dry legal trustee and in which the beneficial interest belongs to a third party, the fact being that by a mistake in a conveyance from the execution debtor to the purchaser a wrong description of the property bought was inserted in the conveyance with the result that the property was left registered in the debtor's name. It seems to me the question depends for its solution upon the meaning of the third section of the Judgments Act by which it is provided that the judgment "shall form a lien and charge on all the lands of the judgment debtor in the several land registry districts in which the certificate is registered, the same as though charged in writing by the judgment debtor under his hand and seal." It will be observed that the language is "on all the lands of the judgment debtor" and not on all the lands registered in the name of the judgment debtor. It seems to me it was the clear intention of the Legislature to subject to the claim of an execution creditor only those lands in which the judgment debtor has a real or beneficial interest. It cannot be supposed that this judgment debtor could have transferred this property, of which he was a mere dry legal trustee arising from an error in a conveyance, to the execution creditors in liquidation of his debt, and it is difficult to understand on what principle his execution creditors can claim to stand in any better position than himself. In fact it seems to me that as soon as the execu-

HUNTER, C.J.

tion creditors became apprised of the true state of the facts it became against equity and good conscience for them to insist on their claim against this property. Then again by the terms of the order which the execution creditors obtained on the 8th of August, they were at liberty to serve a notice of application to sell the interest of the debtor. Manifestly this can only mean such interest as would be recognized by a court of equity, which, in this case is *nil*, so that *quacunque via* I arrive at the same conclusion, and that is that only the actual interest of the judgment debtor was affected by this registration.

With regard to the case of *Levy* v. *Gleason* (1907), 13 B.C. 357, the question there was as to the position of an unregistered conveyance upon the qualification of an alderman and it was held there by virtue of section 74 of the Land Registry Act that the conveyance had no legal or equitable effect so far as concerned his right to rest upon the fact that he was a registered owner of the property, but in this case we have to consider what right under section 3 of the Judgments Act an execution creditor has against the lands of his debtor, and I have no hesitation in coming to the conclusion that this section does not confer upon the execution creditor any greater interest or any greater right in respect of any real estate than was possessed by the debtor himself, excepting of course in the case of a transfer made to defeat the creditor, which however, is an exception more apparent than real.

For these reasons I think the appeal ought to be allowed with costs here and below.

IRVING, J.: I agree that the appeal should be allowed. On the 13th of April, 1907, the day on which Lenz & Leiser recovered judgment against McArthur, the latter was a dry trustee of certain land, registered in his (McArthur's) name, for Entwisle.

Messrs. Lenz & Leiser sought to sell this land to satisfy the judgment they had against McArthur. A statute authorizing so extraordinary a proceeding must be very plain and clear. The Act gives the judgment creditor a lien on "all the lands of

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the judgment debtor." Due effect can be given to those words without taking A's land to pay B's debt.

MORRISON, J., concurred.

Appeal allowed.

Solicitors for appellant: *Taylor & O'Shea.*
Solicitor for respondents: *W. F. Gurd.*

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MCLEOD v. HOPE AND FARMER.

Arbitration—Reference to three arbitrators—Different awards made on different dates—Validity of award—Arbitration Act, R.S.B.C. 1897, Cap. 9—Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 36.

In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators being unable to agree, drew up and rendered three separate awards. Two of the arbitrators agreed in their findings. MORRISON, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to section 10, sub-section 36 of the Interpretation Act:—

Held, on appeal, *per* IRVING and CLEMENT, JJ., that said sub-section 36 does not apply to the construction of a document *inter partes*, as here, but to something done pursuant to statute.

Per HUNTER, C.J.: The arbitrators having acted *separatim* in making their award, an objection to a finding so made is fatal.

Statement

APPEAL from an order made by MORRISON, J., upon a proceeding heard by him at Vancouver on the 28th of April, 1908, by way of originating summons. The parties entered into an agreement, the last clause of which provided that:

"All matters in difference in relation to this agreement shall be referred to the arbitration of three persons, one to be appointed by each party to

the reference and the third to be chosen by the two first named before they enter upon the business of the arbitration, and in accordance with and subject to the provisions of the Arbitration Act for the time being in force in the Province of British Columbia."

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On a reference being had, the arbitrators were divided in opinion; two were agreed on certain points, but the third dissented. They accordingly rendered three separate awards, but on different dates, as to the third arbitrator, and as to the whole three, they were not present together in making and rendering their awards. MORRISON, J., following sub-section 36 of section 10 of the Interpretation Act, came to the conclusion that the awards of the two members agreeing governed.

Statement

Sub-section 36 is:

"When any Act or thing is required to be done by more than two persons, a majority of them may do it."

The appeal was argued at Vancouver on the 12th of November, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Burns, for appellants (defendants): The award is not in such a form that it can be upheld. Not only is it not unanimous, but it was made by the different arbitrators at different times: see *United Kingdom Mutual Steamship Assurance Association* v. *Houston & Co.* (1896), 1 Q.B. 567; *Re O'Connor and Fielder* (1894), 25 Ont. 568; *Willson* v. *York* (1881), 46 U.C. Q.B. 289. This submission is to three persons, and while it says the arbitration is to be in accordance with the Arbitration Act, yet there is nothing in that Act with reference to three arbitrators.

Argument

[HUNTER, C.J.: How do you explain the effect of sub-section 36 of section 10 of the Interpretation Act?]

It might appear that sub-section 36 of section 10 of the Interpretation Act is against us, but the opening words of section 10 shew that sub-section 36 is not applicable, because the Arbitration Act is based on two arbitrators only being appointed. See also *In re Smith & Service and Nelson & Sons* (1890), 25 Q.B.D. 545. Unless the words in the submission bring in sub-section 36, the latter would have no bearing. As to separate findings at different times, see *Nott* v. *Nott* (1884), 5 Ont. 283; *In re Beck and Johnson* (1857), 1 C.B. N.S. 695.

A. E. McPhillips, K.C., for respondent (plaintiff), referred

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to Redman on Arbitrations and Awards, 4th Ed., 165. The Interpretation Act must be read with the Arbitration Act; sub-section 36 of section 10 of the former is applicable here, the submission providing that the arbitration must be in accordance with the Arbitration Act.

[IRVING, J.: Must we not amplify that sub-section by reading it as providing that where any Act or thing is required to be done (by statute) then, unless it is specially provided, the majority may do it?

[CLEMENT, J.: The Interpretation Act applies to statutes, not to agreements *inter partes*.]

Argument

The Arbitration Act shall apply to every arbitration and the agreement here provides that the arbitration is to be in accordance with the Act. Then that being governed by the Interpretation Act, we are driven to read the two together.

Burns, was not heard in reply.

HUNTER, C.J.: Speaking for myself, I have not made up my mind, but the other members of the Court having arrived at a conclusion, I do not see any necessity for delaying judgment.

HUNTER, C.J.

At present I am of the opinion that the Interpretation Act, which is to be read with the Arbitration Act, which Act governs the agreement, cures the first objection, but that the second is fatal, as the arbitrators did not act *conjunctim* but *separatim*.

IRVING, J.: In this case there was an agreement for submission to three persons as arbitrators, not two arbitrators and an umpire, but to three arbitrators. To use the language of the submission, the dispute was to be settled by the arbitrators so appointed. It did not go on to say "or by a majority of them."

IRVING, J.

They were unable to agree. Two agreed on certain matters, but the third stood out. They thereupon proceeded to draw up three separate awards, each signing one. My brother MORRISON came to the conclusion that that was sufficient—that the agreement of two of them would constitute an award. It is stated that he reached this conclusion by invoking the provisions of section 10, sub-section 36 of the Interpretation Act. In my opinion that sub-section has no application to the matter in hand. That sub-section only applies to construction of an Act of Parliament and

not to a document drawn between two persons. The agreement between the parties was that it was to be an award of three persons and not one by the majority.

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CLEMENT, J.: I entirely concur with the judgment of my learned brother IRVING.

Appeal allowed.

Solicitors for appellants: *Burns & Walkem.*
Solicitors for respondent: *Wilson, Senkler & Bloomfield.*

JAMIESON v. JAMIESON.

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Husband and wife—Judicial separation—Cruelty—Residence within jurisdiction at commencement of suit—Cruelty committed outside of jurisdiction—Continuation of within jurisdiction—Apprehension of future—Jurisdiction.

The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, where the parties were domiciled, and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and, apprehensive of further cruelty, the wife commenced proceedings for a judicial separation. He opposed the suit, on the ground that there was not jurisdiction in the Court inasmuch as he was not domiciled or resident in British Columbia:—

Held, that the husband had established sufficient residence to give the Court jurisdiction to entertain the suit.

APPLICATION by the husband to set aside a petition by the wife for judicial separation for cruelty and misconduct on the ground that the husband had not established a sufficient residence in British Columbia to give the Court jurisdiction to entertain the suit. Heard before MORRISON, J., at Vancouver, on the 2nd of October, 1908. Statement

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Cassidy, K.C., and *Senkler, K.C.*, for the petitioner.
Sir C. H. Tupper, K.C., and *Donaghy*, for the respondent.

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MORRISON, J.: The parties hereto were married in Winnipeg in 1898 and immediately took up their residence in Montreal—the husband's domicile. There is issue of the marriage one child, a girl of over eight years of age.

Owing to a series of acts of alleged cruelty and misconduct, commencing about a year after their marriage, Mrs. Jamieson, together with the child, on the 16th of June, 1908, left her home in Montreal and took up her residence in Vancouver with a married sister, with whom she had been invited to make her future home. She wrote her husband upon her departure informing him of what she had done and her reasons for leaving him.

On the 14th of July following, Jamieson appeared in Vancouver and commenced proceedings for the custody of the child. During his temporary residence here for this purpose, he is alleged to have committed acts of cruelty towards his wife, and, being apprehensive of a continuation of those matrimonial offences within the jurisdiction, she immediately caused him to be served with a citation and petition for a judicial separation.

Judgment

This is an application to set aside this citation and petition, and the point involved is whether there is jurisdiction to grant a decree of judicial separation when the husband is not domiciled within the Province, and is not residing permanently here, although the wife (the petitioner) has taken up her permanent residence within the jurisdiction—whether the period of his temporary residence is sufficient to give this Court jurisdiction.

The facts appear fully set out in the petition and material filed which, if proven to be true, are sufficient to satisfy me that the petitioner was compelled to flee her home and of necessity to seek refuge in British Columbia; and that the respondent's conduct and treatment both before and after her departure from their home justify her living apart from him.

It may well be that had he not pursued her and continued his

acts of ill-treatment, she would not have filed the petition. It would, indeed, be a case of extreme hardship if she were forced, in order to get relief, to return to his place of domicile, or follow him wherever he chose to take up his permanent residence. I am of opinion further that the respondent's residence here was of such a nature and of sufficient duration to give our Courts jurisdiction.

The authorities in point appear to be assembled in the judgment of Lopes, L.J., in *Russell* v. *Russell* (1895), 64 L.J., P. 105 at p. 107 *et seq.*, and that of Gorell Barnes, J., in *Armytage* v. *Armytage* (1898), P. 178 where the principles upon which the Court shall proceed and act in suits and proceedings other than those for divorce are minutely considered.

Judgment

I therefore dismiss the application with costs.

Application dismissed.

REX v. JENKINS.

Criminal law—Appeal—Case stated—Circumstantial evidence—Identity—Weight of evidence—Criminal Code, Secs. 1,017, 1,018, 1,021.

The deceased was murdered, according to the only eye witness (a girl of about 8 years), by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes, and a dark coat. Prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat and trousers mentioned, in addition to which he wore a stiff black hat. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with blood, a few feet from the murdered woman's body. When arrested, three days later, prisoner was without the dark shirt:—

Held, refusing an application for a new trial, that the jury was justified on the evidence in coupling the prisoner with the crime.

In a criminal, as in a civil case, on an application for a new trial on

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the ground that the verdict is against the weight of evidence, the Court will be governed by the fact whether the evidence was such that the jury, viewing the whole of the evidence reasonably could not properly find a verdict of guilty.

While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned.

APPEAL, by way of a case stated, from HUNTER, C.J., and the verdict of the jury in a trial for murder, held at the Westminster Fall Assizes, New Westminster, on the 23rd and 24th of October, 1908. The facts appear in the headnote, the case stated, and the reasons for judgment of IRVING, J. The case submitted for the opinion of the Court was as follows:

"(1.) The question reserved is whether or not there was sufficient evidence to have warranted the jury in finding a verdict of guilty.

"(2.) The only direct evidence connecting the accused with the murder was that of a little girl about eight years of age, the daughter of the deceased, who was with her on the occasion of the murder. At the time of Jenkins's arrest he, in conjunction with six other men, was brought before the little girl in the Bellingham (State of Washington) gaol, and she was stated on

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that occasion to have picked out Jenkins as the man who committed the murder. It appeared, however, that the prisoner was the only coloured man among the seven brought before her for identification. I considered it necessary to test whether or not she could really identify the accused. She had been brought into Court for the purpose of being identified by a witness named Thrift, and during that time she sat by the dock near the accused, and I noticed myself that she looked at the accused more than once while present during Thrift's evidence. Shortly after this she was called into Court for the purpose of giving her own evidence, but, before coming in, at my suggestion, a coloured man who was sitting in the audience, was placed in the dock and the accused was seated in the audience. Neither counsel for the Crown nor counsel for the accused made any objection to this procedure. There was no attempt made to disguise the

substitute. He was a man of much darker complexion, being very black, while the accused is a chocolate-coloured man of smaller build. The substitute had a moustache but no beard, while the accused had a fairly heavy moustache and about 10 days' growth of beard, and the substitute was dressed in much better clothes than the accused. After the little girl had been giving her evidence some 10 minutes or more, she was asked whether she could pick out the man who committed the assault, and without hesitation she pointed to the substitute in the dock. I thereupon asked her to make certain by going over to the dock and looking at the occupant, which she did, and again identified him as the man who committed the assault. I then called her up to the bench and having satisfied myself that she had her presence of mind and that she was not fagged out, it being then between nine and 10 o'clock at night, and after warning her that what she was saying was very serious, asked her to go down again to the dock and examine the man, which she did, this time stepping within the dock, and after looking at him a considerable length of time again identified him as the guilty party. On the second day of the trial, the foreman of the jury announced that the jury was not satisfied with the test to which the little girl had been submitted and requested that some other test be adopted. I went over the circumstances surrounding the test already had with them, and pointed out that in my opinion, even if the second test resulted differently, in view of the fact that she had been shortly before in the Court room when the accused was in the dock, and that I had seen her looking at him and she had shortly after this identified a man so different in appearance three distinct times as the guilty person, I would have to charge them, in my opinion, her evidence was of no value and I therefore refused to allow a second test to be adopted, and accordingly charged the jury that in my opinion the case was really one in which the evidence was circumstantial and warned them that, under such circumstances, I thought they should satisfy themselves that there was one fact, or set of facts proved against the accused which, on any reasonable hypothesis, was inconsistent with innocence, and not merely consistent with guilt.

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"The question for the opinion of the Court is whether or not my direction to the jury to apply this rule to the evidence was right; and, if so, then, whether there was sufficient evidence to warrant the verdict measured by this standard.

"If my direction was right, then I have doubts as to the sufficiency of the evidence to warrant the verdict."

The appeal was argued at Vancouver on the 16th and 17th of November, 1908, before IRVING, MORRISON and CLEMENT, JJ.

McQuarrie, for the accused: There is no evidence that the prisoner was on the scene at the time the crime was committed. There is also a difference in the evidence as to his dress, and he was not the only person in the vicinity at the time on whom suspicion could rest. As many as 10 other persons, three of them negroes, were arrested on suspicion, and it is safe to say from the evidence that all of them were in the vicinity at the time. The test of identification imposed by the learned trial judge was both unsatisfactory and unfair. In any event, the child positively identified a man who was not charged with the crime. There was a standard of guilt set up by the learned judge in his charge to the jury, and the evidence does not meet or come up to that standard. Something more than mere suspicion is required to fasten guilt on an accused person: see Taylor on Evidence, 10th Ed., 71; *Hodge's Case* (1838), 2 Lewin, C.C. 227; *The Queen* v. *Winslow* (1899), 3 C.C.C. 215. On the question of sufficiency, see *Rex* v. *Dunning* (1908), 7 W.L.R. 857; Thompson's Charge to Jury, p 13, Wills on Circumstantial Evidence, 5th Ed., 238. Although the question of the test of identification submitted to by the girl is not part of the case stated, yet it is before this Court inasmuch as the trial judge refers the evidence to this Court, and on that the case can be sent back to be restated.

Argument

[CLEMENT, J.: There was no application for a stated case, either on behalf of the accused or on behalf of the Crown. If there is anything which is not clear to us, of course we can send it back to the learned judge to elucidate that matter, but not to state a case on a new point.]

Yes; that is under section 1,017, but it is submitted that the

matter is now before this Court, inasmuch as the trial judge specifically refers to it. The jury should have considered all the facts and not pick out one fact and go on that. The accused should have a new trial.

Cassidy, K.C., for the Crown: There is no dispute as to the sufficiency of evidence to go to the jury, and there was no application that the case should be withdrawn from the jury. It is submitted that notwithstanding the very wide language of the section, 1,021, which would, if read in its fullest sense, refer to this Court the right to re-try the case, yet the Court may not do so: see the cases cited under section 1,021 in Tremeear; *Regina* v. *Greenwood* (1864), 23 U.C. Q.B. 255; *The Queen* v. *Chubbs* (1864), 14 U.C. C.P. 32. The trial judge has not expressed any dissatisfaction with the verdict; but in any event the Court of Appeal will not usurp to itself functions which do not belong to it simply because the trial judge is not satisfied with the verdict. The charge of the learned judge here shews that there was evidence to go to the jury. If the judge allows the case to go to the jury, it is too late then for him to ask whether he should have done so: see the cases of *The Queen* v. *John Hamilton et al.* (1866), 16 U.C. C.P. 340 at p. 361; *Regina* v. *Seddons*, *Ib.* 389; *The King* v. *Molleur* (*No. 2.*) (1905), 12 C.C.C. 16. Here there was an application under section 1,021, and also for a case stated, and on that motion, while a case was stated the other motion was refused. On further consideration a new motion was made. Now, that having been once refused there is no power to grant it on the ground that the verdict was against the weight of evidence when there was no evidence called by the defence. There could not be, in the circumstances, a conflict of evidence.

Argument

[CLEMENT, J., referred to *Eaid* v. *The King* (1908), 40 S.C.R. 272.]

The charge here was in favour of the accused and there was no objection made to it by the defence; therefore it is not reviewable by this Court. A misdirection unfavourable to the Crown cannot be taken advantage of by the accused. As to granting a new trial, see *Queen* v. *McIntyre* (1898), 31 N.S. 422; *The Queen* v. *MacCaffery* (1900), 33 N.S. 232; *The King* v. *James* (1903), 7 C.C.C. 196. On the question of identity, there

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is an unbroken chain of circumstances connecting the prisoner with the commission of the crime, tracing him from the 5th of June up to the time of the murder, from place to place in regular sequence, and afterwards.

McQuarrie, in reply.

Cur. adv. vult.

23rd November, 1908.

IRVING, J.: This case comes before us on an application under section 1,021 of the Code for a new trial on the ground that the verdict was against the weight of evidence, and the learned Chief Justice who presided at the trial has also stated a case for our opinion under section 1,014, wherein he asks (1.) Whether or not there was sufficient evidence to have warranted the jury in finding a verdict of guilty?

With regard to the application for a new trial under section 1,021, I do not see that we can, in a criminal case, do anything more than decide as we would in a civil case whether the evidence was such that the jury viewing the whole of the evidence reasonably could not properly find a verdict of guilty. If reasonable men might find the verdict which has been found in this case, we should not send it to a new jury: *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Jones* v. *Spencer* (1897), 77 L.T.N.S. (H.L.) 536.

IRVING, J.

In this case the deceased was murdered on the afternoon of the 9th of June, at or about the hour of 2:45. The attack on her was made, according to one witness—an eye witness—by a dark man with a fat face, dressed in brown pants, in the seat of which there was a hole. The man at the time was wearing a black shirt with white stripes, and he had also a dark coat. The prisoner had been seen in the vicinity of the murder, *i.e.*, within 1,000 feet of the place, about 20 or 30 minutes before the murder was committed. The prisoner's dress corresponded with the coat, shirt and pants above described. A knife which had been in the prisoner's sole possession some three days before was found on the afternoon of the 9th, still wet with blood, within a few feet of the body of the deceased. When arrested three days later, he was without this dark shirt. Could reasonable men on this evidence find the prisoner guilty? I am not able to say

that they could not, and therefore as the onus is now on the prisoner to satisfy us that the verdict could not be found on that evidence I would refuse the application for a new trial.

In many reported cases we are told that as the law confides the decision of facts to juries and not to judges, we on that account ought to exercise, not merely a cautious, but a strict and sure judgment that the jury is wrong before we send it back for a new trial. It is not sufficient that the Appellate Court would not have pronounced the same verdict.

In the case of *Rex* v. *Ah Chu* heard last week, this Court said very much the same thing.

As to the stated case, the first question is whether or not there was sufficient evidence to have warranted the jury in finding a verdict of guilty.

I understand sufficient evidence means sufficient legal evidence submitted to the jury. In my opinion there was sufficient evidence submitted from which the jury might infer that the prisoner was guilty. I refer to the prisoner's knife still wet with blood being found alongside the body, he himself having been seen in the immediate neighbourhood within 15 or 20 minutes of the commission of the murder. The disappearance of the dark shirt, which must of necessity have shewn marks of blood, without any explanation on the part of the prisoner, might properly be regarded by the jury when considering the weight of evidence.

IRVING, J.

The second question is prefaced by a statement as to what took place at the trial and then goes on: "I accordingly charged the jury in my opinion the case was really one in which the evidence was circumstantial and warned them that, under such circumstances, I thought that they should satisfy themselves that there was one fact, or set of facts, proved against the accused which, on any reasonable hypothesis, was inconsistent with innocence, and not merely consistent with guilt."

When we examine the case the crux of it turns out to be: Was the accused the man who struck the fatal blow? The identification of a man can be inferred from articles belonging to him, or recently in his possession, being found at or near the scene of the crime or otherwise related to the *corpus delicti*.

In a case mentioned in Wills on Circumstantial Evidence, 5th

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Ed., 166, a coloured man was identified and convicted upon the following evidence:

"The dead man's wife saw that her husband's assailant was a black man, and fired a revolver at him. He fell; but afterwards escaped. A few hours later the prisoner was arrested and a bullet extracted from his thigh which fitted the empty cartridge case."

By the identification of property found at or near the scene of the crime the identification of the prisoner has been frequently established. Wills, from pp. 167-178, gives a number of cases. This identification need not be positive evidence; it is sufficient if it is impossible to doubt the identity of the person or thing.

In the present case counsel for the prisoner is satisfied with the standard laid down by the learned trial judge, and I think it is right, subject to this that the jury ought to have been told that the presumption that the man who had attacked the woman, and was described by the girl, was the man who murdered her was so violent a presumption that it was almost direct evidence.

But characterizing the evidence as merely circumstantial was done, as I understand the case, merely to put the jury on their guard.

The rule is thus stated in Wills on Circumstantial Evidence, at p. 262:

"In order to justify the inference of guilt, the inculpatory facts must be imcompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

IRVING, J.

I think no fault can be found with the learned judge's direction on this point.

Then was there sufficient evidence to warrant the verdict measured by that standard? In a reserved case, we should, I think, be guided by the same standard as we are in considering the question of a new trial under section 1,021, to which I have already referred. Looking at all the facts of the case, testified to before them and from which facts they were to draw the final inference of guilty or not guilty, I cannot say the jury was wrong. I cannot say there has been any miscarriage of justice in this case.

One set of facts justified the inference that the deceased had her throat cut by a knife in the hands of a dark man clad in

dark pants with a hole in the seat and in a black shirt striped with white.

Another set of facts justified the inference that the knife found close to the body was the property of the prisoner, and that it had been used in the attack.

Another set of facts justified the inference that the prisoner, travelling south, and the deceased, travelling west, would meet each other at the crossing where the body was afterwards found.

Another set of facts justified the inference that the shirt of the man worn on the occasion would be bespattered with blood as the shrubbery at the spot was bespattered.

Another set of facts justified the inference that the prisoner had himself made away with this shirt between the 9th and 12th.

Taking all these facts together, I cannot say that the jury was acting unreasonably in finding him guilty, particularly in view of the fact that no explanation whatever was offered on behalf of the prisoner, of his movements after being seen within 1,000 feet of the place where the crime was committed, immediately before it was committed; or as to his knife being found there, immediately after it had been committed, or as to the disappearance of his shirt. As to this absence of explanation on the part of the prisoner, I wish to say a few words.

IRVING, J.

It is true that a man is not called upon to explain suspicious things, but there comes a time when, circumstantial evidence having enveloped a man in a strong and cogent net-work of inculpatory facts, that man is bound to make some explanation or stand condemned.

Holroyd, J., said in *The King* v. *Burdett* (1820), 4 B. & Ald. 95 at pp. 139-40:

"It is certainly true, and I most ardently hope that it will ever continue to be the case, that by the law of England, as it was urged and admitted in the case of the Seven Bishops, no man is to be convicted of any crime upon mere naked presumption. A light or rash presumption, not arising either necessarily, probably, or reasonably, from the facts proved, cannot avail in law. That is the presumption spoken of in the Seven Bishops' case, which is no more than mere loose conjecture, without sufficient premises really to warrant the conclusion. But crimes of the highest nature, more especially cases of murder, are established, and convictions and executions thereupon frequently take place for guilt most convincingly

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and conclusively proved, upon presumptive evidence only of the guilt of the party accused; and the well-being and security of society much depend upon the receiving and giving due effect to such proofs. The presumptions arising from these proofs should, no doubt, and most especially in crimes of great magnitude, be duly and carefully weighed. They stand only as proofs of the facts presumed till the contrary be proved, and those presumptions are either weaker or stronger according as the party has, or is reasonably to be supposed to have it in his power to produce other evidence to rebut or to weaken them, in case the fact so presumed be not true; and according as he does or does not produce such contrary evidence. It is established as a general rule of evidence, that in every case the *onus probandi* lies on the person who wishes to support his case by a particular fact, which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant. This, indeed, is not allowed to supply the want of necessary proof, whether direct or presumptive, against a defendant of the crime with which he is charged; but when such proof has been given, it is a rule to be applied in considering the weight of the evidence against him, whether direct or presumptive, when it is unopposed, unrebutted, or not weakened by contrary evidence, which it would be in the defendant's power to produce, if the fact directly or presumptively proved were not true."

And in the same case Abbott, C.J., said, p. 161:

"A presumption of any fact is, properly, an inferring of that fact from other facts that are known; it is an act of reasoning; and much of human knowledge on all subjects is derived from this source. A fact must not be inferred without premises that will warrant the inference; but if no fact could thus be ascertained by inference in a court of law, very few offenders could be brought to punishment. In a great portion of trials, as they occur in practice, no direct proof that the party accused actually committed the crime, is or can be given; the man who is charged with theft, is rarely seen to break the house or take the goods; and, in case of murder, it rarely happens that the eye of any witness sees the fatal blow struck or the poisonous ingredients poured into the cup. In drawing an inference or conclusion from facts proved, regard must always be had to the nature of the particular case, and the facility that appears to be afforded, either of explanation or contradiction. No person is to be required to explain or contradict, until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of

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the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know that, where reasonable doubt is entertained, it is their duty to acquit; and not of one or more lawyers, whose habits might be suspected of leading them to the indulgence of too much subtilty and refinement."

There were other matters referred to which are not subject to review. The question of the jury being prejudiced against the accused on account of his being a negro is not a matter that we can deal with. I cannot believe any such prejudice did exist. It is one of those things to meet which a prisoner is given a liberal right of challenge.

The learned Chief Justice entertained some doubt on the case as to the sufficiency of the evidence.

In *The Queen* v. *Brewster* (1896), 4 C.C.C. 34, where the trial judge was dissatisfied with the verdict and thought that the defendant ought to have been acquitted, the Supreme Court of the North-West Territories refused a new trial, Wetmore, J., at pp. 39-40, making the following statement of the views of that Court:

"I am free to confess that looking at the evidence as it appears on paper, I think if I had been trying the case without the intervention of a jury I would have acquitted the defendant. I have not, however, had the opportunity of observing the demeanour of the witnesses; the jury have, and they are, when there is a jury, the constituted judges of the facts. It has been urged that when an appeal has been brought on the ground that the verdict is against the weight of evidence, the Court will as a matter of course order a new trial if the judge expresses himself dissatisfied with the verdict. That, however, is not the law as established by the later authorities. The law as so laid down is, that in deciding whether there should be a new trial the question is whether the verdict is one that the jury as reasonable men would properly find. *Solomon* v. *Bitton* (1881), 8 Q.B.D. 176; *Webster* v. *Friedeberg* (1886),17 Q.B.D. 736; and see *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152; *Commissioner for Railways* v. *Brown* (1887), 13 App. Cas. 133, and *Phillips* v. *Martin* (1890), 15 App. Cas. 193. No doubt in deciding the question as to the reasonableness of the verdict the opinion of the trial judge is entitled to and ought to receive great weight. But it is not conclusive."

IRVING, J.

What a judge can and should do in such a case is dealt with by Idington, J., in delivering the judgment of the Court in the case of *Ead* v. *The King* (1908), 40 S.C.R. 272 at p. 279:

"The trial judge generally and, if I may be permitted to say so, properly,

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gives the prisoner the full benefit of any such doubt as he may have by reserving a case.

"It is better that a number of cases barely arguable be remitted by this means to an appellate tribunal than that a trial judge should feel oppressed by the risk of being responsible for an illegal conviction.

"On the other hand the accused is given as of right every opportunity of contesting the ruling of the trial judge on anything that arises in the progress of the trial."

MORRISON, J.: The prisoner was tried at the New Westminster Fall Assizes charged with the crime of murder. There was some sort of direct evidence connecting the accused, a coloured man, with the murder, that of the little daughter of the deceased, who is somewhat over eight years of age and who was with her mother at the time of the murder. This girl, upon the arrest of the prisoner shortly after the murder, was taken to the gaol in Bellingham, U.S.A., where he was detained, and she there identified him as the man whom she saw assaulting her mother. At the trial the learned Chief Justice who presided, not being satisfied with the evidence of this girl as to identification applied a test in open Court, removing the prisoner from the box and substituting another coloured man in his place. The girl was then called into Court and upon giving her an opportunity of viewing the substitute she repeatedly affirmed he was the man who committed the murder. The learned judge then told the jury her evidence was of no value, and, upon their requesting
MORRISON, J. that a second test be made, it was refused. He then charged them that, in his opinion, the case was one in which the evidence was circumstantial and ultimately told them that under such circumstances he thought they should satisfy themselves that there was one fact or set of facts proved against the accused which on any reasonable hypothesis was inconsistent with innocence and not merely consistent with guilt.

The trial resulted in the prisoner being found guilty.

After the trial the case before us was stated by the learned Chief Justice.

The first question is whether or not there was sufficient evidence to have warranted the jury in finding a verdict of guilty.

I think this question should be answered in the affirmative.

The evidence independently of the girl, and which was not

impeached, is in substance this. That the prisoner was known to have been in or about Cloverdale, which is the nearest village in British Columbia to the scene of the murder, for at least a month before the 9th of June, the day the murder was committed. On the 5th of June, he was in custody in New Westminster on a charge of vagrancy, where certain articles were found on his person including the knife used in committing the crime. On that occasion he wore a black outer shirt with white stripes, a hard hat, and trousers as described by several other witnesses as having been worn by him before and after the murder. On the 6th and 7th of June, he was seen again at Cloverdale. All this time he seems to have been a vagrant. On the 9th of June, the very day of the murder, he was traced to a point about 1,000 feet from the place where the woman was murdered within at most half an hour of the time when the murder must have been committed. The same afternoon shortly after the time when the murder must have been committed a man answering in some particulars to the prisoner was seen making his way towards the international boundary line, particularly by Kitzel who afterwards identified him in gaol. On the 12th of June the prisoner was arrested some distance south of the boundary line, after having been seen acting in such a manner that it would appear he was endeavouring to avert recognition and suspicion, and placed in custody in Bellingham on a charge of vagrancy. When arrested he had no outer shirt or anything in his pockets. His clothing corresponded otherwise with the description previously given.

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Whilst in custody at Bellingham he was placed with other prisoners, to one of whom he made an alleged confession, which was not excluded, but in reference to which the learned judge told the jury it had no relation to the charge in the indictment, but that if it had, and was clearly voluntary, then it would be very convincing evidence. Upon this evidence, which was characterized as circumstantial, the learned judge expressed his doubt that it was sufficient to warrant conviction.

In Kenny's Outlines of Criminal Law, at p. 338, the author uses the following reference to this kind of evidence:

"Circumstantial evidence should be admitted, but with watchful caution

FULL COURT . . . . . (The caution, however, as Stephen points out, must not be excessive; as when some suggest that there should be no conviction unless guilt be 'the only possible inference' from the circumstances. For even in the best-proved case there must always be some possible hypothesis which would reconcile the evidence with innocence.)"

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Again in Wilson's Works, Vol. II. pp. 225-226, found in a foot note in Will on Circumstantial Evidence, at p. 14, it is said that:

"With great propriety, therefore, the common law forbears to attempt a scale or system of rules concerning the force or credibility of evidence: it wisely leaves them to the unbiassed and unadulterated sentiments and impressions of the jury."

The question "Is the prisoner the person who committed the murder?" is for the jury under all the circumstances of the case.

Now the circumstances of this case include the evidence of the girl together with those just recited, which, if believed by the jury, exclude every reasonable hypothesis of innocence and justify the verdict.

The second question submitted, which contains a narrative of the test applied in Court, is whether or not his direction to the jury to apply what the learned judge terms a rule of prudence to the evidence, thus said to be circumstantial, was right, *viz.*: "that they should satisfy themselves that there was one fact, or set of facts proved against the accused which, on any reasonable hypothesis, was inconsistent with innocence and not merely consistent with guilt, and, if so, whether there was sufficient

MORRISON, J. evidence to warrant the verdict measured by this standard." In my opinion this is not what Baron Alderson meant when in *Hodge's Case* (1838), 2 Lewin, C.C. 227 at p. 228, he laid it down that the jury must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty person." He there did not limit the consideration of the jury to one fact, or one set of facts, but meant that all the facts taken together should be considered. I cannot understand how one fact in a chain of circumstances can be conclusive of a man's guilt. Is it not meant that the same facts which may be found consistent with guilt must also be inconsistent with innocence?

It appears to me, with deference, that the learned judge stepped into the field of the jury when he charged them that the girl's evidence was of no value thus, in effect, asking them to exclude it from their consideration. The degree of credit to be attached to evidence of that kind is peculiarly for the jury. However, inasmuch as the charge in that respect tended in favour of the accused rather than to his prejudice, it can hardly be a ground for a new trial.

But then the learned judge proceeded from a postulate to formulate a rule involving a standard and asks the jury to apply it to the evidence thus found by him. I cannot come to the conclusion that that is right and would therefore answer that part of the second question in the negative. Notwithstanding this I do not think that that part of the charge has caused or tended to cause a mistrial.

As to the scope of the sections of the Code involved here, I think they clearly contemplate an incident of this kind. Where the trial judge has grave doubts as to whether the evidence was sufficient to warrant the verdict it is his duty to proceed, and I submit it is the right of the accused to have him proceed as he has done, particularly so where the charge is that of murder. MORRISON, J.

Nor do I agree with counsel for the Crown that the imposition of that obligation upon the trial judge would be so startling in its consequences as to seriously invade the right of a trial by jury in criminal matters which we all so much cherish.

CLEMENT, J.: I have had an opportunity of considering the reasons of my learned brother IRVING, in which I entirely concur. It does not seem to me that I can usefully add anything thereto. CLEMENT, J.

Appeal dismissed.

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IN RE ROBERTS

IN RE ROBERTS.

Municipal law—Sale of liquor—Regulation of—Conflicting by-laws—Offence committed by employee—Vancouver Incorporation Act, 1900, Secs. 125 (19), 161, 162—Certiorari.

By a by-law passed in November, 1900, the Licensing Board, pursuant to sections 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The Board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till six of the clock on Monday morning thereafter," and provided that "such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the City of Vancouver as conflict with the provisions of this by-law are hereby repealed." Sub-section 19 of section 125 of the Vancouver Incorporation Act, 1900, empowers the City Council to pass by-laws for "the closing of saloons, hotels and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-section, the Council, in May, 1902, passed a by-law preventing the sale of liquor between the hours of 11 o'clock on Saturday night and six o'clock on Monday morning:—

Held, that the Council, in passing this last mentioned by-law, had gone beyond the powers meant to be conferred by sub-section 19 of section 125.

Statement

MOTION to quash a conviction made under a by-law passed by the Licensing Board of the Municipal Council of the City of Vancouver. Heard before MORRISON, J., at Vancouver on the 31st of October, 1908.

J. A. Russell, for the motion.

J. K. Kennedy, contra.

25th November, 1908.

Judgment

MORRISON, J.: The defendant was convicted on the 13th of October, 1908, by the police magistrate of Vancouver for selling liquor within prohibited hours, contrary to the provisions of By-law No. 1A of the Licensing Board of the City of Vancouver. He now moves by way of *certiorari* to quash this conviction.

By section 161 of the Vancouver Incorporation Act, 1900, the Legislature makes provision for the creation of a Licensing

Board in which when formed is reposed the power of granting, regulating and cancelling liquor licences, as well as the power of regulating and governing places for which licences to sell liquor have been issued and of regulating the sale of liquor.

Section 162 empowers the Board to pass by-laws accordingly which shall have the full force and effect of city by-laws and as if they had been passed by the Council under the powers conferred on them to pass by-laws by the Act of Incorporation.

On the 21st of November, 1900, the Licensing Board, exercising the power thus given passed a by-law defining the conditions, requirements and regulations to obtain and hold licences for the sale of spirituous, fermented and other liquors, etc.

On the 11th of August, 1905, the Board passed another by-law the preamble of which is in effect the same as that of the by-law of November 21st, 1900. It is under paragraph 68 of this by-law, known as By-law No. 1A, that the defendant herein is convicted. It enacts as follows:

"68. In every place where intoxicating liquors are authorized to be sold by wholesale or retail, no sale or other disposal of such liquors shall take place therein, or on the premises thereof, or out of or from the same, to any person or persons whomsoever, from or after the hour of eleven of the clock on Saturday night till six of the clock on Monday morning thereafter, nor from or after the hour of one of the clock at night and six the following morning on the other nights of the week, save and except in cases where a requisition for medical purposes, signed by a medical practitioner or by a Justice of the Peace, is produced by the vendee or his agent; nor shall any such liquor, whether sold or not, be permitted or allowed to be drunk in any place during the time prohibited for the sale of the same, except by the occupant or some member of his family or lodger in his house."

Judgment

Section 73 of this by-law provides that:

"Such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the City of Vancouver as conflict with the provisions of this by-law are hereby repealed."

The Incorporation Act, Sec. 125, Sub-Sec. 19, empowers the City Council to pass by-laws

"For the prevention of sales, or exposing for sale, or offering for sale, or the purchase, of any goods, chattels or other personal property whatsoever, excepting the selling of milk, drugs or medicine on Sundays, and for the closing of saloons, hotels and stores and places of business during such hours, and on Sunday, as may be thought expedient."

Pursuant to the powers understood by them as given by this

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sub-section the City Council passed By-law 230 on the 29th of May, 1902, preventing the sale of liquor between the hours of one o'clock in the forenoon and five o'clock following and between the hours of 11 o'clock on Saturday night and six o'clock on Monday morning thereafter.

The two points urged upon me by counsel for the defendant and upon which he relied are:

(1.) That By-law 1A of the Licensing Board is *ultra vires* of their powers inasmuch as the field had already been occupied by By-law 230 of the City Council.

(2.) That there is no jurisdiction under section 68 thereof to convict the licensee where the offence is committed by his employee.

The short answer to this broad second objection is that if an unlawful act is committed by an employee in the course of his employment and for his employer's benefit, it is not necessary to prove authority by the employee. Apart from this general proposition of law, there is section 70 of the By-law 1A itself which reads:

"The word 'keeper' when used in this and the foregoing section, shall include the person actually contravening the provisions of this section, whether acting on behalf of himself or of another or others, and the actual offender as well as the keeper of the licensed premises shall be personally liable to the penalties and punishments which may be imposed for the infraction and violation of this section, and at the prosecution's option the actual offender may be prosecuted jointly with or separately from the keeper, but both of them shall not be convicted of the same offence, and the conviction of one of them shall be a bar to the conviction of the other of them therefor."

Judgment

As to the first objection, I think that the Legislature has given the Board exactly the powers invoked in the by-law; and that the City Council have clearly gone outside the powers meant to be given them by section 125, sub-section 19, in passing By-law 230 with which By-law 1A of the Board is said to conflict, by attempting to close bars during the hours set out in that municipal enactment. I say nothing as to the constitutionality of section 125, sub-section 19.

The Legislature again by section 162 of the Incorporation Act, I think, gave the Licensing Board's by-laws the strength of city by-laws, replacing any such as might conflict with them.

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And though without such provision section 73 of By-law 1A could only have reference to by-laws previously passed by the enacting body, yet, in view of section 162 of the Act, I cannot but think that the Legislature intended to give the Board power to repeal city by-laws dealing with the same subject-matter, assuming there be any such valid by-law in existence.

I am therefore of opinion that on both points the applicant fails, and the conviction consequently stands.

Judgment

Motion dismissed.

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REX v. RULOFSON.

Criminal law—Perjury—Criminal Code, Secs. 170 and 171 (2)—Judicial proceeding—Cross-examination on affidavit filed in civil proceedings—Absence of registrar during cross-examination.

Where an order had been made in a proceeding under the Guardian's Appointment Act for the cross-examination on an affidavit:—

Held, that the judicial proceeding ended when the registrar left the room in which the cross-examination was being held after swearing the witness, leaving the official stenographer to take the cross-examination in shorthand.

CRIMINAL trial, before CLEMENT, J., at the Vancouver Fall Assizes, 1908, of the prisoner on an indictment for perjury. A petition was filed by the wife of the prisoner under the Guardian's Appointment Act, R.S.B.C. 1897, Cap. 96, for the custody of Charles Herman Rulofson, an infant under the age of seven years. The petition came up before MARTIN, J., in Chambers at Vancouver, and the prisoner, who was respondent on the petition, filed an affidavit to oppose the petition. An order was made by MARTIN, J., for his cross-examination and he at once attended before the registrar of the Court in Vancouver. The

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official stenographer was in attendance to take the cross-examination and the prisoner was sworn by the registrar, who, after swearing the witness, left the room, according to the practice in Vancouver, leaving the prisoner to be cross-examined by counsel for the petitioner. The prisoner was represented by counsel. The official stenographer transcribed the evidence and returned the original transcript duly certified to the registrar. In due course the petition would have come up before MARTIN, J., for adjudication, the transcript of the cross-examination being used as part of the material on the application.

Statement

An information was laid against the prisoner for perjury committed in this cross-examination. He was committed for trial, a true bill found and his trial came up on the 17th of October, 1908, at the Assizes at Vancouver.

The registrar was called as a witness for the Crown and produced the record in the civil proceedings shewing the order for examination, etc. In cross-examination he admitted that he had not been present during the cross-examination.

Craig, and *J. A. Russell*, for the prisoner, raised the point that the false statements relied upon were not made in a judicial proceeding as no officer authorized to hold the cross-examination in question was present.

Argument

A. D. Taylor, K.C., for the Crown: The petition under the Guardian's Appointment Act began a judicial proceeding which was pending before MARTIN, J., who was the person holding the inquiry referred to in section 170 of the Criminal Code. The transcript of the cross-examination returned by the official stenographer would come before MARTIN, J., in due course and be part of the material on which he would decide the merits of the application, and he was therefore the person that would be misled as the person holding the proceeding. The registrar was not the person holding the inquiry as he had no judicial function to perform, not being even authorized to decide on the admissibility or otherwise of questions on the cross-examination, which could only be referred to the judge before whom the petition was pending.

CLEMENT, J.: An examination ordered by a judge to be taken before a registrar of the Court ceases to be a "judicial proceeding" as defined by section 171 (2) of the Code, where the registrar after administering the oath leaves the room, and the examination is proceeded with in his absence. A false statement under oath made by a witness at such an examination, but in the absence of the registrar as aforesaid, is not perjury as defined by section 170 of the Code: *The Queen* v. *Lloyd* (1887), 56 L.J., M.C. 119. I therefore direct the jury to acquit the prisoner.

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Prisoner acquitted.

IN RE B. C. TIE AND TIMBER COMPANY.

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Company law—Winding up—Mortgagees—"Proceeding against the Company"—Winding Up Act, R.S.C. 1906, Cap. 144, Sec. 22.

A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court on the ground that such sale would be a "proceeding against the Company under section 22 of the Winding Up Act:—

Held, that the mortgagees were proceeding rightfully.

APPLICATION to restrain mortgagees of a Company in liquidation from selling under their security on the ground that it would be a "proceeding against the Company" under section 22 of the Winding Up Act (Dominion). Heard before CLEMENT, J., at Vancouver on the 14th of December, 1908.

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A. M. Whiteside, for the Liquidator.

Reid, K.C., for the Company.

15th December, 1908.

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CLEMENT, J.: Motion by the liquidator for an order to restrain a mortgagee in possession from proceeding to sell. It is admitted that possession was rightfully taken before the winding-up order was made and no suggestion is put forward that the mortgage was or is in any way open to attack.

So far as the matter is one within the Court's discretion, it seems to me that the principles laid down in *In re David Lloyd & Co.* (1877), 6 Ch. D. 339, are decisive against the application.

But it is said that what the mortgagees are doing is a "proceeding against the Company" within the meaning of section 22 of the Dominion Winding Up Act (R.S.C. 1906, Cap. 144), and that, as admittedly no leave of the Court has been obtained, the applicant is entitled *ex debito* to the order he asks, leaving the mortgagees to apply for the necessary leave, if so advised. Apart from authority, I should have thought that this was a clear case for the application of the *ejusdem generis* rule: that the phrase "or other proceeding" must be limited to such a proceeding as would fall within the *genus* indicated by the words "suit" and "action," *viz.:* proceedings in which the end desired was sought through the instrumentality of the Courts. However it would appear from *In re The Exhall Coal Mining Company* (1864), 4 De G. J. & S. 377, as that case seems to have been viewed by the Court of Appeal in *In re Higginshaw Mills and Spinning Company* (1896), 2 Ch. 544, that the levying of a distress is within the words "other proceeding against the Company," but this result appears to have been arrived at by reading the English equivalents of our sections 22 and 23 together, so that the various proceedings known as attachment, sequestration, distress and execution would fall within the words "or other proceeding against the Company," used in the earlier section. The proceeding by the mortgagee in the case at bar does not, however, come within any one of the classes of "proceeding" specified in section 23, and I do not think I should extend section 22 to cover any proceeding outside of those classes. Here—to paraphrase the words of James, L.J., in *In re David*

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Lloyd & Co., supra, at p. 345—the mortgagees say: "We have nothing to do with the distribution of your property among your creditors. This is our property." The Company's right is merely to whatever surplus may remain in the mortgagees' hands after sale. The mortgagees therefore are not, in my opinion, proceeding in defiance of section 22, as that section does not, as I read it, apply to what they are doing.

I very much doubt the right of this Court to interfere in such a case, but, if there be the right, I am of opinion, as already stated, that no case is made out here for its exercise. The mortgagees are admittedly proceeding rightfully, and why at this last minute should the Court stop them?

Judgment

The application is refused with costs. The liquidator will have his costs in the winding up, but there will be no costs to any of the others who appeared upon the argument.

THE CORPORATION OF THE MUNICIPALITY OF DELTA v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

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Railways—Board of Railway Commissioners—Full Court—Co-ordinate jurisdiction—Order made by Board—Action in Supreme Court for non-compliance with such order—Appeal—Stay of proceedings.

In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff:—

Held, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief as they had complete control over their order.

ACTION tried before CLEMENT, J., at Vancouver on the 2nd, 24th and 25th of September, 1908.

Statement

The plaintiffs' claimed an injunction to restrain the defendants

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from closing up or interfering with a road called the River road along the south bank of the Fraser river within the municipality, and directing the defendants to restore the said portion of the River road to the condition it was in prior to the defendants interfering with the same, until they should have properly diverted the highway in accordance with the order of the Board of Railway Commissioners made on the 5th of August, 1907, and for damages.

Statement

The statement of claim alleged that on the 5th of August, 1907, an order was made by the Board of Railway Commissioners authorizing the defendants to divert the Ladner highway along the Fraser river, known as the River road, to the extent and in the manner shewn on a plan and profile on file, and to maintain, construct and operate its railway along and upon the existing portions of the said highway between the points of diversion; that the Railway Company had proceeded to construct its railway along the highway between the points of diversion and rendered the same impassable to all foot passengers, and had not left an open or good passage for foot passengers or carriages; that by reason of the said obstruction, the general public and persons lawfully desiring to use the said highway have been prevented from using the same, and have been put to delay, injury and damages. The plaintiffs therefore claimed a mandatory injunction directing the defendants to restore the said portion of the River road to the condition in which the same was before they commenced the construction of their railway, and an injunction to restrain the defendants from proceeding with any works or erection upon the said portion of the River road until they had diverted the said highway to the extent and in the manner directed by the order of the Board of Railway Commissioners. It was not denied that the defendant Company had constructed the road referred to in the order of the Board of Railway Commissioners, and that the same had been in use by the public. The Provincial Government had erected a public school on the new road. Further, it was not claimed that the Railway Company had in the course of their works done anything which was not necessary for the construction of their railway and not contemplated by the order of the

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Board of Railway Commissioners. Immediately after the defendant Company had commenced the construction of their railway along the highway, some of the land owners whose lands had not been expropriated for the new road, placed obstructions on the same.

The Municipality of Delta had in 1906 passed a by-law establishing a highway in lieu of the highway which was to be used by the defendants. It was intended at the time of the passing of this by-law that the right of way for the new highway should be acquired by the municipality under the provisions of the Municipal Act, and that the railway should recoup the municipality for their expenses in that behalf. The municipality, in February, 1908, after the road had been constructed, passed a by-law repealing their 1906 by-law.

Statement

Sir C. H. Tupper, K.C., for plaintiff Municipality.

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

7th October, 1908.

CLEMENT, J.: On a careful consideration of the authorities I have arrived at the conclusion that the plaintiffs are, to quote the language of Collins, M.R., in *Devonport Corporation* v. *Tozer* (1903), 72 L.J., Ch. 411 at p. 416, "trying to put in suit a public wrong," and therefore "they must do it in the recognized way, namely, at the suit of the Attorney-General." See *Wallasey Local Board* v. *Gracey* (1887), 56 L.J., Ch. 739; *Tottenham Urban District Council* v. *Williamson & Sons* (1896), 65 L.J., Q.B. 591; *Attorney-General and Rhondda Urban Council* v. *Pontypridd Waterworks Co.* (1908), 77 L.J., Ch. 237.

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I do not overlook the line of authority, of which *Attorney-General* v. *Logan* (1891), 2 Q.B. 100 and *Wednesbury Corporation* v. *Lodge Holes Colliery Co.* (1907), 76 L.J., K.B. 68 may be noted, that for an injury done to a proprietory right vested in a municipality or local board, the municipality or local board may seek redress in its own name; nor the argument of counsel for the plaintiff Municipality that the "possession" of the highway in question here, which by section 242 of the Municipal Clauses Act (B.C. Stat. 1906, Cap. 32), is "vested in the municipality," is a proprietory right within

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the meaning of the cases, for an invasion of which right the plaintiff municipality can sue. One short answer to this argument is that this action is avowedly for a public wrong and not for any invasion of the plaintiff municipality's "possession." It is perhaps unnecessary for the determination of this case to attempt to define what is covered by the word "possession" in the section in question. Does it mean more than the expression "control and management" found in other similar Acts? Suffice it to say that in my opinion it is a "possession" subject to the public right to pass and repass: see *Hickman* v. *Maisey* (1900), 69 L.J., Q.B. 511—and it is for an obstruction to this public right that this action is, as I have said, avowedly brought. I take it to be settled law that for an obstruction to a public highway the only remedy open to the public is by indictment or information at the suit of the Attorney-General, the recognized embodiment in that behalf of the public. To radically change this law so as to substitute another person or body for the Attorney-General in such cases would, I think, require clearer language than is to be found in section 242, above mentioned. If, indeed, the obstruction works to some particular person a special peculiar injury, different in kind and not merely in degree from that suffered by the general public, such particular person may seek redress in his own name, alleging and proving the special peculiar injury: see *Harvey* v. *B. C. Boat Co.*, not yet reported. No such exceptional case is put forward here.

CLEMENT, J.

If I may say so with respect, I entirely agree with what was said by Romer, L.J., in *Devonport Corporation* v. *Tozer*, *supra*, at p. 417, that "it is rather to be deprecated that public bodies such as the plaintiffs in this case should be at liberty, without the leave of the Attorney-General, to commence expensive proceedings such as these at their own will." This very action gives point to the quotation, for it appears from the evidence that it was brought at the instance of or under pressure from certain landowners through whose lands the defendants have constructed a road intended to take the place of the highway in question here, and who chafed—perhaps quite justifiably, I really cannot judge—at the defendants' delay in paying for the land taken from them for the new road.

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I should perhaps add that I have not thought proper to discuss the cases cited from Ontario and Nova Scotia, because I am, I think, bound by decisions of the English Court of Appeal to decide as I do: see *Trimble* v. *Hill* (1879), 49 L.J., P. C. 49. In *Tottenham Urban District Council* v. *Williamson & Sons*, *supra*, *Wallasey Local Board* v. *Gracey*, *supra*, is expressly approved of by the Court of Appeal and to my mind *Wallasey Local Board* v. *Gracey* is indistinguishable from the present case. An injunction was there sought by a local board, in whom not merely the "possession" of the streets but the "streets" themselves were vested, to restrain the defendants from, *inter alia*, allowing noxious and offensive matter to be dropped upon the streets from their carts. *Vestry of Bermondsey* v. *Brown* (1865), L. R. 1 Eq. 204, cited and approved of in *Wallasey Local Board* v. *Gracey*, *supra*, was also a case of highway obstruction, although, it is true, the nature of the local body's interest in or right of control over the street does not very clearly appear.

In *Wallasey Local Board* v. *Gracey* reliance was placed by counsel, for the local board, upon section 107 of the English Public Health Act, 1875, giving power to the local board to "cause any proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance"; but even this was held ineffective to enable the local board to sue without the Attorney-General. Our Municipal Clauses Act (Secs. 50, 55, 107) gives power to the plaintiffs to pass by-laws "for the prevention and removal of nuisances" but no such supplementary power as is contained in section 107 of the English Public Health Act, 1875, above referred to. The argument here for the plaintiff is therefore by so much the weaker.

CLEMENT, J.

The action is dismissed with costs.

The appeal was argued at Vancouver on the 10th of December, 1908, before HUNTER, C. J., IRVING and MORRISON, JJ.

Griffin, for appellant (plaintiff) Municipality.
A. H. MacNeill, K.C., for respondent (defendant) Company.

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HUNTER, C.J.

HUNTER, C.J.: Inasmuch as the plaintiffs are seeking to obtain an order from this Court on the defendants to undo what they have done under the authority of the Railway Board, and as that Board having the powers of a superior Court is amply clothed with authority, either by alteration or rescission of their order or by a remedial or ancillary order to give all necessary relief to the plaintiffs or any other party aggrieved by the mode in which the work has been carried out, while we do not deny that we have jurisdiction if need be to award all proper relief, we think that under the circumstances the plaintiffs should first apply to the Board on much the same ground as a Court acts when it finds that another Court of concurrent jurisdiction has made an order over which it has complete control.

The appeal will therefore be enlarged till the next sittings in order to enable the plaintiffs to make such application to the Board as they may be advised.

IRVING, J.
MORRISON, J.

IRVING and MORRISON, JJ., concurred.

Order accordingly.

Solicitors for appellants: *Tupper & Griffin.*
Solicitors for respondents: *MacNeill & Bird.*

HARRIGAN v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED.

MARTIN, J.
1908
March 28.
FULL COURT
Dec. 11.
HARRIGAN v. GRANBY CONSOLIDATED

Master and servant—Injury of workman—Negligence—Contributory negligence—Serious and wilful misconduct—Serious neglect.

Plaintiff was employed as a brakeman at defendant Company's smelter. Part of his duty was to indicate to the engineer to stop at the required spot where the slag-pots brought out from the smelter were to be emptied, and the engineer was not to move again until signalled to do so. Certain points existed where there were chains which were used to anchor the frame of the car to the track in order to prevent the locomotive being capsized when the pot, weighing about 12 tons, was [being] emptied. On the occasion in question, the engineer reached the chain point, when, considering he had gone too far, reversed, going back about two feet. Plaintiff, meanwhile, had dismounted and thinking the engineer was not going to back up, put his hand under to draw the chain through and anchor the car. In doing so his hand was run over and seriously injured. There were hooks supplied for this purpose, but plaintiff did not use one:—

Held, on appeal, *per* HUNTER, C.J., and MORRISON, J. (affirming the judgment of MARTIN, J., on different grounds), that the accident was due to a natural misunderstanding in the circumstances and that there was neither negligence nor contributory negligence.

Per CLEMENT, J.: That the evidence did not warrant a finding that the engineer was guilty of negligence and the action was rightly dismissed.

APPEAL from the judgment of MARTIN, J., in an action tried before him at Rossland on the 17th of December, 1907. The facts are fully stated in the reasons for judgment of HUNTER, C.J. Statement

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

J. A. Macdonald, K.C., and *D. Whiteside*, for defendants.

28th March, 1908.

MARTIN, J.: This case I have found not an easy one to reach a satisfactory conclusion in, being one "on the line," so to speak, but the decision I have come to is that though the defendant Company is guilty of negligence under the Employer's Liability Act, nevertheless the plaintiff on his part is guilty of such contributory negligence as disentitles him to recover either at com- MARTIN, J.

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mon law or under the Employer's Liability Act, and the action must therefore be dismissed.

But I am unable to accept the further submission that the plaintiff's actions amount to "that serious and wilful misconduct or serious neglect" which would prevent his recovering under the Workmen's Compensation Act, and if desired I am prepared to hear counsel on that point as directed by section 2, sub-section 4 of that Act, in regard to which I draw attention to my recent judgment of February 1st last in *Follis* v. *Shaake* (1908), 13 B.C. 471.

Leave is given to submit written arguments on this point.

The appeal was argued at Victoria on the 19th of June, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

S. S. Taylor, K.C., for appellant (plaintiff): The engineer was not a competent man under the provisions of the Boiler Inspection Act. There was no contributory negligence on the part of plaintiff. The Company should have provided hooks at all convenient places for the handling of these slag-pots.

J. A. Macdonald, K.C., for respondent (defendant) Company: The Company provided hooks for the safety of the men, and they should have used them. The engineer was endeavouring to stop at a particular spot, but the plaintiff put himself in a dangerous position before the engine stopped. Further, he disobeyed instructions by putting his hand into a place where he should have used a hook. This case comes within *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41. See also Beven on Negligence, 142. As to the engineer not being certificated—

Argument

[CLEMENT, J.: Is that material?]

No; but there was no complaint of incompetency made.

Cur. adv. vult.

11th December, 1908.

HUNTER, C.J.

HUNTER, C.J.: This is an action brought by an employee against the employer on account of personal injuries alleged to have been caused by the negligence of a fellow workman.

The plaintiff was employed as the brakeman in connection with the dumping of slag-pots at the defendants' smelter, the pots being hauled away from the furnaces by a locomotive, and their contents turned out on a dump. It is not disputed that the engine-man was under the control of the plaintiff, that is to say, he was to stop the pots when told to do so by the plaintiff or the dump-man, and not to move his engine again until he got a signal to do so.

On the night in question, it being shortly before daylight, March 3rd, it had been agreed by the plaintiff and the engine-man that the pot in question (there being only one pot taken out on this trip), should be stopped at a particular point on the track called No. 1 chain for the purpose of "shelling" it. By No. 1 chain is meant one of the points where the frame of the car can be anchored to the track by means of a chain, which is in place under the rails, the object being to prevent the possibility of the locomotive being capsized by the turning over of the pot which when loaded weighs about 12 tons. For the purpose of making it more convenient and safe for the brakeman to anchor the pot, hooks were provided to enable him to catch the far end of the chain and pull it through the frame, then couple the two ends and in that way fasten the truck to the rails.

The engineer had moved the pot down to the spot, when, considering that he had gone a little too far, reversed, bringing the pot back about two feet. In the meantime the plaintiff had got off and evidently thinking that the engineer was not going to back up, put his hand through for the purpose of anchoring the truck by drawing through the end of the chain, there being no hook handy for the purpose, and in so doing his hand was seriously injured by being run over by the pot.

I am unable on these facts to see that any negligence is attributable to either party. The engineer had undertaken the duty of "spotting" the pot on No. 1 chain and concluded that he had gone a trifle too far; while the plaintiff had evidently thought that he had finished shunting as it was near enough for the purpose, and through this mutual misunderstanding the accident happened. So far as concerns the plaintiff not stopping

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to find and use a hook is concerned, it was necessary for him to hurry the matter, as contrary to the usual practice there was only one dump-man attending to two trains instead of there being one for each train. Moreover, the hook is intended as a protection against the heat rather than to guard against unlooked for movements of the engine, as it is obvious that even with a hook the chain could not be fastened about a moving truck.

I therefore cannot agree that there was either negligence or contributory negligence, and in my opinion the accident was due simply to a misunderstanding which was quite natural under the circumstance, and for these reasons the appeal should be dismissed.

MORRISON, J. MORRISON, J., concurred with HUNTER, C.J.

CLEMENT, J. CLEMENT, J.: I agree with the learned Chief Justice that the evidence does not warrant a finding that the defendants' engineer was guilty of negligence; but I prefer to say nothing as to contributory negligence on plaintiff's part because my opinion on that point would be dependant upon, or at least influenced by, my view as to the propriety of the engineer's action.

In the result, the action was, in my opinion, rightly dismissed, and this appeal fails.

Appeal dismissed.

Solicitors for appellant: *Taylor & O'Shea.*

Solicitors for respondents: *Macdonald & Whiteside.*

ANGLO-AMERICAN LUMBER COMPANY v. McLELLAN.

FULL COURT

1908

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ANGLO-AMERICAN LUMBER CO. v. McLELLAN

Company law—Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note—Allotment.

Defendant purchased 50 shares in plaintiff Company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between the defendant and the president of the Company that defendant was to be employed as foreman by the Company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the Company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be delivered up on payment of the note:—

Held, affirming the judgment of HUNTER, C. J., that upon the signing of the application and the delivery of the note the defendant became the owner of the shares.

APPEAL from the judgment of HUNTER, C. J., reported (1908), 13 B.C. 318.

Statement

The appeal was argued at Victoria on the 10th and 11th of June, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Craig, for appellant (defendant), referred to *Nasmith* v. *Manning* (1880), 5 S.C.R. 417; *In re London Speaker Printing Co.* (1889), 16 A.R. 508; *Henderson* v. *State Life Ins. Co.* (1905), 9 O.L.R. 540; *Standard Bank of Canada* v. *Stephens* (1907), 16 O.L.R. 115 at p. 122. A person applying for shares thereby makes an offer, which, to be turned into a contract requires allotment and notice of allotment by the Company. *Pellatt's Case* (1867), 2 Chy. App. 527 at p. 535; *Hebb's Case* (1867), L.R. 4 Eq. 9; *Gunn's Case* (1867), 3 Chy. App. 40; *Ward's Case* (1870), L.R. 10 Eq. 659. Assuming there is a contract, before we can be compelled to pay the note here, we must be the owner of 50 shares. There is no evidence that we are the owner, that the directors allotted the shares to us, or that

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we were apprised in any way of allotment. He cited *Re Pakenham Pork Packing Co.* (1906), 12 O.L.R. 100; *Manes Tailoring Co.* v. *Willson* (1907), 14 O.L.R. 89; *Re Canadian Tin Plate Co.* (1906), 12 O.L.R. 594.

J. A. Russell, for respondent (plaintiff) Company: There was a contract entered into, and one of the considerations was employment of the defendant and his son. The stock was duly issued, and the Company cannot buy back its own stock. Defendant had notice of the allotment.

Craig, in reply: Defendant was to have a promise in writing before he accepted the stock.

Argument

[CLEMENT, J.: The difficulty in applying the cases you cite is that they are instances where the applicant did not know whether the application would be granted. Here the Chief Justice treats the matter as a present purchase of stock.]

There is nothing in that application to shew that it was anything more than an ordinary contract. The question is, did the defendant ever occupy a position when he could demand that stock?

Cur. adv. vult.

11th December, 1908.

IRVING, J.

IRVING, J., concurred in the reasons for judgment of CLEMENT, J.

MORRISON, J.

MORRISON, J.: The difficulty in this case arises out of an application for shares. Such an application may be made in a number of different ways, but, in whatever way it is made, it is only an offer to take shares, and consequently has to be accepted and notice of the acceptance must be given the applicant before it has any binding effect as an agreement.

There is no doubt that the defendant offered to buy shares in the plaintiff Company, but did the plaintiffs accept this offer? This question must be determined by the application of well-settled principles which govern any other ordinary kind of contract.

They apparently did not enter his name on the register which, if they had done, would not of itself have constituted an acceptance; nor did they send him a letter of allotment, which again is not a circumstance necessarily inconsistent with

acceptance. But they did make out in his name a certificate of shares, thus acknowledging his interest as shareholder. This certificate, which is merely *prima facie* evidence of his title, was placed with defendant's note in the plaintiff's bank in escrow and the bank in due course so notified the defendant. It does not matter how the defendant received notice of the allotment, or, which is the same thing, the appropriation of the shares to him, if such notice reached him before his alleged withdrawal, and I think in this case it did.

It is contended on behalf of the defendant that the shares were not issued, or, if issued, they were not legally issued. The word "issue" has no very definite legal import with reference to shares. When the transaction is complete—when the allottee has become complete master of the shares—the stock is issued: *Spitzel* v. *Chinese Corporation* (1899), 15 T.L.R. 181 at p. 282.

MORRISON, J.

The defendant had within his control the certificate of shares, and upon payment of the note attached he then would have done the last thing for him to do, and he would have the right of disposition of those shares.

Having regard to the circumstances of this case, I think there was a valid issue of shares to the defendant. I do not think there has been any case made out of misrepresentation or fraud on the part of McKee or the Company.

I would dismiss the appeal with costs.

CLEMENT, J.: This seems to me a very plain case. One McKee, president of and professing to act for the plaintiff Company, negotiated with defendant for the sale by the plaintiff Company to the defendant of 50 shares in the capital stock of the Company. I am of opinion that what occurred between McKee and the defendant was an out-and-out sale of the 50 shares at par. Defendant, as he says himself, first signed an application for the shares. Following upon this McKee for the Company at once acceded to the application and sold the shares to defendant, receiving from him the promissory note sued on. The share certificates, of course, were not then in existence, but the promise of McKee that they would issue "at once" or "immediately" shews to my mind that the sale was then and

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there concluded; and I can see nothing to give defendant a right to recede from his bargain. In this connection I would refer to the opening paragraph of the judgment of Meredith, J.A., in *Re Canadian Tin Plate Co.* (1906), 12 O.L.R. 594 at p. 600:

"If there were a valid agreement between the respondents and the company for the purchase and sale of the shares in question, the fact that the shares may not have been duly allotted, or transferred, to them, would be, in my opinion, no sufficient reason why they should not be made contributors—why they should not make good their agreement. Why should it? Why should they be relieved from their contract, the company having the power to sell, and the shares required to fill the contract? In a great majority of cases there is an offer to buy in writing, the only evidence of acceptance of which is an allotment or transfer of the shares by the company to the intending purchaser, and notice of such allotment to him. But any other evidence of a concluded bargain ought to be just as effectual."

This, if I may say so with respect, seems to me sound law and sound common sense.

In the case before us the act of the president was followed by the immediate issue of a share certificate for the 50 shares in defendant's name. Had he demanded the immediate delivery of this certificate to himself, it may be that the Company would have been obliged to get that certificate from the bank and a refusal to do so might have relieved the defendant from liability; but nothing of that sort occurred. There is no serious suggestion that the Company cannot, whenever called on, make delivery of valid shares.

CLEMENT, J.

In short the note was given for good consideration, to wit, the Company's promise through its president to issue the shares to defendant, and it has not been shewn that that consideration has failed.

The appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Martin, Craig & Bourne.*
Solicitors for respondents: *Russell, Russell & Burritt.*

GRAHAM v. KNOTT *ET AL.*

LAMPMAN, CO. J.
1908
May 28.
FULL COURT
Dec. 11.
GRAHAM v. KNOTT

Trade union—Member of—Interference with employment—Threatening employer—Refusal by union men to work with non-union man—Coercion of employer—Contractual relationship between employer and employee.

Plaintiff, a stone-mason, applied for membership in the union of which defendants were officers. He made a payment on account of his application fee, but not being vouched for by two members of the union, the executive returned the fee and requested him to submit to a test of workmanship preliminary to his being enrolled. Considering the test an unfair one, he declined to submit to it, whereupon the union refused him membership. The test proposed was what is known as "boulder work," but plaintiff stated that he had been accustomed to "sandstone work." After some delay, plaintiff was told he could submit to a test in any kind of stone work he chose, but he did not accept the offer. Subsequently, while he was at work on a building, the union at a meeting passed a resolution instructing the secretary to notify the employer that unless the plaintiff was discharged the union men would be called out. Plaintiff having been discharged, brought action, claiming an injunction and damages:—

Held, on appeal (reversing the judgment of LAMPMAN, Co. J.), that plaintiff had not shewn that the purpose of the defendants was to molest him in pursuing his calling and prevent him, except on conditions of their own making, from earning his living thereby.

APPEAL from the judgment of LAMPMAN, Co. J., in an action for an injunction and damages, tried before him at Victoria on the 13th of March, 1908. Statement

Mann, for plaintiff.
H. B. Robertson, for defendants.

28th May, 1908.

LAMPMAN, Co. J.: This is an action of tort brought to recover damages sustained by reason of the defendants' interference with the plaintiff's employment. The defendants, besides representing themselves, represent all persons constituting the Bricklayers and Masons' Union, No. 2, of Victoria. The plaintiff, an Englishman, 48 years of age, is a stone-mason, and he came to Canada in 1904, and settled in Calgary where he worked at his trade. In LAMPMAN, CO. J.

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Calgary he joined the local branch of the Bricklayers and Masons' Union which is about the same as the local union here, both being affiliated with the Bricklayers and Masons' International Union of America. He became president of the union in Calgary but before leaving for Victoria, where he arrived in March, 1905, he had become a contractor and so had lost his membership. Plaintiff secured work with a contractor named Bathier at laying concrete blocks, and working along with him was Harry Owen, a member of the local union, and after some conversation about the impossibility of Owen working with a non-union man, Graham told him he would join the union and gave him $5 as a portion of the initiation fee. At the next meeting of the union (26th August) Owen paid in the $5, but Graham was not elected, and the $5 was ordered to be repaid to him as no two members would vouch for him being a bricklayer as required by section 2 of article 5 of the local union's rules, which is as follows:

"All members proposed for membership to this Union must be practical bricklayers or masons who, by paying the initiation fee and being vouched for by two members in good standing, shall be eligible for membership; and any member vouching for a person who is not a practical bricklayer or mason shall be fined the sum of five dollars, and no member of this Union will be allowed to work with any member so fined until said fine is paid."

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On the 9th of September the matter again came before the union and two members, the defendant Jones and Williams, were appointed a committee to give Graham "a trial test as to his ability" and to report at next meeting. This committee decided to give Graham a test laying boulder-rock, but Graham refused such a test saying that he was used to sandstone work, and that he considered a test on boulder work unfair to him. The matter dragged along until late in October, when the defendants Jones and Pike had an interview with Graham and told him he could have a test on any kind of stone work he liked, but Graham did not accept the offer. The evidence shews that the bulk of the stone work in Victoria is boulder work, and I can see nothing unreasonable in requiring a stone-mason who is going to work in Victoria to understand boulder work. Mr. *Mann* seeks to shew that the union was astute in finding

reasons for rejecting Graham's application for membership, and suggests that inquiries could have been made of fellow workmen and that the committee could have inspected Graham's work on jobs where he had been employed. That sort of thing is contemplated by section 2 of article 5, but when no two members would vouch for the applicant, a practical test seems a fair way of ascertaining the applicant's ability. It is a much better way than asking questions of some friend—or of some enemy. I think the stand taken by the plaintiff was stubborn and unreasonable. If the union had any ulterior motive no suspicion of it was disclosed at the trial.

On the 14th of October, Graham was still working for Bathier, and at a meeting held that evening a resolution was passed instructing the secretary to notify Bathier that if he continued to employ Lawrence Graham all union men will be called off his work, and that same night Knott, the secretary, wrote the following letter:

"Bricklayers and Masons' Union No. 2
of Victoria, B. C.

Victoria, B. C., Oct. 14th, 1907.

"Mr. Bathier,

"Dear Sir,—I am instructed to notify you that as the members of the above Union claim the work of setting the concrete blocks and as it is contrary for members of this union to work with any who do not belong to it, that our members cannot work with Lawrence Graham, and should you keep him on at the work all union bricklayers and masons will be called off your work. Hoping you will see your way clear to employ only union men.

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"I remain, yours truly,
"R. P. Knott, Sec."

and handed it to a member named Clay who worked for Bathier. The next morning Clay handed the notice to Bathier saying "You see what it is, what are you going to do? We want to know so that we will know what to do." In the meantime Clay and the two other union men kept their coats on until Bathier told them that he would let Graham finish the day. Bathier shewed the notice to Graham, and told him he would have to let him go and after that day he employed him no longer although he had plenty of work for him and would have continued to employ him at $5 per day but for the intimation

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contained in the notice. The plaintiff says he has been unable to obtain employment since at his trade on account of this notice, and he claims an injunction and $500 damages.

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Although questions closely allied to the one for determination have been discussed at great length during the last few years in British and American Courts, the precise point now raised is not covered (so far as counsel have been able to ascertain) by any decision having the force of authority in British Columbia. In the United States the decisions are not uniform and their Supreme Court has not yet dealt with the question. The result of the authorities is, I think, that the defendants are liable unless they can shew sufficient justification for their acts. What is or is not sufficient justification must depend on the circumstances of each case as Lord Justice Romer says in the *Giblan* case, *infra*, and in that case the Court would not commit itself in any general terms to saying what would amount to a justification.

Lord Bramwell in *Reg.* v. *Druitt, Lawrence, Adamson, and others* (1867), 10 Cox, C.C. 592 at p. 600, said:

> "The liberty of a man's mind and will, to say how he should bestow himself and his means, his talents, and his industry, was as much a subject of the law's protection as was that of his body."

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And Sir William Erle, in his work on Trade Unions, in a passage often quoted, points out, at p. 12, that

> "Every person has a right under the law, as between himself and his fellow subjects, to full freedom in disposing of his own labour or his own capital according to his own will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similiar rights by others. Every act causing an obstruction to another in the exercise of the right comprised within this description, done, not in the exercise of the actor's own right, but for the purpose of obstruction, would, if damage should be caused thereby to the party obstructed, be a violation of this prohibition."

The latest English case is *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (1903), 2 K.B. 600, in which the Court of Appeal held that the officers of a trade union were not justified in continuing to prevent and in fact preventing a workman who is or has been a member of the

union from obtaining or retaining employment in his trade, to his injury, merely with the object of enforcing payment of a debt due from him to the union. Giblan had been a branch treasurer of the union, and while in office he misappropriated £36 for which the union sued and obtained judgment against him, and as he did not pay up the defendants procured his dismissal from his employment by telling his employer that if he was allowed to continue work the other labourers who were members of the union would be called out. Giblan was eventually expelled and after his expulsion the officers of the union prevented him from obtaining or retaining his employment by inducing his fellow labourers to refuse to work with him.

In *Huttley* v. *Simmons* (1898), 1 Q.B. 181, Darling, J., decided that a cabdriver had no right of action against the defendants for damages caused by reason of their having induced a cab proprietor to refuse to engage him to drive a cab. What Simmons relied on as justifying his conduct does not appear in the report and as Lord Lindley says in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 540, "It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated."

In *Perrault* v. *Gauthier* (1898), 28 S.C.R. 241 at p. 243, the declaration set up the following incident (I omit the others as they are not dealt with in the judgment) in support of the plaintiff's claim, *viz.*:

"That on a later occasion, when he (the plaintiff) had obtained employment in Perrault & Riopel's stone-yard, the union men employed there on being told that he belonged to an opposition union, left work 'without saying a word' or giving any reason; that this 'strike' was maliciously instigated by the defendants and their union who had posted him as a 'scab' on account of his having left their union and he was in consequence compelled to quit work there in order to avoid causing loss to his employers (one of whom was his brother), and that as a result of such combination and conspiracies he was deprived of the means of earning a living at his trade in any stone-yard in Canada or in the United States."

The plaintiff was not dismissed by his employer, but left because he thought it to his employer's advantage for him to do so, and the Supreme Court of Canada held that he could not recover against the officers of the union, founding their decision on *Allen* v. *Flood* (1898), A.C. 1, a case which seems to have

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been imperfectly understood until explained by the House of Lords in *Quinn* v. *Leathem* (1901), A.C. 495, 70 L.J., P.C. 76.

In *Glamorgan Coal Co.* v. *South Wales Miners' Federation* (1903), 72 L.J., K.B. 893, the circumstances were that middlemen at Cardiff were attempting to reduce the price of coal and it was feared that some employers might yield to the pressure of competition and make a reduction with the result that the wages of the miners would be reduced. To counteract this, and decrease the output, the defendants ordered certain stop days on which the men were to cease from work without giving the notices required by the sliding scale agreement, and in this way knowingly procured the men to break their contract with the plaintiffs. It was held by the Court of Appeal, *per* Romer and Stirling, L.JJ., Vaughan-Williams, L.J., dissenting, that the defendants had interfered with the contractual relations between the plaintiffs and their workmen, and that the circumstances shewed no sufficient justification for that interference.

In *Martell* v. *Victorian Coal Miners' Association* (1903), 29 V.L.R. 475, the facts were that the defendants determined that they would not work with the plaintiff who had broken the rules of another association, and they determined to get him out of the mine by informing the mine manager that they would not work with him; but the plaintiff was not removed by the owners and the defendants called the miners out on strike. As a consequence of the strike there was no work for the plaintiff, and he left the district, whereupon the other miners went back to work. Plaintiff then sought re-employment, but the employer was afraid to take him back knowing that if he did there would be trouble again. The strike took place after eight days' notice although the miners were under agreement not to quit work without giving 14 days' notice. The Full Court of Victoria decided in favour of the plaintiff.

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It will be seen that Graham's case differs from each one of the above cases. In *Perrault* v. *Gauthier, supra,* it did not appear that plaintiff was dismissed from his employment. Graham was dismissed. In the *Glamorgan* and *Martell* cases, *supra,* the defendants induced the men to break a contract. Graham was not under contract (*i.e.,* his contract could be determined at the

end of each day) and the defendants in getting him discharged did not procure the breach of any contract.

In the *Giblan* case the object of the defendants was to enforce payment of a debt due from plaintiff to the union. The defendants' object in getting Graham discharged was different.

In *Allen* v. *Flood, supra*, the defendant who had no authority to call out the men simply warned the plaintiff's employers of what the men without his persuasion or influence would do in case the plaintiff was not discharged. Plaintiff was discharged by reason of the facts communicated to him by defendant, but the House of Lords held that defendant was acting within his rights. No case of conspiracy or combination was made out in that case.

In Graham's case there was combination and the defendants had the power to call out the men.

The justification set up by the defendants is the desire on their part as union men to obtain the employment for union men, and so benefit the union and its members, and generally to help the cause of unionism. They knew that if Bathier yielded to their request Graham would have to go or else join the union. Their notice to Bathier does not merely give him the option of employing either Graham or union men, but it conveys an invitation that he dismiss Graham—see the last sentence in it: "Hoping you will see your way clear to employ only union men."

If a union is not justified in preventing a man from getting employment, with the object of enforcing payment of a debt due from him to it, I should say it would follow that it would not be justified in preventing his employment with the object of forcing him to join its organization: and see judgment of Lord Brampton in *Quinn* v. *Leathem* (1901), 70 L.J., P.C. 76 at p. 89.

Now it must be remembered that neither the union as a whole nor any of its members had any objection to Graham on account of any conduct or personal habits of his, but the objection to continuing work with him was solely because he did not belong to the union. I fail to see any good ground for holding that the defendants were justified in invading the plaintiff's rights as they did. In Eddy on Combinations, Vol. 1, p. 416 (as quoted in *Erdman* v. *Mitchell* (1903), 56 Atl. 327 at pp. 332-3) the author

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lays down the principles on which I think this action should be properly decided adversely to the defendants. He says:

"The Courts recognize the right of workingmen to combine together for the purpose of bettering their condition, and in endeavouring to attain their object they may inflict more or less inconvenience and damage upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage inflicted upon the employer is the same; but in the one case the means used are to obtain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party; and, while it may be argued that indirectly the discharge of the non-union employee will strengthen and benefit the union and thereby indirectly benefit the union workmen, the benefit to the members of the combination is so remote, as compared to the direct and immediate injury inflicted upon the non-union workmen, that the law does not look beyond the immediate loss and damage to the innocent parties to the remote benefits that might result to the union."

In the *Giblan* case, S. T. Evans, K.C. (now the Solicitor-General), the senior counsel for the union, was careful to point out that it was not the policy of the union to prevent its members from working with non-union men: see at p. 612 of the report in the Law Reports.

In his work on Torts (7th Ed.), Sir Frederick Pollock, after discussing the question now raised, which he says has not been fully disposed of yet, goes on to state, at p. 326:

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"Possibly it may turn out to be the law that, generally speaking, persuasion and advice are free and of common right; but that, when persuasion is acted upon to the damage of a third person, such damage being intended by the persuader or a natural and probable consequence of the act, the persuader is liable to an action at the suit of the person damaged if he has either used unlawful means, such as intimidation (whether open or disguised as persuasion) or corruption, or procured a criminally punishable or fraudulent act; and that he is also liable, but subject to exceptions in the nature of privilege, if the act procured was a breach of contract or a merely civil wrong not involving breach of the peace or fraud. This would give, it is submitted, an intelligible and fairly acceptable rule. No one, however, is more conscious than the writer that in the present state of the authorities all conjectures on this subject must be advanced with the greatest diffidence."

Applying this test to the circumstances of the present case, I should say that the defendants are liable as the "persuasion"

used by them as contained in the secretary's letter was really a threat and it had the effect of frightening Bathier into acceding to the "hope" as he wanted his work to be gone on with.

In Massachusetts a labour union cannot by a strike refuse to work with another workman for an arbitrary cause (see *Berry* v. *Donovan* (1905), 74 N.E. 603); but in New York the law is the other way (see *National Protective Ass'n of Steam Fitters and Helpers* v. *Cumming* (1902), 63 N.E. 369); but there Chief Justice Parker in delivering the judgment of the majority of the Court of Appeals, says, at p. 373:

"But it seems not out of place to suggest that the decisions of the English Courts upon questions affecting the rights of workmen ought at least to be received with caution, in view of the fact that the later ones are largely supported by early precedents which were entirely consistent with the policy of the statute law of England, but are hostile not only to the statute law of this country, but to the spirit of our institutions."

In regard to the above remark about "the spirit of our institutions," I would point out that the English decisions referred to were founded on what the English judges considered to be the true principles of personal liberty, and an aversion to coercion or intimidation irrespective of considerations as to by whom used. These decisions are applicable to the actions and combinations of employers as well as to trade unions.

And the Courts in the United States whose decisions have been different from the New York one cited, based their decision on that part of the Declaration of Independence which says:

"We hold these truths to the self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness;"

and like assurances of personal liberty which have been embodied in State Constitutions.

The plaintiff is entitled to damages, and in respect to the amount I understand the defendants wish to be heard: if the plaintiff wants an injunction that matter can be spoken to at the same time.

The appeal was argued at Victoria on the 23rd of June, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

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H. B. Robertson, for appellants (defendants): There was no improper motive on the part of the union; simply an effort to promote the legitimate ends of the union as a body.

[HUNTER, C. J.: Under cover of a threat to injure this man's business they get rid of this non-union man.]

No; our lawful right was to not work with this man, and to intimate the fact to his employer. He cited *Rogers* v. *Rajendro Dutt* (1860), 13 Moore, P.C. 214; *Allen* v. *Flood* (1898), A.C. 1; *Kearney* v. *Lloyd* (1889), 26 L.R. Ir. 268; *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25; *Reg.* v. *Day* (1905), 6 O.W.R. 470; *Picket* v. *Walsh* (1906), 78 N.E. 753; *Curran* v. *Treleaven* (1891), 2 Q.B. 563.

R. T. Elliott, K.C., for respondent (plaintiff), referred to *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1892), A.C. 25 at p. 37 and *Quinn* v. *Leathem* (1901), A.C. 495. We have here a contractual relationship which was interfered with by the union. There was a clear threat. The union was entitled to notify the employer, but not to threaten him. It is not within the scope of the union to procure the dismissal of a man merely because he is not a member of the union: see *Regina* v. *Gibson* (1889), 16 Ont. 704; *Read* v. *Friendly Society of Operative Stonemasons of England, Ireland and Wales* (1902), 2 K.B. 732.

Robertson, in reply: There was no contract and therefore no breach.

Argument

Cur. adv. vult.

11th December, 1908.

HUNTER, C.J.: In no case is there a greater obligation on the Court to be alert to maintain the rights of both parties than in that originating in trade or labour disputes, for in none is it more difficult for the Court to satisfy all persons that it has lived up to the time-honoured tradition that it holds an even scale. And this for the reason that two equal and undoubted rights often come into apparent conflict, that is to say, on the one hand the right that every man has to pursue his lawful occupation without wrongful interference, and on the other, the right that every one has to say for and with whom he shall agree to work, and under what conditions. Therefore, it is necessary that the Court take especial precautions to get a

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thorough understanding of the facts before it can decide as to which right, if either, has been infringed. Fortunately the facts in the case at bar are simple and really not in dispute. They are set forth at length by the learned County Court judge, and it is only necessary to state briefly that the plaintiff, a stone-mason, applied for admission to the defendant Union; was rejected because he considered the proposed test of fitness was unfair and would not submit to it; that the Union notified the employer that it was against their rules to work with non-union men, and that the men would be called out if the plaintiff was kept at work; that in consequence of this notice the plaintiff's hiring was legally terminated, although but for this notice he would have been retained and as a result, the plaintiff was unable to get employment at his trade.

Now, it may seem to some that the defendants acted harshly in first presenting an apparently unfair test for admission to their union, and then because the plaintiff was unwilling to submit to the test that they should put him on their foul list and present an alternative to their common employer which left him no choice but to put an end to the plaintiff's employment. In the first place, however, I may remark that there are many harsh acts for which there is no remedy known to the law, as for instance where a man is discharged from employment for inability to work although he may have given up to it the best years of his life; or where a man by his will turns off his wife without a penny after faithful married life, and leaves some one else his worldly substance. So that the fact that a particular act may be harsh, unfeeling or inconsiderate, and may in fact do undoubted injury, does not necessarily give rise to any legal liability or remedy. It was not disputed, and indeed cannot be disputed that a body of workmen may for the protection of their lawful trade, and the promotion of their interest, associate themselves together, and prescribe conditions for the admission or rejection of others to the association, and if any condition appears to work hardship by resulting in the rejection of any applicant, there is no remedy by which the body can be forced to associate themselves with the applicant, and it would indeed be futile to attempt any such thing as that would be in conflict

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with the undoubted right of all persons to choose their own associates. Similarly, any body of men may determine for themselves the conditions under which they will agree to render service; to whom and with whom; and this involves the proposition that they may quit the employer's service having due regard to existing contracts, if the conditions of the employment are such as to dissatisfy them.

And it makes no difference in their legal rights that they complain of such a condition as the employment of another who does not see eye to eye with themselves; they cannot be denied their right to settle for themselves whether they shall remain in the same employment, for, with one or two apparent exceptions a lawful act does not become unlawful merely because done with a questionable motive. It follows then that they may inform the employer of their intention to cease work when they lawfully can unless the conditions are made to their liking, and give him the alternative of employing themselves or those with whom they object to be associated.

It does not follow, however, that it is lawful for a union under colour of exercising this right, systematically to coerce various employers whom they can influence not to employ the obnoxious individual, and in that way attempt to deprive him of his right to make his living by his chosen calling; for in such event the purpose of their action being to molest him and to deprive him of his right to make his living except on conditions of their dictation, their action becomes a legal injury and an actionable wrong.

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In all such cases, then, the question for the Court or jury is whether, having regard to all the circumstances, the object of the Union was merely to exercise their right of settling for themselves with whom they should be associated in their work, or whether their object was to persecute the individual, and if possible deprive him of his equal right to make his living by the common trade, and in coming to a conclusion it will often be necessary to closely scrutinize the circumstances, as the line between the lawful and the unlawful in this class of case may easily become a very narrow one. For example, suppose that there existed only one diamond-cutting establishment in the

Province, and a number of the employees went to the employer and gave him the choice between retaining their services and those of an obnoxious co-worker. The Court might be more easily led to the conclusion that the object was to deprive him of his right to pursue the trade than it would in the case of, say, a carpenter who could find employment with any one of a number of employers, but who had been deprived by the action of the union of any opportunity to work for one or more of them.

In the present case I think that the plaintiff has not produced such evidence as compels the Court to conclude that the purpose of the defendants was to molest him in the peaceful pursuit of his calling and if possible to prevent him from making his living thereby, except on conditions of their own making, and therefore I think the appeal should be allowed and the action dismissed.

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MORRISON, J.: The learned trial judge found that the employer in dispensing with the plaintiff's services did not commit a breach of contract. In *Allen* v. *Flood* (1898), A.C. 1, Lord Davey, at p. 172, said:

"An employer may discharge a workman (with whom he has no contract), or may refuse to employ one from the most mistaken, capricious, malicious, or morally reprehensible motives that can be conceived, but the workman has no right of action against him. It seems to me strange to say that the principal who does the act is under no liability, but the accessory who has advised him to do so without any otherwise wrongful act is under liability."

Again, paraphrasing the language of Lord Herschell in the same case, p. 118, the employer did nothing wrong in the eye of the law. The course which he took was dictated by self interest. He was anxious to avoid the inconvenience to his business which would ensue from a cessation of work on behalf of the union men. Nor can it be contended that merely to induce him to take that course would constitute a legal wrong unless done maliciously, and Lord Herschell holds that malice in this sense has no reference to the existence of evil motive, but rather arises from the act of wilfully and knowingly procuring a breach of contract.

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The judge did find there was a combination and persuasion amounting to a threat against the employer. But "to inform a

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person that others aim to annoy him or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention may have been": Lord Lindley in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 534.

A combination of several persons to do harm to another and harm done to him in fact does not necessarily give him a right of action. If the harm done is only the consequence of what the combination had a right to do the harm is not actionable. There appears to be no law against peaceable persuasion or attempts to peaceably persuade whether by trade unions or any one else provided that the person persuading does not force himself on the person whom he persuades and provided there is no threat of violence and no annoyance so serious as to amount to an actionable nuisance. Nor is there yet any law which enables trade unions or any one else to compel another person who is *sui juris* to obey their commands and to desist from working with any third person willing to work with him.

Again, Lord Davey in *Denaby and Cadeby Main Collieries, Limited* v. *Yorkshire Miners' Association* (1906), A.C. 384 at p. 400, says he does not think that:

> "Inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interests, though it may injure the employer in his business . . . . On the other hand, if the combination be actuated by a malicious intention to spite and injure another without just cause it would be actionable . . . ."

MORRISON, J.

Taking this strong view in connection with *Mogul Steamship Company v. McGregor, Gow & Co.* (1892), A.C. 25 (where there was an extreme case of interference carried on in a combination which amounted in a sense to conspiracy, and yet the House of Lords held no action could be maintained for the acts done were not unlawful and the combination was not a criminal conspiracy), how can it possibly be successfully contended that the plaintiff's action in the case at bar can be maintained or the judgment appealed from upheld? I do not think there is any evidence of such unlawful or malicious combination in this case.

Trade unions can lawfully strike work within certain defined limits. They can refuse like any other individual to deal with

others they do not care to have dealings with always provided they do not break any contracts with them.

It was held in the case of *Jose* v. *Metallic Roofing Company of Canada, Limited* (1908), A.C. 514 at p. 518 that a ruling by MacMahon, J., at the trial that the calling out of the men on strike by resolutions of the union, if those resolutions were the cause of the strike, was an actionable wrong without regard to motive and without regard to the conspiracy alleged, could not be supported.

I think the appeal ought to be allowed.

CLEMENT, J.: I agree that this appeal must be allowed. In the recent case of *Jose* v. *Metallic Roofing Company of Canada, Limited* (1908), 24 T.L.R. 878, their Lordships of the Privy Council have laid it down that the calling out of men on strike by resolutions of a union is not an actionable wrong *per se, i.e.*, "without regard to motive and without regard to the conspiracy alleged," meaning, I take it, by this last phrase a conspiracy to injure as distinguished from a lawful combination or concerted action to forward what the members of the union conceive to be their own interests. To the same effect Lord Davey in *Denaby and Cadeby Main Collieries, Limited* v. *Yorkshire Miners' Association* (1906), 75 L.J.,K.B. 961 at p. 970:

"I do not think that inducing or attempting to induce men not to work for a particular employer, or a combination for that purpose, is a cause of action, if it be done in furtherance of what the parties in good faith believe to be their trade interests, though it may injure the employer in his business: *Mogul Steamship Company* v. *McGregor, Gow & Co.* (1891), 61 L.J., Q.B. 295, (1892), A.C. 25, and *Allen* v. *Flood* (1897), 67 L.J.,Q.B. 119, (1898), A.C. 1. If this were not so, I do not very well see how any general strike could ever be maintained. On the other hand, if the combination be actuated by a malicious intention to spite and injure another without just cause it would be actionable—*Quinn* v. *Leathem* (1901), A.C. 495, 70 L.J., P.C. 76."

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While it is true that these propositions were put forward in cases brought by injured employers, they are equally applicable, in my opinion, where a fellow workman complains, as here, that the stand taken by the union has resulted in loss to him.

In the case at bar the learned County Court judge acquits the

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defendants of conspiring to injure the plaintiff or of harbouring against him the malicious intent to injure mentioned by Lord Davey as a necessary ingredient in such an action as this.

Appeal allowed.

Solicitors for appellants: *Barnard & Robertson.*
Solicitors for respondent: *Mason & Mann.*

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CORPORATION OF THE CITY OF SLOCAN v. THE CANADIAN PACIFIC RAILWAY COMPANY.

County Court—Jurisdiction—Prohibition—Appeal—Judge acting outside his County at request of another judge—Persona designata—Municipal Clauses Act, B.C. Stat. 1906, Cap 32, Sec. 137—Costs.

The judge of the County Court mentioned in section 137 of the Municipal Clauses Act is *persona designata*, and the authority conferred upon him by said section may not be exercised by the judge of another County acting on his request and in his absence.

The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal.

Statement

APPEAL from the judgment of WILSON, Co. J., in an appeal heard by him at Nelson, on the 22nd of June, 1908, from the decision of the Court of Revision. Section 137 of the Municipal Clauses Act, gives an appeal from the Court of Revision "to a judge of the Supreme Court or to a County Court judge having jurisdiction within the municipality." FORIN, Co. J., being absent, his duties were being performed by WILSON, Co. J., on the request of FORIN, Co. J., when the matters in question came before the Court.

R. M. Macdonald, for the Municipality.
W. A. Macdonald, K.C., for the Railway Company.

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WILSON, Co. J.: The assessor for the City of Slocan assessed certain station grounds and right of way of the appellants, the Canadian Pacific Railway, at $4,000. From that assessment the appellants appealed to the Court of Revision, claiming they were assessed too high. No cross-appeal was lodged before the Court. At the hearing, evidence was adduced by both parties, and after the hearing the Railway Company filed the statement required by section 118 of the Municipal Clauses Act, shewing the area of their lands and the values. The Court of Revision then gave their decision, increasing the assessment to $30,000, and from that decision, this appeal is brought.

Mr. *R. M. Macdonald*, for the City, raises two preliminary objections, both dealing with my jurisdiction to hear the appeal. First under section 137 of the Municipal Clauses Act, the appeal can only be heard by a judge of the Supreme Court or a County Court judge having jurisdiction within the municipality, and that I am not a County Court judge having jurisdiction within the municipality, but that that can only mean the judge for West Kootenay and not a judge acting as I am. Second, along the same line that in any event the notice of appeal itself is to the judge of the County Court of West Kootenay, while the appointment fixing the hearing was signed by me and the hearing was taken before me.

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Dealing with these points in order. Is the judge referred to in section 137 of the Act as a County Court judge having jurisdiction within the municipality, *persona designata?* Dealing with the facts. I am acting in West Kootenay at Judge Forin's request and during his absence. He was absent prior to the giving of notice of appeal herein and is still absent, and he was and is the judge of the County Court of West Kootenay, and the municipality of Slocan City is within the limits of West Kootenay.

Then as to my powers under such conditions, see chapter 138, section 31, R.S.C. 1906, sub-section 2:

"The Judge of any County Court may . . . . perform any judicial duties in any County or District in the Province on being requested to do so by the County Court judge to whom the duty for any reason belongs."

Sub-section 3:

"The judge so . . . . . requested as aforesaid shall, while acting

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in pursuance of such . . . . . request, be deemed to be a judge of the County Court or District in which he is so . . . . . requested to act, and shall have all the powers of such judge."

See as to Provincial legislation, section 8 of chapter 52, R.S.B.C. 1897, as re-enacted in 1905, 1906 and 1907:

"Any County Court judge appointed under this Act may act as County Court judge in any other County upon the death, illness or absence of the judge of the other County, (or) at the request of the Lieutenant-Governor in Council, and while so acting, the first-mentioned judge shall possess all the powers and authorities of a County Court judge in the said County."

Am I then within the power of section 137, being a County Court judge having jurisdiction within the municipality?

The section is peculiarly worded and carefully avoids saying that it is a judge of the County Court that has jurisdiction within the municipality, that is authorized to act under section 137. It seems clear to me that the intention of the Legislature was to give jurisdiction in the very words it uses, "a County Court judge having jurisdiction," and that those words should bear a larger and wider meaning than that contended. It is my opinion that it not only was intended to include the judge of the County, but was intended to include any judge exercising the judicial functions of a County Court judge in West Kootenay, under the above enabling and empowering statutes. To my mind, the words used are much wider words than "a judge of the County Court that has jurisdiction," and were intended to mean and include any County Court judge properly exercising judicial functions in West Kootenay.

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Then, again, it seems to me the very wording used contemplated a wider meaning. If the Legislature had wished to narrow the meaning, the jurisdiction as expressed would have been confined to the County Court judge having jurisdiction, etc., or the judge of the County Court having jurisdiction.

On the second point raised I have felt more doubt. The notice of appeal designated the judge of West Kootenay as the County Court judge to hear the appeal, and I by appointment fixed the time and place of hearing and heard the appeal. Had I any power to do so by virtue of such notice of appeal, or is that power solely and absolutely vested in the judge of the County Court of West Kootenay, his Honour Judge Forin?

Mr. *Macdonald* contends that the appellants have made their election as to the judge to try the appeal, and that that election can only mean a trial by his Honour Judge Forin. With hesitation I think I was justified in hearing the appeal. Referring again to chapter 138, R.S.C. 1906, section 31, sub-section 3, it will be seen that while acting at such request I am deemed to be a judge of the County Court of the County in which I have been requested to act. In Judge Forin's absence and for the purpose of this hearing, I think I am the judge of West Kootenay, and as such properly authorized to hear the appeal. The circumstances are peculiar, but it seems only fair that every Court should so view its jurisdiction, that once a case is properly before the Court, it should hear the application rather than refuse to do so on doubtful ground. [The learned judge then dealt with the merits.]

The appeal was argued at Vancouver on the 30th of November, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Griffin, for appellants: There are two points. (1.) As to the power of WILSON, Co. J., to hear the case; (2.) as to the assessment of the railway property: see Municipal Clauses Act, Cap. 32, 1906, Sec. 137. The judge was not here *persona designata*. He referred to *Re Pacquette* (1886), 11 Pr. 463; *Re Young* (1891), 14 Pr. 303; *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606; *Re Toronto, Hamilton and Buffalo R. W. Co. and Hendrie et al.* (1896), 17 Pr. 199; *Re Simpson and Clafferty* (1899), 18 Pr. 402; *Doyle* v. *Dufferin* (1892), 8 Man. L.R. 294; *Owen* v. *The London and North-Western Railway Company* (1867), 37 L.J., Q.B. 35; *In re Vancouver Incorporation Act, 1906, and B. T. Rogers* (1902), 9 B.C. 373. Argument

[HUNTER, C.J.: How do you come here at all? Judge WILSON, if your theory is correct, is in the position of any stranger off the street. Your remedy is by way of prohibition.]

Prohibition would lie, of course, but the judge is here acting as a judicial officer.

Davis, K.C. (called upon as to status of judge): There is no question as to judge being *persona designata* here. The *Rogers*

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case and others shew this. [*In re County Courts of British Columbia* (1892), 21 S.C.R. 446.] There is no provision here (as in the County Courts Act) that the acting judge shall be deemed to be the absent judge.

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HUNTER, C.J.: We think Mr. *Griffin* has misconceived his remedy, which should be by way of prohibition.

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Griffin, as to costs: They should not be against us.

HUNTER, C.J.: Why not? You invoked a jurisdiction which did not exist. We should not depart from the rule that when an appeal is dismissed for want of jurisdiction it is dismissed with costs unless for special reasons.

Order accordingly.

Solicitor for appellants: *H. R. Jorand.*
Solicitors for respondents: *Macdonald & Hall.*

FULL COURT
1909
Jan. 11.

REX v. CARROLL.

Criminal law—Appeal—Certiorari—Right of appeal from single judge—Federal legislation—Necessity for to give such right—Criminal Code—Crown Office Rules.

REX *v.* CARROLL

No appeal lies to the Full Court from the decision of a single judge quashing a conviction under the Criminal Code.

Statement

APPEAL from an order made by HUNTER, C.J., at Victoria, on the 28th of October, 1908, quashing a conviction by the police magistrate under section 238, sub-section (j) of the Code.

The appeal was argued at Vancouver on the 17th and 18th of November, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Argument

Aikman, for the accused, took the preliminary objection that no appeal lay from the order of a judge in criminal causes unless

such right be distinctly given by Federal legislation. Here there is no such right given.

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H. W. R. Moore, for the Crown, called upon: If an appeal lies (a,) the Court must have jurisdiction to hear such an appeal, and (b,) proper machinery must be provided for bringing the appeal before the Court. Power to entertain appeal is a question of jurisdiction, as it is an extension of the jurisdiction of the Court appealed to: Westbury, L.C., in *The Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704 at p. 721. Judges of the Supreme Court of British Columbia acquire all jurisdiction solely from the Provincial Legislature: *In re County Courts of British Columbia* (1892), 21 S.C.R. 446, see remarks of Strong, J., at p. 453.

The sections relating to appeals in the Criminal Code are not jurisdictional. They merely provide the machinery indispensable for evoking the jurisdiction already granted by the Provincial Legislatures. Thus in the same case Strong, J., at p. 454, says:

"That he does not regard the Dominion statute known as The Speedy Trials Act as a statute conferring jurisdiction, but rather as an exercise of the power of Parliament to regulate criminal procedure."

The Supreme Court Act defines the jurisdiction of the judges, and section 86 in terms grants an appeal in *certiorari*.

The machinery for bringing a criminal appeal before the Court is a question of criminal procedure, but in the case of *certiorari*, this is delegated by section 576 of the Criminal Code to the judges. Rule 1 of our Crown Office Rules (Criminal side), made in pursuance of this section, says: "The practice and procedure in relation to . . . *certiorari* . . . shall be the same as that followed in civil proceedings . . ."

Argument

In Ontario and Manitoba there is no appeal in criminal *certiorari*, but their rules and legislation are different in material respects. Nova Scotia is the only Province on the same footing, and there this appeal has been allowed: *The Queen* v. *Simon Fraser* (1890), 22 N.S. 502 at p. 505. See also *Rex ex rel. Corbin* v. *Peveril et al.* (1903), 36 N.S. 275 at p. 280, where this decision is discussed. Such appeals appear to be now regularly heard there.

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In the analogous proceedings of *habeas corpus*, the Full Court has granted an appeal: *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454 at p. 456, which arose out of the Dominion Immigration Act, which being a Dominion statute with penal clauses, should be on the same footing as the Code.

In any event the Court has always the power, independently of statute, to rescind any of its processes which have been improvidently issued: *Rex* v. *Wakefield* (1758), 1 Burr. 485 at p. 488. In *certiorari* the single judge sits as the representative of the Full Court. This was the practice in Nova Scotia before the appeal referred to was granted: *Re Rice* (1888), 20 N.S. 437. In Ontario, though there is no appeal to the Court of Appeal, an application to review will be entertained by the judges of the High Court: *The Queen* v. *Henry Graham* (1898), 1 C.C.C. 405 at p. 408. In the North-West Territories and New Brunswick the writ is returnable before all the judges in the first place.

Aikman, contra: The right of appeal in criminal matters is solely a matter of criminal law on which, under the British North America Act, Parliament alone can legislate. The Criminal Code gives no such appeal, but merely delegates to the judges power to make rules regulating procedure. The power to make rules does not imply the power to give an appeal: *Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704 at p. 721, *et seq.* The Ontario Court of Appeal has refused to hear such an appeal: *Regina* v. *Eli* (1886), 13 A.R. 526; *Regina* v. *McAuley* (1887), 14 Ont. 643.

Argument

Criminal procedure cannot be altered by the Province: *Reg.* v. *Cushing* (1899), 26 A.R. 248 at p. 249; Clement's Constitution, 299.

Rule 1 of our Crown Office Rules (Criminal side) in any event only refers to procedure up to the granting of *certiorari*, and not to an appeal from the order. The rules in regard to appeals are Rules 11-14, which do not refer to *certiorari*. There is no such appeal in England: *The Queen* v. *Fletcher* (1876), 2 Q.B.D. 43.

An application to review cannot be entertained here, as it must be made to the Court *in banc*, not to the Full Court.

Moore, in reply: This case is distinguishable from *Attorney-*

General v. *Sillem* upon which respondent relies. The judges there were merely authorized to make rules regarding practice and pleading in order to co-ordinate the practice in two departments of the Court, and they gave an appeal to the Court above them. The Criminal Code leaves the entire question of *certiorari* to the judges, and their rules, by sub-section 2 of section 576, are subsequently laid before both Houses of Parliament and then published in the Canada Gazette. Thus our Crown Office Rules (Criminal side) have received legislative sanction and are to all intents and purposes part of the Code.

Argument

On the second point, as in this Province the Full Court and the Court *in banc* consist of the same judges, the error, if error there be, merely amounts to a mistake in the wording of the notice of appeal, such as, under the rules, can be amended with leave of the Court.

Cur. adv. vult.

On the 11th of January, 1909, the judgment of the Court was delivered by

MORRISON, J.: The point involved here is whether an appeal lies to the Full Court from an order of a single judge quashing a conviction under the Criminal Code in a *certiorari* proceeding.

Were it not for the very excellent argument of Mr. *Moore*, who urges the entertainment of the appeal in answer to Mr. *Aikman's* preliminary objection that we have no jurisdiction to hear it, I should have had no hesitation in pronouncing my view at the hearing that this being a matter of criminal appeal—a matter of criminal law, and not one of civil procedure—we have no jurisdiction, there being an entire absence of statutory sanction therefor.

Judgment

The provisions in section 5 of the Supreme Court Act (B.C. Stat. 1903-4, Cap. 15) that "the Court may be held before the Chief Justice or before any one or more of the judges of the Court for the time being" is, I think, an enactment relating to the "constitution" or, preferably, the organization of a Provincial Court rather than to "procedure." If so, the enactment suffices to give jurisdiction to a single judge, sitting for and as the Court (and sitting, therefore, in the proper sense of the term, *in banc*) to hear and determine motions to quash convictions.

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I express this view with some distrust because of the contrary opinion, *obiter*, it is true, but unanimous, of the Court of Appeal for Ontario in *In re Boucher* (1879), 4 A.R. 191 at p. 194. It may be, however, that that case might, on closer study of the Ontario legislation there in question, be distinguishable, but it is not necessary, in the view I take, to pursue the matter further because in any case there is, in my opinion, no appeal to this Full Court from the decision of a single judge in a criminal case unless such an appeal is given by Federal legislation.

The functions of the Court are to expound, not to expand, the jurisdiction. I therefore cannot agree with Mr. *Moore's* argument on what seems to me to be his main point, *viz.*: that Rule 1 of our Crown Office Rules (Criminal side) brings into operation all the machinery of our Civil Rules, including an appeal to this Court, thus throwing us back on the Supreme Court Act, whereby this appeal may be taken. That Rule obviously does not cover the matter of the substantive right of appeal, to create which requires legislative authority: *Attorney-General* v. *Sillem* (1864), 10 H.L. Cas. 704. Our Crown Office Rules contain no mention of appeal such as may be found in those of Ontario, for instance, whereby an appeal lies from the order of the judge to a Divisional Court if leave be granted by a judge of the High Court. (But those Ontario Rules are only to come into force upon confirmation by an Act of the Parliament of Canada.)

Judgment

As to the scope of sections 576 and 1,126 of the Criminal Code, see Tremeear, 2nd Ed., pp. 449 and 887 *et seq.*

It seems quite clear that it was not contemplated by the Legislature that parties affected by a conviction such as this should be given an opportunity of running the gamut of all our Courts, particularly in view of the other and effective remedies available. Many of the cases in the long list cited by both counsel are of date prior to the Criminal Code, a reference to which in view of that piece of legislation and of our own enactments, is of dubious assistance.

As we have no jurisdiction to hear the appeal we cannot deal with the merits of the case. The appeal is dismissed with costs.

Order accordingly.

HARVEY v. BRITISH COLUMBIA BOAT AND ENGINE COMPANY.

CLEMENT, J.

1908

Feb. 7.

HARVEY v. B. C. BOAT AND ENGINE CO.

Highway—Obstruction—Removal of—Nuisance—Prevention of access to property—Right of action—Individual injury.

The right of ingress from and egress to a public highway parting a person's land is a private right differing not only in degree but in kind from the right of the public to pass and repass along such highway; and any disturbance of the private right may be enjoined in an action by the land owner alone.

ACTION for an injunction to restrain defendant Company from obstructing a highway.

The trial took place at Vancouver on the 6th of February, 1908, before CLEMENT, J.

The plaintiff leased certain premises at the corner of Georgia and Pender streets, in the city of Vancouver, where he carried on the business of manufacturing lumber for block paving and other purposes.

The defendants held a lease from the city of that part of Denman street between Georgia street and Coal Harbour, on which a portion of the plaintiff's premises abut, and conducted the business of building boats and manufacturing gasoline engines. The main entrance to the plaintiff's premises is on Denman street above the premises of the defendants, but he had two further entrances on Denman street opposite the defendants' premises, through one of which the plaintiff had hauled lumber, although it had not been used for some time before commencement of the action at bar. The defendants, in the course of their business, had erected a tank for the storage of gasoline, and another plant on the said portion of Denman street, which the plaintiff objected to as depriving him of the full use of the street and interfering with the carrying on of his business, preventing him, particularly, from hauling lumber to his premises through the lower entrance, should he desire to do so, and he brought this action, claiming an injunction, restraining the

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defendants from erecting or constructing any buildings, ways, fences, plant or machinery upon, or, in any manner obstructing or interfering with the plaintiff's use of that portion of Denman street lying between Georgia street and Coal Harbour, and for a mandatory order compelling the defendants to remove the obstructions referred to.

The defendants did not rely on the lease which they held from the city, but denied that they had interfered in any way, with the rights of the plaintiff, or with the carrying on of his business, and further that the portion of Denman street referred to, was not used by the plaintiff or other members of the community as a public highway or otherwise, and that so far as it had been cleared and opened up, it had been cleared and opened up by the defendants and their predecessors in business. The defendants further contended that the plaintiff had not by reason of any of the acts complained of, suffered either personally or in the way of his business any particular damage beyond that suffered by the public in general, and consequently had no right of action.

Statement

Belyea, K.C., for plaintiff.
Ellis, and *Creagh*, for defendants.

Cur. adv. vult.

7th February, 1908.

CLEMENT, J.: The plaintiff is the lessee (under a lease which has still nearly two years to run), of certain property on the corner of Georgia and Denman streets in the city of Vancouver. Denman street, running north from Georgia street, ends at the waters of Burrard Inlet. There is no cross-street between Georgia and the Inlet, so that, as far as vehicular traffic is concerned, Denman street—the street adjoining on the east the property in question—is a *cul de sac*. The plaintiff carries on upon the premises a large industry, chiefly the manufacturing of wood into blocks for street paving, and in connection with his business large timbers have to be hauled upon the premises. The works have been laid out with a view to utilizing the Denman street frontage. The main entrance is upon that street, and there is also farther north along Denman street a second door,

Judgment

through which at times (though not recently) supplies have been taken in to the plaintiff's premises. Denman street, as is hardly contested, is a public highway. The corporation of the city have gravelled the centre of the street some distance from Georgia street, and have also laid down a sidewalk.

Now, it must be apparent almost without evidence that the situation of the plaintiff's property, on a corner, facing two 66 feet streets, is a large element in the value of the property.

The defendants toward the northerly end of the street, that is, towards Burrard Inlet, have placed what the plaintiff complained of as "obstructions" upon the highway. These consist of a small building, or tank, as some of the witnesses described it, used for the purpose of storing gasoline—a somewhat permanent structure, as the foundations are some feet under the original surface of the ground. There is also a capstan further north—a capstan, or windlass, used for hauling up boats on to the slip; and, back of the capstan (and, in fact, being the nearest obstacle to Georgia street) is a large post set in the ground used, I presume, to make fast ropes or cables in connection with the boat-hauling operations. Lumber and other boat-building materials have also been piled on the street north of the tank.

The defendants' title is not very clear. In fact, no title is set up on the pleadings by the defendants, and Mr. *Ellis*, on the defendants' behalf, declined to make any amendment of his pleadings in that respect, so that the plaintiff is simply put to proof of the facts and his legal position under them.

Judgment

Some suggestions were made during the course of the evidence that the defendants claimed title to a strip of Denman street running from Georgia street to the waters of Burrard Inlet, leaving only 20 feet to the west—that is, along the eastern boundary line of the plaintiff's property—and three feet along the eastern limit of the street, and it is evident from the nature of the erections upon the streets made by the defendants that they intend to permanently occupy some portion, at all events, of the street opposite the plaintiff's premises. It is admitted by the plaintiff that, so far, he has not experienced any inconvenience in the carrying on of his business from the presence of these obstructions, which, I should premise, were placed there some time last

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autumn. But he does say that the occupation by the defendants of this highway in the way the defendants apparently claim the right to occupy it, has depreciated the value of the plaintiff's leasehold interest, and I really believe that that is the case. It seems to me to go almost without saying that where a property is faced by a 66 feet street, and that street is cut down to a 20 feet lane, there necessarily must be a depreciation. Those being the facts, I intimated during the argument that, in my opinion, the case would be found to turn upon the nature of the plaintiff's right of ingress and egress to and from the street; and consideration overnight of the authorities has strengthened the view which I then tentatively expressed.

The defendants contend that the plaintiff has not been injured in any way different, other than perhaps in degree, from that in which others of His Majesty's subjects have been injured, and invoke the well-known rule that, in such case, the only remedy would be by indictment. I think, however, taking this case entirely upon that rule, if my judgment were to be based on the law as laid down along that line, that this is a case where the plaintiff has a special and peculiarly private interest in the public right, as it was expressed by Mr. Justice Buckley in the case cited by Mr. *Ellis*: *W. H. Chaplin & Co., Limited* v. *Westminster Corporation* (1901), 2 Ch. 329.

Judgment

I prefer, however, to put my judgment upon this short ground, that the plaintiff's right of ingress from and egress to this 66 feet street is a private right, differing not only in degree, but differing altogether in kind, from the right which all His Majesty's subjects, including the plaintiff, have to pass and repass along this highway.

It is somewhat curious that the cases in England as to the right in connection with exit to a street are very few. That may be because such a state of affairs as exists here could hardly exist there, where in most cases the owner of the land is also the owner of the adjoining highway, subject to the public easement or public right of passage and repassage. But in the case of *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662, it is taken for granted that the position of an owner of a piece of ground, so far as his right of exit to the street is concerned, is strictly

analogous to the position of a riparian proprietor in the matter of his access to the stream running before his place.

That being so, what Lord Cairns says seems to be very apposite here. He says, at pp. 671-2:

"Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not a right coming to him *qua* owner or occupier of any lands on the bank, nor is it a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public, for other members of the public have no access to or from the river at the particular place; and it becomes a form of enjoyment of the land and of the river in connection with the land, the disturbance of which may be vindicated in damages by an action, or restrained by an injunction."

I do not think there is anything in the case of *W. H. Chaplin & Co., Limited* v. *Westminster Corporation, supra*, that conflicts with, or which would warrant me in holding that this case does not fall within, the principle that was laid down in that case in the House of Lords. *W. H. Chaplin & Co., Limited* v. *Westminster Corporation*, was a case in which the municipal authority, under statutory obligation to light the streets, chose to place a lamp-post opposite the plaintiff's premises. The plaintiff thought it a bad place to put it, and asserted that it made his exit from his property inconvenient, and brought an action practically to force the municipal authorities to move it to some other place. The action was dismissed, and Mr. Justice Buckley laid down the general principle in the way I have quoted from the case in the House of Lords, and said that as a matter of fact he would be prepared to find that with regard to the alleged interference with the plaintiff's right, there was really no obstruction of the plaintiff's right of access to and egress from his property. In that case the defendant municipality had the right to do what they did, even though it might, *ex necessitate*, abridge the adjoining owner's right.

Judgment

Now, here the plaintiff is entitled to what I may call a commodious enjoyment of the whole 66 feet street, which lies in front of his premises. It is shewn in the evidence that owing to the size and length of the timbers which have to be taken on

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his premises, the obstructions that are now there will materially lessen his enjoyment of his rights (and I think they are properly called his "rights") in respect of this 66 feet street in front of the property. Being of the opinion, therefore, that there is a clear infringement of the plaintiff's rights, and that inevitable and irreparable injury will result if the Court withhold its hand, I think he is entitled to a mandatory injunction for the removal of the obstructions placed there, and also to a general injunction in perpetuity from placing any obstructions on the highway to interfere with the plaintiff's commodious enjoyment of his right of entrance from and egress to the street. The plaintiff, of course, will be entitled to the costs. The mandatory injunction will be suspended for three months to allow of an appeal from my judgment.

Judgment

Order accordingly.

[Note:—No appeal was taken.]

FULL COURT

1908

Dec. 11.

BARRY v. DESROSIERS.

BARRY v. DESROSIERS

Trespass — Encroachment — Proof of location — Authority of surveyor to determine.

The posts planted at the time of the survey of a city lot having been destroyed by a general fire which swept over the block of land in which the lot was included:—

Held, on appeal, that a surveyor could not determine the location of the lot by apportioning the apparent shortage among all the lots in the block.

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 15th of July, 1907, to recover possession of a portion of a city lot encroached upon by the defendant's building, and for a mandatory injunction directing the defendant to remove the building. In a fire, 23 years previously, which swept the entire block in which the lot in question

Statement

was included, the survey posts were destroyed. On the re-survey the block was found to be six inches short of the quantity of land shewn by the original survey, and this shortage was apportioned *pro rata* among all the lots in the block. Defendant's building it was alleged, encroached on plaintiff's lot to an extent varying from three-quarters of an inch down to zero. The learned trial judge came to the conclusion that the cause of action was not due to any error in the survey, but to a mistake on the defendant's part as to his boundaries, and gave judgment in favour of the plaintiff for $100 as full value and compensation for the land encroached upon, with costs up to the delivery of the statement of defence which was accompanied by the payment by defendant into Court of $150; subsequent costs to defendant.

Statement

The appeal was argued at Vancouver on the 11th of November, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Macdonell, for appellant (plaintiff): Our claim is for possession and a declaration of our ownership. The amount of damage should be the cost of removing the encroaching building, or so much of it as to give us our rightful quantity of land. The learned judge below is in error in fixing the value of the land at $100. He has in reality given an expropriation judgment. The cost of removal will be about $200, and we ask for a variation of the judgment to that extent: see *Mayfair Property Company* v. *Johnston* (1894), 1 Ch. 508.

Martin, K.C., and *Craig*, for respondent (defendant): If the structure is placed on appellant's land, then it becomes his property. Further, we submit there is no evidence as to the exact location of lot 3. All the survey posts in that locality were burnt in the fire of 1886. On examination and re-survey, this block was found to be six inches short according to the original survey, and this shortage has not been satisfactorily accounted for. Therefore appellant has no right to make this claim until he establishes by proper evidence the exact location of lot 3 in question.

Argument

Macdonell, in reply.

Cur. adv. vult.

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11th December, 1908.

HUNTER, C.J., concurred with CLEMENT, J.

IRVING, J.: Owing to the destruction by fire of the original pegs, and to a mistake in the survey, it is a matter of surmise as to where the true boundary between lots 1 and 2 is.

As the plaintiff was bound to establish that boundary, his action should have been dismissed.

IRVING, J.

I would allow the cross-appeal, set aside the judgment in favour of plaintiff and dismiss plaintiff's appeal.

CLEMENT, J.: Whether the ground covered by the lot in question is to be determined by the position of the stakes planted when the original survey was made, or by the metes and bounds as shewn on the filed plan of that survey, it seems to me impossible to say that the evidence shews that the defendant's building encroaches upon lot 3 (plaintiff's lot). The lot stakes have long since disappeared and no evidence was attempted to fix their position. As to the metes and bounds, the evidence shews a shortage of six inches in the total frontage of the block on Hastings street and there is no evidence to shew how or where the error was made. I know of no principle of law which authorizes us to say arbitrarily that the error was one extending uniformly along the whole frontage, or, in other words, to say that as matter of law each lot must suffer a proportionate abatement. In the absence of any such arbitrary rule—which in my opinion the Legislature alone can prescribe and no such legislation is put before us—it becomes a pure piece of guess-work upon which no judicial pronouncement can be properly founded. If—which is as good a guess as any other—the error was not in staking out either lot 1 or lot 2 nor in their metes and bounds as set out on the plan filed, then the defendant's eastern boundary is the eastern line of the wall in question where it abuts on Hastings street.

CLEMENT, J.

The appeal of the defendant should be allowed with costs and the action dismissed with costs, but there should be no costs of the plaintiff's appeal.

Appeal allowed.

Solicitors for appellant: *Baxter, McLellan & Savage.*
Solicitors for respondent: *Martin, Craig & Bourne.*

G.—— v. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA.

CLEMENT, J.

1908

Dec. 1.

G.——
v.
COLLEGE OF DENTAL SURGEONS

Statute, construction of—Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 39—Whether retrospective.

Section 39 of the Dentistry Act, empowering the Council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act.

APPEAL under section 48 of the Dentistry Act to a judge of the Supreme Court, heard at Victoria on the 30th of November, 1908, before CLEMENT, J.

Statement

The appeal was from an order of the College of Dental Surgeons, made after an inquiry held under section 39, by which the appellant's name was struck off the register of practitioners.

A. E. McPhillips, K.C., for the appellant: The infamous conduct alleged took place in October and November, 1907, whereas the Act came into force on the 7th of March, 1908, and therefore does not come within the purview of the Act, as the section in question should not be considered to be retrospective. The facts proved do not come within the meaning of the words "infamous or unprofessional conduct."

Argument

The following cases were cited in support of the appeal: *Knight* v. *Lee* (1893), 1 Q.B. 41; *Hickson* v. *Darlow* (1883), 52 L.J., Ch. 453; *Emerson* v. *Skinner* (1906), 12 B.C. 154; *Re Roden and City of Toronto* (1898), 25 A.R. 12; *Gardner* v. *Lucas* (1878), 3 App. Cas. 582 at p. 603; *Moon* v. *Durden* (1848), 2 Ex. 22; *The Village of St. Joachim de la Pointe Claire* v. *The Pointe Claire Turnpike Road Co.* (1895), 24 S.C.R. 486; *Nicholson* v. *Fields* (1862), 7 H. & N. 810 at p. 817; *Phillips* v. *Eyre* (1870), L.R. 6 Q.B. 1 at p. 23.

Reid, K.C., for the College of Dental Surgeons: That part of the section of the Act referring to infamous and unprofessional conduct is retrospective and applies equally to conduct prior to

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Dec. 1.

G.——
v.
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Argument

Judgment

the passing of the Act as well as to conduct after the passing of the Act, it being a question of character and the wording of the Act justifying the inference. The following cases were cited: *The Queen* v. *Vine* (1875), L.R. 10 Q.B. 195; *In re School Board Election for Parish of Pulborough* (1894), 1 Q.B. 725 at p. 734; *Ex parte Pratt* (1884), 12 Q.B.D. 334; *The Queen* v. *General Council of Medical Education and Registration* (1861), 30 L.J., Q.B. 201; *Allinson* v. *General Council of Medical Education and Registration* (1894), 1 Q.B. 750; *Leeson* v. *General Council of Medical Education and Registration* (1889), 43 Ch. D. 366; *Clifford* v. *Timms* (1908), A.C. 12; *Allbutt* v. *General Council of Medical Education and Registration* (1889), 23 Q.B.D. 400; *Ex parte La Mert* (1863), 4 B. & S. 582; *In re Telford* (1905), 11 B.C. 355 at pp. 364 and 368; *Ex parte Gutierrez* (1873), 45 Cal. 429.

1st December, 1908.

CLEMENT, J.: On the question of the Council's jurisdiction to enter upon an inquiry as to the appellant's professional conduct or misconduct prior to registration, I am unable to distinguish this case from *The Queen* v. *General Council of Medical Education and Registration* (1861), 30 L.J., Q.B. 201. The language of section 29 of the English Act there in question and of section 39 of the Dental Act (1908), Cap. 2, here in question, is practically identical, and I think I should follow the decision in that case.

On the merits—or demerits—I think the appellant's case hopeless. The Council has set up a standard of professional conduct with which I entirely agree, *viz.*: that the relations of a dentist with his office staff should not be—as here—flagrantly immoral. The appeal is dismissed with costs.

Appeal dismissed.

WILSON v. WARD

IRVING, J.
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WILSON
v.
WARD

Architect—Instructions to prepare plans—Limitation as to cost of building—Extraneous conditions—Municipal by-law—Compliance with.

Where an architect is instructed to prepare plans for a building to cost not more than a certain sum, but which building must also comply with other conditions as to accommodation under a municipal by-law, then although, in order to comply with such other conditions, the tenders sent in are in excess of the sum mentioned, the architect cannot recover for his services.

APPEAL from the judgment of IRVING, J., in an action tried before him at Victoria on the 19th and 20th of March, 1908. Statement

Luxton, K.C., for plaintiff.
Fulton, K.C., for defendant.

IRVING, J.: I think the plaintiff is entitled to judgment in this case. He is an architect, suing for the following services rendered, preparing preliminary plans in May, 1904, for a brick hotel at Kamloops; and also for making amended plans of a frame building; $200 on the second, and $540 for the first. The defendant is a manager of companies, apparently. He was engaged in promoting the company for the construction of a hotel in Kamloops. In answer to the statement of claim he says that the work was not done for him, but for the Canadian Hotels Company, Limited. Now, first with reference to that, there had been correspondence between the plaintiff and the defendant in which it appears that the defendant said that he himself had purchased a site at Kamloops and had built foundations, and that he himself intended to form a company to take over this for the purpose of building a hotel on this site, and that Mr. Alexander was looking after the matter for "me," that is for him personally. And he w[illegible]s to know what Mr. Wilson's fee will be. He writes sometim[illegible]s as if he were personally responsible, but at other times he speaks of "my people" and "the company." On the 20th of April, 1904, he telegraphed to the plaintiff to IRVING, J.

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meet him at Vancouver. They met, and there was a conversation. Mr. Ward says in his evidence taken on commission, that he distinctly gave the plaintiff to understand that the work was to be done for a company and not for him. Mr. Wilson, the plaintiff, gives a different account, and says no such thing was said, that he understood that he was contracting with Mr. Ward. Mr. Alexander, the third person present, says that he does not remember anything definite being said about Ward's liability. As there was no company formed at that time, and as I am perfectly satisfied with the way in which Mr. Wilson gave his evidence here, I accept his statement and I believe what he has said in the box, and I disbelieve what Mr. Ward said in his evidence. That disposes of the first question as to whom he was working for. The contract was with Mr. Ward. There is another point confirming Mr. Wilson's story that I might refer to before I depart from this. In no place in the correspondence does Mr. Ward take the trouble to inform Mr. Wilson of the fact that the company for which Ward now says Wilson was working ever had been incorporated.

Then, the defendant sets up this other defence, that the undertaking on the part of the plaintiff was to prepare plans which would enable the hotel to be built at a cost not exceeding $18,000, and that if he did not succeed in drawing plans upon which the company could get tenders at $18,000 or upon which a hotel could be built for $18,000, he was not to be paid anything. That was not the agreement made at the time.

IRVING, J.

I find as a fact that there was no express agreement to that effect made between the parties. I do not see why I should imply any such term in the contract that was entered into between them. The agreement that was entered into was this: Ward had a site on which he had erected certain foundations and which he hoped to turn over to a company, and he wanted to get a hotel built on those foundations, to contain at least 30 bedrooms, so as to satisfy the requirements of the licence law, and of material sufficient to comply with the requirements of the fire by-law, and he wanted it to contain as many rooms as possible, and he also wanted it built and equipped as to heating and plumbing for $18,000. It seems to me impossible for Mr. Wilson

to have undertaken to do that, to guarantee that all that would be done for $18,000; he was to do the best he could and see if it could not be done for $18,000, because the other requirements, those other than the price, had to be complied with. And it is significant that Mr. Alexander says that when Mr. Wilson was there in the hotel he was not asked to make an estimate of what this thing would cost. Mr. Wilson did his best, I presume. He prepared a set of plans, sent them to Mr. Alexander, advertised for tenders, but they could not get any suitable prices. In the meantime, the fire by-law had been repealed at Kamloops, and thereupon Mr. Alexander requested Mr. Wilson to proceed with plans for another building, this time to be of frame; and he took the old plans and he produced a fresh set of plans for a frame building. In respect of that second lot of plans he charges $200 only. In the meantime the company according to Mr. Ward, had become "bust," according to the expression used—Mr. Wilson had "bust" up the company by telling Ward that the first building would cost $20,000; but as a matter of fact I think Mr. Ward is mistaken. I do not think the company at that time had burst up, because Mr. Alexander goes on communicating with Mr. Wilson. However that may be, Mr. Wilson advertised here at Victoria, he sent a request to Mr. Alexander, Mr. Ward's agent at Kamloops, to advertise there. Mr. Alexander for some reason or other, possibly because he had received instructions from home not to do so, we do not know how that is, at any rate did not advertise there; and I say it is impossible to say that Mr. Wilson put on paper a building that could not be built for $18,000, having regard to the fact that no one at Kamloops was asked to tender on it.

IRVING, J.

It seems that after a while Mr. Wilson sent in his bill. He addressed it first of all to Mr. Ward; but he received a friendly letter from Mr. Alexander saying, "I think you had better make this bill out to the company, only in making it out or writing about it do not mention my name in any way, I do not want to appear in it." And Mr. Wilson then did what was not a very wise thing, he made out a bill to the company. But I do not think that that in itself constitutes an innovation, I think the object Mr. Wilson had in his mind was to facilitate the payment,

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and I am not prepared to say that, when a man makes out a bill under such circumstances, he thereby then and there adopts the company as his debtor and releases the original contractor. Certainly he would if the company accepted it. But the company had a right to repudiate it, and have repudiated it, then why should he be deprived of his remedy against Ward? Later on Mr. Ward came out here and said, "you have got no personal claim against me," and proposed to pay him $100 out of his own pocket, and that would come from the company. Mr. Wilson refused to accept the company, and insisted upon being paid by Mr. Ward. I think he has the right to be paid by him. But instead of being entitled to $750 on the first, he is entitled only to $540, because, as I have said, that letter of the 23rd of April is an agreement on his part to accept $540 to prepare those plans. I do not think that the sum of $200 is at all unreasonable on the second set of plans. And the charges going up to Vancouver have been sworn to, and, I think Mr. Ward says in his commission evidence, are not unreasonable, $5 for boat expenses and $10 for expenses there. Judgment for those three sums, with costs.

IRVING, J.

The appeal was argued at Vancouver on the 11th of November, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Argument

Bodwell, K.C., for appellant (defendant): Where an architect enters into a contract to make plans for a building, he is to confine the plans to the proposed cost of the building. It is his business to know what a building will cost, and make his plans accordingly: see *Flannagan* v. *Mate* (1876), 2 V.L.R. 157; Hudson on Contracts (1891), p. 51; *Moneypenny* v. *Hartland* (1826), 2 Car. & P. 378.

Luxton, K.C., for respondent (plaintiff): Wilson was asked to do his best for $18,000, but the providing of certain accommodation was imperative. He had to draw the plans before he could know what the building would cost.

Bodwell, in reply.

Cur. adv. vult.

11th December, 1908.

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HUNTER, C.J.: In this case the sole question is whether under the contract between the architect and the owner the latter was not to be liable for the cost of any plans which involved an expenditure of over $18,000.

As to this it seems to me that the plaintiff has concluded himself by his letter of April 23rd, in which he says "which I understand is to cost not more than $18,000, in addition to foundations, etc., already executed"; this letter was replied to by telegram of the 25th, to proceed with the plans and the two together constitute the contract. The plaintiff, moreover, in his account of the negotiations says "And we discussed the proposed arrangements, the accommodations they wanted; he said that he did not want it to cost over $18,000. If I remember right that was the main thing he started in with; he wanted to impress on me that he did not want it to cost more than $18,000; it had to comply with certain conditions." I see nothing in the evidence to shew that this condition was waived or receded from by the defendant; in fact in a letter of June 22nd, after tenders had been called for, with the result that $25,000 was the lowest offer, Ward says in reply to the letter of the plaintiff of the 31st of May suggesting a new arrangement, "the price I gave you was $18,000, including heating and plumbing, and I am afraid that unless you can reduce your plans to meet this we shall not be able to go ahead, etc."

It was argued that Alexander's statement to the plaintiff that he did not think that Ward would object to a small excess in answer to the plaintiff's statement that he was between the devil and the deep sea, was sufficient to authorize the plaintiff to go ahead with the new plans; but I see nothing to shew that Alexander had any authority on behalf of Ward to allow the price to be exceeded. I would therefore allow the appeal.

MORRISON, J.: MORRISON, J.

CLEMENT, J.: CLEMENT, J.

Appeal allowed.

Solicitor for appellant: *F. J. Fulton, K.C.*

Solicitors for respondent: *Pooley, Luxton & Pooley.*

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BISHOP OF NEW WESTMINSTER v. CITY OF VANCOUVER

THE BISHOP OF NEW WESTMINSTER v. THE CORPORATION OF THE CITY OF VANCOUVER.

Municipal law — Arbitration — Property injuriously affected — Lowering grade—Right of owner of abutting property to take arbitration proceedings—Vancouver Incorporation Act, 1900, Cap. 54, Sec. 133, Sub-Secs. 5 and 9.

The owner of property abutting on a street, the grade of which has been lowered by the Corporation, is entitled to arbitration for determining whether his property has been injuriously affected.

APPLICATION by the Roman Catholic Bishop of New Westminster under sub-section 9 of section 133 of the Vancouver Incorporation Act, 1900, for an order appointing an arbitrator for the City. Heard before CLEMENT, J., at Vancouver on the 17th of December, 1908. The City having lowered the level of two streets upon which certain property vested in the applicant abuts, and the applicant, deeming himself entitled to compensation under sub-section 5 of section 133 for the damages which, as was alleged, resulted to the property, commenced arbitration proceedings as contemplated by the Act. Sub-section 5 reads as follows:

Statement

"The Council shall make to the owners or occupiers of or other persons interested in real property, entered upon, taken or used by the Corporation in the exercise of any of its powers, or injuriously affected by the exercise of any of its powers, due compensation for any damages (including the cost of fencing when required) necessarily resulting from the exercise of such powers, and any claim for such compensation, if not mutually agreed upon, shall be determined by arbitration under the following sub-sections."

L. G. McPhillips, K.C., for the applicant.

J. K. Kennedy, for the Corporation.

21st December, 1908.

CLEMENT, J.: It is not alleged that any property of the applicant has been "entered upon, taken, or used" and for the purposes of this application I take it that the claim of the applicant is only for damages resulting from this property being

Judgment

"injuriously affected by the exercise" by the City of its powers respecting grade-lowering.

The only point taken by counsel for the City is that for damages so resulting the City is not liable; at all events not liable by virtue of sub-section 5 and therefore not obliged to arbitrate. The argument is that section 133 in its opening clause is limited—to put it shortly—to the case of expropriations and that the various sub-sections including sub-section 5 must be governed by that limitation. Sub-section 5 is certainly not so limited in terms and I think I must give effect to its plain language. *Cohen* v. *South Eastern Railway Co.* (1877), 2 Ex. 253 at p. 260, 46 L.J., Ex. 417, seems to me decisive upon the point: see Hardcastle, 3rd Ed., 224-5.

The history of the section in question convinces me, moreover, that sub-section 5 was intended to mean just what it says. In the original Vancouver Incorporation Act, 1886, Cap. 32, Sec. 199, Sub-Sec. 17, specific provision was made for cases of grade-lowering. By the amending Act of 1891, Cap. 72, Sec. 31, this sub-section 17 was repealed along with all the other sub-sections of section 199 and a new set of sub-sections was substituted; and these new sub-sections began with what is now sub-section 5, a clear indication to my mind that it was to be the key of the situation. The field was widened, not restricted. In the consolidating Vancouver Incorporation Act, 1900, other sub-sections have been interposed, but I think sub-section 5 is still operative to the full extent of its plain language.

Judgment

Another argument, and to my mind a very cogent one, is that if sub-section 5 be read in the limited sense contended for by the City we would have an instance of legislative authority given to injure a man's property without compensation. While that is possible, the Courts consider it most improbable, and so lean to the construction which affords adequate protection to the private citizen: see *per* Brett, M.R., in *Attorney-General* v. *Horner* (1884), 54 L.J., Q.B. 227 at p. 232.

The order will go for the appointment of an arbitrator for the City.

Order accordingly.

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GORDON v. HORNE, HOLLAND AND HOLLAND.

Partnership—Action to establish—Declaration that one partner is trustee for the others—Profits—Dissolution of partnership—Accounting.

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Plaintiff and the two defendants Holland were real estate agents in partnership, but entered into certain investments on their own account (aside from the agency business) in the purchase of three lots, on account of which they paid down $294. Being unable to meet the succeeding calls when due, they invited defendant Horne into the transaction, he to pay 85% of the purchase money and the remaining three to contribute 15%, the profits to be divided. Horne took over the agreements to purchase and eventually received a conveyance of the lots. There was a verbal agreement that if a sale could be effected before the second instalment of the purchase money became due, and if that sale netted a profit of over 15% the old partnership should share with Horne equally in the profits. This sale was not made, but four months after the due date of the instalment, Horne sold a half interest:—

Reversed by S.C. of Can. 42 S.C.R. 240

Held, on appeal (*per* HUNTER, C.J., and CLEMENT, J.), that Horne was a trustee for the partnership consisting of the plaintiff, himself and his two co-defendants.

Per IRVING, J.: That Horne was not called upon to account until he had been re-imbursed the money he had been compelled to put into the transaction.

APPEAL from the judgment of MORRISON, J., in an action tried before him at Vancouver on the 13th and 18th of December, 1907, for a dissolution of partnership, an accounting and a partition of the partnership property.

Statement

The appeal was argued at Victoria on the 10th of June, 1908, before HUNTER, C.J., IRVING and CLEMENT, JJ.

A. D. Taylor, K.C., for appellant (plaintiff): Plaintiff Gordon, and the two defendants Holland were real estate agents in partnership, but entered into one or two deals on their own account. The question is, on what basis does Horne come into the transaction. Horne provided $1,506, and the firm of Gordon & Holland $294. The documents were assigned to Horne. The result is that Gordon and the Hollands are absolutely shut out by the trial

Argument

judge's judgment, although they took part in the payments. The verbal arrangement made when this transaction was entered into was that there was to be a division of the profits up to 15% to Horne, but if the property realized more, then half to Horne and the remaining half to the other three parties. We say there was a partnership in this property, which was in the name of Horne.

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W. S. Deacon, for respondents (defendants): Gordon has no interest, and has no right of action. When the property is sold, the proceeds will be divided. There was no plea made for a division of the profits, and we never refused to account or said we would not divide when profits arose. On plaintiff's own case he is not entitled to share. Horne was simply buying him out.

Argument

Cur. adv. vult.

11th December, 1908.

HUNTER, C.J., concurred with CLEMENT, J.

HUNTER, C.J.

IRVING, J.: Appeal from judgment of MORRISON, J., who dismissed the action and cancelled the *lis pendens* filed by plaintiff against blocks 2, 10, and 11, lot 320.

The action was brought for a dissolution of partnership alleged to have been existing between the parties to the action in relation to three blocks of land in district lot 320. According to the plaintiff's contention, Horne was to contribute 85% of the purchase money and the others the remaining 15% of the purchase money, and the profits were to be divided.

It appears that the plaintiff and the two Hollands had been in partnership and that they in the spring of 1906 had bought these three lots and had paid a deposit on account thereof of $294.

IRVING, J.

The payments were to be $1,800 cash of which the $294 was to be taken as part—$906.25 on 15th November, 1906, and the balance in four equal instalments payable on 15th May, 1906, 15th November, 1907, and 15th May, 1908, with interest, amounting in all to $5,391.25. The old partners were unable to make any payments on account other than the $294.

To save the plaintiff and his partners an assignment, Horne was invited to come into the deal. He took these contracts and in May, 1906, deeds conveying the three lots to him were executed.

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On the faith of representations made to him by W. S. Holland that a sale could be made before the first instalment of $906.25 became due, and that at a profit of 15% to him on his money, Horne verbally agreed if the profit from the sale of the premises netted over 15%, the old partnership should share equally with him in the profits; if less than 15% then they were not to participate. If there was a profit to him they would of course receive back their $294 cash deposit, but apparently, they were so sure of a sale being made as anticipated, they made no agreement with Horne as to the return of their advance.

The sale could not be made as quickly as expected, and on the 15th of November, 1906, the parties were confronted with difficulties and questions to which they had given but little attention, but in March, 1907—that is before the second deferred payment became due—Horne managed to sell one-half interest for $7,008.50.

IRVING, J.

Horne claims he has been compelled to make the following payments on the original contract, *viz.*: $1,506; $906.25 on 15th November, 1906; $895 on 15th May 1907; $895 on 15th November, 1907, in all $4,202.25.

From Ewing, to whom he sold the half interest, he has only received: $1,500 cash and $1,500 1st of June, 1907, $3,000; and the balance is not yet payable, and no further sales have been made.

The learned judge accepted Horne's statement and decided that there was no partnership, and that the real and only agreement was that of 29th May.

I do not think Horne is called upon to account to the plaintiff until he has received his money and I therefore think the judgment was right in dismissing the action.

CLEMENT, J.

CLEMENT, J.: The learned trial judge gave entire credence to the evidence of the defendant Horne. Upon that evidence it seems to me with all deference, that the plaintiff is entitled to judgment in his favour. Horne says:

"The Holland Realty Company had certain money in this property. Mr. Holland informed me that they had some money in there and unless they got someone to take it up they would lose it, and on consideration of their letting me get the property at the same price as they paid, namely,

$125 per acre, I agreed with them that when the property was sold, anything above 15 per cent. I would divide equally between the Holland Realty Company and myself."

And in the cross-examination this appears:

"Is that correct that the whole $125 per acre—referring to the original purchase price—was to be paid back first before the division of profits? There was nothing said about that, though I had agreed to do it.

"Would it be fair? The agreement I have already repeated to you at least three times.

"And you were to pay back the $125 per acre first? No; there was nothing agreed about that.

"Nothing agreed about that? No; that is another agreement altogether.

"But the Holland Realty Company were in on it for half the profits? Yes; for half the profits.

"And of course, whatever money they put up, they were to get back, besides the profits? There was nothing said about that; I would do it.

"And that you were to do it? No; nothing mentioned in the agreement, but I would do it."

In my opinion, we must hold on this evidence that defendant Horne is a trustee of the lands in dispute for the partnership consisting of himself, his two co-defendants and the plaintiff. Consultations were had as to contemplated sales of the property and nowhere do Horne's actions suggest that he considers himself at liberty to sell without regard to the wishes or without the consent of his fellow adventurers. His bald statement that he was the absolute owner must be taken to refer to the legal estate, which for his protection was to be vested in him alone.

CLEMENT, J.

Then again, Horne has so acted in this trust or partnership that the plaintiff is entitled to have the partnership at once wound up. With a view to closing out the transaction—so far at all events as the plaintiff was concerned—Horne told plaintiff that he, Horne, was selling to one Ford at a certain figure, whereas no sale to Ford was ever contemplated, Ford being simply an *alias* for Horne himself. The transaction was in truth an attempt to buy out the plaintiff on the basis of the price named as the price Ford was paying and on payments long deferred. The document then signed by Horne should, I think, bind him and should preclude us from finding in his favour that the division of profits should take place only after he had withdrawn a special preferred profit of 15% on his investment. In other words, subject to his share of the profits being sufficient

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to net him a 15% profit on his investment, he should (at all events as against the plaintiff) receive one-half only of the profits on this transaction as they may appear on the final winding up. The plaintiff is entitled to one-sixth.

Again, Horne by his pleadings in this action absolutely denies the plaintiff's rights and sets up against him the Statute of Frauds.

In my opinion, therefore, the appeal should be allowed with costs and there should be a declaration as above indicated, with a reference to the registrar to take the usual partnership accounts and to wind up the partnership.

CLEMENT, J.

The plaintiff should have his costs up to and inclusive of the trial and of this appeal.

Appeal allowed.

Solicitors for appellant: *Cowan & Parkes.*
Solicitors for respondents: *Wade, Deacon & Deacon.*

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BROWN v. BROWN.

Divorce—Appeal—Jurisdiction of Full Court.

The Full Court of the Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. *Scott* v. *Scott* (1891), 4 B.C. 316, followed.

APPEAL from an order of HUNTER, C.J., at Chambers, in Vancouver, on the 14th of December, 1908, fixing the amount of interim alimony to be paid by the respondent to the petitioner. The grounds of the appeal were: that the order was wrong in ordering interim alimony being paid until the decree was made absolute; that the order should not have provided for interim alimony being paid after the date of the decree *nisi, viz.*, the

20th of March, 1907, or in any event within a period of six months from that date.

The appeal was argued at Victoria on the 12th of January, 1909, before IRVING, MORRISON and CLEMENT, JJ.

Bodwell, K.C. (*Killam*, with him), for respondent, took the preliminary objection that no appeal lay to the Full Court from an order of a single judge in a proceeding under the divorce jurisdiction of the Supreme Court.

Davis, K.C., for appellant, on the question of jurisdiction: From observation of the practice in divorce and matrimonial cases in British Columbia from the earliest times, it is plain that each judge here exercising the jurisdiction occupied the same position in these matters as the Judge Ordinary in England. Therefore, the Divorce Act being in force here, all the machinery of the Supreme Court is available to carry the Act into effect. *Scott* v. *Scott* (1891), 4 B.C. 316, was merely a decision that there was no appeal to the Full Court. Outside of that point, the case is only *obiter dictum*. The Act being in force, according to the decision of the Privy Council, all that can be done is to use the machinery available. Therefore the various officers and judges of the Court here are made to correspond with those in England. Because the Full Court mentioned in the English Act is not the Full Court in British Columbia, it is putting a heavy strain on the principle of interpretation to say that we, while availing ourselves of the rest of the judicial machinery, cannot also use that.

Argument

[CLEMENT, J.: It was my idea that, there being no Full Court before Confederation, then, when Confederation came, it required Federal legislation to take an appeal from a member of the Supreme Court to any tribunal.]

I say that notwithstanding legislation, and notwithstanding the provisions of the English Act, by reason of the practice of one judge here exercising the power which the Judge Ordinary had in England, they have simply shewn that all the analogous machinery will be utilized. We have an appeal in interlocutory matters to the Full Court.

[CLEMENT, J.: This Full Court is purely a statutory tribunal.]

The statute says we have an appeal. There is no escape from

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that. I have just as much right to be heard here on an appeal as the petitioner has to be heard with reference to a petition for divorce. There was always an appeal in interlocutory matters.

[CLEMENT, J.: What about the period before Confederation?]

We must use such machinery as we have and as is applicable to the condition of the country, and as supplied from time to time. For example, there may have been a time when some of the provisions of the Act were nugatory here. Having the Act in force, the rights given by it must be enjoyed by the public. As to *Scott* v. *Scott*, *supra*, a case is authority only for what it decides.

Bodwell, was not heard in reply.

On the 20th of January, 1909, the following was read as the judgment of the Court by

Judgment

IRVING, J.: This is an appeal from the learned Chief Justice who made an order for the payment of alimony.

The only question before us is as to the right of appeal against the order.

The contention of counsel for the appellant is that as the Privy Council has by its decision in *Watt and Attorney-General for British Columbia* v. *Watt* (1908), A.C. 573 declared, in effect, that the Imperial statute of 20 & 21 Vict., Cap. 85, as amended by 21 & 22 Vict., Cap. 108, is in force in this Province, all the machinery of the Supreme Court of British Columbia, so far as the same is applicable, or at any rate, the procedure followed in civil cases in this Court, should be adopted in divorce matters, and as under the Imperial statute an appeal was given from the decision of a single judge, so an appeal lies to this Full Court, or to some other Court.

In our opinion the decision of *S*—— v. *S*—— (1877), 1 B.C. (Pt. 1) 25, which the Privy Council has affirmed, did not go so far. We cannot agree that all the machinery, and all the rights by the Imperial statute conferred upon suitors in the English Court were necessarily introduced into this Province either by the English Law Ordinance, 1858, or by the statute of the United Colonies of the 6th of March, 1867.

The Proclamation of the 19th of November, 1858, and the

statute of the 6th of March, 1867, brought into the Colony of British Columbia the law of England so far as it was not inapplicable. That declaration established the right to divorce or separation by the Civil Court and abolished the old ecclesiastical jurisdiction and also the action of *crim. con.* It also conferred the right to apply for alimony to the Court, and conferred upon the Court the power to vary marriage settlements. It established what for convenience we may term the jurisprudence of divorce. But it by no means follows that it introduced all the machinery designed by the framers of the Imperial statute to carry out that jurisprudence as it was proposed to be carried out in England. At the date of the proclamation a Court was in existence in this Colony consisting of one judge, and there was also in existence until 1871 a law-making power which had jurisdiction to modify or amend the law brought into force by the proclamation as it should think fit. Having regard to the fact that there was in 1858 no Court to which an appeal could be taken, it seems to us to be an impossible contention to support that, because the jurisprudence was applicable to the Colony, a right of appeal, when there was no Appellate Court, was also applicable.

It appears to us more in accordance with the condition of affairs at that time to accept the view that although the jurisprudence came in as it stood on the 19th of November, 1858, insofar as it was not inapplicable on that particular day, the right of appeal would be a matter to be dealt with by the law-making power when the Colony required a Court of Appeal. At that time no appeal was given in any matter: the appeal to the Privy Council being the only remedy open to a dissatisfied suitor. It was not until 1869 that provision was made for allowing two judges to sit together, not for the purpose of hearing appeals, but only in such cases as they should think fit.

Judgment

Immediately after the decision of *S*—— v. *S*——, *supra*, the three judges who constituted the Court when that decision was given, met and promulgated certain rules (dated 21st March, 1877). It may be observed that in these rules no mention whatever is made of an appeal to any Court, although a motion for a new trial in a case tried by jury is mentioned, and an application

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to a single judge for a re-hearing is contemplated. This by no means determines the point before us, but we think it is worthy of notice.

In our opinion the case of *Scott* v. *Scott* (1891), 4 B.C. 316, holding that no appellate jurisdiction in divorce had been conferred on any Court in this Province by Imperial, Dominion, or Provincial statute, was correctly decided.

Appeal dismissed.

Solicitors for appellant: *Davis, Marshall & Macneill.*
Solicitors for respondent: *Macdonell, Killam & Farris.*

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YOUNG v. MARYLAND CASUALTY COMPANY.

Insurance—Accident—Death by drowning—Evidence sufficient to go to the jury.

Deceased was insured in the defendant Company "against loss of life while sane, resulting directly and independently of all other causes from bodily injuries effected from external, violent and accidental means." There was evidence that he had been drinking heavily just previous to his death, which occurred while he was on a fishing trip. His companion had left him cooling his bare feet in a stream, but on returning to him in less than half an hour afterwards found him lying in about 27 inches of water, his boots and socks on his feet, and his fishing rod on the bank, with the handle in the water. There was an ante-mortem bruise on the back of the head. It was suggested that he was subject to fainting spells, or dizziness, and evidence was given that he had had one of such spells a few weeks before the accident. There was also evidence that he was not in a firm condition, physically, and had to take a rest several times during his walk to the fishing place on the day of the accident:—

Held, on appeal (*per* HUNTER, C.J., and MORRISON, J.), upholding the verdict of the jury at the trial, that the direct cause of death was by drowning, and that the Company was liable.

Per IRVING, J.: That there was not sufficient evidence to justify the case going to the jury.

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APPEAL from the judgment of CLEMENT, J., and the verdict of a jury, in an action tried at Vancouver on the 27th of March, 1908. The facts are set out in the head note and reasons for judgment of the Full Court.

The appeal was argued at Vancouver on the 16th of December, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Davis, K.C., for appellant (defendant) Company.
Martin, K.C., and *Reid, K.C.*, for respondent (plaintiff).

Cur. adv. vult.

20th January, 1909.

HUNTER, C.J.: This is an action by a widow on an accident policy insuring the life of her husband.

By the terms of the policy he was insured "in the amount of $5,000 against loss of life while sane, resulting directly and independently of all other causes from bodily injuries effected from external, violent and accidental means."

The deceased met his death by drowning while fishing from a dam in a small stream to which he had proceeded in company with a friend named Walker on the 26th day of May, 1907. According to the latter's account, the deceased was bathing his feet in a flume when he last saw him alive. He did not see him fall into the water, but some 18 minutes later he found him lying in about 27 inches of water about four feet from the bank of the dam, but notwithstanding his attempts he was unable to revive him. He had put on his socks and shoes and had seemingly been attempting to fish at this spot, as his rod was found lying upright against the bank of the dam, with the handle in the water.

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While various theories were propounded as to how the accident happened, the jury evidently came to the conclusion that death was caused by the deceased having slipped from the top of the dam, which was about five feet above the surface of the water, and being rendered unconscious by reason of the fall when he struck the water.

It was suggested that he might have had an attack of heart disease, but the testimony of the doctors who were at the

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autopsy, and gave it as their opinion that he was alive when he reached the water, lends no countenance to that theory, and it may accordingly be put aside. Another theory put forward was that he was liable to fainting spells or dizziness, but there was only one of which there was any evidence, and which occurred a few weeks before the accident. It was, however, elicited from Dr. Gillies that the deceased might possibly have got such a spell through bathing his feet in the cold water of the flume. There was also evidence that he had been freely using intoxicants before he went on this trip, and it was suggested that this fact might account for the occurrence, and that he slipped or tumbled in by reason of his shaky condition. On the other hand, it was brought out that there were two logs close to where the deceased was found, either of which he may have struck in his fall, or he may have struck some object in his descent; and there was evidence of an ante-mortem bruise on the back of his head which might have caused unconsciousness. That he was unconscious when he began to drown is reasonably certain, as he was drowned in very shallow water, and it only remained for the jury to find the cause of the unconsciousness. They were confronted with four different theories, *viz.*: heart failure, fainting spell or dizziness; shock from impact with the water, and being stunned in the course of the fall; and they, as already said, evidently accepted the latter as being the most reasonable explanation, and

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in view of the fact that there was evidence of a bruise on the head which could have caused unconsciousness, and that only one instance of giddiness had been proved, it seems to me impossible to say that the finding was unreasonable. Indeed, I would go so far as to say that it was the most reasonable conclusion in view of the fact that the rod was found standing against the bank with the heavy end in the water, as although no medical opinion was led as to this, it seems to me that if there had been heart failure, or a seizure, then either he would have been found grasping the rod, or that at any rate he would have carried it down with him, whereas it was natural for him to have dropped the rod if he had slipped and realized that he was tumbling in.

In any event the cases of *Winspear* v. *Accident Insurance Co.* (1880), 6 Q.B.D. 42; *Lawrence* v. *Accidental Insurance Co.*

(1881), 7 Q.B.D. 216; and *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (1893), 58 Fed. 945, cited by Mr. *Martin*, shew that in this class of contract, in the absence of a clearly expressed contrary intention, the liability is determined by the *causa sine qua non*, and not by the *causa causans* or *causæ causantes* as the case may be. Here the *causa sine qua non* was indisputably the water, and the *causæ causantes* on one hypothesis was a seizure and fall and on the other a slip and a blow producing unconsciousness.

I would, therefore, dismiss the appeal.

IRVING, J.: In my opinion the appeal should be allowed on the ground that there was not sufficient evidence to justify the case being left to the jury.

The facts are not in dispute, but can anyone say that the death was the result of an accident independent of a fit or other physical weakness, or that the drowning or rather the falling into the water which preceded the drowning, did not result from some cause other than accident?

The onus was on the plaintiff to prove that death (1) resulted from an accident; and (2) that directly, and (3) independently of all other causes.

The unfortunate man at the time of his death was alone—no one knows how or why he fell. His health had been poor for some time. On the day of the accident he was run-down, nervous, physically shaky, trembling. He had suffered during the night before from an attack of cramp in his legs. He was subject to dizziness or fainting spells and he had that morning immediately before the accident bathed his feet in icy cold water after walking a mile and a half. During this walk he had to sit down two or three times to rest, but there was nothing in the condition of his internal organs to give a clue to the cause of his death. Now, with this testimony coming from the plaintiff's witnesses, it is not possible to say that death was the result of an accident directly and independently of all other causes. It may have been caused by a cramp, or a fainting fit, or a fall from sheer weakness.

When the case for the plaintiff is closed with the evidence in

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this condition, it is for the judge to determine whether there is any case to go to the jury.

The best way to state the law on this point is to refer to the language of Maule, J., in *Jewell* v. *Parr* (1853), 13 C.B. 909 at p. 915:

"I also think there was no evidence to go to the jury, that is to say, no evidence sufficiently pointing to one conclusion in preference to the other, to warrant them in finding either of the two material allegations in the plea, *viz.:* that the bill was negotiated by Allen before it was due, and that it was paid by him when due was affirmatively proved. Perhaps it cannot with strict propriety be said, where the facts proved are not inconsistent either with the affirmative or the negative of the allegation sought to be established, that there is *no* evidence to go to the jury. That would exclude many cases where no doubt there would be evidence, though slight, which ought to be submitted to the jury. Applying the maxim *de minimus non curat lex*, when we say that there is no evidence to go to a jury, we do not mean that there is literally none, but that there is none which ought reasonably to satisfy a jury that the fact sought to be proved is established. There may be evidence upon which a jury may properly proceed, although the contrary is possible; for instance, when the question is whether a certain document is in the handwriting of A.B. and a witness conversant with the handwriting of that person states that he believes it was written by him, it is consistent with that evidence that the document may not be in the handwriting of A.B., and yet the jury would be well warranted in coming to the conclusion that it was, even though there might be witnesses on the other side to pledge their belief that it was not. In the case of presumptive evidence of a given fact, all possibility of the contrary is not necessarily to be excluded: a very high degree of probability must often be treated as an absolute certainty. Even in criminal cases, it constantly happens that evidence is acted upon, even to the infliction of the highest penalty of the law, which is not inconsistent with the innocence of the party charged. Here, however, there is not that class or any class of evidence of that sort: the evidence given does not even raise a presumption in favour of the affirmative of the propositions which it was essential to the defendant to establish. It is at least equally probable upon the evidence that the bill was not negotiated and paid by Allen and afterwards re-issued—supposing that that would afford a defence—as that it was."

And Cresswell, J., at p. 918:

"I think that (the evidence) was not enough to enable any person to form a judgment upon the question. Juries are not to indulge in conjecture, but to deal with facts that are properly proved before them."

For these reasons I am of opinion that the learned judge should have withdrawn the case.

I think there is some weight in the argument that the refusal

by the jury to say specifically what caused the deceased to fall into the water indicates that they too felt there was no preponderating evidence on what was the point left to them.

I do not think the maxim *contra proferentem* can be urged in this case. That rule should not be applied so as to get rid of the plain meaning of words in a contract. Here a stipulation has been introduced in favour of the Company. If it is clear, we should give effect to it. If it is not clear, then and only then the maxim *contra proferentem* can be invoked.

It has been suggested that it is not possible to distinguish this case from the case of *Lawrence* v. *Accidental Insurance Co.* (1881), 7 Q.B.D. 216, and the case decided by Mr. Justice Taft of *Manufacturers' Accident Idemnity Co.* v. *Dorgan* (1893), 58 Fed. 945. The decision in each case must turn on the true construction of the words used. In the *Lawrence* case the true meaning of the proviso (p. 221) was that if the death arose from a fit, that is to say, *directly* arose from a fit, then the company were not liable, even though accidental injury contributed to the death. In commenting upon the judgment on the *Lawrence* case, Taft, J., says, p. 955:

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"As can be seen from the words of Mr. Justice Williams, quoted above in the *Lawrence* case, if that policy had provided that it should not apply to an accident to which a fit contributed *indirectly*, the company would not, in his opinion, have been liable."

Denman, J., at p. 220:

"If the words had simply been these 'this policy shall not attach in cases where the death is caused by an accident jointly with a fit,' I should have thought it was a case in which in all probability the defendants would be entitled to our judgment."

In my opinion the defendant Company in framing the policy we have now under consideration have met this very point by the last of the three stipulations I have mentioned in the earlier part of my judgment, *viz.*: that the plaintiff must establish that the death resulted from an accident independently of a fit or all other causes.

MORRISON, J.: The deceased was insured by the defendants against (1) Bodily injuries not intentionally self-inflicted sustained by the assured while sane, and effected directly and independently of all other causes through external, violent and

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accidental means, suicide, sane or insane included; (2) Disability from illness as hereinafter provided.

Whilst out fishing he was left by his companion sitting on the edge of a dam bathing his bare feet in the cold waters of the runway. The sloping embankment of the dam was about four feet high. In about 15 minutes after his companion left the deceased, he returned and found the deceased prostrate, face downwards, in the water of the dam, which at this point was about 28 inches in depth. The deceased then had his shoes on. His companion worked for some hours in a vain attempt to resuscitate him. As it is admitted by the defendants that there was sufficient evidence of drowning to be left to the jury, it is not necessary to further refer to that aspect of the evidence.

For some months before his death he had been in a run-down condition owing to overwork. And on one occasion, at least, had been seized in his club with a fit of some sort. During the morning of his death and the day before he appeared to have been in a nervous, shaky condition, and whilst on the way to the dam in question from their lodging that morning he was obliged to rest several times—the distance being not over a mile or two.

There is no direct evidence as to how he came to fall into the water. The theory of the defendants is that he fell in a fit and it is contended that his death was due jointly to that and the drowning—that he was not drowned directly and independently of all other causes, and the cases of *Lawrence* v. *Accidental Insurance Co.* (1881), 7 Q.B.D. 216, and *Winspear* v. *Accident Insurance Co.* (1880), 6 Q.B.D. 42, are differentiated.

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Under the ascertained circumstances of this case are the defendants contractually liable? I think they are. The only substantial evidence of the cause of death is that it was caused by drowning. The jury may well take into consideration the surrounding conditions of a resort such as the place in question, and the condition of the body, the head bearing as it did external evidence of contact with some blunt object, such as a snag, and be justified in concluding that he got into the water by slipping and falling on a log rendering him insensible or in such a state that he could easily drown in such a depth before completely

recovering; in short, that he was drowned directly through accidental means as against the theory of the defendants that he fell in from a fit.

During the argument it was contended that the word "solely," which is inserted in the policies in question, in some of the cases cited is not as comprehensive in meaning as the expression "directly and independently of all other causes."

The words "directly," etc., are in my opinion equivalent to "solely." The word "solely" eliminates all other causes and that is all that is contended for in respect to the other expression.

However, if the words are ambiguous then as Willes, J., said in *Fitton* v. *The Accidental Death Insurance Co* (1864), 34 L.J., C.P. 28 at p. 30, there should be a tendency rather in favour of the assured than of the company insuring, where there is any ambiguity in the language of a policy of insurance. Or, using the words of Mr. Justice Taft in *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (1893), 58 Fed. 945 at p. 956:

"It is a well-settled rule in the construction of insurance policies of this character, which the insured accepts for the purpose of covering all accidents, to construe all language used to limit the liability of the company, strongly against the company."

Applying the test of construction urged by the defendants, it might with equal force be contended that, inasmuch as the words in the policy indicating what the plaintiff was insured against, are "bodily injuries," that he cannot succeed because death was shewn to have been caused solely by drowning. But the law is the other way, and so with this expression. The injury must be effected directly independently of all other causes through external, violent and *accidental means* (or causes). If the drowning occurred directly from accidental means, it cannot strictly be said that the death occurred independently of all other causes than the drowning. I confess that I cannot conceive an expression, which is used deliberately with the object of limiting liability, being more ambiguous than that drowning can occur independently of all other causes through accidental means.

The expression necessarily involves a consideration of what is meant by "accident." In *Fenton* v. *Thorley & Co., Limited* (1903), A.C. 443, this word is fully defined, and the extent to

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which the Courts have gone in extending its meaning is illustrated by the very recent case in the House of Lords of *Ismay, Imrie & Co.* v. *Williamson* (1908), A.C. 437, where the deceased, destitute and half starved, obtained a passage from New York, shipping as a trimmer on board the steamship Majestic. He was a miserable creature physically, undersized, underfed and so emaciated that, as one of the witnesses says "his bones projected." The work of trimmer is trying work owing to the heated atmosphere of the stokehole. He had no experience of the work and shortly after he started he had a "heat stroke." He went on until he fell in a faint. He was sent to hospital and died through exhaustion two hours after leaving the stokehole. It was held that that was an injury by accident in the ordinary sense of the expression. The rays of heat from the boiler impinging on his body caused the exhaustion from which he died, as Lord Ashbourne put it. And the Lord Chancellor at the conclusion of his speech, at p. 439, said :

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"I feel that in construing this Act (The Workmen's Compensation Act) of Parliament, as in other cases, there is a risk of frustrating it by excess of subtlety, which I am anxious to avoid."

Such a construction of the term in question of this policy as is suggested on behalf of the defendants, is so despairingly ingenious that it seems to be well within the meaning of the above quotation.

I would dismiss the appeal.

Appeal dismissed, Irving, J., dissenting.

Solicitors for appellants: *Cowan & Parkes.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

[See *Etherington* v. *Lancashire and Yorkshire Accident Insurance Company* (1909), 25 T.L.R. 287.]

BRYCE *ET AL.* v. CANADIAN PACIFIC RAILWAY COMPANY.

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Practice—Costs—Increased counsel fee—Fiat for—Application to judge—Procedure applicable—Principles governing.

On an application for increased counsel fee, no formal summons is necessary ; merely a letter notifying the other side of intention to apply at a time mutually convenient, and the applicant should have a certificate from the registrar, shewing dates and extent of sittings and the highest fee taxable by the registrar. These facts should be submitted without any argument.

Observations on the reasons which will be taken into consideration by a judge in exercising this discretion.

APPLICATION by defendant Company for a fiat for increased counsel fees on the trial of six consolidated actions. Heard by MARTIN, J., in Victoria, at Chambers, in June, 1907. Statement

Peters, K.C., for plaintiffs.

Bodwell, K.C., for defendant Company.

14th June, 1907.

MARTIN, J.: I am asked by the defendants' counsel to grant a fiat for increased counsel fees on the trial of these six consolidated actions. Seeing that applications of this kind are of late becoming more frequent (probably in view of the recent greatly increased cost of living which doubtless compels solicitors to brief leading counsel correspondingly) it seems opportune for the information of the profession to give my reasons for granting the application so that it may be some guide on future occasions. Judgment

These cases, though tried together, yet involved some distinct issues, so I decided that it would be proper to allow each side to be represented by three counsel, regarding, for the purposes of taxation, two of them as seniors and one junior. The Court was assisted by two nautical assessors, and the matters in issue were of unusual importance and of a nature to require sustained close attention. The Court sat on eight days, five of which were long sittings, generally from 10 to 5 with one hour's adjournment for

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lunch, and the three others were from one-quarter to three-quarters as long, these broken days being caused by the usual Saturday half holiday and the unexpected detention *en route* of a witness from a great distance. I mention this because no delay was caused by any oversight on the part of counsel or solicitors.

Now the mere fact that a case lasts many days is not to be taken as a ground for increased counsel fees—because cases are but too often, at great expense to the litigants and the inconvenience of all concerned, regrettably protracted by unpreparedness, unpunctuality, long unnecessary adjournments, and unduly short hours of sitting. But on the other hand where a case is conducted, as was the one at bar, with skill, punctuality and expedition, there results a great saving of expense and valuable time, not to speak of the minimizing of inconvenience to a large number of persons, which should be recognized by the Court, because what should primarily be regarded is not the mere time taken up by a trial but the skill displayed in the handling of it. In other words, it is quality and diligence, and not quantity and delay that govern my discretion.

It is just, therefore, in this case that effect should be given to the foregoing principles and in applying them to the facts (which must differ more or less in each case) I have decided to allow a fee of $800 to one of the leading counsel, Mr. *Bodwell*, and $750 to the other, Mr. *Davis*, who was absent on one day's fractional session. To the junior, Mr. *McMullen*, who did not formally appear at the three sittings in Victoria, I allow $225.

Judgment

Because of some uncertainty in the practice, I take this opportunity of stating that applications for fiats are not made on a formal summons: a notification by letter to the other side of intention to apply at some convenient hour is sufficient. The applicant should have with him, for convenient reference, a memorandum (not certificate) from the registrar shewing the hours of sitting and the highest fees that the tariff permits him to tax on his own discretion. No argument is heard, but merely a statement is made of such facts as are necessary for the exercise of the judge's discretion.

Order accordingly.

ANGUS AND SHAUGHNESSY AND THE COLUMBIA AND WESTERN RAILWAY COMPANY v. HEINZE.

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Partition—Lands subject to agreement to convey—Agreement—Construction of—Taxation—Evasion of—Exemption from—Railway subsidy lands—B. C. Stat. 1896, Cap. 8.

There is a substantial distinction between a conveyance and an agreement to convey.

Where, therefore, an agreement provided for a formal conveyance by one party to the other party of the latter's moiety, upon the latter's request:—

Held, that provisions respecting partition of the property did not come into effect until the execution of such conveyance.

Held, also, that the question that the clause providing for the formal conveyance was merely a device to escape taxation, could be raised only in a proceeding by the Crown.

APPEAL from the judgment of CLEMENT, J., directing a reference to ascertain what lands were obtained from the Province of British Columbia by the plaintiffs, the Columbia and Western Railway Company, as subsidy lands and directing a sale of a portion of the lands comprising the Castlegar Townsite and ordering a partition as to the balance of said subsidy lands. The action was tried at Vancouver during July, August and September, 1907. Statement

The defendant was the principal owner of, and controlled the Columbia and Western Railway Company, and on the 11th of February, 1898, he entered into an agreement with the plaintiffs, Angus and Shaughnessy, that for the consideration therein mentioned he was to transfer to them all the shares of the capital stock of the Columbia and Western Railway Company which had been issued at that time and also the bonds theretofore issued by the Company, and certain other lands and properties mentioned in the agreement, and the said shares, bonds, lands and other properties were accordingly duly transferred.

At the time of such transfer, in March, 1898, the Columbia and Western Railway Company had earned certain lands by way of

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subsidy from the Province of British Columbia under the Columbia and Western Railway Company Subsidy Act, 1896, Cap. 8 of the statutes of 1896, and subsequently to such transfer, namely, on the 3rd of October, 1901, Crown grants were issued to the Railway Company for the said subsidy lands.

The agreement between the defendant and the plaintiffs, Angus and Shaughnessy, provided that as soon as the shares and bonds were transferred they (Angus and Shaughnessy) would cause a formal and valid instrument to be executed by the Columbia and Western Railway Company at the request of and in such form as the defendant might reasonably devise and present for that purpose, shewing that he was entitled to an equal moiety of the said subsidy lands.

The plaintiffs relied on certain clauses of Schedule C to the said agreement as entitling them to partition although no conveyance had been executed in favour of the defendant for the moiety thereof, nor had he requested any conveyance thereof, nor had he devised or presented for execution an instrument shewing that he was entitled to an equal moiety of the said subsidy lands.

The plaintiffs proved at the trial that they had served upon the defendant, under said agreement, a demand for partition of the lands.

Statement

The defendant contended that under the agreement, until he received a conveyance of his moiety in the lands, he had no interest capable of being the subject of partition.

The clause in the agreement upon which the defendant relied was as follows:

"And that as soon as the said shares and bonds and control be transferred and made over to the purchasers and their assigns in manner and to the extent hereinbefore provided for, the purchasers will forthwith cause a formal and valid instrument to be executed by the Columbia Company in such form as the vendor or his heirs or assigns may reasonably devise and present for that purpose, shewing that he and they are entitled to an equal moiety of all lands which the Columbia Company shall have earned at the time of such transfer by way of subsidy from the Province or Government of British Columbia and to which the Columbia Company may be or become entitled to by reason of the construction of so much of the Columbia Company's railway as is then constructed except so much of the said lands as the Columbia Company shall decide to use for

the purposes of its railway upon the terms and conditions set out in schedule C hereto attached."

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Davis, K.C., and *Marshall*, for plaintiffs.

Bowser, K.C., and *Reid*, for defendant.

13th September, 1907.

CLEMENT, J. (orally): In this case I have come to the conclusion that there is nothing to warrant the Court in expressing a doubt as to the right of this Company—indeed, their obligation—to implement the agreement entered into by Messrs. Angus and Shaughnessy with the defendant. The Company undoubtedly, on re-organization, ratified that agreement and took the benefit of it, and I think should also assume the burden. A perusal—probably somewhat hasty—of the Company's Act of incorporation left me with the impression that the very specific provision for raising money by way of mortgage upon this Provincial land grant negatives the idea that the Company could sell in a wholesale way, as in this case, their land grant; and having that impression I requested counsel to assist me in elucidating the point. Having had the benefit of those arguments, and having looked more carefully at the Company's Act of incorporation, and their Subsidy Act of the same session, I have come to the conclusion that the governing clause is the earlier clause of the statute, which provides that the Company may accept grants from any Government, and may sell or dispose of the same in such manner as the directors may deem proper in the interests of the Company. I think that is the governing provision; and the Company had the right, and under the circumstances it was their duty, to implement that earlier agreement.

CLEMENT, J.

Coming, then, to the matters directly at issue in the action, there are two distinct classes of property in question: There is, first of all, what I may call the Provincial land grant, and then there is the district lot on which is situate the townsite of Castlegar. Schedule C referred to in the agreement does not in any way touch the Castlegar property; but as to both of those properties I think that upon the re-organization of the Company, and upon the acquisition by the Company of the land grant from the Provincial Government, the Company held the property in question as to a half interest for themselves, and as to the

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other half interest as trustees for the defendant Heinze. It was not necessary in order to bring about that position that there should be the formal instrument which in the interest of Heinze was stipulated for in the agreement. The fact that a formal document has not been handed to him by the Company does not I think in any way affect the legal position. It was a provision, as the cases put it, *pro se introducto*; and that he did not choose to ask for the instrument and in fact has not got it, does not, I think, make any difference.

The plaintiff Company, is in my opinion entitled to specific performance of paragraph 3 of Schedule C of the agreement. I find that the conditions precedent mentioned in that paragraph have been complied with; that is to say, the notice has been duly served, and there has been failure on the part of the parties to the action to come to an amicable arrangement for partition.

Mr. *Bowser* argued that since that agreement was entered into there had been a substitution of a trust for sale. There is no doubt that arrangements were made between Heinze and the officials of the Company that from time to time as occasion offered, portions of the property might be sold; but I think that was a temporary arrangement, and did not in any way create a trust for sale so as to prevent the Court from decreeing partition. The cases of *Taylor* v. *Grange* (1879), 49 L.J., Ch. 24, affirmed on appeal (1880), *ib.* 794, and *Biggs* v. *Peacock* (1882), 52 L.J., Ch. 1, do lay down this proposition, that the Court will not decree partition in the teeth of a direct trust for sale; the principle underlying it being that where a testator has directed that lands are to be held by trustees for sale, and certain provision is made for disposition of the proceeds, that is a matter really outside of the Partition Act altogether, and the Court will not substitute its will for the will of the testator. So, here, I think, the temporary arrangement made for sales did not in any way weaken the effect of the earlier agreement; and, as I say, I think the plaintiffs are entitled to specific performance of it.

CLEMENT. J.

Then Mr. *Bowser* argues that as his client is entitled to a moiety of the land, under the Partition Act he is entitled to insist upon sale rather than partition. There is no doubt that the case of *Pemberton* v. *Barnes* (1871), 40 L.J., Ch. 675, approved of in the

House of Lords in *Pitt* v. *Jones* (1880), 49 L.J., Ch. 795, shews clearly that the onus is upon the party who desires partition to shew that there is "good reason to the contrary"; *i.e.*, against a sale. In other words, *prima facie*, there must be a sale if the defendant, the owner of a moiety or more, insists upon it. Here, I think, the very best reason is offered to the contrary; in short, the whole tenor of the agreement between the parties is for partition and not for sale. That consideration, however, does not apply to the Castlegar property. As to that, it is only touched by the one clause in what I may call the main agreement? As I have said, Schedule C does not apply to the Castlegar property; so that is held simply upon a bare trust by the Company. As to one-half, they are beneficial owners; and as to the other half they hold as trustees for Heinze. As to that, I think he is entitled to the benefit of the statute, and the Castlegar property will have to be sold.

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The judgment of the Court then will be, first, as to both the land grant and the Castlegar property, that there shall be a reference to the registrar to report as to what lands have been sold, and what sum is due to the defendant in respect of those sales after making all just allowances. So far, no request has been made on behalf of the defendant for an order in his favour for payment of what may be found due on the taking of that account. I think, however, the pleadings, if so desired, may be considered amended; and on further consideration the defendant should be at liberty to ask for payment by the plaintiffs of whatever may be found due to him. Secondly, as to the Castlegar property, there will be a decree for sale with reference to the registrar to carry it out according to the ordinary practice of the Court. Thirdly, as to the land grant, there will be a decree for partition in the modified sense in which that term is used in the Schedule C itself. There is a clause at the close of the Schedule which distinctly provides that the legal title is not to be vested in Heinze until he asks for it. That will be a matter that will be attended to on further directions; and in the meantime there will be, as I say, a decree for partition, in that modified sense, with a reference to the registrar to report a scheme in case the

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parties do not come to an amicable arrangement as to the way in which the partition is to be carried out.

As the defendant has, up to date, denied the right of the plaintiffs to the relief to which I adjudge them entitled, the plaintiffs are entitled to the costs of the action up to and inclusive of the judgment. Further directions and subsequent costs will be reserved.

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The appeal was argued at Vancouver on the 27th of April, 1908, before HUNTER, C. J., IRVING and MORRISON, JJ.

Bowser, K.C., A.-G., and *Reid, K.C.*, for appellant (defendant): We say that no formal and valid instrument of conveyance was ever presented by defendant. Further, the Crown grants of the lands went to the Railway Company, *ergo*, the plaintiffs Angus and Shaughnessy cannot ask for partition. Defendant for the same reason cannot apply, and the Company cannot because they were not parties to the agreement. No deed or conveyance is to be made before the year 1911, unless otherwise requested by defendant. All parties concerned in partition must have an interest in the land in question.

[HUNTER, C. J.: Of course there is a clear distinction between an actual conveyance and an agreement to convey: see *Commissioners of Inland Revenue* v. *Angus* (1889), 23 Q.B.D. 579.]

Argument

Pugh, and *Marshall*, for respondents (plaintiffs): We are entitled to specific performance of the agreement. The division asked for is not necessarily a conveyance; that can only be done a short time before the termination of the 10 year period. The agreement and correspondence between the parties clearly indicate an intention of division, and we are entitled to a division.

Bowser, in reply: Schedule C is not in the agreement. That only becomes operative when a "valid" document is given.

Cur. adv. vult.

11th December, 1908.

HUNTER, C.J.

HUNTER, C. J.: I think the appeal should be allowed on the ground that the provisions of Schedule C do not come into effect until the formal conveyance has been executed by the Company on Heinze's request.

The law recognizes a solid distinction between an agreement to convey and the actual conveyance: see *Commissioners of Inland Revenue* v. *Angus* (1889), 23 Q.B.D. 579, but the effect of the learned judge's judgment is practically to reduce this clause in the agreement to surplusage.

It is urged that this was only a device to enable Heinze to avoid exposing his interest to taxation. Assume that it is: this is a matter that can be agitated only in a suit by the Crown.

IRVING, J.: I agree.

MORRISON, J.: This is a straight action for partition, and the right of the plaintiffs to sustain it is contested by the defendant, who claims that if any action is maintainable then it should be for a sale in lieu of partition, and suggests that the plaintiffs are thus seeking to evade the agreement made substantially between the parties.

I have now had the opportunity of reading the judgment of my Lord, and agree that before Schedule C can be invoked there must be a valid instrument given by the Company as to the Heinze moiety; that the clause on page 8 of the agreement qualifies the stipulation in the schedule. I have only to add that the letter of the plaintiffs' solicitor, dated the 13th of March, 1906, written to the defendant, supports this view; for after referring to page 8 of the agreement and Schedule C thereto, he says "so far as I can ascertain, you have never submitted any instrument to the purchasers of the character of that indicated in the agreement, and have not requested them, either formally or informally, to sign any instrument shewing that you are entitled to such moiety," etc.

MORRISON, J.

I think, also, that section 8 of the plaintiff Company's subsidy Act, Cap. 8, B. C. Stat. 1896, should be considered in understanding the philosophy of the parties' position, as regards the question of exemption from taxation. I would allow the appeal.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Davis, Marshall & Macneill.*

MORRISON, J. (At Chambers)

1909

Feb. 2.

PLOWMAN v. PLOWMAN.

Divorce—Petition for dissolution of marriage signed by solicitor—Petitioner within the jurisdiction—Leave of Court—Dismissal of petition.

PLOWMAN v. PLOWMAN

Where the petitioner for divorce resides within the jurisdiction, the petition must be signed by the petitioner personally, except when cause is shewn to justify the Court in dispensing with that formality.

APPLICATION on behalf of respondent to dismiss a petition for dissolution of marriage on the ground that the petition was not signed by the petitioner, but by his solicitor. Heard by MORRISON, J., at Chambers in Vancouver, on the 2nd of February, 1909.

Spinks, for respondent, in support of the application.
Walkem, for the petitioner, *contra*.

MORRISON, J.: This is an application to dismiss the petition herein for dissolution of marriage, which was signed by the husband's solicitor. The affidavit of the husband was taken at Red Deer, Manitoba, 28th August, 1908, and a petition was afterwards signed by his solicitor in Vancouver, B.C., on the 25th day of September, 1908, without leave having been first given by the Court to sign and file the petition or allow its verification, by his solicitor on his behalf.

Judgment

The husband, the proposed petitioner, is shewn to be residing within the jurisdiction and nothing appears, or is suggested, to justify me in dispensing with his signature.

In all the cases cited the leave of the Court was first given: *Ex parte Bruce* (1881), 6 P.D. 16; *Ex parte Hobson* (1894), 70 L.T. N.S. 816; *Ross* v. *Ross* (1882), 7 P.D. 20.

In *Ex parte Tartt* (1886), 34 W.R. 368, leave was refused to have the affidavit sworn and the petition filed on behalf of the applicant on the ground that he was absent from the country by his own will and not involuntarily as in *Ex parte Bruce, supra.*

MORRISON, J. (At Chambers)

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Hall on Divorce, at p. 779, says:

"Petitions must be signed by the petitioner, and personal service is in general required, inasmuch as it demonstrates the fact that the petition is the act of the petitioner; but if that fact be shewn by affidavit, the Court may allow either an original petition or a petition for variation of settlements to be signed or verified by the petitioner's solicitor on his behalf until such time as the petitioner can act for himself."

The petition is dismissed with costs.

Petition dismissed.

A. v. A. AND K.

CLEMENT, J.

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A. v. A.

Divorce—Petition by husband—Infidelity of wife—Husband also leading an immoral life—Discretionary power of Court—Exercise of—Refusal of husband's petition.

The Court will not, unless under very exceptional circumstances of excuse or palliation, grant a divorce to a petitioner guilty of adultery.

PETITION by a husband for divorce on the ground of the wife's adultery. Heard at Vancouver by CLEMENT, J., on the 28th of January, 1909. Neither the respondent nor co-respondent entered an appearance. The wife's adultery was proved, but the petitioner admitted that he, too, had been guilty of matrimonial infidelity. The parties were married in 1902 and lived together for about two years and a half. Two children were born of the marriage; a boy, still living, and a girl, who lived for a few months only, dying not long after the parents separated. The cause of the separation, according to the evidence of the husband, was that there was trouble over the children. "I thought they were not well taken care of. That

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was about the main trouble." He did not in his evidence suggest infidelity on the wife's part prior to the separation. She went to live with her mother, and her husband has since contributed nothing to her support. The boy is with friends of the father and is being maintained by him. Not long, apparently, after the separation the wife formed an illicit connection with the co-respondent, at that time a "roomer" in the mother's house, and they are now living as man and wife, styling themselves Mr. and Mrs. K. The petitioner, however, admitted that since the separation he had been leading an immoral life, visiting houses of ill-fame and from time to time indulging in promiscuous sexual intercourse with the inmates of such houses.

R. M. Macdonald, for the petitioner.

2nd February, 1909.

CLEMENT, J. [after stating the facts above set out]: By section 31 of the Matrimonial Causes Act, 1857, the Court is not bound to pronounce a decree of divorce if the petitioner has been guilty of any one or more of the matters mentioned in the section, one of which is adultery on the part of the petitioner. In other words, it becomes a question of judicial discretion to be exercised by the Court upon the facts of the individual case. But this principle seems firmly established by the authorities, *viz.*: that it is only in cases of exceptional character that the Court's discretionary power should be exercised in favour of a petitioner guilty, himself or herself, of adultery. This was the view expressed in *Lautour* v. *Her Majesty's Proctor* (1864), 10 H.L. Cas. 685, by "the learned Lords who had taken part in the framing of the Act." In England, since the Act of 1857, in two cases only has the discretion been exercised in favour of a guilty petitioner: in *Symons* v. *Symons* (1897), P. 167, 66 L.J., P. 81, and in *Constantinidi* v. *Constantinidi* (1903), P. 246, 72 L.J., P. 82; both before the late Lord St. Helier. This last cited case is the one relied on by Mr. *Macdonald*. Unfortunately for his client, that case can hardly be treated as an authority, even if the facts in the case at bar were at all similar. There the wife's conduct was so grossly immoral that Lord St. Helier held, in effect, that she was the conducing cause of the husband's errors.

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Here the husband and wife have practically agreed to lead their lives apart and each has been guilty of matrimonial infidelity. I can see no exceptional, palliative circumstances in the case to warrant me in divorcing this couple, even if *Constantinidi* v. *Constantinidi* were an instance of a proper exercise of discretion.

But that case is of very questionable authority, as is pointed out by Sir Gorell Barnes in *Evans* v. *Evans and Elford* (1906), P. 125, 75 L.J., P. 27, which is the latest pronouncement upon this matter. For the reason, as pointed out by the learned president, that this Court, in divorce cases, is dealing with a subject-matter of great gravity, I think it well to extract certain passages from that judgment in order that the public as well as the legal profession in this Province may be reminded of the principles upon which this Court should act in these unpleasant cases. First of all I repeat a quotation from a judgment of Lord Justice Vaughan Williams (see p. 29 of the Law Journal report), in which as it happened he was dealing with the very petitioner in the case of *Constantinidi* v. *Constantinidi* who, after securing his divorce, was seeking the aid of the Court to vary the marriage settlements, a discretionary power vested in the Court under section 5 of the Act of 1859. Lord St. Helier, acting on the same view as had influenced him in granting a divorce upon the husband's petition, acceded to the application for variation of the settlements; but his decree was reversed in the Court of Appeal (1905), P. 253, 74 L.J., P. 122. Lord Justice Vaughan Williams, at pp. 128 and 130, said:

Judgment

"In the exercise of the powers conferred by the Matrimonial Causes Acts the Court must have regard not only to the rights and liabilities of the person wronged and of the wrong-doer respectively *inter se*, but also to the interests of society and public morality, which generally require that the relief and benefit which the Court has the power of giving under those Acts shall hardly ever be given to those who themselves have been guilty of matrimonial infidelity. There may be such palliation of matrimonial infidelity by a petitioner as that public morality will not be outraged by the exercise of judicial discretion in favour of such a petitioner . . . . . but those cases must be very rare. I cannot myself see in the present case that the benefits intended to be conferred by the Legislature on husbands or wives who have been wronged can, having regard to the conduct of the husband in the present case, be conferred upon him without seriously trenching upon the spirit of public morality which seems to me to run through these Acts of Parliament."

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And Lord Justice Stirling, at p. 131, is also quoted as follows:

"In the exercise of every discretion which is vested in the Court, the Court must so use that discretion as to promote the interests of virtue and morality, and to discourage vice and immorality."

Sir Gorell Barnes in *Evans* v. *Evans and Elford, supra,* at p. 29, then states his own view of such cases thus:

"It must obviously be very rarely that the Court would be disposed to exercise its discretion in favour of the petitioner, and I am not aware of any case in which this has been done except the two cases above referred to of *Symons* v. *Symons* and the questionable case of *Constantinidi* v. *Constantinidi.*"

Later on he refers to the argument that it would be unreasonable to hold the petitioner and respondent bound for the rest of their lives by the tie of marriage, of which argument he says:

"It is sufficient to observe that for centuries marriage in England was indissoluble except by Act of Parliament; and when the Act of 1857 gave a right to sue in this Court, that right, as I have already noticed, was restricted by the provision, *inter alia*, that the Court should not be bound to pronounce a decree if petitioner were guilty of an offence specified in the proviso to section 31; so that, although in some systems of jurisprudence it may be considered inexpedient to hold persons bound by the marriage tie when both have been guilty of adultery . . . . that is not the position adopted in the law of England, which has to be administered in this Court."

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And he concludes in language which I make bold to adopt unqualifiedly:

"Although, therefore, it may be to the interest of the petitioner to accede to his application in this case, in my judgment it would not be in the interest of society and public morality and purity to do so; and there are no special circumstances in the case which would justify me in doing so, and I therefore exercise my discretion by refusing the petitioner a decree, and I dismiss the petition."

See also *Cox* v. *Cox and Warde* (1906), P. 267, 75 L.J., P. 75.

Petition dismissed.

[Note:—Since the delivery of the above judgment I have found two other cases in which, since 1857, the English Courts have granted a divorce to a guilty petitioner under very exceptional circumstances: *Freegard* v. *Freegard* (1883), 52 L.J., P. 100, a case of innocent bigamy, and *Collins* v. *Collins* (1884), 53 L.J., P. 116, where there had been a separation, a subsequent condonation on both sides, and a resumption of cohabitation. The subsequent misconduct of the respondent had been of the grossest kind.]

LAIDLAW AND LAURIE v. THE CROW'S NEST SOUTHERN RAILWAY COMPANY.

FULL COURT

1909

Jan. 20.

LAIDLAW v. CROW'S NEST SOUTHERN RAILWAY CO.

Railways—Fire on right of way spread to adjoining property—Condition of right of way—Origin of fire—Evidence—Burden of proof—Negligence—Dismissal of action.

Fire was seen smouldering in a dry stump on a high bank, about level with an engine smokestack, on defendant Company's right of way. Evidence was given that one engine passed the place ten hours, and another six hours previously. Evidence also went to shew that the right of way contained inflammable material, and that there were other fires, whose origin was unknown, in the vicinity of the right of way. The fire in question was first seen by some of plaintiffs' workmen, when it was insignificant in extent and the weather was calm, but the wind rising, the fire spread and burnt plaintiffs' mill property and a large extent of timber area:—

Held, on appeal (affirming the finding of IRVING, J., at the trial, dismissing the action), that there was no evidence to connect the setting of the fire by sparks from the defendant Company's engines.

Affirmed by Sc. of Can. 42 S.C.R. 305

APPEAL from the judgment of IRVING, J., in an action tried before him at Fernie on the 5th of June, 1908. The facts are shortly set out in the headnote.

Statement

The appeal was argued at Vancouver on the 20th and 23rd of November, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

S. S. Taylor, K.C., and *Lucas*, for appellants (plaintiffs): The right of way was in a dirty condition and negligently kept by the defendants. There is no doubt but that this fire originated from the defendant Company's engine. Even supposing the engine to have been in perfect condition, when we find a fire smouldering for hours as this did, and in such proximity to the track, the inference as to the origin of the fire is very strong. While the fire as it commenced might not or would not have destroyed our property, yet the dirty condition of the right of way is the contributing cause. The Company is engaged in a dangerous calling, and therefore must not be negligent: *The*

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Grand Trunk Railway Company of Canada v. *Rainville* (1898), 29 S.C.R. 201; *Senesac* v. *The Central Vermont Railway Company* (1896), 26 S.C.R. 642. He also cited *Smith* v. *London and South Western Railway Co.* (1870), L.R. 5 C.P. 98; *McGibbon* v. *Northern R. W. Co.* (1887), 14 A.R. 91; *Vaughan* v. *Taff Vale Railway Co.* (1860), 5 H. & N. 679; *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 at p. 338; *Canada Central R. W. Co.* v. *McLaren* (1883), 8 A.R. 564; *Scott* v. *London Dock Co.* (1865), 3 H. & C. 596; *Rigby v. Hewitt* (1850), 5 Ex. 240.

The Court of appeal may draw the inference which the trial judge should have drawn: *Snook* v. *The Grand Junction Waterworks Company* (1885), 2 T.L.R. 308 at p. 309; *Defiance Water Co.* v. *Olinger* (1896), 44 N.E. 238; *Babcock* v. *Chicago & N. W. Ry. Co.* (1883), 17 N.W. 909; Beven on Negligence, 3rd Ed., 492.

A. H. MacNeill, K.C., for respondent (defendant) Company: The assumption that although the fire may not have been started by the Company's locomotive, yet the Company are liable because of the condition of the right of way, was first set up in the argument before the trial judge. There is nothing in the pleadings on which such a cause of action can be based, and they should not now be allowed to raise a new issue: *Smith* v. *London & South Western Railway Co.* (1870), L.R. 5 C.P. 98, and the other cases cited by the appellant are not applicable here.

Argument

[HUNTER, C.J.: There was no duty on the Company to keep its right of way clear, but of course the moment it came to the Company's knowledge that there was a dangerous nuisance on its property, then it should have been abated. The man who maintains the nuisance is as bad as the man who creates it, but it strikes me that that was not argued before the learned trial judge.]

That was not the case before him. Because there was a fire on the right of way, it does not follow that it started on the right of way. The exact point of origin of the fire has never been fixed. There were five servants of the plaintiffs on the scene, and they took no notice of the fire and made no effort to prevent its spreading. If there was negligence on the part of the defendant Company, there was, in the circumstances, also negligence on the part of the plaintiffs. They should have

notified us. The Company is not bound to prove affirmatively that the fire did not originate on their property: *Furlong* v. *Carroll* (1882), 7 A.R. 145 at p. 159. The defendants here did not start the fire, and therefore *Rylands* v. *Fletcher* does not apply.

[HUNTER, C.J.: There may have been negligence in permitting it to spread.]

It is the duty of the plaintiffs to shew what train started the fire, if they allege it was started by one of our trains.

Cur. adv. vult.

20th January, 1909.

HUNTER, C.J. HUNTER, C.J., concurred in the judgment dismissing the appeal.

MORRISON, J. MORRISON, J.: Whilst the decision of the learned trial judge is a very close one, yet I am not prepared to say he erred in dismissing the action. He has found, in effect, that there is no evidence that the fire originated from an engine of the defendants. If that is right, then its origin is a matter of surmise.

Yet, if the learned trial judge meant that the fire seen by the Swedes originated on the defendants' right of way, in my opinion, he should go further and find that the defendants had discharged the duty upon them of observing an appropriate measure of vigilance to prevent damage being done to the plaintiffs, because if a danger of such a well-understood nature as fire on their right of way at that time of the year in that locality were brought home to them and the warning disregarded then there would be evidence of negligence to go to a jury. But, he does not say that the fire the Swedes saw was on the right of way, nor am I satisfied, from a close reading of the evidence and an inspection of the photographic exhibits produced, that the fire mentioned by the Swedes was in reality on the right of way. They did not approach the place, but saw it from the railway track, the smoke issuing from a stump situated on the embankment some 12 feet high and in from the track they say about 30 feet. Their view must have been of the most casual kind, as they were evidently not impressed with any danger of fire spreading for, if

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so, it would have been only an act of the most ordinary decency, not to say prudence, for them to have clambered up the bank and put it out, particularly as the property of their own employer was in the immediate vicinity and was ultimately destroyed. Besides, it was after the fire, which was of great volume, that they pretended to identify the very stump, an undertaking (having regard to the tangled condition of the locality) which discloses the possession of powers of observation not usual in ordinary labourers. It is common knowledge, with those who have to do with Courts of law, how loosely witnesses make use of distances, periods of time and the like details.

What strikes me as a matter of comment—and it doubtless impressed the learned judge the same way—is that, if the right of way was in the inflammable condition alleged and the engine so defective as to spark-arresting appliances, the fires were so long in starting up. It seems a curious coincidence that the only spark alleged to be emitted should find lodgment in a punky stump, where it lay smouldering possibly six or seven hours. There is some evidence that there were fires in the vicinity—the origin of which is not attributed to the defendants. Assuming that the stump in question was on the defendants' right of way, yet the origin of the fire may have been outside the right of way and that it ran along the undergrowth to the stump. There are a number of theories that might be advanced, but the plaintiff must, with certitude, prove that the damage was due to the defendants' negligence. Given negligence on the defendants' part and damage sustained by the plaintiff, it even then does not necessarily follow that the defendants are liable. They must be clearly connected up as it were.

MORRISON, J.

Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury: *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41.

I think that it is not sufficiently established that the point of origin of the fire was on defendants' right of way, or, if it was on the right of way, I think that the defendants were not aware

of its existence, and that they exercised a reasonable inspection over that part of their premises.

Under those circumstances the judgment should stand.

CLEMENT, J.: I find myself unable to say that the learned trial judge was wrong in declining to draw the inference that the fire in question originated from one of the defendant Company's engines.

The case must therefore be approached on the assumption that the fire was started by some agency other than these defendants, by whom or in what way being really unknown. If so, it comes within the description given by Lord Denman, C.J., in *Filliter* v. *Phippard* (1847), 17 L.J., Q.B. 89 at p. 92, of a fire which is accidental within the meaning of 14 Geo. III., Cap. 78, namely, "a fire produced by mere chance or incapable of being traced to any cause." That statute is, I think, in force in this Province: see *Canada Southern Ry. Co.* v. *Phelps* (1884), 14 S.C.R. 132 at pp. 143-4, and upon this ground alone the defendants are not liable.

But, assuming that statute not to apply, I still think the defendants are not liable. Two questions arise: Firstly, is a railway company bound to take precautions in advance to prevent or render unlikely the spread of such a fire as this, that is to say, a fire for the kindling of which they are in no way responsible, as, for example, by keeping a clean right of way? Secondly, if not in advance, after such a fire has come to their notice?

To dispose of this second question first: no such case was made at the trial either on the pleadings or in the argument as reported, or in the notice of appeal to this Court. But apart from all this, there is in my opinion no evidence of notice, so that the plaintiffs' case cannot be founded on any such ground as the negligent maintenance of a known nuisance.

The first question must, I think, be answered in the negative. I am unable to see any principle upon which it can be held that these defendants are bound to guard in advance against other peoples' carelessness or negligence. In the Law Journal report of *Smith* v. *The London and South Western Railway Co.* (1870),

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40 L.J.,C.P. 21, a somewhat similar case to this upon the facts, Kelly, C.B., is reported as saying, during the course of the argument, at p. 22:

"If sparks did not fall from an engine and cause the fire, there is an end of the case."

No dissent was expressed by any other of the learned judges. I think the proposition applies here and suffices for the disposition of this case.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Harvey, McCarter & Macdonald.*
Solicitor for respondent: *A. H. MacNeill.*

MARTIN, J.
1908
June 18.

FULL COURT
1909
Jan. 15.

CHARLES H. LILLY CO.
v.
JOHNSTON FISHERIES CO.

THE CHARLES H. LILLY COMPANY v. THE JOHNSTON FISHERIES COMPANY, LIMITED, AND A. R. JOHNSTON.

Company law—Unlicensed foreign company suing on a foreign judgment—"Doing business," what constitutes—Companies Act, 1897, Secs. 123, 143, 144—Winding-up proceedings—Notice of—Action against company in liquidation—Liquidator appearing for first time in action on appeal—Costs.

A foreign company is not precluded by any provision in the Companies Act, 1897, compelling registration before it can transact any of its business within the Province, from access to the Courts of the Province in the capacity of an ordinary suitor.

Per IRVING, J. (dissenting on this point): That the bringing of an action within the jurisdiction by an unlicensed foreign company was carrying on business as aimed at by sections 123 and 143 of the Companies Act, 1897.

Judgment having been obtained against defendants in a foreign jurisdiction, suit was brought in British Columbia on the foreign judgment. The defendant Company had been wound up prior to the commencement of the suit, but this was not pleaded and was only raised by counsel for defendant Johnston at the opening of the trial, the liqui-

dator of the Company not being present or represented; nor was the permission of the Court obtained to sue the Company:—

Held, that the plaintiff must pay the costs occasioned subsequent to the receipt of notice of the Company's legal position.

The liquidator of such a company appearing for the first time in the action when it came to appeal:—

Held, that he should have only such costs as he could have obtained on an application to a judge in chambers.

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APPEAL from the judgment of MARTIN, J., in an action tried before him at Vancouver on the 21st, 22nd and 28th of May, the 8th, 17th and 18th of June, 1908.

The facts upon which the decision turns appear sufficiently in the arguments and reasons for judgment.

J. A. Russell, for plaintiff Company.

Eberts, K.C., for defendant Johnston.

The Johnston Fisheries Company not represented.

MARTIN, J. (orally): There are two branches in this case. One is upon the judgment recovered in the State of Washington, and the other upon the original cause of action, the accounts between the parties.

I find both issues in favour of the plaintiff Company. I am satisfied that the defendant Johnston had notice of that Seattle judgment, and of the procuring of the proceedings in Seattle. I accept in the main, and substantially, the evidence of the witness Allen in favour of the plaintiff Company. There was an unfortunate contradiction of evidence, and I am sorry to say that the evidence on some matters in dispute is absolutely irreconcilable —that is the best opinion I have been able to come to, exercising the functions of a jury.

MARTIN, J.

In regard to the amendment which was allowed at the eleventh hour, and the new defence applied for the last day of the trial and which the learned counsel plainly could have put forward long before, that amendment was designed to make an attack upon the foreign judgment on the ground that it was procured by fraud in the State of Washington. I did allow that, being careful to allow the defendant the opportunity to raise every defence because of the amendment that had earlier been allowed

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the plaintiff, although in the ordinary course such a defence would not have been allowed at that stage.

That charge of fraud was a very grave matter, *viz.*: that there had been practically forgery committed in regard to the changing of certain Court documents. It is right to say that, to my mind, there was no justification for it at all. Judgment therefore will, as I say, go for the plaintiff on the foreign judgment and also on the original cause of action.

Some question of costs will probably arise, and if there is any counsel present to speak to that matter, I shall be pleased to hear it spoken to. Subject to that, the view I take of the costs is this, that as to the amendment made at the trial which allowed the plaintiff to raise as an alternative claim the original cause of action, in the ordinary course the costs of and consequent upon that amendment would have been payable by the plaintiff, and such would be the case now. But against that there is to be offset the indulgence of allowing the defendant Company to set up a charge of fraud at the eleventh hour, in regard to which, had reliance been placed upon it and pressed as it later was, it would have been necessary to get all the proofs which would have been available to the plaintiff to establish the original cause of action. For that reason, the proper order to make in regard to costs, as far as I have been able to work it out—though somewhat difficult—is that the plaintiff shall have the general costs of the action, subject to the defendant Johnston having the costs occasioned by one day's adjournment. . . . .

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The appeal was argued at Victoria on the 14th and 15th of January, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

W. J. Taylor, K.C., and *Twigg*, for appellant Johnston: The dispute in question here does not arise out of the original contract between the parties. That contract was for a certain quantity of fish which had to be caught. But an entirely separate transaction took place by which a cargo of fish was purchased. The bill of lading was in course of dealing transferred to Lilly & Co., who sold the cargo and it was sent to Japan. There was no proof of any shortage in the quantity. Johnston was not a party to the bill of lading. Whatever liability attaches to the

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captain of the ship or to the successive indorsers, none attaches to us. The action was originally launched upon the judgment recovered in Seattle against the Johnston Fisheries Co. and Johnston. The attorney there entered an appearance for Johnston without instructions. He had no notice of the proceedings. As to the purchase of the cargo of fish, there was no attempt to prove that such cargo was to be taken in satisfaction of the contract.

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[HUNTER, C.J.: What we are immediately concerned in, Mr. *Taylor*, is the status of this appeal here. At the previous hearing, you will remember, the Court took the point that the decision in *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, was wide enough to cut these people out from doing any kind of business in the Province. It was a matter of such importance to the commercial community that, after retiring, we decided that it would be better to have the matter re-argued.]

J. A. Russell, for respondent (plaintiff) Company, called upon on this point: A foreign company can only be registered. The provision in the Companies Act which would have any disabling effect, is section 123; but the Judicature Act gives any person the right to come here and sue any defendant who is found within the jurisdiction. The question of the right of a person or a company to sue is not within the scope of the Companies Act. Section 144, which provides that an extra-provincial company commencing proceedings in the Province shall give security for costs, implies the power to sue.

Argument

[IRVING, J., referred to sections 123, 138 and 143.]

It does not say anywhere that such a company shall *not* sue; the Act does not specifically take away the right of any extra-provincial company to sue. The mere suing is not doing any of the company's business in the Province. The law of nations gave us the right to sue.

[IRVING, J.: Yes; but the Provincial Legislature has altered the law of nations.]

The statute, we submit, does not say so in terms.

[HUNTER, C.J.: On further inspection of that section (143), you look at the words "not entitled to obtain a licence." That, it seems to me, is intended to strike at companies which should

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register. It is a direct prohibition on companies which are not British attempting to do anything in this Province unless registered.]

It is the commencement of that section which gives me trouble. That would appear to have something to do with some act of theirs within the Province, but we have done nothing within the Province to affect our rights.

[HUNTER, C.J.: That section seems to strike at this, *viz.*: You must be registered, apparently, before you are recognized for any purpose. It strikes me at present that it is broad enough to include any suit brought by a foreign unregistered company.]

Still, we submit, the forepart of the section does not carry that bearing. The Court has gone on since 1897 allowing foreign companies to sue: see *City of Halifax* v. *McLaughlin Carriage Co.* (1907), 39 S.C.R. 174. We have not done anything within the Province affecting our corporate rights, nor disentitling us to sue. The mere act of coming in to sue is not doing business, and the words "act, matter, disposition or thing," as used in the section do not include cause of action.

Argument

Prior, for the liquidator: The judgment against the Company is null and void, having been obtained after the winding-up order. The date of the latter was 13th March, 1907; the writ in this action was issued 16th October, 1907.

Russell, on this point: The same solicitor who obtained the winding-up order, entered the defence and took all the other steps in this action up to two days before the trial without saying anything about the winding-up proceedings. The liquidator appeared in Court with that solicitor, and made no application to amend, although he gave notice of application. He then palpably abandoned the position. We applied for leave to proceed against the liquidator. He has no right here now, as he was not before the Court below. If, as he contends, the judgment is null and void, there is nothing to set aside.

Taylor, proceeded on the merits.

Russell, was not called upon on the merits.

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HUNTER, C.J.: For my part, I do not see my way to interfere with the findings of the learned judge in which he states that he

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attaches credibility to Allen's evidence, and I think it is all the more difficult to impugn his findings as to that when one considers all the circumstances. The facts were that the Johnston Fisheries Company and Johnston were parties to a contract with this Seattle Company, and Mr. Allen in dealing with Mr. Johnston and Mr. Campbell informed them that he intended to bring suit on this contract, and there was a discussion as to which would be the most convenient forum, *i.e.*, whether the suit should be brought in the British Columbia Courts or in the Seattle Courts; and according to Allen's evidence, he says that in the course of this discussion Mr. Campbell said he wanted to get all the business into one suit, wanted to settle the whole thing up in that suit, and he distinctly intimated to Campbell in the presence of Johnston that the parties with whom he was concerned were Johnston & Company and Johnston, and not the parties to the bill of lading. And he also says that at the close of the interview Mr. Campbell undertook to enter an appearance. Now, it seems to me if this evidence is credible at all you must believe the entire account of it. That being so, there was a clear holding out of Johnston, that Campbell had complete authority as his attorney to act. Accordingly an appearance was entered for him and his interests defended, and it is impossible for us to accept his story afterwards that Campbell was not authorized to represent him. It seems to me it is a clear case of holding out, with the other attorney Allen acting on the representation that Campbell was authorized to enter this appearance. That being so, the defences we have heard discussed in this appeal should have been raised in the Seattle suit and it is impossible for us to investigate these things now.

HUNTER, C.J.

Now, with reference to the point raised by the Court itself, that this Company not being registered in accordance with the provisions of the Companies Act, they are thereby debarred from pursuing their remedy in our Courts, it seems to me, after the best consideration I have been able to give it, that section 143 does not necessarily imply any such intention. For my part, I must find plain legislation before I can come to the conclusion that it is the intention of the Legislature to interfere with the doctrine of comity by which foreigners, including

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foreign corporations, are allowed free access to our Courts. I think that section 143 was intended to enforce the distinction which is made in the earlier part of the Act, between licensed companies and registered companies. The Legislature clearly intended that those companies that were entitled to take out a licence should, when they took out a licence, be empowered to carry on their business in accordance with the provisions of their own charters. With reference to registered companies, it was intended that companies required to register should have no corporate rights whatsoever within the Province, except such rights as could be acquired by virtue of registration, in other words, such rights as are given by the Companies Act, and this is the intention of section 143. I find nothing in the section which necessarily imports the idea that no action by an unregistered company is to be entertained; in fact the next section undoubtedly contemplates that such actions may be brought, as it makes provision for security for costs.

HUNTER, C.J.

With regard to the appeal by the Company, it seems to me that the moment Mr. *Russell* was notified that the suit had been brought without the leave of the Court, or that he had received any information to that effect, it was his duty at once to ascertain the real fact, which he could have done by searching the files of the Court. That being so, I think he ought to pay the costs subsequent to the receipt of that notice. With regard to the earlier costs, I think there should be no costs. In regard to the costs of appeal, I think the liquidator is entitled to only such costs as he could have got on an application to a judge in chambers.

IRVING, J.

IRVING, J.: I agree with the disposition of the costs. With reference to the appeal from the judgment on its merits, the action was brought to enforce a judgment which had been obtained in Seattle. The only issue the judge had to decide was whether A. R. Johnston was aware that the foreign action was being carried on. The learned trial judge came to the conclusion that he, Johnston, must have been aware of it. In that conclusion I agree. [The learned judge then dealt with the facts.]

With reference to section 143, I now read that section with

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the mood changed. In the original it is in the passive—no act, matter or thing made, done or executed by the company. I now change it to read this way, "an extra-provincial company not entitled to obtain a licence—shall not make, or do, or execute (that is, be able to make, do or execute, or have power to enforce by action in any Court in this Province any act, matter, disposition or thing, done, made or executed), any act, matter, disposition or thing, although such act, etc., would be valid by the laws of its own country and under its original powers—unless such act, matter, disposition or thing be within the rights, powers and privileges granted by this Act and done and exercised according to the provisions of this Act." Now, when you turn to section 138 and see the powers that they may exercise under this Act, you find among the powers given, the power to sue.

As to the suggestion that was made, *viz.*, that this section only relates to the "acts, matters, dispositions or things" which would fit in with the three verbs used immediately afterwards, *viz.*: "made, done and executed," I feel confident that is not the way to construe the statute. In the first place, we have four general words, four nouns, and we have three verbs: it seems to me that the four nouns inserted in the Act were selected because they would include all kinds of acts, all kinds of things that a company could do, and that the verbs were selected to fit those words. If it is suggested that the verbs should form the guide as to what the nouns include, then we would expect to see the verbs arranged in the same order as the nouns which they qualify. But they are not in that order. It is impossible to say, taking the first noun and the first verb, that an "act" was "made," or, taking the second noun and the second verb, that a "matter" was "done." The three verbs, "made, done and executed," will agree with, will fit in and apply to the whole expression, "acts, matters, dispositions or things." So to my mind the proper way to read that section is this: nothing shall be of any force or effect or enforceable, no matter what the "act, matter, disposition or thing" may be, unless it is authorized by the provisions of this Act. That would include the power to sue. I agree with what we said before with reference to section 123.

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It seems to me on the evidence in this case, that what was done by the Company constituted doing business here.

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MORRISON, J.: As to the appeal on the merits, I agree with what has been already said by my Lord.

As to section 143, it seems to me quite clear that it has reference only to extra-provincial companies that have been registered or licensed.

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Taking all the other sections down to 143 under the rubric "General provisions applying to Extra-provincial Companies licensed or registered under this Act," they have reference specifically to registered extra-provincial companies. Section 143 seems to me to have reference to the transactions within the Province of an extra-provincial company, already registered, and therefore no construction of which it is susceptible will sustain the contention that there is no power to sue. The ordinary common law right to sue is not taken away or interfered with by the Act: *Great Western Railway* v. *Midland Railway* (1908), 2 Ch. 644, 77 L.J., Ch. 820; *Tiverton and North Devon Railway Co.* v. *Loosemore* (1884), 9 App. Cas. 480.

MORRISON, J.

I think the only point raised in this appeal is whether invoking the aid of the Courts is transacting business. It seems to me it does not in any way touch the case of the *Northwestern Construction Co.* v. *Young* (1908), 13 B.C. 297, or that the decision in that case could in any way affect or cut down what has been said here.

HUNTER, C.J.: Neither party will get any costs up to the time Mr. *Russell* received his notice; and after that Mr. *Russell* pays the costs of the trial. With regard to the costs of appeal, only such costs are allowed the liquidator as he could have got on an application to a judge in chambers.

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Appeal dismissed.

Solicitors for appellant Company: *Eberts & Taylor.*
Solicitor for the Liquidator: *C. J. Prior.*
Solicitors for respondent Company: *Russell & Russell.*

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Contract—Extraction of ore from mine—Right of contractor as against mortgagee of lessee to percentage of fund representing ore extracted—Bargain with lessee of mine—Right against mortgagee of ore claiming under lessee—Notice—Lien on fund—Fraud.

Where a miner takes out ore on a percentage basis, *i.e.*, for a fixed percentage of the smelter returns on the ore extracted, one taking a mortgage with notice of the agreement between the owner and the miner, cannot claim in priority to the latter.

APPEAL from the judgment of MARTIN, J., in an action tried by him at Nelson on the 13th of December, 1907.

The defendant Smith held a lease of the Payne mine at Sandon, B. C., from the owners, under which he agreed to pay the owners 15 per cent. royalty on all ore extracted and sold; he also agreed to pay 2 per cent. Government tax on ore. After he obtained that lease, he entered into an agreement with the plaintiff Forrest. That agreement contained an error, namely, "88" should read "78" and upon the trial this was found for the plaintiff upon the plaintiff's evidence, that the real agreement was to pay Smith the 15 per cent. royalty for the Company, then the 2 per cent. tax, then 5 per cent. for Smith, total 22 per cent., leaving 78 per cent. to Forrest and partners.

Statement

Smith borrowed money from Traves for the purpose of working the lease, and without the knowledge of Forrest gave a chattel mortgage to Traves covering the ore Forrest was then mining under the contract. Traves, however, admitted in evidence that at the time he took the mortgage and before, Smith had told him of the Forrest contract, and he, Traves, knew he was getting a mortgage on the Forrest ore. At the time the mortgage was given to Traves about half of the ore was then mined; the balance was *in situ*.

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

R. W. Hannington, for defendant Smith.

R. M. Macdonald, for defendant Traves.

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MARTIN, J.: It is established to my complete satisfaction that the words "eighty-eight per cent." in the contract (which I find was executed as dated) were written by mistake for "seventy-eight per cent." and that the error was in substance admitted by the defendant Smith. While the statement of claim does not in exact terms ask for a rectification of the document in that respect, yet from the facts alleged, particularly paragraph 2, that is what must necessarily follow, in the circumstances of this case, from what has been proved, and therefore the record may be formally amended to meet such proof, and the rectification will follow therefrom. Nor likewise is there any reason to doubt that the true arrangement between Smith and Forrest upon which the 78 per cent. was agreed was that their respective interests were made up and apportioned on the following basis: 15 per cent. royalty to the Payne mine; 2 per cent. tax to Government; 5 per cent. to Smith; 78 per cent. to Forrest.

Such being the case, the amount due to Forrest is simply a matter of calculation, which I leave to the parties, or to the registrar if there is any disagreement. But in any event I should, if necessary, be prepared to hold that in the strict construction of the wording of the contract the expression "all expenses in connection therewith" would not, on the face of it, reasonably include, having regard to the context, the royalty or the taxes—

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such obligations are foreign to the expenses which would ordinarily be contemplated by one who merely contracts to "mine and ship" ore under such a bald agreement as this is.

With respect to the second branch of the case against the defendant Smith, the claim for $509.53 under paragraph 10 should be allowed, but I see no reason for giving effect to the so-called counter-claim which is really a set-off, and it will be dismissed.

There remains still to be considered the relief sought against Traves. I am of opinion that as against him the action is not maintainable, because under the contract, which alone determines the rights of the plaintiff, he is not in the position of an owner, but is simply a contractor who receives his remuneration in a particular manner, which is not unusual in mining operations. The case of *Grobe* v. *Doyle* (1906), 12 B.C. 191, 2 M.M.C. 327,

supports this view. The action against Traves must therefore be dismissed. Judgment will therefore be entered for the plaintiff.

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The appeal was argued at Victoria on the 22nd of June, 1908, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

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S. S. Taylor, K.C., for appellant (plaintiff): We are appealing only as to Traves's judgment against us. We submit that Traves took his mortgage as to an undivided one-third in this ore, thereby admitting that while Smith might be nominally the owner of the ore, he was not actually so. We say that Traves had no mortgage on the ore, if he has, then it is only for 22 per cent. The rights existing between Forrest and Smith were known to Traves when he took his mortgage. We claim that the mortgage given to Traves cannot apply to this ore, because the ore was made personal property by being converted by Forrest into moveable property from ore *in situ*, under an arrangement that Smith had with Forrest providing as and when he so converted ore *in situ* into personal property (and this made it available for chattel mortgages), he did so under an arrangement by which the labour of so converting it gave him a 78 per cent. interest in the ore, and hence as Smith can only mortgage that which belongs to him or went to him in the act which made it personal property, then Traves could only take under his mortgage Smith's 22 per cent. interest in that ore. This is particularly so, because Traves had knowledge of the Forrest contract respecting this ore. The proper construction of the contract is that it is a partnership arrangement for the mining of ore from the Payne mine, and as one partner cannot under the Partnership Act mortgage without the consent of the other, the mortgage is invalid. Forrest bestowed labour on these goods, improved them, and has a common law lien upon them, which the mortgage cannot defeat. The lien is for 78 per cent. We submit that a man cannot give a mortgage valid as against all parties when possession is in another person. Here the goods were in the possession of a third person, namely, Forrest, to the knowledge of Traves. At the time he took the mortgage therefore, he got the mortgage subject to that possession, which possession protects

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the payment stipulated for in the contract. The mortgage covers 20 tons of ore; the judgment is for 30 tons. It should go, if at all, for one-third, subject to Traves paying his share.

Bodwell, K.C., for respondents (defendants): There is no property interest in the ore; only in the proceeds. Plaintiff has a mere right of action, nothing more.

Taylor, in reply.

Cur. adv. vult.

11th December, 1908.

HUNTER, C.J., concurred with CLEMENT, J.

MORRISON, J.: Smith appears to have had some sort of lease of the mine in which the ore in question was lying at the time of the arrangement between the parties hereto. That lease was not produced in evidence at the trial and its terms are unknown to us. Whether it was a lease at all is quite problematical, for those terms are loosely and casually used by the ordinary mine worker. However that may be, I am of opinion that the arrangement under which the plaintiffs took out the ore was one of hiring only and the remuneration offered by Smith and accepted by Forrest amounted simply to wages, for which the latter had a good claim against the former and he has succeeded in getting his judgment. The plaintiff had been engaged in this same work just previously and the net result was he did not make any money, so Smith, in order to have the work completed, entered into the contract in question without in any way altering the relations between them. It was merely an expedient as to mode of remuneration. Upon a true construction of the agreement, I do not think it was intended that the plaintiff should acquire a charge on the ore, but that he should look to Smith personally for his pay. The whole circumstances of their relationship point to this view. The plaintiff had no possession of the ore in the sense that is necessary to create a common law lien. There was no partnership. What they agreed about was not ownership or interest in the ore, but the payment of wages —remuneration for his work.

MORRISON, J.

I agree with the learned trial judge that the action is not maintainable against the defendant Traves. The evidence as to

his knowledge of the plaintiff's alleged charge on the ore is very weak and the learned trial judge has not found that he did have knowledge as contended for on behalf of the plaintiff.

I think the case turns solely on the personal liability of Smith to the plaintiff.

The appeal should be dismissed with costs.

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CLEMENT, J.: The facts so far as this appeal is concerned may be shortly stated. Defendant Smith was the lessee of the Payne mine under an agreement which entitled the lessors, owners of the mine, to a royalty of 15 per cent. of the smelter returns on ore extracted.

Smith entered into an agreement with the plaintiff that the latter should undertake the extraction of the ore from certain areas in the mine and should be paid 78 per cent. of the smelter returns on such ore. After allowing for the owner's royalty (15 per cent.) and Government royalty of 2 per cent., Smith would reap a middleman's profit of 5 per cent. The ore when broken down was to be shipped by Smith in his own name and he was to receive the smelter returns. The lease from the mine owners to Smith was not put in evidence at the trial and whether Smith was or was not to become the owner of the ore when severed does not really appear; but as no argument was advanced to us upon this point, I think we should assume—at all events I do assume—that it was taken for granted at the trial that on severance the property in the ore passed to Smith.

CLEMENT, J.

The defendant Traves, uncle of Smith, had assisted Smith financially and had either paid or was liable upon negotiable paper held by the bank. Smith was, as Traves acknowledged, financially worthless, and Traves looked to a successful issue of Smith's venture in this mine as his safeguard against loss. As he expressed it, "the ore was there for it." The learned trial judge has not made any finding upon the question of Traves's knowledge of the bargain between Smith and the plaintiff, but in my opinion it is quite clear upon Traves's own evidence that he did know that the plaintiff was taking out the ore on a percentage basis. Speaking of what Smith told him he is asked:

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"Did he explain how it was that he only had a one-third interest in the ore mined under his own lease, because naturally he would have the whole thing, subject to the royalty to the Company? He said they were taking ore out on the basis of two-thirds.

"That is, Forrest was? Yes."

Smith in his evidence gives this account of it:

"What did you tell Traves at the time of giving this chattel mortgage or before then about your relations with Forrest in connection with the Payne mine? I told him I had given Forrest a contract to extract clean ore in the Payne mine between No. 5 level and the surface and that he was to be paid 70 per cent. for doing it."

Following upon this conversation, Smith gave Traves a mortgage upon "an undivided one-third interest (being all the interest of the mortgagor) in and to a carload (about 20 tons) of clean silver ore, now broken down, sacked and lying in the said Payne mine at Sandon aforesaid," and the learned trial judge has held this mortgage effectual to entitle Traves to one-third of the proceeds or "smelter returns" of the ore, as against and in priority to the plaintiff's claim under his bargain with Smith. With all deference I think this judgment cannot be supported. The argument advanced by the learned trial judge is that under the agreement between the plaintiff and Smith, the plaintiff took no interest in the ore. Perhaps not; but it seems to me that to concentrate attention upon the question as to the property in the ore is to lose sight of the real thing about which these parties were bargaining. The contract looked to the creation out of the ore then *in situ* of a fund, which fund was to be divided or distributed in a certain way. It would be clear fraud upon Smith's part to do anything to divert to one of his own creditors the share or percentage to which the plaintiff is entitled; and it would be equally a fraud on Traves's part to be a knowing participant in such a design. I would prefer to hold him innocent and as intending to take under his mortgage a charge upon the actual interest or share of Smith after allowing for the mine owners' royalty, the Government royalty and the plaintiff's agreed percentage, whatever it really was. The fact that Smith stated the amount of plaintiff's percentage incorrectly cannot, I think, better Traves's position. I might say in passing that I cannot see how in any event less than 66⅔ per cent. (if Traves's

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story be true) or 70 per cent. (if Smith's statement be correct) could be allotted to the plaintiff, leaving the mine owners' and Government royalty to be paid out of the remaining 33⅓ or 30 per cent. But it is not necessary, in my opinion, to dwell on that point. The whole transaction seems to me to bring this case within the principle enunciated in *Werderman* v. *Societe Generale d'Electricite* (1881), 19 Ch. D. 246, as explained in *Bagot Pneumatic Tyre Company* v. *Clipper Pneumatic Tyre Company* (1901), 1 Ch. 196, 71 L.J., Ch. 158. See also *Dansk Rekylriffel Syndikat* v. *Snell* (1908), 2 Ch. 127, 77 L.J., Ch. 352. To quote the words of Sir George Jessel in the first cited case, at p. 252:

"It is a part of the bargain that the patent shall be worked in a particular way, and the profits be disposed of in a particular way, and no one taking with notice of that bargain can avoid the liability."

For "patent" read "ore" and the statement fits the case exactly.

CLEMENT, J.

The appeal should be allowed with costs here and below and the plaintiff declared entitled to 78 per cent. of the fund. In other words the defendant Traves has only a charge upon what remains after satisfying the mine owners' royalty, the Government royalty and the plaintiff's 78 per cent.

Appeal allowed, Morrison, J., dissenting.

Solicitors for appellant: *Taylor & O'Shea.*
Solicitor for respondent Smith: *A. M. Johnson.*
Solicitor for respondent Traves: *R. W. Hannington.*

CLEMENT, J. 1909

Feb. 12.

NATIONAL TRUST CO. v. DOMINION COPPER CO.

NATIONAL TRUST COMPANY, LIMITED v. DOMINION COPPER COMPANY.

Practice—Special case—Questions of fact—Proceedings extra cursum curiæ.

A special case asking the Court to determine suggested or possible points of law in advance of an agreement or determination as to the facts, is not to be encouraged.

APPLICATION for a special case, heard by CLEMENT, J., at Chambers in Vancouver, on the 8th of February, 1909.

Wilson, K.C., for plaintiffs.
A. H. MacNeill, K.C., for the liquidator.
J. A. Macdonald, K.C., for a creditor.
A. M. Whiteside, for defendants.

12th February, 1909.

CLEMENT, J.: I have read the pleadings, the special case, and those parts of the trust mortgage which were referred to by counsel and, as I intimated during the argument, I cannot see how any useful or decisive expression of opinion can be given at this stage. As I understand it, a stated case is based upon stated (admitted or ascertained) facts: see Order XXXIV., r. 1; *Burgess* v. *Morton* (1895), 65 L.J., Q.B. 321; but in this case it was quite apparent upon the argument that it is not admitted that there are any assets of the defendant Company which fall within the clauses upon which the liquidator relies, whatever those clauses may mean. In my opinion, there should be an agreement reached as to the classification of the assets, and such particulars given as to their nature, mode of acquisition, etc., as will enable the Court to say whether or not they are covered by the plaintiff's mortgage upon its proper construction. If the parties cannot agree upon these matters, there can be no special case which will decide the real points of law which the facts, as they really exist, do in truth raise, as distinguished from suggested points of law which the facts, when ascertained, may perhaps raise. A special case asking the Court to determine such suggested or

Judgment

possible points of law, in advance of an agreement or determination as to the facts, is not, I think, to be encouraged. Indeed, such a practice is not, in my opinion, warranted by our rules.

Application dismissed.

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STOCKHAM v. THE SPRAY.

MARTIN, LO. J.A. (At Chambers)
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STOCKHAM v. THE SPRAY

Admiralty law—Practice—Damages—Reference to the registrar and merchants—Inspection of the ship and cargo.

On a reference to the registrar to ascertain the damages caused by a collision he has power of his own motion to inspect the ships and cargoes concerned.

ON a motion for judgment before MARTIN, LO. J.A., the liability for damage caused by the steamship Spray was admitted, and an order was made referring the question of damage to the registrar only, it being agreed that the case was one in which he would not require the assistance of merchants.

Statement

Fell, for the motion.

J. H. Lawson, Jr., for the owners of the Spray: I ask that a clause be inserted in the order directing the registrar to make an inspection of the vessels concerned.

Argument

Per curiam: It is not necessary to give such a direction, because by the practice of this Court the registrar already possesses full powers of inspection of ship or cargo, and will no doubt exercise them of his own motion if he sees fit, or upon the request of either party.

Judgment

Judgment accordingly.

MARTIN, J.

1909

Jan. 28.

REX v. NAR SINGH.

Criminal law—Summary trial—Police magistrate—Stipendiary magistrate for County acting in absence of and on his request—Persona designata—Criminal Code, Sec. 777, Sub-Sec. 2—B. C. Stats. 1900, Cap. 54, Sec. 168; 1908, Cap. 25.

REX v. NAR SINGH

Even though a stipendiary magistrate for a County may have conferred upon him by a Provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under section 777 of the Criminal Code.

It is desirable that there should be uniformity of decisions in all the Courts of Canada on Federal legislation.

Statement

MOTION for writ for *certiorari* to remove into the Supreme Court the conviction of the defendant by the stipendiary magistrate for the County of Vancouver, acting for the police magistrate of Vancouver at his request. Heard by MARTIN, J., at Vancouver, on the 21st and 28th of January, 1909.

The accused was charged under section 206 of the Criminal Code with having unlawfully in private attempted to procure the commission by a male person of an act of gross indecency, and having elected to be tried summarily was convicted.

Argument

Craig, for the prisoner in support of the rule *nisi:* The conviction is made under section 777 of the Criminal Code, but the magistrate had no jurisdiction under sub-section 2 of that section, because he is not a stipendiary magistrate for a city: *The King* v. *Benner* (1902), 8 C.C.C. 398; *The King* v. *Brackenridge* (1903), 7 C.C.C. 116. The fact that the magistrate was a magistrate for the County, and as such had jurisdiction in the City as a County stipendiary magistrate does not make him the official named in sub-section 2 of section 777. In *Rex* v. *Williams* (1905), 11 B.C. 351, the judgment proceeds on the assumption that a County stipendiary magistrate has no jurisdiction under section 777 of the Code. The Provincial statutes of 1900, Cap. 54, Sec. 168, and 1908, Cap. 25, Sec. 3,

which provide that any two justices of the peace, or other functionary exercising the power of two justices of the peace, may act in the city at the request of the police magistrate, apply only to offences under Provincial statutes. The Legislature has no power to confer jurisdiction on any functionary to try offences against the Code. Such legislation is procedure in criminal matters: *Regina* v. *Toland* (1892), 22 Ont. 505; *In re Vancini* (1904), 34 S.C.R. 621; *The Attorney-General of Canada* v. *Flint* (1884), 16 S.C.R. 707. If such Provincial legislation applied to offences under the Code, it would in this case amount to an amendment of sub-section 2 of section 777 of the Code.

W. A. Macdonald, K.C., for the Crown: The magistrate was a stipendiary magistrate for the County of Vancouver, which includes the City of Vancouver, and he therefore had jurisdiction in the city: *The King* v. *Giovanetti* (1901), 5 C.C.C. 157; *The King* v. *Sainsbury* (1791), 4 Term. Rep. 451 at p. 455; *Regina* v. *Young* (1887), 13 Ont. 198; *Regina* v. *Roe* (1888), 16 Ont. 1. Having jurisdiction in the city by virtue of his commission, he is a city magistrate who has jurisdiction under section 777 of the Code. In any event under the Provincial statutes referred to any functionary exercising the power of two justices, could exercise the jurisdiction of the police magistrate in his absence. Argument

Craig, in reply: In *The King* v. *Benner* it was admitted that the magistrate had jurisdiction in the city as a county magistrate, which is the point decided in *The King* v. *Giovanetti*. The other cases cited for the Crown were not decided under section 777 of the Code.

Per curiam: I think this case cannot be distinguished in principle from the decision of the Supreme Court of New Brunswick, *in banc*, in *The King* v. *Benner* (1902), 35 N.B. 632, and it is supported by the judgment of our Full Court in *Bell & Flett* v. *Mitchell* (1900), 7 B.C. 100. And I am entirely in accord with what Mr. Justice Meredith says in *Rex* v. *Lee Guey* (1907), 15 O.L.R. 235 at p. 240, that Judgment

> "The interpretation of such (*i.e.* (federal) legislation should be the same in all parts of the Dominion. It would be unseemly, if not intolerable, that one view of it should be adopted in one Province, and the opposite

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view in another; that the same person, for the same offence, should, under the same law, be deprived of his right of trial by jury on one side of an imaginary inter-provincial line, and yet, on the other side of it, be accorded that right—not through any fault in legislation, but solely by reason of a false interpretation of the enactment in one or other of the Provinces."

Order accordingly.

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REX v. PHILLIPS.

Criminal law—Perjury—Statutory declaration—Statutory form not followed—Jurat—Persons "authorized by law" to declare—Criminal Code, Secs. 174, 175, 1,002.

There is a marked difference between taking an oath and a solemn declaration. In the one case, the false swearing itself constitutes the offence; in the other, before the procedure becomes a solemn declaration the statutory form must be followed. The permission to receive a solemn declaration includes the authority to make it.

A solemn declaration is not made unless the declarant reads over to the officer receiving the declaration the form as given in the Act, or unless the officer reads over that form to the declarant.

Statement

CRIMINAL trial before WILSON, Co. J., at Cranbrook, on the 23rd of December, 1908, on a charge of committing perjury. The facts appear in the reasons for judgment.

Thompson, for the Crown.
Harvey, K.C., and *M. A. Macdonald*, for the accused.

24th December, 1908.

Judgment

WILSON, Co. J.: The accused has been arraigned and tried before me on two counts; 1st, for that he (etc.), being required or authorized by law to make a statement on solemn declaration, did thereupon, before John Hugh McMullen, stipendiary magistrate in and for the county of Kootenay,

being a person duly authorized to receive solemn declarations under the Canada Evidence Act, make a statement which would amount to perjury if made in a judicial proceeding, contrary to section 175 of the Criminal Code, the declaration being set out at length.

The second count is that he did, etc., commit perjury with intent to procure the conviction of one R. H. Bohart for an offence punishable with imprisonment for life, etc., contrary to sections 172 and 174 of the Criminal Code.

The prisoner was arraigned before me and elected for a speedy trial, but, before pleading to the accusation, counsel for the defence raised three formal objections to the charges made. As to these objections, I thought they should be dealt with at the close of the case and I so held.

The evidence adduced shews that the accused went before the police, and, by statements made and a letter produced, implicated one Bohart in procuring one Laclue to commit arson. Before proceeding with the matter, the police deemed it advisable to obtain full particulars, and the stipendiary magistrate, after discussing the matter, asked the accused if he was willing to declare as to the facts he had stated, and the accused said he was willing to do so. A statutory declaration was then drawn up by the stipendiary magistrate, who handed it to the accused, who took it and appeared to read it. It was then handed by the accused to the stipendiary, who said, "Do you declare it is true?" The accused answered "I do," and then signed it in the presence of the stipendiary magistrate, who also signed it.

Judgment

The formal part of that declaration reads as follows:

"And I make this solemn declaration conscientiously believing it to be true, and of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act."

Bohart was called to prove that the statements in the declaration, insofar as they were within his knowledge, were untrue, and other evidence was called to shew that the alleged letter mentioned in the declaration, and which was produced, was not written by any man of the name of Laclue, but by the accused. No evidence was called by the defence except what I might term "suspicion evidence" as to Bohart's connection

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with fires at Wardner. For the time being, leaving out the question of corroboration, I find that Bohart's evidence was true, and it has not in any way been contradicted by the defence as to the facts in the declaration.

The corroboration of Bohart's statement was sought to be established by shewing that the Laclue letter was in the handwriting of the accused, and on both sides evidence of an expert nature was adduced to shew that Phillips was or was not the writer of the Laclue letter. On that point I have some doubt in my mind after hearing the evidence, and after very careful perusal of the documents, and in regard to that doubt I will give the prisoner the benefit. Such being the case, the defence maintains that both the charges must fail, but with this I do not agree. The charge under section 174 must undoubtedly fail for want of corroboration. The defence maintains that corroboration is necessary under section 175 as well, but I do not agree with this. Section 1,002 of the Code is undoubtedly clear on this point:

"No person accused of any offence under any of the hereunder mentioned sections shall be convicted upon the evidence of one witness, unless such witness is corroborated in some material particular by evidence implicating the accused . . . . (*b*) Perjury, Part IV., section 174."

Judgment

I think this is undoubtedly a specific reference which is absolutely plain, and, although it is contended that the word "perjury" includes section 175 as well, I cannot agree with that view, when the section is specifically mentioned, and, in addition, the offence under section 175 is taking a false oath.

Has the prisoner then been guilty of an offence under section 175? To this several objections are raised. The first is, that taking for granted that the declaration is in proper form and properly declared, no offence has been committed under section 175, as the declaration was not made under the authority of any law, nor was the prisoner required or authorized by law to make the said statement or solemn declaration. It is maintained that the declaration was a purely voluntary statement which the prisoner was not required to make, nor was he in any sense of the word authorized to make it. I think this is fully answered by the decision in *The Queen* v. *Skelton* (1898),

4 C. C. C. 467. That case is very similar to the one at bar. The accused there made a declaration which, like the prisoner's, was a purely voluntary one, stating that a certain man had been guilty of certain improper practices in regard to the carrying on of an election, and, amongst other defences raised, was the one above set out. Scott, J., at pp. 478-9, sets out the law as follows:

"Upon the argument of the case, it was contended by counsel for the defendant that section 26 of the Canada Evidence Act, 1893, merely authorized a justice of the peace, etc., to receive the solemn declaration of any person making the same before him as to the truth of any fact, etc., and did not go the length of authorizing such person to make such a declaration, that there is no other law which requires or authorizes a person to make a solemn declaration as to such matters as are contained in the declaration mentioned in this charge; and that, as section 147 only applies to such statements on oath, affirmation or solemn declaration as a person is required or authorized to make, the matter contained in the charge is not an offence under that section. Section 150 of the Code was referred to as bearing out this contention, because it applies only to declarations and statements which a person is permitted to make before an officer permitted to receive them, thus shewing that the permission to receive does not include permission to make. I cannot find that it ever was the case that a person committed a criminal offence by taking an unauthorized oath, although the administering of such an oath did constitute an offence. The object of section 26 of the Canada Evidence Act, 1893, and a somewhat similar provision in England (5 & 6 Will. 4, Cap. 62, Sec. 18) was to provide a means by which certain statements which were not authorized to be made on oath could be verified. This object was accomplished by permitting certain officers to receive solemn declarations as to such statements. If, instead of doing this, Parliament had authorized the administering of oaths as to such statements, it would have removed the only restriction against the taking, as well as the administering of such oaths. I think, therefore, that the permission to receive a solemn declaration, includes the authority to make it."

Judgment

Section 147 of the old Code is now section 175, and is the one under which this charge is laid. That decision was one given by the Court of Appeal of the North-West Territories, and, it seems to me, very clearly expresses the law.

Two other objections were raised by the defence, which I will deal with together: first, that the official taking such a declaration, having omitted from the formal part the words "knowing that it is," acted beyond his jurisdiction, as jurisdiction was only given to him to take in the form given in the Act; and

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secondly, that, by merely using the words "Do you declare it is true?" and the accused saying "I do," no solemn declaration was ever made. On these points the Crown rely on *Regina* v. *Atkinson* (1866), 17 U.C.C.P. 295, and *Rex* v. *Mary Hailey* (1824), 1 Car. & P. 258. Both these cases were cases of perjury by virtue of swearing falsely under oath, and did not deal in any way with making a solemn declaration.

The authority to take a declaration arises from section 36 of the Canada Evidence Act, which states, *inter alia*, "that a stipendiary magistrate may receive the solemn declaration of any person voluntarily making the same before him in the form following, in attestation of the execution of any writing, deed, or instrument, or truth of any fact or any account rendered in writing:

"I, A. B., do solemnly declare that (*state the fact or facts declared to*), and I make this solemn declaration conscientiously believing it to be true, and knowing that it is of the same force and effect as if made under oath, and by virtue of the Canada Evidence Act. Declared before me at . . . . . this . . . . . day of . . . . . A. D. 190 . . "

Now, it seems to me that the objection is well taken. As stated in the *Atkinson* and *Hailey* cases, perjury is committed when the oath is taken, and the jurat is not material. The taking of a false oath is itself the offence, and I can quite see that the jurat has nothing whatever to do with the matter; but in the case of a solemn declaration, no solemn declaration can be taken, nor has the officer any authority to receive the solemn declaration, except in the form given in the Act. It does not become a solemn declaration until that form is followed. It might be that, if the officer taking the declaration had read over to the party making it the exact wording of the Act, the party would be guilty of taking a false oath under the Code, even if the actual written form were defectively drawn. But, in this case, all that was said was "Do you declare it is true?" In Archbold's Criminal Pleading and Evidence, 23rd Ed., at p. 1,074, the form of indictment reads "Made, etc., to wit a declaration made before G. H. in accordance with the provisions of the said last mentioned statute," etc. It seems, therefore, that it does not become a solemn declaration until the statutory form has been complied with. Nor do I think it is cured by the Interpretation Act. Sub-section (*d*) of section 31 states that:

Judgment

"Whenever forms are prescribed, slight deviations therefrom, not affecting the substance or calculated to mislead, shall not invalidate them."

Apart from this being a deviation affecting the substance, which I think it is, I still think that that section does not help us, even if it was not. On that point I would refer to *Reg.* v. *The Inhabitants of Bloxham* (1844), 6 Q.B. 528. That is a case where the words "before me" were omitted from the jurat, and the affidavit was held to be defective. Then again, there is the well-known line of cases under the Bills of Sales Acts of various Provinces by which certain forms of affidavits are prescribed, and in which cases it is held that the form must be followed. For example, *Morse* v. *Phinney* (1894), 22 S.C.R. 563, is a decision in point. At p. 571 King, J., states as follows:

"In this state of things the form given in the schedule cannot be treated merely as a model (as is ordinarily the case when forms are prescribed) for the form becomes a matter of substance; the essence of the thing is in the form, and the provision is unaffected by the general statutory provision that 'forms when prescribed shall admit variations not affecting the substance or calculated to mislead.'"

Again, in *Thomas* v. *Kelly* (1888), 13 App. Cas. 506, Lord Macnaghten, at p. 520, says:

Judgment

"When is an instrument which purports to be a bill of sale not in accordance with the statutory form? . . . . . Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form."

I might also quote from *Reid* v. *Creighton* (1894), 24 S.C.R. 69, in Mr. Justice Sedgewick's judgment, at pp. 75-6:

"The affidavit was not as nearly as it might have been in the statutory form. There was a clear, manifest and altogether needless departure from it, and when that is the case it is not proper that we should be astute in inquiring the extent to which the volunteered form is equivalent to the statutory one."

Numerous other cases might be cited on this point, but I think that what I have cited are sufficient for my purpose.

My view, therefore, is that there is a marked difference between the case of taking an oath and the matter of a solemn declaration. In the one, false swearing itself constitutes the offence; in the other, before it becomes a solemn declaration the statutory form must be followed, and for that reason I

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think that the cases under the Bills of Sales Act are clearly in point, and until the statutory form is followed the statement does not become a solemn declaration. Of course, I am not referring to slight deviations.

I have, in part, dealt with the second question raised under this heading, and I am shortly deciding on the ground that, as it seems to me, a solemn declaration is not made unless the declarant reads over to the officer receiving the declaration the form as given in the Act, or unless the officer reads over that form to the declarant. It must be made clear to the declarant's mind that he is taking a solemn declaration in the nature of an oath. In taking an oath the swearing itself imports the solemnity, while in taking a solemn declaration the form prescribed in the Act does so.

Judgment

In the short time at my disposal I have dealt with the objections as fully as I was able, as I think the points raised are all of very serious importance.

Prisoner acquitted.

MORRISON, J.
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March 22.

REX v. TANO

REX v. TANO.

Criminal law—Habeas corpus—Offence by foreign sailor on British ship—Leave of Governor-General for prosecution—Criminal Code, Sec. 591—Territorial Waters Jurisdiction Act, 1878 (Imperial), 41 & 42 Vict., Cap. 78.

A preliminary hearing before a magistrate of a charge against a foreign seaman for an indictable offence committed on board a British ship within the English Admiralty jurisdiction is not such a proceeding for the trial and punishment of such person as to require the consent of the Governor-General pursuant to section 591 of the Criminal Code.

Statement

APPLICATION to MORRISON, J., at Vancouver, on the 18th of March, 1909, for a writ of *habeas corpus*. The accused, who was

not a British subject, was arrested on a warrant by the police magistrate of Vancouver, charged with having attempted to wound another sailor on a British tug 40 miles north from Welcome Pass and within the three mile limit. On the hearing before the magistrate, objection was made that under section 591 of the Code the accused was entitled to be discharged because the consent of the Governor-General to the prosecution had not been obtained: *Thorpe* v. *Priestnall* (1897), 1 Q.B. 159. The Crown intimated that it was not proposed to proceed under the Code, but under the Imperial Territorial Waters Jurisdiction Act, 1878, and that it was desired to hold a preliminary inquiry before the magistrate merely as a justice of the peace. The magistrate then decided to adopt this course. The informant having been called to swear to the facts of the assault, the Crown counsel then applied for a remand to enable him to apply to the Governor-General for his consent and took the ground that the words "proceedings for the trial and punishment of a person" in section 591 of the Code meant not the preliminary hearing, but the actual trial. The remand was granted.

Statement

Griffin, in support of the application: The Territorial Waters Jurisdiction Act, 1878, is confined to those cases where the offence took place on board of or by means of a foreign vessel, and as this took place on a British ship the Act does not apply.

Argument

J. K. Kennedy, for the Crown, *contra*.

22nd March, 1909.

MORRISON, J.: This is an application for the release under *habeas corpus* of a foreign sailor who has been sent up for trial by a justice of the peace on a charge of having committed an indictable offence on board a British ship off the coast of British Columbia within the jurisdiction of the Admiralty of England. The application is based upon the ground that the leave of the Governor-General was not given to commence the proceedings leading to his incarceration, pursuant to section 591 of the Criminal Code which provides that

Judgment

"Proceedings for the trial and punishment of a person who is not a subject of His Majesty, and who is charged with any offence committed within

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the jurisdiction of the Admiralty of England, shall not be instituted in any Court in Canada except with the leave of the Governor-General and on his certificate that it is expedient that such proceedings be instituted."

This section is in substance taken from the Territorial Waters Jurisdiction Act, 1878 (Imperial), Cap. 73, which gives the Courts of Canada jurisdiction over a foreigner who commits an offence on the open sea within the territorial waters of His Majesty's dominions.

The last paragraph of section 4 of that Act enacts that

"Proceedings before a justice of the peace or other magistrate previous to the committal of an offender for trial or to the determination of the justice or magistrate that the offender is to be put upon his trial shall not be deemed proceedings for the trial of the offence committed by such offender for the purposes of the said consent and certificate under this Act."

This provision meets Mr. *Griffin's* objection. The case of *The King* v. *Adolph* (1907), 12 C. C. C. 413, cited by him does not seem to be in point as there the offender was *tried*, though summarily, and Russell, J., discharged him giving effect to the objection that before being tried the consent of the Governor-General had not been obtained. Stress was laid by Mr. *Griffin* on that learned judge's inquiry as to whether the consent were necessary at the "preliminary" stage of the proceedings. As any view expressed by Mr. Justice Russell is entitled to the greatest weight, I rather suspect that what he meant, or perhaps even said, had reference to summary proceedings.

Judgment

I cannot follow Mr. *Griffin's* contention that section 4, *supra*, of the Imperial Act does not apply to the preliminary proceedings in this case.

Mr. Justice CLEMENT in his treatise on the Canadian Constitution, 2nd Ed., p. 25, *et seq.*, deals fully with the extent to which Imperial statutes affect a colony. All the leading cases up to the year 1904 are there cited.

The only point here is whether the proceedings before the Justice of the Peace to bring the offender to trial may be taken before the consent of the Governor-General is given. I think they may, and that in this case the prisoner is properly detained.

Application refused.

ATWOOD v. KETTLE RIVER VALLEY RAILWAY COMPANY.

IRVING, J.

1909

Feb. 9.

ATWOOD v. KETTLE RIVER VALLEY RY. CO.

Practice—Postponement of statutory sittings—Fresh notice of trial—Whether necessary in consequence—Rule 440.

It is not necessary to give fresh notice of trial in consequence of the postponement of the statutory sittings.

MOTION by defendant to strike the case off the list of trials and to set aside the notice of trial; argued at Nelson on the 9th of February, 1909, before IRVING, J. The action was originally set down for trial at the December sittings at Nelson, and appeared on the cause list for that Court, but owing to pressure of work in the Full Court, the Chief Justice directed the sittings to be adjourned until the February sittings. The plaintiff on the 1st of February, 1909, gave notice of trial for the sittings of the Court commencing February 9th, and the action was set down and entered on the cause list, February 5th.

Statement

Lennie, in support of the motion, read the affidavits filed setting out the facts and relied on Rule 440.

S. S. Taylor, K.C., contra: It was not necessary for the plaintiff to serve notice, or set the action down for trial in February. The telegram of the Chief Justice, postponing the statutory sittings of December can be treated as being equal to the old order known as an "order of *nisi prius*" in which case no fresh notice of trial is necessary. The telegram had the effect of making all actions there set down as remanets of that Court. He cited *Altman* v. *Sirbin* (C.A.) 17th June, 1907 (not reported); *Shepherd* v. *Butler* (1822), 1 D. & R. 15, and section 55 of the Supreme Court Act.

Argument

IRVING, J.: As the postponement of the sittings of the Court from December to February of this year was directed by the Chief Justice, after the case had been set down, it was not necessary for the plaintiff to give fresh notice of trial. The defendant's motion is therefore dismissed with costs.

Judgment

Motion dismissed.

MARTIN, J.

1909

Jan. 20.

IN RE B. C. TIE AND TIMBER CO.

COLAN v. THE SHIP RUSTLER

IN RE B. C. TIE AND TIMBER COMPANY, LIMITED (No. 2), AND COLAN v. THE SHIP RUSTLER.

Practice—Winding-Up Act (Dominion), Sec. 22—Action by seaman for wages—Proceedings in Admiralty Court—Arrest of vessel—Leave to proceed in Admiralty—Irregularity.

Where a company is being wound up pursuant to the Dominion Winding-Up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular.

Held, further, that, in the circumstances here the leave should be granted without the imposition of terms.

MOTION under section 22 of the Dominion Winding-Up Act, on behalf of the plaintiff Colan, for "leave of the Court" allowing him to proceed with his action on the Admiralty side of the Exchequer Court of Canada against the ship Rustler, notwithstanding the appointment of a liquidator in winding-up proceedings against the company owning the ship. The motion was heard by MARTIN, J., in Vancouver on the 18th, 19th and 20th of January, 1909. An order under the Dominion Winding-Up Act was made for winding up the British Columbia Tie and Timber Company, Limited, on the 5th of January, 1909, which was gazetted on the 12th of November, 1908. The order appointing a permanent liquidator was made on the 2nd of December, 1908. Through error the writ of summons of the Admiralty Court was issued on the 13th of November, 1908, without leave of the Supreme Court of British Columbia in which the winding-up proceedings were being taken. The writ was served and the ship seized, but no further proceedings were taken.

Statement

A. M. Whiteside, for the liquidator: The writ having been issued after the winding-up order and without leave is void; or in the alternative, the proceedings taken are so irregular that the leave asked for cannot be given.

Argument

MARTIN, J.

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IN RE B. C. TIE AND TIMBER CO.

COLAN v. THE SHIP RUSTLER

Reid, K.C., for the plaintiff: Section 22 of the Winding-Up Act, which is practically the same as section 87 of the English Act, is enforced by applying to the Court having control of the winding-up to stay the action, and no application having been made on behalf of the liquidator to stay the action, the leave can be given *nunc pro tunc*.

The following authorities were cited: *In re International Pulp and Paper Co.* (1876), 3 Ch. D. 594 at p. 598; *Re The East Kent Shipping Company, Limited* (1868), 18 L.T.N.S. 748; *In re Hermann Loog, Limited* (1887), 36 Ch. D. 502; *Re Lake Winnipeg Transportation Co.* (1892), 8 Man. L.R. 463; *Gray* v. *Raper* (1866), L.R. 1 C.P. 694; *Graham* v. *Edge* (1888), 20 Q.B.D. 538, 683; *Henderson* v. *The Peruvian Railway Company, Limited* (1867), 16 L.T.N.S. 297; *The Queen* v. *The Lord Mayor of London* (1893), 2 Q.B. 146 at p. 149. As to the necessity for applying in the winding-up to allow proceedings to go on in Admiralty: *In re Rio Grande Do Sul Steamship Company* (1877), 5 Ch. D. 282; *In re Australian Direct Steam Navigation Company* (1875), L.R. 20 Eq. 325; *North-West Timber Co.* v. *McMillan* (1886), 3 Man. L.R. 277.

Argument

Per curiam: This question has already been raised before me in the Admiralty Court in the case of *The Topaz* on March 9th, 1908, but it became unnecessary to decide it. The present contention has come down to this, *viz.:* that though the proceedings in Admiralty without leave are not void, they are irregular and that an order should not now be made authorizing them, or leave given to proceed *de novo*. While this Court, which is a Provincial one, "has not the slightest control" over the Admiralty Court—*Williamson* v. *Bank of Montreal* (1899), 6 B.C. 486 at p. 493—which is a Federal Court, yet the present proceedings are taken under a Federal statute which does control Federal Courts, and whatever might be urged in other circumstances, I see no difficulty in the way of making an order now which would make those proceedings in regard to this Company effective in the Admiralty Court without which they would be ineffective. In the exercise of my discretion I do not think this is a case for the imposition of any terms under section 22, because

Judgment

MARTIN, J.

1909

Jan. 20.

IN RE B. C. TIE AND TIMBER CO.

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no tribunal is as well fitted to entertain and adjudicate upon claims for seamen's wages and maritime liens as the Admiralty Court, wherein, as I said in *Roberts* v. *Tartar* (1908), 13 B.C. 474, the "practice affords the means for a very desirable, prompt determination" of such claims.

Leave granted.

CLEMENT, J.

1909

March 26.

IN RE MOODY AND THE COLLEGE OF DENTAL SURGEONS

IN RE MOODY AND THE COLLEGE OF DENTAL SURGEONS.

Statute, construction of—"Unprofessional conduct," what constitutes—Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 66.

Where a professional class is governed by a statute applying specifically to that profession, and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise.

APPEAL from the decision of the College of Dental Surgeons, made in the following circumstances: The charge laid by the Council of the College of Dental Surgeons against the appellant was of unprofessional conduct in the practice of his profession of dentistry or dental surgery by using a trade name for the premises in which he carried on the practice of his profession, and that he did not for all purposes in connection with his profession use his own proper name, such acts being in violation of section 66 of the Dentistry Act. Counsel for the appellant admitted on the investigation of the charge by the Council:

Statement

(*a*) That the appellant was a member of the College of Dental Surgeons of British Columbia.

(*b*) That having for many years used the name "New York Dentists" as representing the dental business carried on by Dr. T. G. Moody, he continued to use that name in his business of a dentist, and that sometime in November last Dr. Moody removed

from his office the sign, "New York Dentists," and put up his own name, T. G. Moody, and later, in accordance with advice of counsel as to the meaning of section 66 took that sign down and put up the sign, "New York Dentists" with T. G. Moody under it.

(*c*) That the only sign now on the windows of Dr. Moody's office is: Dr. T. G. Moody, Dental Surgeon. The associated sign is an electric sign outside of the building in the centre of the office and along the wall of the office. There is a board sign downstairs with "New York Dentists, Dr. T. G. Moody" upon it. The electric sign has "New York Dentists, T. Glendon Moody," and is attached to the outside wall of the office. The board sign is at the entrance of the stairway leading up to the office.

(*d*) That newspaper advertisements are signed with the same name, "New York Dentists, T. G. Moody, D.D.S." In the electric sign the words New York Dentists are larger than the words T. Glendon Moody, D.D.S.; and also in the sign at the entrance to the stairway. Since some time in November to the present time this state of affairs has been continuous.

Statement

The Council having found that the charge was proved and adjudged the said Moody to have been guilty of unprofessional conduct, an appeal was taken and was heard before CLEMENT, J., at Vancouver, on the 25th of March, 1909.

Cassidy, K.C., for the appellant.

Reid, K.C., for the College of Dental Surgeons.

26th March, 1909.

CLEMENT, J.: The facts are fully stated in the minutes of the meeting of the Council and are not in dispute. The appeal raises two questions:

(1.) Has Dr. Moody infringed section 66 of the Dentistry Act?

(2.) If so, is an infringement of that section "unprofessional conduct" within the meaning of section 39 so as to give the Council the disciplinary jurisdiction thereby conferred?

Judgment

In my opinion both questions must be answered in the affirmative. Section 66 reads as follows:

"No member of the College shall, in the practice of the profession of dentistry or dental surgery, use any trade name or designation, or corpor-

CLEMENT, J.

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IN RE MOODY AND THE COLLEGE OF DENTAL SURGEONS

ate name, or any distinguishing name, for any premises in which he carries on the practice of his profession, but every such member shall for all purposes in connection with his profession use his own proper name."

Mr. *Cassidy* contends that the presence of a comma before the words "for any premises" makes those words a qualifying phrase for all the preceding disjunctives, *i.e.*, "trade name or designation," "corporate name," "distinguishing name." I cannot agree to such a construction. The phrases "trade name or designation" and "corporate name" do not ordinarily and, in my opinion, do not here refer to premises but to the person or persons by whom the business is carried on. If I am right in this, then Dr. Moody has by the use of the signs mentioned in the minutes used a "trade name" for the purpose of drawing business, *i.e.*, for one purpose in connection with his profession. I read the latter part of the section "but," etc., as a short affirmative summing up of the negative provisions which precede, and as indicating that no such effect can be attributed to the comma already mentioned as is contended for by Mr. *Cassidy*.

But even if the idea of use "for any premises" should be held to run through the section, I think Dr. Moody does use a trade name for his premises. "For," in my opinion, should in that view of the section mean "in connection with" and not "descriptive of."

Judgment

And, if driven that far, I should be prepared to hold that the trade name "New York Dentists" as used by Dr. Moody is a phrase which would convey to the mind of any one reading it the idea that the premises over which the phrase is placed are premises where New York dentists carry on dentistry; in other words, it is a phrase which, to the ordinary man, is descriptive of the premises.

In my opinion, therefore, the Council was right in finding Dr. Moody guilty of a breach of section 66.

As to the second question, it is sufficient to say that where the law of the land requires a professional man to carry on the practice of his profession in a certain way, it is, in my opinion, "unprofessional conduct" to carry it on otherwise.

The appeal is dismissed with costs.

Appeal dismissed.

PIPER v. BURNETT *ET AL.*

MORRISON, J.

1909

April 22.

FULL COURT

April 29.

PIPER v. BURNETT

Practice—Security for costs of appeal—Order LVIII., r. 15A.—Discretion.

A respondent must make his application for security for costs of appeal with due promptness, and it is too late to apply when the appeal is set down and about to be heard.

Held, on appeal, that this order was within the discretion of the judge below and should not be interfered with.

Ward v. *Clark* (1896), 4 B.C. 501, overruled.

Statement

APPLICATION for an order directing security for costs of appeal, made by MORRISON, J., at Chambers in Vancouver on the 22nd of April, 1909.

J. A. Russell, in support of the application.

Woods, contra.

MORRISON, J.: This is an application on behalf of the respondents for security for costs of appeal. The appellants have duly entered the appeal and the Court of Appeal is now sitting disposing of the list which includes this case.

Mr. *Russell* takes the ground that he is entitled as of right to the order for security and cites the case of *Ward* v. *Clark* (1896), 4 B.C. 501, where DAVIE, C.J., held that upon appeal to the Full Court the respondent is entitled, under Order LVIII., rule 15A, as of right and without shewing special circumstances, to an order for the appellant to give security for the costs of appeal. That rule reads as follows:

MORRISON, J.

"The deposit or other security for the costs to be occasioned by any appeal shall be made or given as may be directed by the Full Court or a judge."

According to my reading of this rule, all it does in terms is to make it obligatory upon the appellant to give the security which may be directed to be given by the Court or judge. It does not, in terms, say the Court or judge shall so direct. The power is there, but I do not think that power thus conferred is a duty.

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The words are unambiguously permissive, and it seems to me the reason of the rule must be to have them so understood.

True, there may be circumstances which may couple the power with a duty to exercise it, but it lies upon those who call for the exercise of the power to shew that there is an obligation to exercise it: *Julius* v. *Lord Bishop of Oxford* (1880), 5 App. Cas. 214. The respondent has not satisfied me at all on that point.

I think the application has not been made with sufficient promptness and that it would be harsh and unreasonable to order security at this juncture.

MORRISON, J. Having regard to the decision in *Ward* v. *Clark*, *supra*, upon which the applicant relied, the application is refused, without costs.

Respondent gave notice of motion for leave to appeal from this ruling, and the motion came on for hearing at Vancouver on the 29th of April, 1909, by HUNTER, C.J., IRVING and CLEMENT, JJ.

Argument

R. W. Hannington, in support of the motion: The judgment of the learned judge below is at variance with that of DAVIE, C.J., in *Ward* v. *Clark* (1896), 4 B.C. 501. It is true we did not make our demand promptly, but no one is prejudiced by our neglect. *Star* v. *White* (1906), 12 B.C. 355, is in our favour. The mere delay is not a waiver, unless something has occurred to prejudice the party affected.

Woods, for respondent, was not called upon.

Judgment

Per curiam: We think the decision in *Ward* v. *Clark* (1896), 4 B.C. 501, must be overruled. It seems quite clear that it is in the discretion of the judge whether in all the circumstances he will make the order for security.

Appeal dismissed.

GRAHAM v. LISTER.

FULL COURT

1908

Dec. 21.

GRAHAM v. LISTER

Water and watercourses—Defined watercourse—Existence of—Diversion of water—Different levels—Adjoining proprietors of land—Obstruction—Nuisance.

Until water reaches a watercourse, the lower of two proprietors owes no servitude to the upper. He is at liberty to protect himself, and is not liable for the damage which the other suffers from the exercise of such right of protection.

APPEAL from the judgment of MARTIN, J., in an action tried by him at Vancouver on the 8th of May, in which judgment was given on the 30th of June, 1908. The learned judge dismissed the action on the ground that the plaintiff had not satisfied the onus of proving the allegation which he had set up, *viz.*: that the water came on the land in question by means of a defined, natural watercourse. Statement

The appeal was argued at Vancouver, on the 3rd of December, 1908, before IRVING, MORRISON and CLEMENT, JJ.

Woodworth, for the appellant, cited and referred to *Beer* v. *Stroud* (1888), 19 Ont. 10 at pp. 17 and 19; *Arthur* v. *Grand Trunk R. W. Co.* (1895), 22 A.R. 89; *Dudden* v. *Guardians of Clutton Union* (1857), 1 H. & N. 627; *Bunting* v. *Hicks* (1894), 70 L.T.N.S. 457; *Hurdman* v. *North Eastern Railway Co.* (1878), 3 C.P.D. 168; *Broder* v. *Saillard* (1876), 2 Ch. D. 692 at p. 700; *Whalley* v. *Lancashire and Yorkshire Railway Co.* (1884), 13 Q.B.D. 131 at p. 135; *Roberts* v. *Rose* (1865), L.R. 1 Ex. 82. Argument

Macdonell, for respondent (defendant): There is no natural watercourse here, and we are entitled to protect our property: *Broadbent* v. *Ramsbotham* (1856), 11 Ex. 602; *Wilton* v. *Murray* (1897), 12 Man. L.R. 35.

Cur. adv. vult.

21st December, 1908.

IRVING, J.

IRVING, J.: By the common law the water falling from Heaven on the surface of the earth, so long as it does not flow

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in some defined natural watercourse, is the property of the owner of the soil it falls on. He may deal with it as he pleases; he may permit it to lie on his land if it is in a hollow basin or in a swamp; or he may drain it away. After it has reached and is flowing in some natural channel already formed, then it becomes part of a stream, and different considerations arise.

Until it has reached the watercourse the right of drainage exists as I have said, but by the common law, the lower of two proprietors owes no servitude to the upper proprietor to receive this drainage—natural or assisted. He is at liberty to protect himself and is not liable for the damage which the other suffers from the exercise of this right.

The solution of this case, in my opinion, depends upon the question whether there was a stream or watercourse leading from the plaintiff's ground to the defendant's.

The case before us is not unlike the question discussed in the judgment in *Bunting* v. *Hicks* (1894), 70 L.T.N.S. 455, where Smith, L.J., at p. 458, said:

"In *Broadbent* v. *Ramsbotham* it was held that where water, whether from a spring head or any other source, is squandering itself over the surface of land before it has arrived at a natural defined course, the owner of the land over which it is squandering itself may do what he likes with it, irrespective of what effect his action may have upon the volume of water in a stream down below which has then become a defined natural watercourse. In *Dudden* v. *Guardians of Clutton Union* it was held that, if a natural defined stream commences running from a spring head, the stream begins at the spring head which is its source, and that the owner of the land upon which the spring head and stream are situated must deal with them as one and can only take such water from either as is incident of his right as being a riparian owner thereon. This being the law it becomes necessary to ascertain what is the true result of the evidence given in this case, for, until this be done, it is impossible to say which of these two rules is to be applied."

IRVING, J.

The learned trial judge, who took a view of the *locus* found some difficulty in coming to a conclusion that there was a natural defined watercourse. I find the same difficulty particularly with reference to the land to the south of 16th Avenue, and therefore I think the appeal must be dismissed.

MORRISON, J.

MORRISON, J.: The difficulty in this case is to determine what is the precise character of the *locus in quo*. The learned

trial judge, presumably at the request of both parties, visited the ground and he finds that the plaintiff has failed to satisfy him that he proved the issues of fact upon which it is claimed the case turns—which means that the plaintiff did not prove to the trial judge's satisfaction that the water in question came to the property of the parties through a defined natural, watercourse.

It is not to be disputed that there is a right to have a stream flow in its natural, defined channel. That right is *ex jure naturæ*. Apart from that, it must be shewn that the plaintiff possesses some definite right in order to deprive the defendant (though bound *sic uti suo ut non lædat alienum*) of her general right to use her own land in the manner she may think best: Parke, B., in *Rawstron* v. *Taylor* (1855), 11 Ex. 369 at p. 381.

The lots in question are within the corporate limits of the City of Vancouver. A distinction has been drawn in the case of building lots in cities and the cases are referred to in the judgment of Moss, J. A., in *Ostrom* v. *Sills* (1897), 24 A.R. 526 at p. 534 *et seq.* This case seems peculiarly applicable assuming that in the case at bar there was no defined watercourse. At pp. 541-2 he further says:

"The plaintiff's right, if any, to maintain this action depends therefore upon whether he has a right to complain of the effect upon his premises of the defendants stopping or preventing the flow on to their premises of water brought there by other persons than the plaintiff, and from other lands than those owned by him . . . . I think that the defendants are entitled to judgment, because in doing what is complained of they are protecting themselves against the acts of other parties by means of something put up on their own land as a barrier, and not as a medium for conducting the waters from their premises to, and casting them upon, the plaintiff's premises; and because the defendants are making a reasonable and natural user of their own premises in building upon their lands, and in doing so they are not exceeding their proprietary rights; and because, if the plaintiff is suffering damage, it is by reason of the attempt of the municipality, and others not parties to the action, to dispose of their surface waters and drainage by unwarrantably casting them on the defendants, thereby seeking to impose a burden upon them, which they are properly resisting."

MORRISON, J.

It appears that a person upon whose land there is a sudden accumulation of water, brought there without any fault or act of his, cannot actively turn it off on to the premises of his neighbour in order to save his own property from injury: Lindley, L.J., in

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Whalley v. *Lancashire and Yorkshire Railway Co.* (1884), 13 Q.B.D. 131 at p. 141. But that is not this case where there was an intermittent danger of overflow and to guard against its recurrence the defendant takes the precaution of protecting her own property. The water had not got on to her land. It is not a case of letting water off her land on to that of the plaintiff. She was simply exercising an act of ownership which created no responsibility to the plaintiff.

That circumstance, I think, brings this case within the scope of *Nield* v. *London and North Western Railway Co.* (1874), L.R. 10 Ex. 4, and *The King* v. *Commissioners of Sewers for Pagham, Sussex* (1828), 8 B. & C. 355, where it was held that upon a danger threatening you and only for the purpose of protecting yourself you prevent the danger from happening to you, but the danger is so far common that the necessary consequence of its being prevented from happening to you is that it will happen to your neighbour. In so acting there is no intention of injuring your neighbour and you are not answerable because the danger which has been diverted from you has done mischief to someone else: Brett, M.R., in *Whalley* v. *Lancashire and Yorkshire Railway Co.*, *supra*, at p. 141.

MORRISON, J.

The evidence is not satisfactory, and I am not prepared to say that the learned trial judge who saw and heard the witnesses and inspected the place is wrong in his conclusion.

I would dismiss the appeal.

CLEMENT, J.: The learned trial judge was apparently of opinion that the proper determination of this case depends upon the answer to a question of fact: watercourse or no watercourse; and a close perusal of the evidence leaves my mind in such doubt on that question of fact that I cannot say my brother MARTIN should have found for the plaintiff, upon whom undoubtedly the burden of proof rested.

CLEMENT, J.

But at the close of the argument I was disposed to think that it might not be necessary to determine that issue of fact; that in abating a nuisance which threatened her land the defendant had no right to work injury to the property of the plaintiff, who was in no way a party to the creation or mainten-

ance of the nuisance: *Roberts* v. *Rose* (1865), 35 L.J., Ex. 62.

Since the argument, however, I have carefully considered *Ostrom* v. *Sills* (1898), 28 S.C.R. 485, in which the facts, as set forth in the report, are singularly like those in the case before us. The only distinction of real importance that I can see is in the nature of, and the motive for, the obstruction to the flow from the culvert. There the obstruction interposed by the defendant was the foundation wall of his warehouse, built by him in the reasonable and natural user of his property and with entire disregard or indifference to the existence of the culvert and the flow therefrom; here (as was also the case in *Roberts* v. *Rose*, *supra*), the obstruction was designedly placed to ward off the nuisance and without other apparent motive. But in the view of Mr. Justice Moss (now Chief Justice Sir Charles Moss) this makes no difference as is shewn by the passage from his judgment quoted by my brother MORRISON.

What is there said as to a barrier interposed for protection against the acts of other parties is, I think, *obiter*, but no criticism of it appears in the unanimous judgment of the Supreme Court of Canada as delivered by Mr. Justice Gwynne, who refers to the judgment of Mr. Justice Moss as a very able judgment. The *obiter*, therefore, must, I take it, be deemed to have been adopted by the Supreme Court, and a considered *obiter* of that Court should, I think, be followed by this Court, although I must confess I find it hard to reconcile that *obiter* with the judgment of the Exchequer Chamber in *Roberts* v. *Rose*.

CLEMENT, J.

With some doubts, therefore, I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Smith & Woodworth.*

Solicitors for respondent: *Macdonell, Killam & Farris.*

GRANT, CO. J.
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IMPERIAL TIMBER AND TRADING COMPANY, LIMITED v. HENDERSON *ET AL.*

Ship—Mortgage—Registration—Priority—Right of execution creditors against holder of unregistered mortgage—Merchant Shipping Act—Bills of Sale Acts.

Ships being specially exempted from the operation of the Bills of Sale Acts, and there being no provision in the Merchant Shipping Act penalizing neglect to register a mortgage on a ship, an execution creditor cannot seize and sell in priority to an unregistered mortgage.

IMPERIAL TIMBER AND TRADING CO. *v.* HENDERSON

APPEAL from the judgment of GRANT, CO. J., in an interpleader issue tried by him at Vancouver on the 18th of November, 1908. The facts appear in the reasons for judgment of the learned trial judge.

Statement

Craig, for plaintiff Company.
A. D. Taylor, K.C., for defendants.

GRANT, CO. J.: This is a trial of an issue upon an interpleader order of his Honour the late Judge Cane, in which the question to be tried is "whether at the time of the seizure by the sheriff, the goods seized were the property of the claimant (plaintiff herein) as against the execution creditors" (defendants herein).

GRANT, CO. J.

From the evidence it appeared that the defendants as plaintiffs in an action against Sweeney & Shaw recovered against them (Sweeney & Shaw) a judgment in the County Court of Vancouver on May 2nd, 1908, for the sum of $897.27; that on June 22nd, an execution on said judgment was issued and placed in the sheriff's hands with instructions to seize the tug Leonora, of which Sweeney & Shaw were the owners, each being the registered owner of 32 shares in the said tug; that the tug was seized by the sheriff under said execution on June 24th while in the actual possession of Sweeney & Shaw, and was under the immediate management of Sweeney & Shaw brought to Vancouver, on June 28th, and was tied up and duly advertised

for sale by the sheriff, said sale to be held on July 8th. Owing to negotiations for a settlement of the judgment by Sweeney & Shaw the sale did not take place as advertised, and on the 16th of July a notice was given to the sheriff by the plaintiffs herein claiming the tug, under a mortgage from Sweeny & Shaw to the plaintiff, dated March 15th, 1908. Upon receipt of said notice the sheriff notified the execution creditors, the defendants herein, and the interpleader order was made and the issue herein directed.

The mortgage to the plaintiff Company was given in consideration of the sum of $3,000, lent by the plaintiff Company to Sweeney & Shaw and payable by them on the 16th day of July, 1908, with interest. In the said mortgage is the following provision:

"And for better securing to the said Imperial Timber and Trading Company, Limited, the repayment in manner aforesaid of the principal sum and interest, we hereby mortgage to the said Imperial Timber and Trading Company, Limited, sixty-four shares of which we are owners in the ship above particularly described."

The register in the office of the registrar of shipping shews Sweeney & Shaw each individually to be the owner of 32 shares in the said ship, in other words, that the interest of each is separate and not joint. The mortgage represents the mortgage by the owners of 64 shares, and as the register shewed each to be the separate owner of 32 shares the registrar refused to register the mortgage. In this I am inclined to hold that the registrar was right, as otherwise there would have been a hiatus in the register of title. But if the plaintiff Company was not the holder of a valid registerable mortgage, it was unquestionably in the position of an equitable mortgagee and entitled to have a registerable mortgage on the ship for the said sum of $3,000 and interest, and I am satisfied that upon refusal by the registrar to register the mortgage, steps were at once taken to have mortgages of the interests of Sweeney & Shaw, as appears by the register, executed, but owing to the absence of the mortgagors from the city the same were not executed until after the seizure of the ship under the execution. These mortgages I find were intended as additional, and not as substantial security.

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On the part of the defendants it is contended that the first mortgage was invalid because of the way in which it was drawn, and not being registerable the plaintiff cannot claim thereunder. This contention in the face of the authorities as against a mortgagee claiming under a subsequently registered mortgage is unanswerable, but not I submit under an execution issued months after the equitable or beneficial interest arose, as in this case.

As between the parties of the first mentioned mortgage it was a valid security on the ship, which between them became really the property of the mortgagee, and had, and has, priority of the execution under which the levy was made. See *Jellett* v. *Wilkie* (1896), 26 S.C.R. 282 at pp. 288-9, where the learned Chief Justice thus states the law:

> "No proposition of law can be more amply supported by authority than . . . . . that an execution creditor can only sell the property of his debtor subject to all such charges, liens and equities as the same was subject to in the hands of his debtor."

Again at p. 291 his Lordship says:

> "As regards authority the *National Bank* v. *Morrow* (1887), Hunter's Torrens Cases, p. 306, appears to me directly in point. In that case the Supreme Court of Victoria held that an unregistered equitable mortgage was entitled to priority over a registered execution, and not only over the execution creditor but also over a purchaser from the sheriff under the execution, but whose transfer had not been registered."

GRANT, CO. J.

I take it that these authorities conclude the matter and that under the issue herein I must find that at the time of the seizure by the sheriff the goods seized were the property of the claimants, the plaintiffs herein, as against the execution creditors, the defendants herein.

The defendants will pay the costs of the sheriff and of the plaintiffs, of the application for interpleader and all proceedings leading up to the order, also of the issue, trial and judgment. The sheriff will deliver to the plaintiff the said ship Leonora. The fees of the sheriff as far as they are applicable to the seizure and detention of the said ship are to be paid by the defendants herein.

The appeal was argued at Vancouver on the 6th of April, 1909, before HUNTER, C.J., IRVING and MORRISON, JJ.

A. D. Taylor, K.C., for appellants (defendants): We say that the seizing creditor was entitled to sell, notwithstanding this prior mortgage. The seizure of the ship and its being allowed to remain in the hands of the sheriff for 21 days is tantamount to an act of bankruptcy and in the same circumstances in England a mortgagee would not have any right as against a seizing creditor: see *Trustee of John Burns-Burns* v. *Brown* (1895), 1 Q.B. 324. Not having registered his mortgage, the mortgagee has no priority. In the English cases, purchasers are being dealt with; here it is otherwise, the mortgagee never having been in possession.

[HUNTER, C.J.: Is not your best argument that, the mortgagee not having availed himself of the privileges open to him, cannot now expect the Court to help him?]

That is what it amounts to. If there is a duly registered mortgage the creditors cannot seize and sell the ship. If it is an ordinary mortgage, irrespective of the Merchant Shipping Act, and it has not been registered, it is a mortgage of a chattel under the Bills of Sale Act. We could not get any more than the debtors themselves had.

Argument

Craig, for respondent (plaintiff) Company: We hold a document which, apart from some statutory regulation compelling registration, is valid. Therefore all we are concerned in is whether there is any provision in the Merchant Shipping Act taking away this common law right. We have a good conveyance at common law, and there is no statute interfering with it.

He was stopped.

Taylor, in reply.

The judgment of the Court was delivered by:

HUNTER, C.J.: I think the appeal must be dismissed. At common law a valid transfer of a chattel, whether capable or incapable of manual delivery, could be made by writing and such transfer could be absolute or conditional, and the clauses of the Merchant Shipping Act which have been referred to, like the Bills of Sale Acts, affect documents only, and not transactions. It therefore remains to see whether there is anything in the Merchant Shipping Act which affects an

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unregistered mortgage as against execution creditors, as the Bills of Sale Act by its express language does not apply to ships. Notwithstanding the vigorous argument of Mr. *Taylor*, I can find nothing in the Imperial Act which requires a mortgage to be registered on penalty of being postponed to an execution creditor, and as it is not suggested that there was any collusion or fraud, the appeal fails.

Appeal dismissed.

Solicitors for appellants: *Taylor, Hulme & Innes.*
Solicitors for respondents: *Martin, Craig, Bourne & Hay.*

MORRISON, J.
1909
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ROBINSON v. McKENZIE BROTHERS, LIMITED. MARSHALL v. THE CORPORATION OF THE CITY OF VANCOUVER.

ROBINSON v. MCKENZIE BROTHERS
MARSHALL v. CITY OF VANCOUVER

Practice—Examination of parties—Discovery of documents—Delivery of pleadings—Rules 225 (c.), 241, 370 (1).

The examination of an officer of a corporation may be had without an order being specially made for that purpose.

APPLICATION for an order for directions, heard by MORRISON, J., at Chambers in Vancouver on the 2nd of February, 1909.

Statement

Harper, for plaintiffs.

Martin, K.C., for defendants McKenzie Brothers, Limited.

W. A. Macdonald, K.C., for the defendant Corporation of Vancouver.

11th February, 1909. MORRISON, J.

1909

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ROBINSON v. MCKENZIE BROTHERS

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MORRISON, J.: This is a notice of motion for an order for directions in respect to the following matters, *viz.*: (1.) Examination of parties; (2.) Discovery of documents; (3.) Delivery of pleadings.

The amendments to the Rules which took effect July 1st, 1908, seem to me to obviate the necessity for such an application as this. Sub-section (*c.*) of Rule 225 was rescinded and the following substituted:

"Where the writ of summons is not indorsed under Order XVIIIA, a statement of claim may be served with the writ or notice in lieu of writ; and if not so served it shall be delivered within 21 days after appearance, unless otherwise ordered."

Rule 241 is amended by omitting the words which I put in brackets:

"When a statement of claim is delivered pursuant to an order, or filed in default of appearance under Order XIII., r 12, the defendant, unless otherwise ordered, shall deliver his defence (within such time, if any, as shall be specified in such order, or, if no time be specified)," etc.

Then section 1 of Rule 370c, which is the rule particularly involved in the present application, has been wholly rescinded and the following substituted:

"In the case of a corporation, any officer or servant of such corporation may, without any special order, and anyone who has been one of the officers of such corporation may, by order of a Court or judge, be orally examined before the trial touching the matters in question by any party adverse in interest to the corporation, and may be compelled to attend and testify in the same manner and upon the same terms, and subject to the same rules of examination as a witness, save as hereinafter provided. Such examination may be used as evidence at the trial if the trial judge so orders."

Judgment

It is contended by Mr. *Harper* that inasmuch as under the old rule any officer or servant of a corporation could be orally examined "without order" and under the new rule he may be examined "without any special order," the use of the word "special" indicates an intention to require an order of some sort as a condition precedent to such examination.

I cannot accede to this contention. The section is an entirely new one in substitution of the old, and is not an amendment thereto. The expression seems to me to be equivalent to saying:

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"the examination may take place without an order being specially made for that purpose."

I have recited the several rules involved in this application because I understand there is some misapprehension as to their scope, or lack of knowledge of their existence, and in the hope that applications of this nature may not be repeated.

I believe the motion was made with a view to having the practice settled and therefore I think there should be no costs.

Motion dismissed.

FULL COURT 1909 April 28.

ANDERSON v. CITY OF VANCOUVER

ANDERSON AND ANDERSON v. THE CORPORATION OF THE CITY OF VANCOUVER.

Practice—Examination of parties—Officer of municipal corporation—Order XXXIA.

A park commissioner, being a legislative functionary, and not subject to the control or direction of the municipal corporation, is not an officer of the latter body within the meaning of Order XXXIA, and is not examinable under said order before trial in proceedings against the corporation.

Statement

APPEAL from an order of MORRISON, J., at Chambers in Vancouver on the 19th of March, 1909, directing the examination of the city clerk and one of the park commissioners.

The appeal was argued at Vancouver on the 28th of April, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Argument

W. A. Macdonald, K.C., for appellant Corporation: There cannot be an order for the examination of two officers of the Corporation on the same subject at the same time, and in any event a park commissioner is not such an officer of the Corporation as to be examinable before trial.

[HUNTER, C.J.: Is the park commissioner subject to the control or directions of the Council ?]

No; those commissioners are merely legislative officers.

Reid, K.C., for respondents (plaintiffs), called upon: While merely legislative officers are not subject to examination, yet executive officers are, and we submit that the park commissioners are executive officers as to parks.

Argument

[CLEMENT, J.: If you could shew a resolution of the park board, authorizing or directing Mr. Tisdall to do certain work, then he might be an officer within the meaning of that rule.]

HUNTER, C.J.: The word "officer" in the rule points to some individual who is under the control and direction of the Corporation; that is not the case with the park commissioners.

HUNTER, C.J.

IRVING, J.: I see no reason for cutting down the ordinary meaning of the word "officer" to a subordinate officer or person under the control of the Council. According to the statute the commissioners may not be executive officers, but the plaintiff, in my opinion, has a right to ascertain by discovery if they have not been permitted to act as executive officers.

IRVING, J.

CLEMENT, J., agreed with HUNTER, C.J.

CLEMENT, J.

Appeal allowed, Irving, J., dissenting.

Solicitors for appellant Corporation: *Cowan, Macdonald, Parkes & Kennedy.*

Solicitors for respondents: *Bowser, Reid & Wallbridge.*

LAMPMAN, CO. J.

1908

March 3.

FULL COURT

1909

April 20.

CROMPTON v. B. C. ELECTRIC RY. CO.

CROMPTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Statute, construction of—Statutory limitation of actions—Consolidated Railway Company's Act, 1896—Cap. 55, Secs. 29, 50, 60—Victoria Electric Railway and Lighting Company, Limited, B. C. Stat. 1894, Cap. 63.

The statutory exemption as to limitation of actions provided by section 60 of the Consolidated Railway Company's Act, 1896, does not enure to the benefit of the British Columbia Electric Railway Company's operations as carried on in the City of Victoria.

The doctrine that private legislation must be strictly construed against the company or corporation obtaining the same, applied.

Reversed by P.C. of Can. Feb. 15, 1910.

APPEAL from the judgment of LAMPMAN, CO. J., in an action tried by him with a jury at Victoria on the 16th and 19th of December, 1908. Plaintiff, an infant, was injured in his mother's house by coming in contact with an electric light wire, and on the evidence the jury found negligence on the part of defendant Company, and awarded $1,000 damages. The accident occurred on the 26th of December, 1907, but the action thereon was not commenced until the 31st of October, 1908. The learned trial judge reserved for argument the point as to the right to bring action in respect of an injury sustained more than six months previously. Section 60 of the Consolidated Railway Company's Act, 1896, under which the defendant Company operates, reads:

Statement

"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 of and by authority of this Act."

Under the said incorporating Act of 1896 defendant Company acquired the property rights, contracts, privileges and franchises of the Consolidated Railway Company, but the properties specifically mentioned in the Act did not include the Victoria

Electric Railway and Lighting Company, although there was provision for the acquisition of other companies in the future. The Victoria company was absorbed by the defendant Company subsequently under the provisions of section 50 of said Act, which generally gave power to take over the franchises of any other electric tramways, and carry on the business of such companies in the names of the companies acquired, if thought fit. This was not done in the case of the Victoria company.

The Victoria company had been operating originally by virtue of an Act of the Legislature and an agreement between the municipality and the company, which agreement was embodied in the Act, but in absorbing the Victoria company, there was no evidence given at the trial of the defendant Company having dealt with the municipality in the negotiations for taking over the concern. There was no clause dealing with limitation of actions for damages or injury, in the Victoria company's charter.

Aikman, for plaintiff.
A. E. McPhillips, K. C., for defendant Company.

3rd March, 1909.

LAMPMAN, CO. J.: The defendants supplied electric light to the house occupied by the plaintiff's mother, and in the evening of the 26th of December the plaintiff, while sawing wood in the cellar, touched an electric light wire with the saw and received a shock and a burn on his arm.

The jury returned the following verdict:

"We find that

"(1.) The defendants were guilty of negligence.

"(2.) In respect to the fact that the wires were strung too close to the trees and the wires too close together causing a connection.

"(3.) No contributory negligence.

"(4.) And that we award $1,000 damages."

The injury was sustained by the plaintiff on the 26th of December, 1907, and his action was not commenced until the 31st of October, 1908, and the Company now contend that as more than six months elapsed between the injury and the bringing of the action, it is too late, and rely upon section 60 of their incorporation Act, Cap. 55 of the statutes of 1896, which is as follows: [Already set out.]

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This section has been considered in two cases in British Columbia: *Sayers* v. *B. C. Electric Ry. Co.* (1906), 12 B. C. 102; and *Green* v. *B. C. Electric Ry. Co.*, *ib.* 199; but as the points there decided were different from that now under consideration, I am unable to derive much assistance from them. In the *Sayers* case, in which the plaintiff was injured on defendants' tramway in stepping off a movable platform provided by defendants for the accommodation of passengers transferring, it was held that the section did not apply: in the *Green* case, it was held that the section was not a bar to an action under Lord Campbell's Act not brought within six months.

One of the operations of the defendants is the supplying of electric light, and while supplying light to the plaintiff's mother they injured plaintiff. Now, I do not think there is any doubt that the six months' limitation would apply if the plaintiff had been on the street and had come in contact with the current from the defendants' wires, but as he was in his mother's house at the time of his accident causes me some difficulty. That people other than the head of the house will use the house and be near wires is, of course, well known to defendants, but the contractual relation does not I think extend to them.

In the *Sayers* case there are some expressions that would seem to assist the plaintiff, but after a careful perusal of that case I think that decision was founded on the contractual relation that existed between plaintiff and defendants.

LAMPMAN, CO. J.

By section 44 of the Company's Act they are under an obligation to supply light, and I think that the principle of *Lyles* v. *Southend-on-Sea Corporation* (1905), 2 K.B. 1, governs this case, which must be decided in favour of the defendants.

The plaintiff's action is not founded on contract, and as it was not brought within six months next after the time he sustained damage, it is too late and must be dismissed with costs.

The cases are pretty fully considered in *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric R. W. Co.* (1905), 10 O. L. R. 419, and a note of them may be found in MacMurchy and Denison's Canadian Railway Act, 1903, p. 475, *et seq.*, and Jacob's Railway Law of Canada, p. 524. The phrase "by reason of the tramway or railway, or the works or operations of the Company"

is a much more comprehensive one than that under consideration in the Canadian cases there noted, and it is obvious that if this more comprehensive phrase had applied, many of the decisions must have been given in favour of the defendants. The phrase "by reason of the railway" in the old Railway Act of Canada has been widened, and now is "by reason of the construction or operation of the railway": (3 Ed. VII, Cap. 58, Sec. 242.)

The appeal was argued at Vancouver on the 19th and 20th of April, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Aikman, for appellant (plaintiff): While we admit that the works and operations of the Victoria tramway system could have been acquired by the Consolidated Railway Company under section 40 or 50 of the Consolidated Railway Company's Act, 1896, yet we say there is no proof that the Company was doing business in Victoria by virtue of that Act. On the contrary we allege that they are operating under the old Victoria charter, and that section 60 of the 1896 statute does not apply to Victoria for the simple reason that the people of Victoria, who were a party to an agreement with the Victoria company (which agreement was made part of the statute under which the Victoria company operated) were not consulted or dealt with in the transfer of the system to the Consolidated Railway Company. We do not know how the British Columbia Electric Railway Company became possessed of the Victoria charter, as we have no proof of the transfer.

Argument

A. E. McPhillips, K.C., for respondent Company: This was admitted at the trial. The British Columbia Electric Railway and Lighting Company bought it out.

[CLEMENT, J.: They may have bought out the company, but I cannot see how they could purchase a statutory exemption.]

McPhillips: We say that the Consolidated Company was in the shoes of the Victoria company.

[CLEMENT, J.: That would not pass a statutory exemption.]

McPhillips: We submit that every possible power goes to the purchasers.

Aikman: The Consolidated Railway Company's Act is a general statute; there is a special statute with reference to the

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City of Victoria, which cannot be overridden by the general legislation. We contend that the learned trial judge erred when he found that the Company were operating in Victoria under this Consolidated Company's Act at all; he should have found that they were operating under the old Victoria charter of 1894. The Company could not obtain the right to operate in Victoria under any other than the original charter. In neither the Victoria Act, nor in the agreement between the original company and the City of Victoria is there any provision as to limitation of actions. The limitation or immunity contended for here under section 60, is confined to the company named in the Act, and is not assignable or transferable. The "defendant" and "the Company" referred to in section 60 means the Consolidated Railway Company and no other. It is true the defendant Company has pleaded that section here, but it has not proved that the accident occurred or the act was done in pursuance of the authority conferred by the Act, nor given any evidence in that direction. To hold that section 60 applies in the circumstances here would be tantamount to saying that this Company could buy out any other company, and because the charter of such other company happened to be repugnant to this general statute, then the general statute applied. Even if the Company were operating in Victoria under the Consolidated Act, and section 60 applied, the accident in the case at bar is not of such a nature as section 60 is meant to cover. The plaintiff is an infant, and this provision cannot apply to him until he is of age. Section 60 is a fact that must be pleaded and proved, after which it is for the jury to decide. This was not done; but the jury having found negligence, and given a verdict upon that finding, the judge cannot as a pure question of law find that the section applies. The point should have been submitted to the jury. In short the learned judge has found as a matter of law a point which is one of fact.

Argument

McPhillips: The Consolidated Company's Act takes in the Victoria Electric Railway Company's Act and incorporates it. The lessee or purchaser under the Consolidated Company's Act is not bound to use the name of the company whose operations

or franchises are leased or purchased; it is merely optional: see section 50.

Aikman, was not called upon in reply.

HUNTER, C.J.: My learned brothers having made up their minds on the question there is of course no object in delaying the decision.

Speaking for myself I have not yet been able to arrive at this view of the construction of section 29 of the Consolidated Railway Act of 1896 on which the question admittedly depends.

Omitting the introductory part, the clause in question reads as follows:

"And in case of any such lease or sale, the lessees or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the Company." Now of course that does not provide how the property is to be held, it simply provides for the lessee having the right to exercise all the powers and franchises by the Act conferred. There is no express language used in that member of the sentence providing how the property is to be held. Then the clause goes on "and the said property may continue to be held and operated under the provisions of this Act." I am not yet persuaded that the "right to hold and operate" is made conditional on the use of the corporate name of the Company. I am so far of the opinion that the intention was to make that optional as I am unable to see the point of transferring all the powers and franchises of the company over to the lessee or purchaser and at the same time requiring all the property to be held in the name of the old company.

HUNTER, C.J.

Now if we stop there it would be reasonably clear, that the intention of the Legislature was to confer the benefit of the entire provisions of this Act from first to last upon the lessee or purchaser, and the immunity should pass to the purchaser upon the sale of this undertaking; that the benefit of the entire Act with reference to the undertaking should pass to the lessee or purchaser. The property "may continue to be held and operated under the provisions of this Act" and then it adds, as I think, parenthetically, "with the corporate name and powers of the Company."

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It is true of course that by section 50 the Legislature did enable the Consolidated Railway Company to acquire the undertakings of other companies and conferred on it the power to operate them in the names of the old company "if thought fit," and this may to some extent militate against the view I have expressed, but to hold it conclusive of the matter would, I think, be attaching too much importance to the mere phraseology, instead of its substance.

I therefore think, although with some hesitation, in view of the opinion of my learned brethren, that it was not the intention of the Legislature to compel the purchaser to hold or operate the property under the old company's name in order to obtain the benefit of any particular provision but that the use of the old name was left optional and therefore that this is not a good ground of appeal.

IRVING, J.: The question we have to decide is whether the immunity that is given by section 60 of the Consolidated Act of 1896 to the Consolidated Company has passed to the new Company in respect of business carried on by the new Company in Victoria.

I think the case is covered by section 29 which declares that "in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company, and the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company."

IRVING, J.

Now that section is capable of two constructions: The one contended for by Mr. *Aikman, viz.:* that in order to receive the benefit of the Act (including the 60th section) the purchaser or lessee must carry on the business with the corporate name of the Company, *i.e.*, of the Consolidated Company.

The other construction is that just stated by my Lord that a purchaser or lessee is authorized to carry on the business and have all the rights, powers, privileges and franchises of the Act and it is optional with him to use the old name or not as he may think fit. Much may be said in favour of this last construction, but when we read section 50 we see that the Legislature in

considering the question of names knew how to give an option by using apt words: there the option is expressly given "The company shall have power to carry on the business of such other company so acquired in the name or names of the companies so acquired, if thought fit."

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On a comparison of these two clauses it seems to me that the contention of Mr. *Aikman* should prevail, as one is not at liberty to assume that the difference in language is due to a slip on the part of the Legislature.

If there is any doubt on the point I think it is our duty to determine the question adversely to the Company; the Company being a private Company and obtaining this private bill for their benefit should see that they get everything they want.

For these reasons I think this six months' limitation does not enure to the benefit of the defendant Company in respect of works carried on by them in Victoria.

The appeal should be allowed.

CLEMENT, J.: I agree in the result arrived at by my brother IRVING; but in view of the fact as stated by counsel that the point upon which our judgment turns has remained unnoticed for a number of years I had better state briefly the reasons for the view I take.

CLEMENT, J.

This is an action against the British Columbia Electric Railway; *prima facie*, therefore, section 60 does not apply because as I read it, that section in terms applies to actions against the Consolidated Railway Company.

But this defendant Company claims that being a purchaser under section 29 it has secured by virtue of its purchase the immunity given under section 60.

Section 29 sets out the property which might be pledged or mortgaged by the old company and makes provision for a lease or sale of that property in case of default. Upon such a sale or lease the property would, of course, pass. None of the words used to describe the property can be construed as covering the immunity given by section 60, which, in my opinion, clearly is not property at all.

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But the clause goes on, "And in case of any such lease or sale, the lessee or purchaser shall have the right to exercise all the powers and franchises by this Act conferred upon the company." The benefit of section 60 is neither a power nor a franchise, so that, if we stop there, the purchaser would be entitled to carry on the Company's operations but would not have the benefit of section 60.

The clause however goes on, "And the said property may continue to be held and operated under the provisions of this Act, with the corporate name and powers of the company." In other words if the purchaser does desire to operate under the provisions of the Act he can only do so with the corporate name of the old company. In that case he would in my opinion have the benefit of section 60, whatever that benefit may be.

There is nothing that I can see in the concluding lines that carries to a purchaser the benefit of section 60. They provide that "such lessee or purchaser shall have the same rights, powers, privileges and franchises and shall stand in the same position as regards the said tolls, incomes, franchises, powers, uncalled capital and property, real and personal as the company itself under this Act." None of these words are apt to give a purchaser this immunity. In my opinion it is incumbent on a purchaser in order to avail himself of that immunity, to operate under the name of the old company.

CLEMENT, J.

I think the appeal should be allowed.

Appeal allowed, Hunter, C.J., dissenting.

Solicitor for appellant: *J. A. Aikman.*

Solicitors for respondent Company: *McPhillips & Heisterman.*

LAW v. MUMFORD.

CLEMENT, J.

1909

May 6.

LAW v. MUMFORD

Mechanic's lien—Charge against a mine—Assignment of proceeds of ore extracted—Mechanics' Lien Act Amendment Act, 1900, Sec. 12.

The lien upon a mine as provided in section 8 of the Mechanics' Lien Act, R.S. B.C. 1897, Cap. 132 (as enacted by section 12 of Cap. 20, 1900), is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine.

APPLICATION to summarily dispose of claims to a certain fund paid into Court under circumstances set out in the reasons for judgment. Heard by CLEMENT, J., at Vancouver on the 6th of May, 1909. Statement

Griffin, for plaintiff.
McHarg, for defendant and applicants.

CLEMENT, J.: Summary disposition, by consent, under section 15 of the Attachment of Debts Act, 1904, of the claims of certain parties to a fund ($1,211.71) paid into Court under an attaching order. This fund represents the price payable by the garnishees to the defendant for certain ore; but with their payment into Court the garnishees filed a suggestion that they had received notice of three assignments of the fund, aggregating $1,100. Application is now made for payment out to the three assignees of the amounts due them respectively and the only answer to the application put forward by the attaching creditor is that he is entitled to a lien on this fund by virtue of the Mechanics' Lien Act and amendments. This issue I am asked to dispose of summarily in Chambers. Judgment

The plaintiff (attaching creditor) was the defendant's "superintendent foreman" at the mine from which the ore sold and delivered to the garnishees was extracted, occupying that position until the 11th of March last. His claim under the Mechanics' Lien Act was filed on 3rd May instant, the property to be charged being described as "the interest of George D. Mumford in" certain named mineral claims at Granite Bay,

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Valdez Island. That would not affect the fund in question for the defendant Mumford had no interest in the fund (at least *quoad* the assignee's claims) on the day the mechanic's lien claim was filed; but I do not dispose of the matter upon that ground because the statutory lien would, apparently, stand good until the expiration of 60 days from the time when the plaintiff ceased work and an amended claim might be filed within time, asserting a lien upon the fund in question. But I must hold that no such lien can be successfully asserted. That has been held by the Full Court in *Gabriele* v. *Jackson Mines*, referred to in *Power* v. *Jackson Mines* (1907), 13 B.C. 202. The fund there in question was, as here, one representing the proceeds of ore sold by the mine-owners and the ground of the decision is stated by Mr. Justice IRVING (pp. 205-6): "the Full Court being of opinion that under section 12 the lien-holders could have no possible right to the moneys." The reference to section 12 is evidently to section 12 of the Mechanics' Lien Act Amendment Act, 1900, by which section 8 of the main Act was repealed and a new section 8 substituted for it. The expression there, "Every lien upon any such . . . . . mine," was evidently treated as an authoritative interpretation of the very involved and ungrammatical language of section 4 in its relation to miners' liens and as clearly limiting the lien to a charge upon the mine itself, and negativing the idea that such a lien could be asserted against the fund arising from the sale of severed ore. Whether ore severed but still lying upon the property could be held to be part of the mine is really not before me and I think it is not advisable to express any opinion upon the point.

Judgment

Nor do I express any opinion as to whether the plaintiff is a "labourer" within the meaning of the Acts.

The order will go for payment out to the three assignees of the amounts due them respectively with costs. As between the plaintiff and defendant the costs (including the assignees' costs paid out of the fund in Court) will be to the defendant in any event.

Order accordingly

REX v. TAYLOR.

CLEMENT, J.

1909

May 8.

REX v. TAYLOR

Certiorari—Obstructing thoroughfare—Nuisance—Municipal by-law dealing with—Validity of.

Summary Convictions Act Amendment Act, 1899, Cap. 69, Sec. 4—Motion to quash conviction.

Under a power to pass by-laws "for preventing and abating public nuisances" a municipal council may impose penalties for obstructing public thoroughfares by congregating thereon in crowds and for refusing to disperse when so requested by the police, for such an obstruction is a public nuisance at common law.

Where the information omitted a material allegation of fact but the issue as to that fact was fairly fought out before the magistrate who found the fact against the accused, the conviction will not be quashed. Section 4 of B.C. Stat. 1899, Cap. 69, is imperative to that effect.

MOTION to quash a conviction by the police magistrate of Vancouver upon a writ of *certiorari*, heard by CLEMENT, J., at Vancouver on the 7th of May, 1909. The applicant was convicted "for that the said William Taylor of the City of Vancouver within the space of one month last past, to wit, on the 4th day of April, 1909, at the City of Vancouver, being one of a crowd congregated in a public place so as to obstruct the same, did unlawfully refuse to separate therefrom when requested so to do by a police officer of the City of Vancouver, contrary to the form of the by-law in such case made and provided."

Statement

The by-law referred to is No. 576, the 37th section of which is as follows:

"It shall be unlawful for any persons to collect in crowds or by congregating thereon, or therein to obstruct any public place or to refuse to disperse when so congregated, upon being requested so to do by any police officer of the City of Vancouver, and any person who shall be one of such crowd or congregation, or who shall refuse to separate therefrom when requested so to do by any police officer, or who shall wilfully attract the attention of persons and cause them to congregate upon and obstruct any public place shall be deemed guilty of violation of this section."

CLEMENT, J.

1909

May 8.

Bird, in support of the motion.

J. K. Kennedy, for the Municipality, *contra*.

8th May, 1909.

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CLEMENT, J. [after stating the facts above set out]: I can see no reason for suggesting a doubt as to the validity of this by-law. Such obstruction as is therein mentioned constitutes a public nuisance at common law: *The Queen* v. *The United Kingdom Electric Telegraph Company, Limited* (1862), 31 L.J., M.C. 166; *Horner* v. *Cadman* (1886), 55 L.J., M.C. 110; *Rex* v. *Bartholomew* (1908), 1 K.B. 554, 77 L.J., K.B. 275. And by section 125, sub-sections 185 and 195 of the Vancouver Incorporation Act (B.C. Statutes, 1900, Cap. 54) the Council of the City is given power under the heading "Nuisances" to pass by-laws "for preventing and abating public nuisances" (sub-section 185) and "for the good rule and government of the City and for the suppression and prevention of nuisances" (sub-section 195). The provisions of the by-law now before me are, in my opinion, well within the scope of these powers.

The conviction upon its face finds the material facts and upon a motion of this sort I have only to examine the evidence in order to ascertain if there was any evidence to support the findings. The weight and credibility of the evidence is a matter entirely for the learned magistrate. There was evidence to bring the case within the by-law: see *Horner* v. *Cadman*, *supra*. The facts were much like those in the present case. Smith, J. (afterwards L.J.), at pp. 111-2, says:

Judgment

> "The question here is, was there any evidence on which the magistrate could properly convict the appellant of causing an obstruction to a highway? I think there was. The defendant used the highway in an unauthorized manner by bringing a band and stationing himself, as he did, on a stool; his only right was to pass and repass; but he brings a band, as it seems to me, for the express purpose of collecting a crowd round him, and then he addresses the crowd for an hour and a half. Is not that obstructing a highway? Mr. Greene says it is not, because the appellant did not obstruct the whole of the highway. That, perhaps, is true; but the appellant nevertheless obstructed part of the highway. I think that the conviction was perfectly right."

The band was not in evidence in the case before me but that is really about the only distinction to be drawn.

Mr. *Bird's* last objection was that the applicant had been tried upon an information which disclosed no offence inasmuch as the allegation that the crowd obstructed the thoroughfare was missing. Were it not for section 103 of the Summary Convictions Act (enacted by B.C. Statutes, 1899, Cap. 69, Sec. 4) this would be a fatal objection. So far as here material, that section reads as follows:

"In all cases where it appears that the merits have been tried and that the conviction, warrant, process or proceeding is sufficient and valid under this section or otherwise, and there is evidence to support the same, such conviction, warrant, process or proceeding shall be affirmed or shall not be quashed (as the case may be)."

A careful perusal of the evidence convinces me that here the merits on the very point have been fully and fairly tried. It is true that at one point the magistrate expressed a doubt as to whether or not he was concerned with the question of obstruction, but, nevertheless, he heard all the evidence offered by the applicant upon that question and also allowed full cross-examination of the City's witnesses upon it. He now finds by the formal conviction returned into this Court that the crowd did actually obstruct the street, and the evidence, as I have intimated, warrants the finding. Were there anything to cause me to even suspect that the applicant had not been given the fullest opportunity to disprove what his own counsel evidently considered a material fact to be proved I should quash the conviction without hesitation. As it is, the merits have been tried and that being so the statute is imperative that the conviction shall not be quashed.

Judgment

The motion is therefore refused with costs.

Motion refused.

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WATEROUS ENGINE WORKS COMPANY v. OKANAGAN LUMBER COMPANY.

WATEROUS ENGINE WORKS COMPANY v. OKANAGAN LUMBER COMPANY

Sale of goods—Action for price—Late delivery—Inferiority—Counter-claim —Amount overpaid.

Company law—Extra-provincial company—Incorporation by Dominion Act —Doing business in Province without licence—Companies Act, 1897, Sec. 123—Intra vires.

Plaintiff Company, incorporated by the Dominion Companies Act, but not licensed in British Columbia, entered into an agreement in British Columbia, through their resident agent, to supply certain machinery to defendant Company, a British Columbia corporation. The machinery was rejected for faultiness, and also because it was not delivered within the time agreed, thus necessitating the purchase of other machinery:—

Held, on the facts, that the machinery was faulty in construction and the rejection of it was justified; also that defendants knew that it was being held at their disposal and risk.

Held, further, that plaintiffs were carrying on business within the Province as contemplated by the Companies Act, 1897, and should have taken out a licence to do so.

Held, further, that section 123 of the Companies Act, 1897, is not in conflict with the Dominion Companies Act. The latter gives a company the capacity or status to carry on business in the various Provinces of the Dominion, consistently with the laws thereof, and in British Columbia, a pre-requisite to doing business is the securing of a licence.

Statement

ACTION to recover balance of price of goods sold and delivered, tried by MORRISON, J., at Vancouver on the 21st of May, 1908.

L. G. McPhillips, K.C., and *Laursen*, for plaintiff Company.
C. B. Macneill, K.C., and *Pugh*, for defendant Company.

Judgment

MORRISON, J.: The plaintiffs are an extra-provincial company (not licensed pursuant to the provisions of the British Columbia Companies Act), domiciled in Ontario, and incorporated by letters patent under the Companies Act (Dominion).

The defendants are incorporated under the British Columbia Companies Act, 1897.

The plaintiffs, pursuant to a contract executed in British Columbia by the defendants, shipped to them certain mill machinery. The order for these goods was taken by the plaintiffs' resident agent, and the contract was witnessed by him. The goods were shipped, but arrived at a period later than contemplated by the contract, as contended by the defendants, and, in consequence, other machinery had to be purchased instead. When the goods did arrive, it is further alleged by the defendants, they were faulty both in material and in construction, and were rejected. This action is brought for payment of a balance of some $500 odd on the contract price.

The point was at once raised that the plaintiffs were then and thus carrying on business in British Columbia in contravention of the Companies Act, R.S.B.C. 1897, Cap. 44, Sec. 123. Subject to a further consideration and determination of this point, the merits of the case were investigated, and, after hearing a number of witnesses on both sides, I have come to the conclusion on the facts that the machinery in question arrived at a period later than stipulated for in the contract, and that, in consequence of its non-arrival when contemplated, the defendants were obliged to secure other machinery to enable them to commence their operations.

I also find that the saws shipped by the plaintiffs were so faulty in material and construction as not to be in accordance with the terms of the agreement, and that the defendants were justified in refusing to accept them.

Judgment

I find further that defendants took all reasonably necessary steps to so inform the plaintiffs, and that the plaintiffs knew that the saws were at their risk and disposal.

If so considered necessary, there will be an accounting before the registrar as to the amount claimed by the defendants as having been overpaid by them, as set out in paragraph 5 of the defence.

But should the plaintiffs be advised that those findings are not justified by the evidence, I venture upon a consideration of the other aspect of the case.

Counsel for the defendants moved to dismiss the action, urging that the order having been taken by the plaintiffs' agent here,

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and the contract having been signed here by the defendants, though subject to ratification in Ontario, the contract sued upon was made in British Columbia, and is therefore illegal and void by reason of the 123rd section, *supra*: *North-Western Construction Co.* v. *Young* (1908), 13 B.C. 297.

I think the plaintiffs, in the circumstances, were carrying on or doing business in British Columbia under a contract made in British Columbia.

Counsel for the plaintiffs contend that the British Columbia Companies Act is *ultra vires*, inasmuch as it interferes with the status of a company created by the Dominion. From my understanding of the meaning of the word "status" as used in this connection, I am strongly of opinion that that is exactly what the section in question does not do. In support of this contention, my attention has been directed to the existence of the word "such" in the fifth line of section 123. It is contended that the Province thereby has the right to curtail the powers of a Federal company when issuing a licence. With due respect, the words of Bacon, V.-C., in *Cleve* v. *The Financial Corporation* (1873), 43 L.J., Ch. 54 at p. 61, occur to me, *viz.*: "that in a great many judgments, well-considered and well-expressed, a part of a sentence or a piece of a line may be extracted, so as to sustain anything that is desired to be founded upon it." Having regard to the whole section, can it mean more than "such" of its powers as the company may seek to exercise in the Province.

Judgment

Section 123 cannot operate to repeal a Federal Act. It cannot be invoked to reconstitute or dissolve a company; it cannot enforce its amalgamation or liquidation; it cannot regulate or affect a company's dealings in respect to transfer of shares. And transfers involve a change in status: *In re National Bank of Wales* (1897), 1 Ch. 298, 66 L.J., Ch. 223.

In short, it cannot, nor is it intended in any way to, limit or interfere with the capacity or status of the plaintiff Company.

The Dominion has given the plaintiff Company the capacity, the status, to carry on certain business throughout Canada, consistently with the laws of that particular Province in which it seeks to extend its operations. In this case the pre-requisite is

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the securing of a licence: *Colonial Building and Investment Association* v. *Attorney-General of Quebec* (1883), 9 App. Cas. 157. See also the leading cases collected in Lefroy on Legislative Power, p. 617 *et seq.*

On this branch of the case I think the plaintiffs also fail.

There will be judgment for the defendants dismissing the plaintiffs' action with costs.

Action dismissed.

DISOURDI v. SULLIVAN GROUP MINING COMPANY.

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DISOURDI v. SULLIVAN GROUP MINING CO.

Practice—Workmen's Compensation Act, 1902—Arbitration Act, R.S.B.C. 1897, Cap. 9—Procedure to set aside award under former Act—Costs where procedure uncertain—Prohibition—Discretion.

The Arbitration Act applies to an award under the Workmen's Compensation Act, and a motion to set aside such an award may be made under the former Act.

Where, therefore, an award was attacked by a motion for a writ of prohibition, the motion was properly dismissed, particularly as the applicant admitted that the award should have provided for weekly payments instead of a lump sum and undertook to have the register amended in this particular.

Where there is a doubt as to procedure based upon a decision of the Court, the Court in its discretion will not order costs to the successful party: *Murphy* v. *Star Mining Co.* (1901), 8 B. C. 421 at p. 422.

APPEAL from an order made by MORRISON, J., at Cranbrook on the 22nd of February, 1909, on a motion heard by him for a writ of prohibition in the following circumstances: WILSON, Co. J., at Cranbrook, as arbitrator, under the Workmen's Compensation Act on the 10th of October, 1908, awarded to Disourdi $1,500 for personal injuries received as an employee of the Sullivan Group Mining Company. This award was entered in

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the office of the registrar of the County Court at Cranbrook. The Sullivan Group Mining Company, then by summons returnable at Chambers, applied for an order prohibiting Disourdi from taking any further proceedings in the matter of the said award, and also for a writ of prohibition to be directed to the said Disourdi; and his Honour Judge WILSON, judge of the County Court of East Kootenay prohibiting them from further proceeding in the matter of the said award.

The learned arbitrator, in fixing the amount of compensation, gave the following written reasons:

Statement

This is an application under the Workmen's Compensation Act to fix the amount of compensation (if any) that the applicant should receive by reason of injuries received while in the Company's employment.

The applicant was engaged tapping for the Company and in such employment it was his duty to bring the empty cars used in conveying away the slag—while bringing one back he was injured.

Two defences are raised (1.) a wilful disobedience of orders. That I must find in the applicant's favour. He obeyed any orders received and I believe his evidence as opposed to Moran.

The second defence is that he was guilty of serious and wilful misconduct or serious neglect. On these points I find in his favour. I cannot find that the accident happened solely by reason of his serious neglect and therefore he must succeed. After Mr. Justice CLEMENT'S findings in *Armstrong* v. *St. Eugene Mining Co.*, afterwards confirmed by the Full Court (1908), 13 B.C. 385, I cannot grant a stated case but must find the question as one of fact. Following the same learned judge in *Roylance* v. *Canadian Pacific Ry. Co.* (1908), 14 B.C. 20, and for the reasons there given, I will fix the award at $1,500. The applicant will therefore recover $1,500 and his costs of and incidental to the arbitration.

MORRISON, J., dismissed the motion for prohibition, and the Sullivan Group Mining Company appealed.

The appeal was argued at Vancouver on the 21st of April, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

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L. G. McPhillips, K.C., for appellant (defendant) Company: The learned arbitrator misapprehended the decision in *Roylance* v. *Canadian Pacific Ry. Co.* (1908), 14 B.C. 20. The arbitrator having made his award is *functus* and cannot state a case. Therefore, the only remedy is by prohibition.

[CLEMENT, J.: There is no appeal: *Lee* v. *Crow's Nest* (1905), 11 B. C. 323; is not there a right to move to set aside the award?]

There is no doubt that prohibition lies to a county judge.

S. S. Taylor, K.C., and *F. G. T. Lucas*, for respondent (the applicant): The award should have been for $10 per week and not for a lump sum of $1,500. We contend that prohibition does not lie, and the remedy is by *certiorari*. A writ of prohibition is a high prerogative remedy which is never applied where there is any other sufficient remedy available. Here it was open to the Sullivan Group Mining Company to apply to bring up all the proceedings connected with the award and also the award by *certiorari* on the civil side, because they allege that his Honour had no jurisdiction to award a lump sum of $1,500 to Disourdi. It was also open to the Company to move to set aside the award under the Arbitration Act. Further, prohibition does not lie here to his Honour because, having made the award, he is *functus officio*. The award under the Act is enforced by the County Court as a judgment of the same, but not by his Honour in any judicial capacity, hence the application is improperly directed against him.

ARGUMENT

[CLEMENT, J.: The matter having been entered in the County Court, prohibiton would lie.]

CLEMENT, J.

They seek to prohibit the judge from rectifying the matter. The matter may be rectified, but nothing more may be done.

[HUNTER, C.J.: It seems to me that you could have gone to the County Court registry and had the register changed. You have something to which admittedly you are not entitled, and you are driving him to his remedy, whatever that may be.]

HUNTER, C.J.

It is not our fault that the learned arbitrator has given this award, and we did the next best thing which was to write a letter asking that the award be varied. If they cannot sustain their position in this Court, they are not entitled to costs.

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McPhillips: The form is quite regular. Here the want of jurisdiction is patent on its face; therefore the remedy is by prohibition. It is not a high prerogative writ.

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HUNTER, C.J.: Speaking for myself I think we must dismiss this appeal. I think that Mr. Justice MORRISON'S refusal to grant the writ of prohibition in this instance cannot be interfered with.

As I have always understood it, these high prerogative writs are never issued by the Court unless the Court sees no other remedy available or unless under special circumstances. A writ of prohibition of course would have to be issued if this award was to pass the Board. If, however, as was pointed out by my brother CLEMENT the Court deems it has not power to pass the award, it is void. The question to be decided here is whether there was any other remedy available for the Company and in connection with that matter I think it desirable that this question should be set at rest. We understand that there has been considerable doubt among members of the profession especially in the upper country as to whether the procedure by way of motion was open against an award under the Compensation Act. In my opinion such an award is clearly within the language of the Arbitration Act which is of the widest possible character. It enacts in terms that the Act is to apply to any arbitration held under any existing Act or any Act hereafter to be passed except so far as any future Act might require some other inconsistent course of procedure. The decision of Mr. Justice DUFF which has been referred to merely decided that the schedule under the Arbitration Act relating to arbitrator's fees is not applicable to an arbitration under the Workmen's Compensation Act. It is not necessary for us in this appeal to pass upon that, whether or not that decision is sound, but there is nothing whatever in the decision which is any warrant for holding that procedure by way of motion is not available against an award made under the Compensation Act. It therefore having been open to the Company to have proceeded by way of motion to set aside the award instead of by asking

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for the issue of a high prerogative writ I think Mr. Justice MORRISON properly exercised his discretion in refusing to grant the writ. That being so and as it has been a moot question as to how far the decision of Mr. Justice DUFF in *Chisholm* v. *Centre Star* (1906), 12 B. C. 16, settled the question as to whether the procedure was by way of motion or applying for a writ of prohibition, there has been as I recollect at least two or three instances where the Court held it could give no costs to either party; and in the case of *Noble* v. *Blanchard* (1899), 7 B. C. 62 it was held that where a decision of the Court had been generally misunderstood, it was good ground for making an order that each party pay his own costs. I think that decision should be followed in this appeal, and I think our order should be that the appeal should be dismissed and each party should pay his own costs here and below, and also a further order directing a transfer, except that Mr. *Taylor* to-day undertook that he would have the matter rectified in the County Court.

HUNTER, C.J.

IRVING, J.: I think my brother MORRISON was right in refusing to grant prohibition as the motion could and should have been made by applying under the Arbitration Act instead of to set aside the award.

I would be in favour of allowing the costs to go in the usual way but the other two members of the Court think that the general misunderstanding which has arisen from the language used in Mr. Justice DUFF's judgment is sufficient to justify us in directing no costs to either side. I think this is a very dangerous ground to proceed on, but I am not prepared to go further than that.

IRVING, J.

CLEMENT, J.: I agree with what has been said by the learned Chief Justice. I would only add that I cannot find anything in the judgment of Mr. Justice DUFF which would warrant the view that a motion to set aside an award made under the Workmen's Compensation Act cannot be made; but I do happen to know from my previous connection with these arbitrations that it has been a very general opinion among the profession that

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that method of attack upon such an award was not open. I think as we are now laying down a definite rule for the first time that the judgment of my Lord on the question of costs is the just one to make in this case.

Appeal dismissed.

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(At Chambers)
1909
June 15.

LAITNEN
v.
TYNJALA

LAITNEN v. TYNJALA.

Practice—Affidavit in Supreme Court action sworn before a notary—Oaths Act, R.S.B.C. 1897, Cap. 3; Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 50.

A notary public within the Province of British Columbia has not authority to take an affidavit in an action in the Supreme Court.

Statement

APPEAL from the district registrar of the Supreme Court at Vancouver, who refused to accept an affidavit of service sworn before a notary public within the Province of British Columbia in an action in the Supreme Court. Heard by CLEMENT, J., at Chambers, in Vancouver, on the 15th of June, 1909.

Argument

McLellan, for the plaintiff: While the Oaths Act does not permit an affidavit to be sworn before a notary public within the Province of British Columbia, still sub-section 50 of section 10 of the Interpretation Act, permits the notary public to take said affidavit.

No one, for defendant.

Judgment

CLEMENT, J.: I do not think sub-section 50 of section 10 of the Interpretation Act applies to such an affidavit as this. It has reference to oaths of office, oaths to be taken by persons conducting public enquiries, etc., and cannot, in view of the language of section 15 of the Oaths Act, be extended to cover affidavits in ordinary litigation.

Appeal dismissed.

GALLAGHER v. BEALE *ET AL.*

MORRISON, J.

1909

Feb. 12.

GALLAGHER v. BEALE

Practice—Pleading—Parties—Joinder of defendants—Fraudulent conveyance—Action by judgment creditor to set aside—Grantor not a necessary or proper party—Insolvent defendant.

The execution debtor is not always a necessary or proper party to an action by an execution creditor to set aside a conveyance as fraudulent.

MOTION by defendant Beale for an order striking out her name from all proceedings in the action and dismissing the action as against her. Heard by MORRISON, J., at Vancouver on the 11th of February, 1909. Statement

McLellan, in support of the motion.

Bird, for plaintiff, *contra*.

MORRISON, J.: The plaintiff commenced an action against the defendant Mrs. Beale on the 1st of May, 1907, and on the 14th of February recovered a judgment therein. On the 4th of July, 1907, she conveyed her property in question to the other defendant Estabrook, her brother, who, in due course, registered his deed. The judgment debt is still unsatisfied and Mrs. Beale is alleged to be insolvent.

The plaintiff in his statement of claim seeks to set aside this deed as being fradulent and void as against him. Judgment

Mr. *McLellan* now applies to have the defendant Beale struck out as a defendant.

Mr. *Bird*, who opposes this application, drew my attention to Parker's Frauds on Creditors, p. 209, but the learned author there refers to creditors who had not obtained judgment and the authorities therein cited carry the point no further, *viz.*: *Gibbons* v. *Darvill* (1888), 12 Pr. 478; *Longeway* v. *Mitchell* (1870), 17 Gr. 190; *Faulds* v. *Faulds* (1897), 17 Pr. 480.

The defendant Beale is a judgment debtor who has conveyed away her interest in the property and from whom, as it appears

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from the statement of claim, the plaintiff has failed to get any fruits of his judgment. It seems to me quite clear that she is not a necessary or proper party to this action as framed: *Weise* v. *Wardle* (1874), L.R. 19 Eq. 171; *Bank of Montreal* v. *Black* (1894), 9 Man. L.R. 439; *McDonald et al.* v. *Dunlop* (1895), 2 Terr. L.R. 177.

Judgment

A similar application was granted by my brother IRVING in the case of *Burns* v. *Barrett et al.*, March 13th, 1901 (unreported).

The application is allowed with costs.

Application allowed.

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Feb. 12.
REX v. HONG LEE

REX v. HONG LEE.

Criminal law—Warrant of commitment—Jurisdiction of magistrate not shewn—Conflicting descriptions.

Where the warrant of commitment stated that the prisoner was convicted before a justice of the peace "in and for the said County of Westminster," but the document was signed "J. Pittendrigh, Cap'n, S. M.":—

Held, that the warrant was bad.

APPLICATION for a writ of *habeas corpus*, heard by HUNTER, C.J., at Victoria on the 12th of February, 1909.

Statement

The prisoner was convicted before CANE, Co. J., at Vancouver for theft, and was sentenced to 12 months' imprisonment. While a prisoner under such sentence in the Provincial gaol at New Westminster, he assaulted a fellow prisoner and was sentenced by stipendiary magistrate Pittendrigh to six months' imprisonment with hard labour, such last mentioned sentence to commence after the expiration of the sentence imposed by CANE, Co. J. At the time of the present application the second sentence had just commenced to run. The warrant of commitment was attacked, *inter alia*, on the ground that the jurisdiction of the functionary

alleging to have made the commitment was not shewn on the face of the same. The warrant stated in the recital that the person was convicted "before the undersigned, one of His Majesty's justices of the peace in and for the said County of Westminster, for that, at the Provincial gaol, New Westminster, on Saturday, July 11th, 1908, Hong Lee did commit an assault on Sam Sing, thereby causing him bodily harm"; and said warrant was signed as follows: "J. Pittendrigh, Cap'n., S.M."

Lowe, in support of the application.
Aikman, for the Crown, *contra*.

HUNTER, C.J.: The warrant is bad, as it does not shew the jurisdiction of the magistrate. He had jurisdiction only as being stipendiary magistrate for the district and not as justice of the peace, but he is described as a justice of the peace. It cannot be inferred from the letters "S.M." appended to his signature that he was stipendiary for that district; he might be stipendiary for some other district.

Judgment

Prisoner discharged.

HUNTER, C.J.

1909

May 20.

ALEXANDER v. WALTERS.

Practice—Stay of proceedings pending appeal—Terms.

An application for a stay of proceedings is generally an application for an indulgence, and the applicant should pay the costs.

ALEXANDER v. WALTERS

APPLICATION by the defendant for a stay of proceedings pending appeal. Heard by HUNTER, C.J., at Vancouver on the 20th of May, 1909. The action was brought by the lessee named in a lease from the defendant for damages for entering and dispossessing the plaintiff in violation of the lease. The defence was that the plaintiff had forfeited the lease by non-fulfilment of covenants. The plaintiff succeeded at the trial, was awarded damages and declared entitled to possession. The defendant appealed and brought the present application for a stay pending appeal. The only term argued was as to the costs of this application. The plaintiff (respondent) asked for these costs forthwith, and unconditionally, relying upon *Merry* v. *Nickalls* (1873), 8 Chy. App. 205.

Statement

J. A. Russell, for defendant (appellant).

R. M. Macdonald, for plaintiff (respondent).

HUNTER, C.J.: The order will be that the defendant pay these costs forthwith on the defendant giving the usual undertaking to return them in the event of the appeal succeeding. An application for a stay is, generally speaking, an application for an indulgence.

Judgment

The order will be that a stay be granted on the terms of the defendant furnishing security for costs of the appeal in the sum of $150, and also furnishing security to the satisfaction of the Registrar for the damages awarded and mesne profits, and paying the costs of the action and the costs of this application forthwith after taxation on obtaining the usual undertaking to return same in the event of the Appeal Court so ordering.

Order accordingly.

GRANICK v. BRITISH COLUMBIA SUGAR REFINERY COMPANY.

MORRISON, J.

1909

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GRANICK v. BRITISH COLUMBIA SUGAR REFINERY CO.

Master and servant—Injury to and resulting death of servant—Workmen's Compensation Act, 1902—Negligence—Elevator—Warning—Accident arising out of and in course of employment—"Serious and wilful misconduct"—Disobedience of directions.

Deceased, a foreigner, but able to speak and understand, though not to read or write, English, entered the employment of defendants at work in which he had had no previous experience. Before commencing work, a fellow labourer was cautioned by the foreman, in presence of the deceased, not to allow the latter to use a freight lift. He nevertheless attempted to use it, and was cautioned not to do so. He was later in the day killed in the lift:—

Held, that he was guilty of serious and wilful misconduct.

ACTION under the Workmen's Compensation Act, 1902, tried by MORRISON, J., at Vancouver on the 5th of February, 1909.

Statement

Burns, for plaintiff.

L. G. McPhillips, K.C., for defendant Company.

11th February, 1909.

MORRISON, J.: This is an action under the Workmen's Compensation Act brought by the widow of a workman who was killed in the factory of the defendants on the afternoon of the first day of his employment at work in which he had had no previous experience.

Judgment

He was hired during a rush of work as a temporary hand. He had just left the service of the Canadian Pacific Railway Company where he worked in the blacksmith shops and had previously laboured in Winnipeg. He could speak and understand, but could neither read nor write, English.

There is a lift running to each floor which is used by the men in carrying freight. Evidence was led that there is a rule of the establishment against their using it unless for the purpose of handling freight.

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GRANICK v. BRITISH COLUMBIA SUGAR REFINERY CO.

He was set to work on floor 1 assisting in handling the products of the refinery and was taken in charge by a fellow workman Morgan. Before starting to work the foreman cautioned Morgan in the presence of the deceased not to let him use the lift until he knew how. Morgan saw him subsequently attempting to use it and told him not to do so.

In the afternoon he asked Morgan the way to the lavatory and Morgan directed him to the stairway leading downstairs, the lavatory being outside the building. Morgan then proceeded to another part of the building, and, upon his return in the course of four or five minutes, found the body of the deceased jammed between the lift and the side of the shaft at floor No. 2. One leg was hanging outside the lift.

The first question for me to decide is whether the injury to the deceased was by accident arising out of and in the course of his employment. And, if so, the further duty devolves upon me to decide whether there is any evidence to justify a finding that the injury is attributable solely to the serious and wilful misconduct or serious neglect of the deceased.

No one witnessed the fatality. But from the evidence I find, with some doubt—the benefit of which I give the plaintiff—that the accident arose out of and in the course of his employment.

As to the second question. I distinguish between this case and *Johnson* v. *Marshall, Sons & Co., Limited* (1906), A.C. 409, where the workmen were accustomed to the lift in question, though prohibited from its use, except when carrying freight. In the case at bar, the deceased was a new hand, inexperienced in the use of lifts, and was personally and specifically told not to use it. In *Johnson* v. *Marshall*, though the use, contrary to orders, of the lift by the men who were accustomed to it, was "wilful misconduct," yet it was held not to be "serious." As an illustration of the distinction, suppose it were Morgan who met with the accident, then, though it could be reasonably inferred that he wilfully misconducted himself in committing a breach of the rules, yet it could not be fairly inferred that he was guilty of serious misconduct, since the act of using an ordinary freight elevator with which he was accustomed would not, of itself, involve any danger to him or anyone else. There

Judgment

was no evidence that the deceased was obliged or told to use the lift in the course of his employment. The inference is that, on his way to the lavatory, he worked the lift in the wrong way, and, upon finding it ascending instead of descending, he attempted to get out and was caught. Now, I think the unfortunate man was guilty of misconduct and it was wilful and serious. It was a deliberate breach of a rule and warning which exposed him to danger. Considering the purpose for which the deceased desired to get down from the floor on which he was, there was no appreciable difference in time or convenience in his taking the stairway as he was directed to do, instead of using the lift. As to the meaning of the expression "serious and wilful misconduct," see *George* v. *Glasgow Coal Co., Limited* (1909), A.C. 123 at p. 129, 78 L.J., P.C. 47 at p. 49.

Judgment

I think that the onus—a very heavy one—which has been cast upon the defendants in cases of this kind by the Legislature has been discharged, and, being of that opinion, I must, though regretfully, dismiss the action.

Action dismissed.

IRVING, J.

1909

May 19.

IN RE YING FOY

IN RE YING FOY.

Criminal law—Mandamus—Adjournment of preliminary examination—Discretion of the magistrate—Limitations of control exercised by the Supreme Court.

Accused was one of 16 Chinamen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. At the end of that time a second remand was granted. Upon application for a *mandamus* requiring the magistrate forthwith to commit the accused for trial:—

Held, that a writ of *mandamus* will not issue directing a magistrate to commit prior to his adjudication of the case.

That it is the duty of the magistrate to take the evidence of all concerned, and that the Court must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally and in good faith.

Statement

APPLICATION on behalf of the accused for an order making absolute a rule *nisi* for a writ of *mandamus* requiring the police magistrate of Victoria forthwith to commit the accused for trial. The facts appear sufficiently in the headnote and the reasons for judgment. The application was heard by IRVING, J., at Victoria on the 19th of May, 1909.

Argument

Aikman, for the rule: The accused has the right in a criminal trial to have his case disposed of without delay. In two admittedly similar cases the magistrate has committed for trial on similar evidence to that already adduced here. We admit that a *prima facie* case has been made out, and under the circumstances the magistrate should be compelled to send the accused up for trial at once, so that his case may be adjudicated upon without further delay, unnecessary so far as the magistrate's share in the proceedings is concerned. On the second remand counsel for the prosecution gave no reasons for his request, so there was nothing before the magistrate on which he

could properly act. Consequently his granting of a further remand was an illegal exercise of his discretion.

H. W. R. Moore, for the magistrate: In no state of facts can this rule be made absolute, as this Court has no jurisdiction to compel the magistrate to adjudicate in a particular way prior to his announcing his decision. On the merits the facts shew that the magistrate acted legally and reasonably. The adjournment of a preliminary enquiry is a matter for the discretion of the magistrate: *Kinnis* v. *Graves* (1898), 67 L.J., Q.B. 583 at p. 584, approved by Alverstone, L.C.J., in *Bagg* v. *Colquhoun* (1904), 1 K.B. 554. The Court will not interfere with the magistrate's powers of adjournment unless it is shewn that he has exercised his discretion unreasonably, illegally, or that his decision has been actuated by extraneous considerations. See remarks of Esher, M.R., and Coleridge, C.J., in *Reg* v. *Evans* (1890), 54 J.P. 471.

Argument

IRVING, J.: This rule must be discharged, in the first place, because it is not competent for this Court to make a mandatory order directing a magistrate to find that a case has been made out, and to send the accused up for trial. This Court must not interfere with the discretion of a magistrate when he is acting *bona fide*, as he unquestionably is in this case.

The proceedings were first launched in the beginning of April, but from that date until May an armistice had been arranged. This period came to an end about May 4th, and upon the 7th the magistrate began the preliminary examination and heard all the evidence against the accused, that was available. Counsel for the prosecution wished to introduce further evidence which was not then at hand, and asked for an adjournment. At the same time he intimated that he would probably require a further adjournment, and on May 14th he asked for it, but did not again set forth the grounds of his application. The magistrate already knew the reason for this further adjournment and so did not require a fresh statement from counsel. He granted the application, and I think properly.

Judgment

It is the duty of the magistrate to take the evidence of all concerned and to commit as soon as the nature of the case will

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permit, but he must be allowed a reasonable time after the close of the evidence to reach a determination. At one time it was supposed that a magistrate could not detain a party before him more than 16 or 20 days, but now there is no precise limitation as to time. It all depends on the circumstances of each particular case. Chitty on Criminal Law, an old but reliable authority, says that it seems more reasonable that there should be a full investigation rather than that the magistrate should be tied to any particular rule.

Judgment

Rule discharged.

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DISOURDI v. SULLIVAN GROUP MINING COMPANY AND MARYLAND CASUALTY COMPANY. (No. 2.)

DISOURDI v. SULLIVAN GROUP MINING CO. AND MARYLAND CASUALTY CO.

Workmen's Compensation Act, 1902, Cap. 74, Sec. 6—Order directing insurers to pay amount into Court—Liability to third party.

There must be an admission of liability on the part of the insurer, or a finding by a competent tribunal, before the provisions of section 6 of the Workmen's Compensation Act, 1902, as to payment into Court, can be invoked.

Statement

APPEAL from an order made by MORRISON, J., on the 22nd of February, 1909, at Cranbrook. Plaintiff, an employee of the defendant Mining Company, having been injured, was awarded compensation under the Workmen's Compensation Act, 1902, in the sum of $1,500. He then took out a summons for an order directing the Maryland Casualty Company (the insurers with the defendant Mining Company), to pay the amount of the award into a chartered bank, pursuant to section 6 of the Workmen's Compensation Act. During the proceedings steps

had been taken for the winding up of the Mining Company. Section 6 of the Workmen's Compensation Act reads:

"Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, making an assignment for the benefit of his creditors, or making a composition or arrangement with his creditors, or if the employer is a company, of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and a judge of the Supreme Court may direct the insurers to pay such sum into any chartered bank of Canada in the name of the registrar of such Court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto, ..."

Statement

The Company, it developed on this application, proposed to contest their liability under the policy. MORRISON, J., made the order asked for and the Company appealed.

The appeal was argued at Vancouver on the 21st of April, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

L. G. McPhillips, K.C., for appellant (defendant Company) These proceedings are analagous to those in garnishee proceedings. The question is, if the garnishee comes in and disputes liability, can a judge order him to pay the money into Court? We are not liable until the insurer is bound to pay. Here the Company deny liability, but there being no valid judgment it is not possible to compel the Company to pay the amount into Court: *Mount Royal Milling Co.* v. *Kwong Mau Yuen* (1892), 2 B.C. 171.

Argument

S. S. Taylor, K.C., for respondent (plaintiff): The Insurance Company appeared and conducted the defence on the arbitration proceedings. Is it just that they should have a right to intervene now and contest said proceedings? They admitted their liability. We ask that the order be varied to payments in weekly amounts, and that such amounts be paid by the Company. The liability is found by the arbitrator, but he has mistakenly directed the manner of payment.

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[HUNTER, C.J.: There must be a finding of indebtedness by a competent tribunal. The amount cannot be ordered to be paid in during the progress of the suit. The question is, how has that liability arisen?]

By the happening of an accident.

[HUNTER, C.J.: But the workman may have been guilty of serious and wilful misconduct, and there may be no liability at all.]

It was not compulsory on the learned judge below to direct an issue.

[CLEMENT, J.: You cannot ask the Insurance Company to pay this man, because the order is that they pay the amount into Court.]

The Company has made an admission of liability. They had no right to take part in the arbitration proceedings unless they were interested parties contesting their rights with us.

[IRVING, J.: In those proceedings they never raised any question of dispute between themselves and the Sullivan Group.]

They could not take part in those proceedings without saying that that policy is good between us and the Sullivan Company. Now they want to say here that that policy is not good between the Sullivan Company and them. They must have a present, existing interest, not a possible interest.

Argument

[CLEMENT, J.: This is not a question of possible interest; it is a question of possible liability.]

A liability is an interest.

HUNTER, C.J.: I think this appeal must be allowed on two grounds. Section 6 of the Workmen's Compensation Act, 1902, shews that where any employer becomes liable under the Act, to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, ... such workman shall have a first charge upon the sum aforesaid for the amount so due, and a judge of the Supreme Court may direct the insurers to pay such sum into a chartered bank in the name of the registrar of the Court. I take it that it must be clear that the language of

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that section means that the employer has either to be found liable by admission on his part, or by a competent tribunal. The statute says "entitled." There must be a finding by a competent tribunal that the insurers are liable to pay that amount. For these reasons I think the appeal must be allowed.

IRVING, J.: I agree. I have nothing to add.

CLEMENT, J.: I agree. I wish to say, however, that I prefer not to pronounce upon the question whether payment in can be ordered before an award is made under the Workmen's Compensation Act. But, upon the second point mentioned by my Lord, I feel quite clear that this order should not have been made. Before this very drastic section should be invoked there must be an admission on the part of the Insurance Company that they owe the money, or there must be a finding by a competent tribunal, and until that stage is arrived at I do not think the Insurance Company should be ordered to part with the money.

CLEMENT, J.

Appeal allowed without prejudice to future proceedings.

Solicitor for appellant: *G. H. Thompson.*
Solicitors for respondent: *Harvey, McCarter & Macdonald.*

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Constitutional law—Dominion and Provincial legislation—Conflict—Laws governing sale and quality of milk—Ultra vires—Adulteration Act, R.S.C. 1906, Cap. 133, Sec. 26—Health Act, R.S.B.C. 1897, Cap. 91.

Section 20 of the Provincial Board of Health regulations governing the sale of milk not being clear as to what was intended to be prohibited, or what allowed, the Court refused to interfere with a judgment quashing a conviction thereunder: see *Barton* v. *Muir* (1874), L.R. 6 C.P. 134 at p. 144.

APPEAL from the judgment of CLEMENT, J., on an application to quash the conviction of the defendant for an infraction of the regulations governing the sale of milk passed pursuant to the Health Act, R.S.B.C. 1897, Cap. 91. The application was heard at Vancouver on the 2nd of March, 1908. The regulations, under which the conviction was had, read as follows:

"MILK.

"(16.) All milk rooms shall be situate at least 10 feet from any cow stable.

"(17.) A cooling room with facilities acceptable to Board shall be provided for by cow keepers.

"(18.) Milk that is bloody or stringy or unnatural in appearance shall not be offered for sale.

Statement

"(19.) Milk intended for sale must not be allowed to 'stand' in cow-shed, but shall, as soon as possible, be removed to cooling room.

"(20.) Milk intended for sale shall have the following minimum composition: (a.) Fat, 3 per cent.; (b.) Solids, not fat, 9 per cent.; (c.) Total solids, 12 per cent.

"(21.) Water existing in cows' milk in excess of 88 per cent. shall be an adulteration.

"(22.) Drugs or colouring matter for any purpose whatever shall not be added to milk offered for sale.

"Penal Clause.

"Any person who violates any provision of these regulations shall be liable, upon summary conviction before any stipendiary or police magistrate, or any two justices of the peace, for every such offence to a fine not exceeding $100, with or without costs, or to imprisonment, with or without hard labour, for a term not exceeding six months, or to both fine and imprisonment, in the discretion of the convicting Court."

By section 26 of the Adulteration Act, R.S.C. 1906, Cap. 133, the Governor in Council is empowered to establish a standard of quality and fix the limits of variability permissible in any article of food. No standard had been fixed for milk pursuant to this section, but section 23 permits the sale of skimmed milk when contained in cans so marked as to bring the fact to public notice.

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J. K. Kennedy, for the Crown.
Craig, contra.

28th March, 1908.

CLEMENT, J.: Notice to quash conviction of defendant by the acting police magistrate of Vancouver, for having in his possession milk intended for sale which did not have the minimum composition required by section 20 of the regulations authorized by the Lieutenant-Governor in Council under the Provincial Health Act, R.S.B.C. 1897, Cap. 91.

Various objections were urged against the conviction, but I find it necessary to express a decided opinion upon one only as will appear.

I think it must now be taken that Provincial regulations and even prohibitions of the traffic in particular commodities is *intra vires* (as relating to a matter "of a merely local or private nature in the Province") so long as such traffic is dealt with in its local or Provincial aspect: *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73.

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But at the same time if such traffic has or acquires a larger national aspect it may properly be dealt with by Federal legislation, "the peace, order and good government" of section 91, B.N.A. Act, as explained in *Attorney-General for Ontario* v. *Attorney-General for the Dominion* (1896), A.C. 348, 65 L.J., P.C. 26 at p. 31.

Russell v. *The Queen* (1882), 7 App. Cas. 829, 51 L.J., P.C. 77, and to the extent to which the ground is covered by such Federal legislation, Provincial legislation is inoperative, if of earlier date than the Federal it is overridden and ceases to be law, at least so long as the Federal Act remains in force; if of later date it is *ultra vires*. The result is the same in either case. The Provincial enactment is not law.

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The traffic in milk has to some extent been the subject-matter of Federal legislation, and it was not suggested that the clauses of the Adulteration Act, R.S.C., Cap. 133, which dealt with milk are not within the competence of the Parliament of Canada. Such a contention it seems to me could not be successfully maintained so long as the authority of *Russell* v. *The Queen*, *supra*, is maintained for the quality of an article of food of such general consumption throughout Canada as milk, is as much a matter of national concern as the liquor traffic dealt with in *Russell* v. *The Queen*.

By the 26th section of the Adulteration Act it is provided that the Governor-General in Council shall fix the standard of quality and the limits of variability in the constituent parts of any article of food. I have not been referred to the order in council by which this imperative duty was performed in the case of milk, but the defendant here admitted before the learned magistrate that his milk has failed to reach the standard set by the Federal authorities. At all events if the duty of fixing the standard rests upon the Governor-General in Council it cannot be undertaken by or under the authority of Provincial legislation and section 20 of the Provincial regulations is therefore *ultra vires* and this conviction, based solely upon that section, must be quashed with costs.

CLEMENT, J.

The appeal was argued at Vancouver on the 6th and 7th of April, 1909, before HUNTER, C.J., IRVING and MORRISON, JJ.

Maclean, K.C. (*D.A.-G.*), for the appellant Provincial Government: There has been no order in council passed by the Dominion Government fixing a standard for milk, and that being so, can the Province do so, or must it remain and suffer from such neglect? In a word, the Dominion has not occupied the field.

Argument

[HUNTER, C.J., referred to *Madden* v. *Nelson and Fort Sheppard Ry. Co.* (1897), 5 B.C. 541.]

That was a railway which had been taken out of Provincial control by becoming a Dominion railway. Here the Province has occupied the field in the interests of public health. The Adulteration Act (Dominion) is a criminal statute; it is for the

purpose of preventing fraud, but the Province comes in on the point of view of public health. Here are two entirely different intents. Something more has to be done by the Dominion before there is any law. The decision in *In re Narain Singh* (1908), 13 B.C. 477 [referred to by IRVING, J.] does not interfere with my argument. That Parliament may make a law is clear, or it may delegate the power to do certain things, but until that power is used, there is no law. For example, there is the Canada Temperance Act, but until Part 2 is brought into force, we proceed under our Provincial jurisdiction. Only when there is a direct conflict does the Provincial legislation drop into the back-ground. There is no provision that the Provincial jurisdiction is ousted where both the Dominion and Province cover the field; simply both laws are administered. The Provincial regulation does not conflict with the Adulteration Act.

Craig, and *Hay*, for respondent: The regulations in question here deal with adulteration and nothing else. The question of dealing with milk may be a Provincial or Dominion one, and if there is a Dominion law in existence in conflict with the Provincial law, the latter must go. Here there is a very pronounced conflict. Section 2 of the Regulations deals with milk; section 3 deals with adulteration. The Adulteration Act provides for an analysis by a qualified analyst; the analysis here was not by a Dominion qualified analyst. In short, the Provincial regulations virtually repeal section 5 of the Adulteration Act. The latter permits the sale of skim milk; a person doing so can be prosecuted under the Provincial regulations. Parliament has designated the person who shall fix a standard; but the Province has actually fixed a standard. Surely that is a conflict.

Argument

[HUNTER, C.J.: The Province has said, simply: The Dominion not having exercised that power, the Province has fixed a standard. Why should not that standard remain in force until the Dominion exercises the power?]

They have said that the Governor-in-Council and he only shall fix the standard, but the Province says the Provincial Board of Health shall be the body who shall fix the standard.

[HUNTER, C.J.: Start out with this premise: The Dominion has legislated; has delegated the power, but that power has not

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been exercised. Now the decisions shew that there must be a conflict.]

He "shall" do it, excludes every one else from fixing the standard. The effect of the Dominion legislation is that until there is a standard fixed by the Governor-in-Council, there shall be no standard. The Provincial regulations are void, as they deal with criminal law. It is applicable to all cases at all times and therefore is in conflict with the Dominion. The case of *Regina* v. *Wason* (1890), 17 A.R. 221, is strongly in our favour in this regard. See also *Russell* v. *The Queen* (1882), 7 App. Cas. 829. There is no doubt here that we intended to sell, but there is no evidence of knowledge on our part that the milk was below the standard.

Argument

Maclean, in reply: There is no prohibition against disposing of skim milk, if it is marked pursuant to the Adulteration Act; therefore there is no conflict.

Cur. adv. vult.

7th June, 1909.

HUNTER, C.J.: This is an appeal from the judgment of Mr. Justice CLEMENT quashing the conviction of the defendant for having milk in his possession intended for sale, which milk was below the standard prescribed by the Provincial Board of Health under the Health Act. It was assumed by and before him that the Governor-General in Council had under the provisions of section 26 of the Adulteration Act prescribed a standard for milk, and had that been so I do not see how there would be any doubt that any Provincial regulation on the subject could be inoperative. It turns out, however, that the Governor-General in Council has not fixed any standard. Much argument was directed to the question as to whether the Parliament of Canada having delegated the power to fix the standard to the Governor-in-Council, but no standard having yet been fixed, it was open to the Province to create a standard on the ground that the field has not yet been effectively occupied. However, having regard to the admonition in the *Citizens Insurance Company of Canada* v. *Parsons* (1881), 7 App. Cas. 96 at p. 109; see also *Attorney-General of Manitoba* v. *Manitoba Licence Holders' Association* (1902), A.C. 73 at p. 177, that we should not enter "more largely

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on an interpretation of the B.N.A. Act than is necessary for the decision of the particular question in hand," I do not think it necessary on the present occasion to go into this question, as assuming that there is a field still open to the Province, it does not, in my opinion, precisely appear what it was that was intended to be penalized. The regulations material to consider are as follows: [Sections 20 and 27 already set out.]

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It is not clear whether it was intended to penalize the person who intends to sell whether he has it in his possession or not, and whether or no the intention is implemented by sale. Nor again is it clear whether the prohibition applies only to milk intended for human consumption, and if so, whether it includes skimmed milk, which is already to some extent the subject of Dominion legislation. In short the provisions taken as a whole do not form a clear and coherent enactment, but are merely *disjecta membra* furnishing heads of contention, and affording more or less colour for vexatious prosecutions, and I do not think either the Courts or the public should be called on to speculate as to what is allowed and what is prohibited. As the Privy Council said in *Barton* v. *Muir* (1874), L.R. 6 P.C. 134 at p. 144, in dealing with a statute affecting civil rights: "It is dangerous in the construction of a statute to proceed upon conjecture." *A fortiori*, when the Court is called on to interpret a doubtful penal enactment, *melior est conditio defendentis*, and on this ground alone I would dismiss the appeal.

HUNTER, C.J.

IRVING, J.: In my opinion the regulation under which the conviction purports to have been made does not state that it is an offence to be in possession of impure milk intended for sale, not having the constituents prescribed by section 20.

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The milk itself may perhaps be destroyed, but the regulation has not made it clear that a person found in possession of impure milk is liable to punishment.

MORRISON, J.: I agree.

MORRISON, J.

Appeal dismissed.

Solicitors for appellant: *Cowan & Parkes.*
Solicitors for respondents: *Martin, Craig & Bourne.*

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EAST KOOTENAY POWER AND LIGHT COMPANY, LIMITED v. CRANBROOK ELECTRIC LIGHT COMPANY, LIMITED.

Water and water rights—Water Clauses Consolidation Act, 1897, R.S.B.C., Cap. 190, Sec. 36—Appeal under—Hearing de novo—Scope of—Point of diversion of water—Effect of on other records.

Section 36 of the Water Clauses Consolidation Act, 1897, R.S.B.C., Cap. 190, provides that any person affected by any decision of a commissioner or gold commissioner under the Act, may appeal therefrom to the Supreme or County Court in a summary manner by filing a petition pursuant to the procedure prescribed in the section:—

Held, that a hearing so had is a trial *de novo* and that the judge is bound to go fully into the merits of the application, as he must make such order in relation to the matters dealt with in the decision appealed from, and respecting the rights of all parties in interest and affected by the decision appealed from, whether named in the petition or not, as he deems just.

Held, further, on the facts, that as the change in the point of diversion of the water sought, meant a serious interference with a prior record, the learned judge below rightly refused to allow such change.

APPEAL from the judgment of WILSON, Co. J., in an appeal to him from the gold commissioner under sections 36 and 38 of the Water Clauses Consolidation Act, 1897.

Statement

The appellants (respondents below) were holders of a water record for 25,000 inches on St. Mary's river, the point of diversion being about four miles above the point of diversion mentioned in the respondents' (appellants below) record for 5,000 inches on the same river. Neither party at the time of the hearing had constructed any works on this river, but both parties had paid money for records and making surveys. The respondents however, operate a plant in Cranbrook and supply the municipality with light. The appellants having found that their point of diversion was not practical, from an engineering standpoint, sought to change the diversion to a point within 150 feet of the respondents' point of diversion. Evidence was given that the dam of the appellants when built would be about 150

feet away from the respondents' proposed dam, and that such dam would interfere with the respondents' works. This was contradicted, but it was admitted that the appellants' dam would flood the respondents' dam. The respondents had had their proposed works and undertaking approved under section 85 *et seq.* of the Water Clauses Consolidation Act, 1897, which approval covered not only a scheme for using the 5,000 inches but at least 25,000 inches more in addition, but such approval it was understood should not be construed as giving the Company any absolute right to such future records when applied for. The scheme as approved allowed the respondents to construct their power house immediately below their dam.

The appellants admitted that if they changed their point of diversion their record must be considered junior to the respondents' record of 5,000 inches. The respondents, however, after the appellants' petition for a change of diversion, had applied for records of 30,000 inches in all, additional water from the same point.

It was urged by the appellants that the proposed works could not possibly affect the grant of the respondents, as the right to use the water was wholly under the control of the Lieutenant-Governor in Council under section 85 and following sections, and that the grant to a power company not giving the right to use should in no way prejudice the respondents.

Statement

S. S. Taylor, K.C., and *Gurd*, for appellant Company.
Harvey, K.C., and *M. A. Macdonald*, for respondent Company.

15th December, 1908.

WILSON, CO. J.: This matter comes before me by way of petition on an appeal from the decision of J. F. Armstrong, gold commissioner for the district of South-East Kootenay. That decision was one granting the respondent Company the right, under section 27 of the Water Clauses Consolidation Act, to change the place of diversion in the grant which they had recorded.

WILSON, CO.J.

The respondent Company applied on the 22nd of April, 1907, for a water right of 25,000 inches at a point one-half mile up-stream from the Canadian Pacific Railway bridge crossing

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the St. Mary's river at Wycliffe. That application on its face is presumably a new application, but by reading the petition of the 6th of May, 1907, it is seen that its writers made application to change the point of diversion. Prior to that the appellants in this matter had obtained a water right of 5,000 inches near the new proposed point of diversion and being a company carrying on considerable business at Cranbrook, had proceeded under Part IV. of the Act to have its undertaking approved, and that undertaking as approved by the Lieutenant-Governor in Council on the 2nd of May, 1907, amongst other things, provided as follows:

> Eight thousand miner's inches of water are to be presently taken from St. Mary's river, in East Kootenay District; 5,000 miner's inches of the said 8,000 miner's inches so to be presently taken stand already recorded in the name of the Company, which record is hereby approved and confirmed, and the intended application for a further record of 3,000 miner's inches, and of such further records not exceeding 30,000 inches, from and out of the said St. Mary's river, according to the requirements of its business and the extensions to be subsequently undertaken, is approved; provided that such approval shall not be construed as giving the Company any absolute right to such records when applied for.

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They then proceeded, on the 27th of May, 1907, to apply for a record of 15,000 inches at the point indicated above, and again on the 3rd of June, 1907, they applied for a further record of 15,000 inches at said point. The whole proposed scheme was then, apparently, approved of on the 2nd of May. At that time, it would be noted, the respondent Company had no rights at or near the point of diversion other than the record for water four miles above for 25,000 inches, which record they now wish to change to this point. The gold commissioner has decided that they have a right to a record for that 25,000 inches at the point described in the evidence of one McCullough, which is the point at which the appellants have staked their water right, and from the arguments during the hearing he has apparently concluded that it is for the Lieutenant-Governor in Council to inquire into

and setttle disputes between the holders of water records, when the holders are power companies.

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Now, shortly, it seems to me that the appellants have a water record for 5,000 inches and a right to apply for a further record of 28,000 inches, and their undertaking to that extent is approved by the Lieutenant-Governor in Council. They have made the necessary applications. The respondents, if succeeding on that point, would deprive them of all rights at the point of diversion except insofar as the 5,000 inches, which they already have, is concerned, and to that extent render the order in council nugatory. That is clear from the expert evidence, which shews there is approximately only that amount of water in the river. It seems to me that by the approval of their scheme they have acquired a superior status to that of the respondents and that their rights must be recognized. For example, according to the evidence of the expert, McCullough, their (the respondents') work will almost necessarily seriously interfere with the proposed scheme of the appellants, and under those conditions it does not seem to me to be either equitable or right that a water record should be given to them or that they should be allowed to have rights that will in any way necessitate the appellants to be, as it were, upon the defensive, in protecting their rights.

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Mr. *Taylor*, at the hearing, laid stress on the point that the notice as to the change stated the point of diversion to be half a mile above the Canadian Pacific Railway bridge at Wycliffe, whereas the point of diversion granted by the gold commissioner at the hearing was a mile above, but as I have decided as above I will not deal with that point.

The appellants must therefore succeed.

The appeal was argued at Vancouver, on the 26th of April, 1909, before HUNTER, C.J., IRVING and CLEMENT, JJ.

Woodworth, for appellants, the East Kootenay Power and Light Company, Limited: The question is, should the appellants be allowed to change the point of diversion mentioned in their record? We submit that the powers of the Lieutenant-Governor in Council under the Act are restrictive instead of expansive: see sections 86 and 87. As to the *locus*

Argument

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standi of the respondents, section 13 gives the gold commissioner the right, in adjudicating upon any application, to consider pending applications. Section 16 states the rule of priority among pending applications. The right prior to the record is only a right of application. A right of application does not give an applicant a right to oppose the grant to another person, who is not a person affected by the decision of the gold commissioner under section 36: *Farmer* v. *Livingstone* (1882), 8 S.C.R. 140. No interference with the prior rights as to the 5,000 inches is asked for or proposed to be given. As to subsequent application they have no right to be heard in opposition to our grant, or change of point of diversion.

The lines upon which the gold commissioner should act are, firstly, it is a matter of revenue (Part I. of the Act), and he as Government officer ought therefore to be sole judge, subject, of course, to any Government supervision; secondly, he should, under section 144, secure the greatest beneficial use of the entire available water supply for the greatest number.

The respondents not having erected any works, and not being likely to for two years yet, the right the appellants are asking for they take upon the hazard that their plans may never be approved of by the Lieutenant-Governor in Council. Their mere record does not give them power to turn a single sod or interfere with the respondents, nor does it give anyone else the right to use the stream. They may pay for a year or more and find themselves entirely defeated when they come before the Lieutenant-Governor in Council. Revenues will thus be obtained for the Crown, which this Court ought not to deprive them of, if the appellants are willing to take the risk.

Argument

S. S. Taylor, K.C., for the respondent, Cranbrook Electric Light Company, Limited: We refer to sections 12, 13, 27, 36, 38, 85, 86, 87, 89, 92 and 144 of the Water Clauses Consolidation Act. The respondents had a record for 5,000 inches in this canyon, which was only 300 feet wide, and which was too narrow to permit of more than one spillway, and not of sufficient grade to allow of any other dam in the canyon below respondents' works, because such would interfere with the tailrace. The respondents' scheme as approved, gave them the right to acquire 25,000 inches

more, and such took up the entire flow of the river at low water. To interfere with the 5,000 inches would be to destroy the whole scheme, and such was established by respondents' experts; and appellants produced no expert testimony.

Under section 13 the gold commissioner was bound to "adjudicate" upon the dispute, and in such adjudication to "have regard to existing rights and records." A distinction is drawn between "rights" and "records" whereas the gold commissioner confined his judgment to "records" alone. He practically disregarded the approval of the whole scheme by the Lieutenant-Governor in Council and his judgment destroyed the usefulness of respondents' record of 5,000 inches.

Under section 36 the case is heard on appeal as a trial *de novo*: see *Ross* v. *Thompson* (1903), 10 B.C. 177; and the County Court judge under section 38 may "confirm or reverse the decision of the gold commissioner . . . and may make such order in relation to the matters dealt with in the decision appealed from, and respecting the rights of all parties in interest and affected by the decision appealed from . . . as he deems just . . . ."

Very wide powers are given to the Appeal Court, namely, the judge of the County Court—and he was right in considering the effect of the appellants' application upon the whole scheme of the respondents, notwithstanding the fact that the respondents so far only had a record for 5,000 inches.

Argument

The appellants' contention to the effect that these objections should be taken before the Lieutenant-Governor in Council when the appellants would apply for their certificate of approval is not sound, because the Lieutenant-Governor in Council has no jurisdiction under section 85 and following sections to adjudicate upon the rights of the parties in conflict. Under sections 86 and 92 the Lieutenant-Governor in Council deals solely with the scheme as it affects the public interests, and can if they see fit grant or refuse a certificate without notice to any person. It is the duty of the gold commissioner to adjudicate upon all the rights of conflicting parties, and the Lieutenant-Governor in Council under section 85 and following section do not interfere with that jurisdiction. Section 92 in specifically dealing with

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the "paralleling of the proposed works by others," and in limiting the hearing therein referred to to the special subjects therein named indicates that the jurisdiction of the gold commissioner is not interfered with by the Lieutenant-Governor in Council, hence the matter was properly fought out in the Courts below and is properly before this Court.

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Woodworth, in reply.

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HUNTER, C.J.: In my opinion the hearing under section 36 before the County Court judge is a trial *de novo*, and the County Court judge is bound to go fully into the merits of the application because he must make "such order in relation to the matters dealt with in the decision appealed from and respecting the rights of all parties in interest and affected by the decision appealed from, whether named in the petition or not as he deems just . . . . ."

Here I think the learned County judge properly held that the change of the point of diversion of the appellants' record to the rocky canyon where the respondents had their record of 5,000 and the approval of the scheme involving the utilizing of 25,000 inches more, meant serious interference with that scheme, and therefore rightly refused to allow such change of point of diversion.

HUNTER, C.J.

I may add that the Lieutenant-Governor in Council does not exercise a jurisdiction in conflict with the gold commissioner, but reserves the right to protect the public interest by approving or disapproving of the scheme of development submitted by water record holders.

I would dismiss the appeal with costs.

IRVING, J.

IRVING, J.: I agree.

CLEMENT, J.

CLEMENT, J.: I agree.

Solicitors for appellants: *Harvey, McCarter & Macdonald.*
Solicitor for respondents: *W. F. Gurd.*

DISOURDI v. SULLIVAN GROUP MINING COMPANY, LIMITED.

DISOURDI v. MARYLAND CASUALTY COMPANY (No. 3.)

CLEMENT, J. (At Chambers)

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June 29.

DISOURDI v. SULLIVAN GROUP MINING CO.

SULLIVAN v. MARYLAND CASUALTY CO.

Workmen's Compensation Act, 1902, Sec. 6—Rules made thereunder—Ultra vires—Insolvency of employer—Procedure by applicant to establish liability of insurer.

The applicant was injured in the employment of the defendant mining Company, which during the proceedings to establish his claim against them, went into liquidation. He was awarded compensation in $1,500. The Insurance Company disputed their liability, under their policy of insurance issued to the Mining Company. Under these circumstances the applicant applied under section 6 of the Act for an order that the Mining Company and the insurers proceed to the trial of an issue with him:—

Held, that any right which the applicant might have against the insurers under said section 6 must be decided in an action commenced in the ordinary way.

Held, further, that the rules made under section 6 are *ultra vires*.*

SUMMONS by the applicant, for an order that the respondents and insurers proceed to the trial of an issue with the applicant, and that the question to be tried shall be whether the said applicant is entiled to payment from the insurers of a certain award dated the 10th of October, 1908, as amended pursuant to

*Section 6. Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, making an assignment for the benefit of his creditors, or making a composition or arrangement with his creditors, or if the employer is a company, of the company having been commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and a judge of the Supreme Court may direct the insurers to pay such sum into any chartered bank of Canada in the name of the registrar of such Court, and order the same to be invested or applied in accordance with the provisions of the First Schedule hereto with reference to the investment in any chartered bank of Canada of any sum allotted as compensation, and those provisions shall apply accordingly.

Statement

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the order of the Full Court, dated the 21st of April, 1909, in the case reported *ante* pp. 241,. 256. Heard by CLEMENT, J., at Chambers in Vancouver, on the 29th of June, 1909.

Argument

L. G. McPhillips, K.C., for the insurers: The award of the arbitrator is *ultra vires*, in that it provides that the whole of the $1,500 is to be paid in sums of $10 per week "unless said applicant should not so long live." The only power of the arbitrator was to order this payment during incapacity (*b.* of 3, First Schedule) and subject to the right of review (9 of First Schedule); and a point of this nature could probably not be raised in an issue. Further, the rules made by the Lieutenant-Governor in Council, as they appeared in the Gazette, 1904, pages 353 and 1,164, are *ultra vires* insofar as they provide for the procedure under section 6 of the Act (the section under which the application was brought). The only authority in the Act for making the rules is sections 2 and 5 of the Second Schedule. Section 5 merely refers to appearance by a party other than the parties to the arbitration; and section 2 refers only to the rules respecting the decision of questions between the applicant and the respondent and not to questions between the applicant and an insurance company; and the first two lines of the schedule provide that the provisions of that schedule shall apply for settling any matter which under this Act is to be settled by arbitration. And section 6 does not provide that the question as to whether the respondent is entitled to a sum of money from the insurer is to be settled by arbitration.

S. S. Taylor, K.C., for the applicant: Section 6 of the Act in itself provides that the question of whether the respondent was entitled to any money from the insurers should be decided by an application to a judge of the Supreme Court as distinguished from an action in the Court; and therefore authorizes a judge to order an issue.

Judgment

CLEMENT, J.: The rules made under section 6 are *ultra vires*, and section 6 in itself, apart from the rules, does not authorize me to order an issue. Any right which the applicant might have under this section as against the Insurance Company must be

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decided in an action commenced by writ of summons in the ordinary way. I, however, reserve the question of costs until after the decision in any action to be brought, provided that if no action be brought within three months this application shall stand dismissed with costs.

Application dismissed.

REX v. SUNG CHONG

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June 7.

REX v. SUNG CHONG

Municipal law—By-law regulating hawkers—Construction of—Validity—Regulation and prohibition—Difference between—Vancouver Incorporation Act, 1900, Cap. 54, Sec. 125, Sub-Sec. 110.

Where a municipal by-law was passed prohibiting hawkers and peddlers of vegetables and similar products from pursuing their calling throughout the municipality during certain hours on market days:—

Held, per HUNTER, C.J., dissenting, that the by-law was regulatory and not prohibitory in its provisions and therefore *ultra vires* the Council.

Per IRVING, J.: The by-law in question was not authorized by the statute.

Per MORRISON, J.: A statutory power to pass by-laws regulating a trade does not authorize the prohibition of such trade or the making it unlawful to carry on a lawful trade in a lawful manner.

APPEAL from the decision of CLEMENT, J., at Vancouver, on the 17th of September, 1908, dismissing an application for a writ of *certiorari* removing into the Supreme Court a conviction of the defendant for an infraction of the Market By-law, No. 630, of the City of Vancouver. Section 4 of the by-law, on which the conviction was had, reads:

Statement

"No peddler shall peddle any dairy produce (except milk) or garden or field produce or fruit in any part of the City before the hour of 10 o'clock on any market day as defined in section 2 hereof, and no person other than a consumer, buying for his own use, shall buy, or bargain for any goods exposed in the market before the said hour of 10 o'clock."

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The appeal was argued at Victoria on the 15th and 19th of January, 1909, before HUNTER, C.J., IRVING and MORRISON, JJ.

Farris, for appellant (defendant): A by-law must be strictly construed against the municipality: *Re Taylor and Winnipeg* (1896), 11 Man. L.R. 420; *Re Brodie and the Corporation of Bowmanville* (1876), 38 U.C. Q.B. 580. The legislation in question is only as to market days, which would appear as if it was the interest of the market and not that of the public which was concerned.

[HUNTER, C.J.: We cannot presume bad faith as to governmental bodies.]

No, but we must see if the legislation is reasonable, and they are not reasonable in attempting to restrain a person from doing a lawful thing in a lawful manner.

[*Per curiam:* It is plain that sub-sections 64 or 66 of section 125 are not intended to apply. The question, then, is had the Council power under sub-section 110, relating to hawkers, to pass this by-law?]

Statement

The question is what power had the council to regulate—

[MORRISON, J.: Prohibit.]

Partially prohibit and partially regulate. The Court must be satisfied that there is a substantial prohibition on the individual pursuing his business or calling: *O'Dea* v. *Crowhurst* (1899), 63 J.P. 424.

J. K. Kennedy, for respondent Corporation: The intention of the by-law is to prevent the forestalling of the market, and in doing so, the Council is decidedly within its powers.

Farris, in reply: The by-law should state in terms that the intention was to prevent forestalling.

Cur. adv. vult.

7th June, 1909.

HUNTER, C.J.: I think the by-law impugned may be supported under sub-sections 68 and 110 of section 125 of the Incorporation Act.

HUNTER, C.J.

It was argued that a prohibition on a peddler from peddling garden produce before 10 a.m. on market days was not an enactment regulating peddlers, and reliance was placed on the case

of *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88. It was there held that a by-law which purported to be passed under the regulating powers possessed by the City of Toronto, and which prohibited peddlers from plying their trade at all on certain streets was in reality *pro tanto* prohibitory, and therefore to that extent *ultra vires*, but I am unable to see how it can be quoted as an authority in support of the proposition that a by-law which allows peddling during certain hours and forbids it during certain hours, can be said to be prohibitory and not regulatory. In fact Lord Davey says, at p. 93:

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"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order."

I would dismiss the appeal.

IRVING, J.: In my opinion we should upset this conviction on the ground that the fourth clause of the by-law is *ultra vires* of the powers conferred upon the City of Vancouver.

There are two sub-sections (if at all) under which this clause 4 can be upheld, *viz.*: sub-section 63, "for establishing markets and stock yards and for regulating the same"; and sub-section 66, "for preventing or regulating criers and vendors of any vegetables, etc., from practising their calling in any public markets, public sheds and vacant lots, and the streets and lanes adjacent to the market." The Legislature by section 66 expressly authorized the Council to prevent and regulate criers from practising their calling in the streets and lanes in the City adjacent to the market. If it was intended that the City should have the power that they profess to exercise by this clause 4 of the by-law, the words "adjacent to the market" would be wholly unnecessary.

IRVING, J.

The question is not absolutely plain, but in such a case as the present, which restrains or limits a man's right to carry on his trade in the ordinary way, we ought to be satisfied that the right has been taken away from him before we uphold any by-law to that effect.

Among the normal rights which are available to every British subject against all the world are (1) personal safety and freedom;

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(2) one's good name; (3) the enjoyment of the advantages ordinarily open to all the inhabitants of the country, *e.g.*, the unmolested pursuit of one's trade or occupation and free use of the highways; (4) freedom from malicious vexation by legal process; and (5) to one's own property.

Where a restraint is sought to be put upon any person in respect of the exercise of any of these natural rights, I think it is the duty of the Court to assume that the Legislature did not intend to interfere with them unless clear and unequivocal words have been used.

In this case there is an interference with the right of the peddler to carry on his business at the hour he thinks best suited for peddling, and there is also an interference with the right of the citizen to purchase in (to him or her) the most convenient market.

IRVING, J.

I would quash the conviction.

MORRISON, J.: The City of Vancouver passed a by-law to regulate their market, section 4 of which reads as follows [already set out.]

For an infraction of this section of the by-law the defendant was fined, and the matter is brought before us by *certiorari* proceedings.

One of the grounds upon which this by-law is sought to be quashed is that the provision in question is unreasonable. A very effective answer to this ground of objection is found in the course of the decision of Lord Hobhouse in *Slattery* v. *Naylor* (1888), 13 App. Cas. 446 at pp. 452-3, where in part he says that in determining whether or no a by-law is reasonable it is material to consider the relation of its framers to the locality affected by it, and the authority by which it is sanctioned. And then his Lordship goes on to point out that where the Legislature has taken the precaution to ensure that the Council represents the feelings and interests of the community for which it makes laws; that, if it is mistaken, its composition may promptly be altered; that its by-laws shall be under the control of the supreme executive; and that ample opportunity shall be given to criticize them in the Legislature; then there should be strong reluctance shewn before questioning the reasonable character of

MORRISON, J.

by-laws made under such circumstances, and there should be doubt whether they ought to be set aside as unreasonable by a Court of law unless it be in some very extreme case. And again in *Hanrahan* v. *Leigh-on-Sea Urban Council* (1909), 1 K.B. 78 L.J., K.B. 238 at p. 241, Walton, J., says:

"We must construe these by-laws (sanitary) according to their plain sense, without regard to the consequences, the Legislature having assumed that the local authorities would act in a reasonable manner."

But assuming that the provision is a reasonable one, yet the point is raised that it is *ultra vires* the Council because it is a prohibition and not a regulation of the business of hawkers.

Mr. *Farris* laid stress upon Lord Davey's observation upon certain authorities cited in *Municipal Corporation of City of Toronto* v. *Virgo* (1896), A.C. 88, that all through them the general principle may be traced that a municipal power of regulation or of making by-laws for good government without express words of prohibition does not authorize the making it unlawful to carry on a lawful trade in a lawful manner.

Here the appellant was prohibited during a certain period from plying his trade at all as in the *Virgo* case. The continuity of the trade's existence was broken.

Lord Davey goes on to say that the real question is whether under a power to regulate and govern hawkers, etc., the Council may prohibit, there being no question of any apprehended nuisance; and he continues (p. 93):

HUNTER, C.J.

"No doubt the regulation and governance of a trade may involve the imposition of restrictions on its exercise both as to time and to a certain extent as to place where such restrictions are in the opinion of the public authority necessary to prevent a nuisance or for the maintenance of order."

There is no question of nuisance or maintenance of order here, the provision in my opinion being solely for the protection of the market. It seems to me therefore that the Council have no power to restrict the appellant as they have done in the lawful exercise of his business.

I would allow the appeal.

Appeal allowed, Hunter, C.J., dissenting.

Solicitor for appellant: *J. W. De B. Farris.*

Solicitor for respondent: *J. K. Kennedy.*

MORRISON, J.

1909

June 18.

REX v. GATES

Criminal law—Appeal—Hotel keeper employing bar tender—Illegal act of latter—Knowledge of employer.

REX v. GATES

A hotel keeper, having delegated authority to his porter or bartender to sell intoxicating liquors on the hotel premises, is responsible for his servant's infraction of the law regulating such sale.

APPEAL by way of case stated from the decision of the police magistrate for Fernie, heard by MORRISON, J., at Fernie on the 18th of June, 1909.

Statement

The appellant (defendant) a hotel keeper, was convicted of having unlawfully sold liquor to persons on his premises within prohibited hours. The sale was actually proved, as well as the fact that the purchasers were not *bona fide* travellers under the Act, and the question in doubt was as to the knowledge of the defendant, the liquor having been sold by his bartender or porter.

Ross, K.C., for appellant.

W. A. Macdonald, K.C., for the Crown.

Judgment

MORRISON, J.: Having come to a clear opinion, I do not think it advisable to reserve my decision in this matter. The magistrate in stating the case has found that an employee of the defendant sold intoxicating liquor by retail during prohibited hours to persons other than those excepted by the Act. He also finds that there was no evidence to shew whether the sales of liquor in question were made with the knowledge, sanction or approval of the defendant. This last finding cannot mean more than that the defendant was not actually present and did not request the sale at that particular time to those particular persons.

The short point urged upon me on behalf of the appellant is that inasmuch as the sales in question were made in the absence and without the knowledge or sanction of the licensee, the conviction is bad.

Section 7 of the Liquor Traffic Regulation Act, 61 Vict., Cap. 124, prohibits absolutely the sale of liquor within certain specified hours with certain few specific exceptions within none of which exceptions this case comes. The case of *Emary* v. *Nolloth* (1903), 2 K.B. 264, 72 L.J., K.B. 620, cited by Mr. *Ross* is direct authority for the proposition that in such a case the question whether the sale was made with or without knowledge is immaterial.

The other cases cited by Mr. *Ross* seem to me distinguishable, for in none of them was the sale prohibited at all as here. And the question seemed to turn in each case upon the presence of the owner or person in charge which circumstance negatived the presumption that he had delegated authority to the servant who actually made the sale unknown to him. The wording of those Acts is also essentially different. The citation from Bowstead on Agency, 3rd Ed., 442, does not apply if it can be held that the servant in this case was in charge of the premises on the occasion in question.

Judgment

I think the conviction is right. The appeal is dismissed with costs.

Appeal dismissed.

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Re BANK OF MONTREAL ASSESSMENT

IN RE BANK OF MONTREAL ASSESSMENT

Assessment—Bank, income of—Deductions for losses written off during the year—Date of ascertainment of such losses—Assessment Act, 1903, Amendment Act, 1905, Cap. 50—"Transaction," meaning of.

Form 1 of the schedule of forms to the Assessment Act, as enacted by chapter 50 of the statutes of 1905, provides among the deductions permitted in making returns of incomes earned by banks: Losses written off during the year, such losses being written off within six months of the time they were ascertained, and not covering transactions antedating that date more than 18 months:—

Held, on appeal, reversing the decision of the Court of Revision, that, the enactment being doubtful as to whether the inception or completion of the transaction was meant, the doubt must be resolved in favour of the taxpayer.

APPEAL from the Court of Revision and Appeal at Victoria on the 25th of March, 1909. The net income of the Bank for the year was $94,200, but during the year there was written off as losses, sums amounting in the aggregate to $300,000, extending over a considerable period of time. The statutory form of return of income by banks requires them to shew "losses written off during the year; such losses being written off within six months from the time they were ascertained and not covering transactions antedating that date more than 18 months." The losses in question here admittedly arose out of loans made more than 24 months prior to the time they were written off, but, it was contended, were not ascertained until they were written off.

Statement

The appeal was argued at Vancouver on the 6th of April, 1909, before HUNTER, C. J., IRVING, and MORRISON, JJ.

Senkler, K.C., for appellant Bank: If the decision appealed from is correct, a bank must always close its transactions each year or it cannot get the benefit of the deductions allowed by the statute for losses. There can be no proof of a loss ascertained by a bank except by particular methods, and the general method is by writing off. They might be also classed as uncollectible

Argument

debts, but that amounts to the same in the result; the loss is ascertained only by the amount being written off. We say that the transaction must have been completed and 24 months must have run before the Bank is not to be allowed to deduct the loss.

Maclean, K.C., D.A.-G., in support of the assessment: There must be some limit, otherwise a bank could always bring in some old debt and so wipe out its entire income for the year. If the loan was made more than 18 months before, then it should not apply. True, it may have the effect of reducing the period of credit, but there should be some limitation applied. "Transaction" does not comprise the whole period of a loan.

Argument

Senkler, in reply: This is not an old debt. This is a transaction which the Bank has been carrying along in the regular course of business. Moreover, banks are business institutions and conduct their affairs in a business-like way. They could not afford to hold over old losses in the manner suggested.

Cur. adv. vult.

7th June, 1909.

HUNTER, C.J.: The question in this appeal is whether or not the appellant Bank is right in claiming to deduct a loss of $300,000 which was admittedly written off within the year for which the assessment was made. The statute in Form No. 1 provides that deductions may be made for "losses written off during the year. Such losses being written off within six months from the time they were ascertained and not covering transactions antedating that date more than 18 months." The $300,000 transaction had its inception long before the 18 months, but the Bank contends that the completion of the transaction of credit must have occurred before the 18 months. If the language had been "and not including loans or credits made or given more than 18 months before that date" the intention would have been clear, although the effect would be to force banks to reduce the length of credit or forbearance which they might otherwise extend to customers, which might result in some cases in ruin. The question, however, is whether the word "transaction" is to be interpreted as referring to the act of

HUNTER, C.J.

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lending or giving credit, or to the entire period of forbearance or credit given. Mr. *Maclean* argued that the latter interpretation would reduce the last member of the clause to a nullity, but it may have been designed, as Mr. *Senkler* suggests, to prevent banks carrying over in "uncollectible debts" accounts losses which they had in reality long before written off and so prevent evasion of the Act. However that may be, I think there is sufficient doubt about the matter to resolve it in favour of the subject, and that as there is nothing to shew when the period of credit came to an end I think the appeal should be allowed.

IRVING, J. IRVING, J.: I agree.

MORRISON, J. MORRISON, J.: I agree.

Appeal allowed.

Solicitors for appellant: *Wilson, Senkler & Bloomfield.*
Solicitor for respondent: *H. A. Maclean.*

JONES AND JONES v. THE NORTH VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED LIABILITY.

CLEMENT, J.
1908
March 28.

FULL COURT
1909
June 7.

JONES
v.
NORTH VANCOUVER LAND AND IMPROVEMENT CO.

Company law—Forfeiture of shares—Abandonment by acquiescence in forfeiture.

The plaintiff, H. A. Jones, one of the original shareholders of the defendant Company, organized in 1891, transferred 240 shares to his wife, the co-plaintiff, Clara B. Jones, on September 26th, 1893, and on the same day took an assignment of the same shares from her to himself. The assignment was never registered. The par value of the shares was $100, on which 80 per cent. had been paid up. In May, 1895, a call of 2½ per cent. was made, payable on June 14th following, with the usual penalty of forfeiture in case of default. Default was made, and the shares were declared delinquent, were offered for sale, but there being no bid, were withdrawn. In March, 1896 (new by-laws having been adopted in the meantime), a call of 6 per cent. was made on all shares, including those of the plaintiff, Clara B. Jones. Default was made and in due course the shares were declared delinquent. In April, 1897, a further call of 9 per cent. was made. On the 21st of May, 1898, a resolution was passed by the directors that Mrs. Jones be served with a notice requiring her to pay the call of 2½ per cent. by the 24th of June, and that in the event of default the shares would be forfeited. At a meeting of the directors on the 25th of June, a resolution of forfeiture, reciting the facts, was put, when Mrs. Jones's husband and co-plaintiff, who was present and a director, offered to pay $100 on account if the shares were not forfeited for six months. This offer was refused and the resolution was passed. In May, 1907, Mrs. Jones's solicitors inquired of the Company whether the shares had been forfeited, and offering to pay up the arrears, but were informed that the shares had been forfeited. She then brought action :—

Held, on appeal, affirming the judgment of CLEMENT, J., at the trial (HUNTER, C. J., dissenting), that the plaintiff, Clara B. Jones had elected to abandon the undertaking by acquiescing in the forfeiture at a time when the Company's prospects were doubtful, and such abandonment could not be recalled when it was found that the Company was prosperous.

APPEAL from the judgment of CLEMENT, J., in an action tried by him at Vancouver on the 25th and 26th of March, 1908. The action was for a declaration that the plaintiffs were the

Statement

CLEMENT, J.

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owners of 240 shares of the capital stock of the defendant Company, subject to any unpaid calls, and for damages for the alleged illegal forfeiture of the said shares. The facts are fully set out in the reasons for judgment of HUNTER, C.J., and in the headnote.

Martin, K.C., and *Craig*, for plaintiffs.

Davis, K.C., and *Pugh*, for defendant Company.

28th March, 1909.

CLEMENT, J.: In this case I accept as the principle to be applied that where there is a vested right or interest in any party he cannot waive or abandon that right except by act equivalent to an agreement or a licence: *Palmer* v. *Moore* (1900), A. C. 293; but I find no difficulty in holding that the acts of the plaintiffs here were equivalent to an agreement to acquiesce in the forfeiture of and waive all claims to these 240 shares and that on the strength of that agreement the other shareholders contributed further, at (as then appeared) great risk, to carry on the Company's operations. The plaintiffs knew all the facts as to the forfeiture and must, I think, be taken to have known that if they objected, the forfeiture could not stand, in which case further steps to that end could have been adopted. But to my mind they clearly acquiesced—in effect, agreed to drop out.

CLEMENT, J.

Action dismissed with costs.

The appeal was argued at Vancouver on the 30th of November, and the 1st, 4th, 7th 8th and 9th of December, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Martin, K.C., and *Craig*, for appellants (plaintiffs), submitted (1.) there was no proof of service of any notice of the call made on the 21st of November, 1895; (2.) there was no election of trustees; (3.) there was no provision made in the by-laws for the election of directors; (4.) the call of 2½ per cent. was not a call for which the shares could be forfeited, inasmuch as there were in the hands of the Company moneys paid on an illegal call of 15 per cent. on account of these shares more than sufficient to pay the 2½ per cent. call; (5.) the Company made other calls subsequently to the 2½ per cent. call; (6.) the directors or

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trustees were not elected by ballot; (7.) all the meetings held up to the time of the call in question were adjourned from time to time for want of a quorum. There was no power in the directors to do this; (8.) from the wording of the forfeiture resolution, it is not clear what shares, if any, were forfeited; (9.) the provisions of section 33 of the then Companies Act as to publication were not carried out; (10.) the provisions of section 35 were not complied with inasmuch as no by-law was passed limiting the time for paying before forfeiture.

We claim that the forfeiture, for the above reasons, was irregular and void. This contention is supported by a finding of the trial judge that the plaintiff abandoned the shares within the meaning of *Palmer* v. *Moore* (1900), A.C. 293. There the idea was that the party seeking relief was confronted with the difficulty that he had acted on the proposition: was it worth while putting any more money into the venture? and deliberately decided that it was not and was ready and willing that the other persons should go ahead and assume the burden. Our answer to that is that here there is no evidence whatever pointing in that direction. Of course that condition of affairs may be assumed from the subsequent actions of the parties, more especially in delay in asserting their rights. We claim that this inference never arises except where there has been delay after knowledge of the rights of the party, and that while the plaintiff knew that there had been a forfeiture, yet he never knew that he had a right to set it aside. This is shewn from the fact that the plaintiff, H. A. Jones, being a director of the Company was aware that the whole matter of the forfeiture proceedings had been turned over to a firm of solicitors, and the directors had done nothing without the advice of such solicitors and on their instructions. In these circumstances it is clear that Jones did not have any knowledge of his rights; that is, that while the forfeiture was actually carried out in the books of the Company, yet the statutory conditions precedent had not been complied with. In further answer to the suggestion that the delay might cause an inference of the intention of abandonment, it is proved affirmatively, by the evidence of the directors that at the meeting in 1898, when the forfeiture resolution was passed, H. A. Jones,

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acting for his wife, appeared and endeavoured to prevent the forfeiture being carried out by asking that his wife be given further time to pay, and offered, as an indication of *bona fides*, to pay $100 down if six months' additional time were given to pay the balance of the call, $500. It was suggested by the defence that even if that were so, that knowledge of the right to set aside the forfeiture, as well as knowledge of the forfeiture, is necessary to be shewn; that the maxim *ignorantia legis neminem excusat* applies, and *ergo* the plaintiffs must be held to have known what the law was. We submit that this contention is completely met by the cases of *Stack* v. *Dowd* (1907), 15 O.L.R. 331; *Cooper* v. *Phibbs* (1867), L.R. 2 H.L. 149; *Ex parte Mercer* (1886), 17 Q.B.D. 290. While these cases shew that every person is bound by the law and must be presumed to have a knowledge of the general law of the country, yet it cannot be suggested that a person knowing certain facts must also be held to know the law arising from those facts in order to impute him with knowledge in acting in the whole matter. In other words, a man's knowledge of a legal fact with certain effects is a pure question of fact. If he has a legal knowledge, then he can be imputed with knowledge of it, but if he is ignorant of the law, then for purposes of estoppel, he cannot be considered to have known the law as a matter of fact.

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The respondent has however, practically abandoned the judgment of the trial judge and suggested that the plaintiffs are estopped by their actions. It is true that the respondent claims that estoppel and abandonment are the same. This is clearly not so. Abandonment is a deliberate contract or agreement entered into, the existence of which may be inferred from subsequent acts. Estoppel on the other hand is a doctrine of the Court by which a man having taken a certain position at the time of entering into an agreement with another person is not allowed to take any different position subsequently even if it be shewn that the facts were not at all as the party had suggested at the time of entering into the contract. Here nothing of that kind can be suggested. There was no representation by the plaintiffs to the Company or to the Company's directors. Whatever the plaintiffs knew about the forfeiture

the Company knew through its directors. There was no obligation of any kind upon the plaintiffs to disclose anything to the Company, except the fact that legally the forfeiture was invalid, and that was something not in the knowledge of the plaintiffs any more than it was in the knowledge of the Company. The mere lapse of time alone will not bar a man claiming his right: see *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633. See also *Cockerell* v. *Cholmeley* (1830), 1 Russ. & M. 418 at p. 425. In the latter case it will be noticed that the delay in asserting the right extended to nearly 50 years.

Davis, K.C., and *Pugh*, for respondents: As to notice not having been properly given, the statute, section 32, prescribes that the notice to be given may be in manner prescribed by the by-laws of the Company. According to the by-laws, notice could be given by mail and we have evidence that the secretary mailed the notices. If there is any flaw in the election of the trustees, Jones, who was always present at the meetings, is estopped from setting up any illegality in the position of the directors: so also is Mrs Jones, assuming that she was holding the shares in question either in trust for Mr. Jones or jointly with him. By the amendment of 1892 to the Act, it is plain that the Legislature intended that the word "directors" should be synonymous with trustees. At the time the 15 per cent. call was made, Jones himself held all the 250 shares; he was present at the meeting and seconded the resolution making the assessment. So that the shares declared delinquent must be those concerned in the 15 per cent. call, as there was no call between that and the 2½ per cent. call. As to waiver of other calls, the Company were entitled to make any number of calls; the shares were in good standing at that time, and nothing had been done to affect them. Jones, in 1902 had an offer to buy in the shares at a certain price and had refused. He was present at that meeting by proxy, and therefore was sufficiently informed. A person cannot stand aside when it is a question of putting up money, because he does not consider the venture good enough, and, having awaited events, then come in and reap the benefit. There is no proof that at that time Jones could not put up the money. He simply stood by. The inference from his conduct

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is that the Company could do what they liked with the shares. In a matter of estoppel, knowledge by the party of his legal position is not necessary or even of importance.

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Martin, in reply.

Cur. adv. vult.

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HUNTER, C.J.: The plaintiff, Clara B. Jones, is the wife of her co-plaintiff, H. A. Jones, and they seek a declaration of the Court that 240 shares in the defendant Company, registered in her name, have not been forfeited, but are still her property notwithstanding an attempted forfeiture by the Company.

The Company was incorporated in 1891 under the British Columbia Companies Act of 1890, and the plaintiff, H. A. Jones, was one of the original shareholders, but transferred the 240 shares in question to his wife, and on September 26th, 1895, Clara Jones became and has since remained the duly registered owner. On the same day by assignment indorsed on the certificate, she transferred the shares back to her husband, but this assignment was never registered, the explanation of this transaction being that in the event of either predeceasing the other, the survivor could obtain the shares without delay, and according to the husband it was also done with the idea of protecting the property against his creditors. It was contended that in view of these circumstances she was the mere *alter ego* or *prete-nom* of her husband, but there was no admission by her that she was holding the shares in trust for her husband; in fact, according to the unimpeached testimony of herself, as well as the evidence of her husband, the shares were given her by the husband in compensation for her having assented to mortgage their home which he had given her shortly after their marriage in 1888, the shares being bought mainly with the moneys thus raised. No doubt the husband regarded himself as having at least an equal interest with her in the shares, but in the absence of any admission by her, or other competent proof, I think we must take it that so far as this litigation is concerned, the shares were her property in law and in fact.

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The shares, which were of the par value of $100, were paid up to the extent of 80 per cent. when in May, 1895, a call was made by the then directors of 2½ per cent., making the amount due on these shares $600. The call was made payable on June 14th, 1895, and in default of payment by June 29th the shares were to be delinquent, and on July 15th liable to be sold to make good the assessment and costs of sale.

On the 29th of June the directors met and declared the shares in question delinquent, and on the 18th of September, 1895, the secretary reported to a meeting of the directors that he had duly advertised the shares for sale by auction on the 15th of July, that the sale had been twice adjourned, and that on the 3rd of September they were duly offered for sale, but no bid having been made, they were withdrawn from sale.

On November 1st, 1895, new by-laws were adopted at a general meeting, and those of November 5th, 1891, repealed.

On March 13th, 1896, a call of 6 per cent. was made on all the shares including those of Mrs. Jones, naming the 12th of May as the date on which they would become delinquent, and fixing July 4th in such event as the time of sale. On June 9th the directors met and declared the said shares delinquent. At another meeting of the directors held on April 8th, 1897, another call of 9 per cent. was made, with May 29th as the date of delinquency, and June 21st as the day of sale. On the 21st of May, 1898, a resolution was passed by the directors that a notice in Form No. 7 of appendix A of the by-laws be served on Mrs. Jones requiring payment of the call of 2½ per cent. by June 24th, and stating that in the event of default the shares would be forfeited. On the 25th of June, at a directors' meeting held in pursuance of a notice dated June 23rd, a resolution was passed which, after reciting the 2½ per cent. call and that Mrs. Jones's shares were duly declared delinquent, on June 29th, 1895, and that they were put up for sale with no bid, and that notice was duly given her on May 28th, 1898, requiring payment, and that she had not paid and was unable to pay the call, declared "the said 100 (*sic*) shares" to be forfeited to the Company. There is no doubt that the whole 240 shares were intended to be forfeited and by a resolution passed at a meeting held on November 4th,

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1907, it was declared that "100" was a clerical error for "240." At the same meeting of June 25th, when the resolution respecting Mrs. Jones's shares was about to be put, the husband demurred, stating that he would pay $100 on account, to which the president said "Pay up by all means, and we will be glad to get the $100." Jones then said he would not pay unless the directors assured him that the shares would not be forfeited for six months, which was not agreed to and the stock was then declared forfeited.

No tender of any money other than the $100 already mentioned, in respect of any of these calls has ever been made by or on behalf of Mrs. Jones, but on the 16th of May, 1907, her solicitors requested to be informed as to whether the shares had been forfeited, and offering to pay up all arrears, if any, and on being informed that the shares had been forfeited for non-payment of calls, this action was commenced on May 27th, 1907.

The first question then, is whether the forfeiture was valid. As to this, a number of different objections to its validity were raised by the learned counsel for the appellant. One was that the by-laws of November 5th, 1891, did not purport to provide for the election of "trustees" as required by the statute, but for the election of "directors." It is evident, however, that the persons called "directors" were by the terms of the by-laws to manage the affairs of the Company, and were therefore in fact

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the "trustees" of the Company, though not described by that name, and as there is no magic in words, the objection merely goes to the proper designation of these officers and must fail, and in my opinion, the fact that the Legislature in the amending Act of 1892 expressly authorized the use of the word "directors" as well as "trustees" is immaterial.

It was next objected that as there was no valid election of the first set of yearly trustees, the Company got into a state of collapse, and that no acts of any of the trustees subsequent to those named in the memorandum of association were valid for any purpose; but on the best consideration I can give this point, I think it can be fairly inferred from the language of the Act that the corporation was not to become dissolved merely because of irregularities in the election of trustees.

A number of other objections, however, were urged, any one of which would seem to be fatal, *viz.*: that the trustees were not elected by ballot, as provided for by section 11; that the call was not made at a meeting which was assembled after a proper notice, the meeting being the final one of a series of adjournments for want of a quorum, and not preceded by a new and regular notice; that the resolution of forfeiture, no doubt through an oversight, did not in terms forfeit the whole 240 shares, but only "the said 100 shares"; and the subsequent resolution of another board passed several years later, and after action brought, declaring that there was an error, was clearly futile and cannot affect the rights of the parties, as this sort of *ex post facto* declaration is only open to a Legislature or a Court. There is also the further objection that the notice leading up to the meeting did not purport to shew that it was being called by the president. It is not, however, necessary to go any further with this branch of the case as the least irregularity is as fatal as the greatest: *Garden Gully United Quartz Mining Company* v. *McLister* (1871), 1 App. Cas. 39; *Johnson* v. *Lyttle's Iron Agency* (1877), 5 Ch. D. 687.

But assuming the invalidity of the forfeiture, the Company contends that Mrs. Jones is estopped from asserting her title to these shares, and in connection with this contention avers that Jones's knowledge is her knowledge as Jones held her proxy and represented her at such meetings as were attended by him, she herself not attending any meeting. But it is important to bear in mind that Jones's knowledge of any irregularities whatever its extent was gained by him as a director and not as a shareholder, and I know of no authority for saying that the knowledge gained by a shareholder in his capacity as director can, without more, be imputed to the shareholder for whom he holds a proxy. In the absence of express provision giving any such privilege, the shareholder has no right of access to the minutes of directors' meetings (see *Regina* v. *Mariquita Mining Co.* (1858), 1 El. & El. 289), and it would obviously tend to make it impossible for the directors to properly carry on the business of the Company if every shareholder were to be allowed unlimited access to the reports of the directors' meetings. That being so, it is not only

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not incumbent on a director to communicate information gained by him as a director to the particular shareholder for whom he acts as proxy, but to do so would be in derogation of his duty to the Company, *i.e.*, all the shareholders, since such information should be communicated to all alike, as, for example, at a general meeting. Nor do I think we are at liberty to assume in the absence of proof that he communicated the information gained by him as director to his wife, as it is common knowledge that many husbands do not discuss the details of purely business matters with their wives, nor does any such presumption arise merely by virtue of the marital relationship.

Now, it is clear that laches alone does not disentitle the registered owner of shares from contesting the validity of a forfeiture: *Garden Gully United Quartz Mining Company* v. *McLister*, *supra*; *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633; and therefore the only ground on which the action can be defeated is estoppel either by representation or conduct. The estoppel on which the learned judge proceeded was that arising out of adandonment, applying the decision in *Palmer* v. *Moore* (1900), A.C. 293. In that case one of the joint holders of a mining lease notified his co-lessees that he was unable to contribute any further to the expenses, and that they might do as they liked with it; and it was held that he had abandoned his interest and could not afterwards claim to participate in a sale effected by the co-

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lessee who went on and developed the mine at his own expense. There was, therefore, the plainest case of estoppel resting on equitable grounds, otherwise it would be "heads I win, tails you lose." In the present case, however, with great deference to the learned trial judge, I can find no evidence of abandonment, *i.e.* of an agreement that the Company should become entitled to the shares, or a licence that it should absorb them. Indeed the evidence is the other way, for, as already stated, there was an offer of $100 on account, on certain conditions which were not accepted, and so far as I can see there was nothing more than an involuntary submission to that which the plaintiff believed she could not prevent; nor can I see that she did anything on the faith of which the Company can be heard to say that it afterwards changed its position on her account, and, of course, the fact

that particular shareholders may have advanced moneys to the Company under the belief that there was an effective forfeiture is immaterial, as there was no privity of any kind between her and them.

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Much reliance was placed on *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98. It is true that that was a case where there had been an irregular forfeiture of a vested interest in a mining company, and that there was about the same lapse of time between forfeiture and suit as here, but it is pointed out in the judgment of the Lord Chancellor in *Clarke and Chapman* v. *Hart*, *supra*, at p. 656, that the case of a mining venture is peculiar as "the property is of a very precarious description, fluctuating continually." I see no warrant for extending the application of that case to undertakings such as the one in question any more than any other class of trading company, as if we were to do this the rule would soon be swamped by the exceptions. Further, although I do not find this stated in the report of the case itself, the Lord Chancellor states that in the case in question distinct notice had been given to the party that the shares were forfeited, which it is not pretended was done in the present case.

There was clearly no estoppel by representation, as there was no communication of any kind between Mrs. Jones and the Company, either personally, or by her husband with her authority, after the forfeiture upon which the Company could say that it changed its position; or by conduct, as she did nothing one way or the other which amounts to anything more than laches. As to abandonment, this of course implies a purpose to abandon. If so, when was it formed or communicated? Certainly not at the time, as there was the offer of part payment and there is an obvious distinction between not expressing her intention to impugn the forfeiture of the shares, *i.e.*, laches, and expressing her intention to allow the Company to retain them, *i.e.*, abandonment.

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Even assuming that her husband had full authority to protect her interest in the Company, that would not of itself empower him to abandon it. Moreover, she did not come into full knowledge of her rights until she took legal advice. She was never personally notified by the Company of the forfeiture, or of the

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mode in which it was effected; and although no doubt she knew through her husband that the shares had been forfeited, she has not been shewn to have had such full knowledge of her rights, as in my opinion warrants the Court in concluding that she ever intended to waive them, especially as the interest was one in respect of which a large sum of money had been paid.

For these reasons I think the plaintiff, Clara B. Jones, is entitled to a declaration that she is the owner of the shares in question, with costs here and below.

IRVING, J.: I have found great difficulty in dealing with this case. The plaintiff received all the notice reasonably necessary that the Company was about to forfeit her shares, and I think she must be deemed to have had notice that they were forfeited. In *Knight's Case* (1867), 2 Chy. App. 321, the notice of forfeiture was not given after the forfeiture. In *Nellis* v. *Second Mutual Building Society* (1881), 29 Gr. 399, Boyd, C., applied *Knight's Case* in an action by a shareholder to set aside a forfeiture.

That she had that notice in fact there can be no doubt. She discontinued payment because she was unable to go on with the venture. There can be no doubt about it, she elected to abandon undertaking.

The case is well within the authority of *Prendergast* v. *Turton* (1841), 1 Y. & C.C.C. 98, and having regard to the nature of the enterprise, *viz:* buying land on credit for speculation pure and simple, and to the provisions of the statute under which the company was incorporated, *viz.:* advancing capital in instalments, without any personal liability in case of refusal to continue to subscribe, I think that authority, rigorous as it is, should be applied to this case.

IRVING, J.

In a case of this nature, where the determination of the question at issue largely depends (to use Lord Blackburn's expression, in *Erlanger* v. *New Sombrero Phosphate Co.* (1878), 12 App. Cas. 1,218 at p. 1,278) on the turn of mind of those who have to decide, and is therefore subject to uncertainty, I think the Appellate Court should support the judge of first instance, and affirm the decision appealed from, unless we are satisfied that he is wrong.

MORRISON, J.: I do not think that the irregularities relied upon by the appellant are sufficient to prevent the operation of the forfeiture.

Assuming, however, the invalidity of the forfeiture I think the appellant is estopped from coming in at this juncture and attacking its validity. "Estoppel is only that a man may not resist an inference which a reasonable person would necessarily draw from his words or conduct." Anson, p. 360.

A representation may be by conduct no less than by language. Inaction is a part of conduct. Therefore, inaction may amount to representation: Ashburner's Principles of Equity, 635.

In *Blake* v. *Gale* (1886), 32 Ch. D. 571, at p. 581, Bowen, L. J., says:

"We have to look at the delay which had taken place, coupled with the circumstances under which it has taken place, in order to see whether or not the true inference to be drawn from such delay under such circumstances is that the party claiming the right either agreed to abandon or release his right, or else has so acted as to induce the other parties to alter their position on the reasonable faith that he has done so. If that is the inference to be drawn, the claim will, for the purpose of quieting possession, be treated as abandoned."

The nature of the venture upon which the parties embarked was and is highly speculative, and at the time of the forfeiture the speculation was extremely doubtful. The Company being in jeopardy, was striving to keep afloat. The appellant, unable to contribute further to its support, made default. The question then arises whether there was a purpose to abandon on her part. The learned trial judge has found, and I think correctly, that there was such purpose of abandonment, which cannot be recalled now that the affairs of the Company are prosperous: Turner, L.J., in *Hart* v. *Clarke* (1854), 6 De G. M. & G. 232 at p. 251.

I would dismiss the appeal.

Appeal dismissed, Hunter, C. J., dissenting.

Solicitors for appellants: *Martin, Craig & Bourne.*

Solicitors for respondents: *Davis, Marshall & Macneill.*

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LALANDE & CLOUGH v. CARAVAN.

Principal and agent—Listing land for sale or exchange—Purchaser using knowledge gained from agents to open negotiations with vendor.

LALANDE v. CARAVAN

Defendant listed with plaintiffs for sale or exchange ten acres of land. One Callaghan opened negotiations for an exchange. While the deal was being transacted defendant telephoned plaintiffs asking if any disposition of his property had been effected, and was replied to in the negative. He then said that he withdrew the property, and at or about the same time, consummated a deal for the property mentioned by Callaghan to the plaintiffs, Callaghan having opened up negotiations with him direct:—

Held, on appeal, affirming the judgment of GRANT, Co. J., at the trial (MORRISON, J., dissenting), that the relationship of vendor and purchaser had been brought about by the plaintiffs, and that Callaghan had endeavoured, by approaching defendant, to deprive them of their commission.

APPEAL from the judgment of GRANT, Co. J., in an action for commission on the sale of land, tried by him at Vancouver on the 19th of February, 1909.

Statement

The appeal was argued at Victoria on the 8th of June, 1909, before IRVING, MORRISON and CLEMENT, JJ.

A. H. MacNeill, K.C., for appellant (defendant): The parties were never brought together.

McCrossan, for respondents (plaintiffs), called upon: Caravan did not act in good faith, and the trial judge so found. Plaintiffs are entitled to commission because through their intervention the sale was brought about. There is collusion on the evidence, and the defendant is not worthy of credit.

Argument

MacNeill, in reply: The agent has not shewn that his act was the direct cause of the sale. This is essential.

IRVING, J.: I think the appeal must be dismissed. The ground of the appeal is that there was no evidence to justify the County Court judge in finding that the relation of vendor and purchaser was brought about through the instrumentality of Lalande &

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Clough, members of the real estate firm which the defendant had employed. The employment is admitted. In some way or other a lot that would satisfy the defendant was found. Mr. Duncan, agent of the owner of that lot, went to the plaintiffs and it was agreed between them and him that Duncan should take his client (Newsome) and shew him the defendant's lot; this Duncan did, and Newsome was satisfied and willing that the transaction should go through. Then in some way or other the defendant met Duncan and they had a conversation and they closed the transaction. Now, I think it was the duty of the defendant to have said, "Yes, I put those lots in the hands of Messrs. Lalande & Clough, you must go and see them." And I think it was Duncan's duty to have stated, "Yes, I have seen Lalande & Clough, and they are your agents, and I will see them." Instead of that Duncan and the defendant closed the transaction behind the backs of the plaintiffs, and I think the evidence would sustain the inference that they did so to deprive the plaintiffs of the commission. The defendant says that he discharged the plaintiffs from his employment; but when, is not very clear. The plaintiffs seem to me to have established a *prima facie* case and the defendant's evidence is so unsatisfactory that he failed to displace it. I would dismiss the appeal.

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MORRISON, J.: It seems to me the determining factor leading to the sale arose through the defendant's own exertions. He listed this property with the plaintiffs and a number of other real estate people. The plaintiffs apparently had not succeeded in making any advance in the way of carrying out the instructions which were left with them; and the defendant doubtless all this time, during the time he had it listed with the plaintiff and other people was himself casting about to see if he could not dispose of his property, as he had a right to do, notwithstanding he had it listed. It was not exclusively listed. He met Callaghan, and Callaghan was the outside scout of Duncan, and through Callaghan Duncan got seized of the defendant's property; and then they connect up with Newsome who owned the property that was listed with Duncan. Now as to the method that Callaghan and Duncan employed in finding out what property was listed with the plaintiffs, and presumably

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with a lot of other agents in the town, I do not think that that should affect the defendant, or that he should be concerned with it; it was a sort of domestic arrangement between real estate men, and even though they may have acted dishonourably amongst themselves, I cannot see how that should affect the defendant. Through that intimation which was obtained by Callaghan through the defendant, negotiations were set on foot which led directly to the sale of the property, and the defendant paid Duncan, whether regularly or not, his commission. Now it seems to me the plaintiffs were hanging back; they were passive. I do not think that it was incumbent upon the defendant to tell the plaintiffs that he had sold his property. I do not know that a man is obliged, suppose he lists his property with one hundred real estate agents, not exclusively, and he himself brings about a sale, or some one of them brings about a sale—to go around and cancel his listing with all of them.

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But the defendant went further and told these people that he had sold; it seems to me that should not be a circumstance against him.

It comes down to this, as I understand the evidence read by both counsel—that were it not for Duncan and Callaghan the sale would not have been consummated. It was their introduction into the affair that brought about and was the immediate cause, the proximate cause of the sale. Of course all these transactions were knitted closely together; but where real estate is as lively and highly speculative as it is in Vancouver, where property is bought and sold again within a short time, and prices are rapidly going up, such activity must be expected.

I think the appeal should be allowed.

CLEMENT, J.

CLEMENT, J.: I agree with my brother IRVING that the appeal should be dismissed. The employment of the plaintiffs as agents to bring about a sale, is not denied. The fact is that the question before the learned County Court judge was largely a question of fact, whether or not the sale that took place was brought about by the direct instrumentality, or as a direct consequence, of the introduction (if I may use the expression) of the two properties, each to the other. It appears that the plaintiffs

being the agents of the defendant, owner of one property, came into contact with Duncan who was the agent for the owner of the other property; an exchange was mooted; Duncan promised that he would take his man up to have a look at defendant's lot; and apparently did so, with the result, ultimately, that the exchange went through. To my mind, the learned County Court judge was right, upon this evidence, in treating the intrusion of Callaghan as an incidental matter. I think there is evidence here on which the learned County Court judge could find that the sale was brought about through these plaintiffs. And if so, there is no doubt as a matter of law but that the defendant has to pay.

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Appeal dismissed, Morrison, J., dissenting.

Solicitor for appellants: *A. H. MacNeill.*
Solicitor for respondent: *A. M. Harper.*

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Divorce—Dissolution—Husband's suit for—Domicil—Foreign, matrimonial—Wife banished by husband.

Petitioner in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some three or four years in different places. In 1899 he married and at once removed to the North-West Territories. In 1907, satisfied of his wife's infidelity, he "made her go away," and after some financial arrangements between the couple, she left for New York, since which time no communication has passed between them. In the autumn of 1908, he came to Vancouver, B. C., and took a position in a mercantile house, and in January, 1909, filed a petition for divorce, alleging that he and the respondent were domiciled in British Columbia:—

Held, that he had not acquired a domicil in British Columbia to entitle him to a divorce.

Statement

PETITION by the husband for a divorce *a vinculo* on the ground of the wife's adultery. Heard by CLEMENT, J., at Vancouver on the 3rd of June, 1909.

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Tiffin, for petitioner.

No one, for respondent.

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CLEMENT, J.: It is now clearly settled that "the domicil for the time being of the married pair affords the only true test of jurisdiction to dissolve their marriage": *Le Mesurier* v. *Le Mesurier* (1895), A.C. 517, 64 L.J., P.C. 97. And a very eminent judge, speaking in a case which involved this very question, has laid it down that "the Court ought to be perfectly satisfied that it has jurisdiction before it proceeds to make any decree": *per* Lord Penzance in *Wilson* v. *Wilson* (1872), L.R. 2 P. & D. 435, 41 L.J., P. 74 at p. 76. In other words, applying that language to the facts of this case, this Court should be perfectly satisfied that at the date of the petition the domicil of this married pair was in this Province.

The facts may be shortly stated. The petitioner was born in Ontario in 1876. He left his parents' home in 1895 (being then about 19), and came to this Province. After some months spent in Vancouver and Victoria (in both of which cities he had relatives on his mother's side) he went "into the Kootenay" and was for about three years clerk in various grocery stores throughout that district. In 1899 he was in Revelstoke where he had some position with the Canadian Pacific Railway. There in that year he married the respondent, then a widow who, as he puts it, "had no people here at all," her relatives being in the eastern States. Immediately after the marriage the petitioner and respondent moved to the North-West Territories. There the petitioner made a homestead entry under the Dominion Lands Act and for eight years (1899-1907), the married pair lived in what is now Alberta; half the time, roughly speaking, upon the homestead, and the other half in Wetaskiwin, where the petitioner carried on a livery and transfer business. In October, 1907, the petitioner having satisfied himself of his wife's adultery, "practically"—to use his own expression—"made her go away." There was apparently some settlement of money matters between them, and the petitioner telling his wife that "it was final, she had to go," gave her a draft on New

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York, for which city she at once departed. Since then the petitioner has had no communication with her, but has learned that she is living among friends in New York and Boston. The petitioner continued to reside in Wetaskiwin until May, 1908. After some time spent at Calgary, Alberta, "taking care of horses," he took a position as traveller for a Spokane (Wash.) grocery house, his district being "Southern Alberta, and down through the Crow's Nest." Finally, last autumn he came to Vancouver, and is now a clerk with a furniture firm here. He styles himself "a traveller" and this he explains as meaning that his work is partly that of a "city traveller" for the firm in whose employ he is. On January 11th, 1909, he filed this petition for divorce, alleging, *inter alia*, that he and the respondent were domiciled in this Province.

So far as concerns the wife, the allegation as to her domicil is, of course, the statement of a legal inference based upon the general principle that the wife's domicil necessarily and invariably follows that of the husband. We have here the case of a wife put away (for cause, it is true) in the place where, as I view the facts, the married pair had their domicil, and now cited before the Court of a Province with which she has absolutely no link of connection beyond the fact that her husband has chosen to take up his abode here. In *Wilson* v. *Wilson*, above referred to, Lord Penzance makes use of this argument in favour of the view that jurisdiction in divorce should be based upon domicil: "It is both just and reasonable," he says, "that the differences of married people should be adjusted in accordance with the laws of the community to which they belong"; and the passage is quoted with approval and is in fact accepted as the basis of the judgment in *Le Mesurier* v. *Le Mesurier*, above referred to. Only by the application in its most absolute form of the principle that a wife's domicil invariably and of legal necessity follows that of her husband can it be said that this is the community to which this respondent belongs.

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I need not, however, enquire whether that principle should be stated in such an uncompromising form, or whether there may not be exceptional cases as hinted at in *Ogden* v. *Ogden* (1908), P. 46 at p. 79, 77 L.J., P. 34 at p. 49; see also *Bater* v. *Bater*

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(1906), P. 209, 75 L.J., P. 60; because I am not satisfied that the petitioner is himself domiciled in British Columbia even if that alone were sufficient to fix the domicil of both husband and wife here. Residence alone is not sufficient to give a man that *status* in a community indicated by the word "domicil." What else is necessary has been defined or explained by high authority: "a fixed intention to settle": *per* Lord Cairns in *Bell* v. *Kennedy* (1868), L.R. 1 H.L. (Sc.) 307 at p. 310; "a fixed intention of establishing a permanent residence": *per* Lord Chelmsford, *ib.* at p. 319; "this settled purpose of taking up a fixed and settled abode": *per* Lord Westbury, *ib.* at p. 321; "an act which is more nearly designated by the word 'settling' than by any one word in our language": *per* Lord Hatherly in *Udny* v. *Udny* (1869), L.R. 1 H.L. (Sc.) 441 at p. 449; in short there must be the *animus manendi*. As Dr. Dicey says in his well-known work on Conflict of Laws, 2nd Ed., at p. 123 (n.), *Udny* v. *Udny* is "the leading case on the change of domicil and taken together with *Bell* v. *Kennedy* contains nearly the whole of the law on the subject." Those two cases were exceptional in this respect, that in each of them the person as to whose domicil question arose was alive and gave evidence, an advantage which the Courts do not often enjoy, as in the great majority of cases the question has arisen only after the death of such person. I have that exceptional advantage here. The question being so pre-eminently one of intention, the oath of the very person whose intention is questioned, would, one would think, naturally be almost conclusive. But although in each of the above cited cases (as also in *Wilson* v. *Wilson*, to be discussed later), the Court's decision was in accordance with the view entertained and deposed to by the living witness, a strong note of warning is sounded throughout against a too ready acceptance of a person's own testimony in such a case as to his intentions *Wilson* v. *Wilson*, *supra*, is the only case to which I refer specially upon this feature, because it was a divorce case, and because the petitioner's oath was there accepted as conclusive when without his testimony the finding as to domicil would have been adverse. The residence in England in that case, prior to the filing of the petition for divorce, was some six years as

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against a few months or weeks in the case at bar, so that the inference proper to be drawn from residence alone was very much stronger there than here. The domicil of origin of both parties in that case was Scotch, the marriage took place in Scotland (1861), and the alleged adultery was committed there (1866). The petitioner's mother meanwhile had removed permanently to England, and to her he went after the breaking up of his Scotch home. He swore that he left Scotland never intending to go back there to live but, on the contrary, intending to make England his permanent home. Without going into further detail as to the facts which appear fully in the report, I proceed to quote two passages from the judgment of Lord Penzance. At p. 77, he says:

"If this case were a case in which Mr. Wilson were dead, and the Court had nothing to go upon but the fact of his residence here and the way in which it arose, I do not think there would be enough to enable the Court to come to the conclusion that he had taken up his domicil in this country."

Then, after summing up the evidence he proceeds, p. 78:

"Still, when you have the man here, and when he swears that that was his intention, the question which the Court has to ask itself is, why should not it believe him? The Court must take his word, but not as conclusive proof of it, and if there are circumstances in the case which tend to shew that what he says is not true nor likely to be true, that might shake the conclusion at which the Court would arrive. Therefore, the question is here not so much whether the circumstances of his English residence tend to prove English domicil, as whether, the man swearing to his intention to acquire an English domicil, there are such circumstances on the other side as would warrant the Court in throwing over his oath and disbelieving him."

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Now, if in the case before me the petitioner had sworn definitely as to his intention to make this Province his fixed abode, that he had no present intention ever to take up his residence elsewhere, I should have felt great difficulty in giving credence to his testimony; but as a matter of fact he did not attempt to go that length. His evidence was, with one exception, a mere narrative of his movements from the time he left his father's home in Ontario until the filing of this petition. Only in one instance does he use an expression having a bearing on the question of intention. Speaking of his removal to this Province in 1895, he says: "My aunts and cousins were residing here, and I came to them. This has been my home so far as any home

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that has been, all the while I have been here, except the time I have been on the prairie." If the question were as to the petitioner's domicil prior to his marriage I should say that he did not acquire a domicil here. His movements were those of a young man in search of a place in which to settle, and to use Lord Westbury's phrase in *Bell* v. *Kennedy, supra*, indicated a "want of settled fixity of purpose." But it is clear, in my opinion, that he did at once after marriage settle down in Alberta and acquire a domicil there. Whether he has any property there now does not clearly appear, but at all events he has not pledged his oath that he has left there "for good." If he has abandoned Alberta, then until he takes up elsewhere some fixed place of abode, *facto et animo*, his Ontario domicil of origin is his legal home. I am not satisfied that he has the necessary *animus manendi* so far as this Province is concerned, and that is a sufficient reason for refusing his petition. His few months' stay amongst us is in my opinion not a sufficient foundation upon which, standing alone as it does, to find affirmatively that he is domiciled here.

Judgment

I do not lose sight of the argument which may very properly be advanced that as between the various Provinces of Canada with (if we except Quebec) the marked likeness in our laws, the Court may well be more ready to draw the inference of intent to settle in one Province upon removal thereto from another than in the case *e.g.*, of a removal from Scotland to England, with its different laws and legal system; but on the other hand the Court cannot shut its eyes to the fact that in this Province alone of all the Provinces west of New Brunswick can a wronged spouse find a Court competent to dissolve marriage; and the incentive to come here for a divorce is strong. I do not wish, however, to be understood as holding that because a man's motive in coming to this Province may be to procure the dissolution of an intolerable marriage tie, the Court must necessarily find a want of fixed intention to make this his permanent home, his "com munity"; the motive mentioned may be sufficiently all-powerful to induce a man to go to live permanently in a community where he may get release from his bonds, but it must be apparent to any one who gives the matter a moment's consideration that

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the Court in a case like this should insist on the clearest evidence of a settled intent to abide here permanently. This Province may be a haven of refuge; it should not be a mere port of call.

The petition is dismissed. This will, of course, be without prejudice to the filing of a petition in the future should the facts arise to warrant it.

Petition dismissed.

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Infant—Custody of—Children's Protection Act of British Columbia, B.C. Stat. 1901, Cap. 9—Charitable institution—Religious persuasion of parent—Order of magistrate awarding custody—Change of such order—Jurisdiction—Habeas corpus.

A magistrate made an order under the provisions of the Children's Protection Act of British Columbia awarding the custody of an infant to the Children's Aid Society of Vancouver, an undenominational Society, but, upon further evidence being submitted, made a second order committing the child to the care of the Children's Aid Society of Our Lady of the Holy Rosary, a Roman Catholic institution:—

Held, on appeal, affirming the decision of MARTIN, J., that the magistrate had power to make the second order in the circumstances.

APPEAL from an order made by MARTIN, J., at Vancouver on the 30th of July, 1908. The facts are set out in the reasons for judgment of IRVING, J., and in the headnote.

Statement

L. G. McPhillips, K.C., for the applicant.

Boak, contra.

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MARTIN, J.: I am clearly of the opinion that section 39 of the Children's Protection Act, 1901, contemplated the course of procedure which was properly taken by the magistrate in this case. That is to say, it allows him to review or reconsider a prior order made for the disposition of the child, and in the further exercise of his jurisdiction to make the order complained of, where it appears to him that the child, pursuant to such order, has been placed with a person or society not of the same religious persuasion as that to which it belongs, the judge shall on the application of any person in that behalf, and on its appearing that a fit person or society of the same religious persuasion as the child is willing to undertake the charge, make an order to secure his being placed with such person or society.

Those pre-requisites being satisfied, it is the duty of the magistrate to make the order to secure the child being placed with such fit person or society.

Now, there is no doubt that the only one of those pre-requisites in regard to which there is any contention is whether or not the child was originally placed with a person or society of the same religious persuasion as that to which it originally belonged. The magistrate came to the conclusion, upon reviewing the evidence before him, that she had not been placed with such society as contemplated by the statute. I do not propose to go into the matter at any length, but it appears to me that the father was not of any religious denomination whatever, in the proper sense of that word. People who knew him for a great number of years said that, so far from his having any inclination, generally, for religious denomination, his action had been against all established forms of religion, and was one of what I might call unjustifiable hostility, exhibited in the language he employed in respect of what he called priests and parsons, speaking of them with the greatest contempt, and casting upon them imputations the most objectionable possible, asserting that they were not really religious for the sake of Christianity, but simply to further their own interests. In view of such consideration, it seems to me to be an insult to one's intelligence to say that this man belonged to any established religion. The man who spoke most strongly in his favour, Francis Williams, had to admit that

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he was, on some points, an agnostic. Under those circumstances, it is idle to say that a man belonged to any religious denomination, as contemplated by the statute. But a further point I rely upon, and one to which the greatest importance should be attached, is this: As a matter of fact, this child, Mary Howard, was before the death of the father, baptized in the Roman Catholic church, and that she was baptized according to the mother's own statement which was not contradicted and could not be, after the wife had declared to the husband (the father) her intention of bringing up the child in that religion, and the father had no objection whatever to such a course. That seems to me to answer the whole case and puts it upon an entirely different plane from any one of those which had been cited.

Having the statement here, that the child with the father's consent has been baptized in one religion, it seems to me to be law and common sense as well that she should not be removed from that religion. It seems to me it would be something that would be most destructive to any religious authority that the child should under such circumstances be removed.

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With regard to some objection that was taken to practically the technical form of the order, with regard to some property which may or may not belong to the child, the statute being of the nature that it is, that is, contemplating such procedure that it does, and also apart from all the statutes, I agree that that is not a point which can properly be considered here. All that I mean to say is that I consider the magistrate has, both essentially and technically, made the proper order which ought to be made in this case, and the application to enforce this order will therefore be granted.

The appeal was argued at Victoria on the 8th of June, 1909, before IRVING, MORRISON and CLEMENT, JJ.

Sir C. H. Tupper, K.C., for appellant: Neither of the societies concerned is a religious society; they are both purely civil corporations. The statute empowers the committing magistrate to give the child to any fit person or society, but directs him to ascertain whether the proposed guardian is of the same religious

Argument

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persuasion as the child. The point the learned judge below relied upon was not in evidence, as the child was baptized a Roman Catholic after, and not before, the father's death. The statute recognizes no particular religion. The magistrate's order was based on the consent of the mother; the child was not a Roman Catholic and the father was a Protestant. The question of legal guardianship does not arise: *In re Agar-Ellis* (1883), 24 Ch. D. 317 at p. 336. As to the duty cast to bring up a child in the religion of the father, see *In re Scanlan Infants* (1888), 40 Ch. D. 200 at p. 212.

L. G. McPhillips, K.C., for respondent society: The real point involved is what would the Court have ordered with reference to this child. If there is not something to shew that the father has given up his right to the child, and if it is proved that he was of some religious persuasion, then the child must be brought up in that faith. The fact was proved here that the father was not of any religious persuasion, and, further, that he did not believe in anything. Therefore the Court must fall back on the mother's religion, and the child must be brought up accordingly. The father being dead, the rights of the mother govern: *The Queen* v. *Barnardo* (1891), 1 Q. B. 194 at p. 207 *et seq.*; *In re Besant* (1879), 11 Ch. D. 508 at p. 512.

Argument

Tupper in reply: The father was a Protestant, of the Methodist sect.

IRVING, J.: In this case the difficulty has arisen by the use of the expression "religious persuasion." The Legislature have used that in connection with a corporation. As we all know, corporations have no soul, and really can have no religion; but religious persuasion is a convenient expression which indicates the religion of the people who have organized the institution. The Legislature recognizes, as we all must recognize, that as a rule these institutions are the outcome of the charitably disposed people of some one church or other—I am now alluding to the two great bodies, Protestants and Roman Catholics.

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Now, in this case there is an institution called the "Children's Aid of Vancouver," which seems to be non-sectarian, that is to say, it is ready to embrace children of all religions. There is

another institution called "The Children's Aid Society of the Church of Our Lady of the Holy Rosary." That is exclusively a Roman Catholic institution, so admitted, got up by Roman Catholics and directed by Roman Catholics in the interests of the Roman Catholic Church. Now, a discussion has arisen as to which of these two charitable institutions is entitled to the guardianship of a child, that child now about six years of age. It was after its father's death, as I understand it, baptized in the Roman Catholic Church at the request of the mother. It appears that the father shortly before his death had discussed the question of the baptism of the child, but had not indicated in one way or other, except to Mrs. Howard, his wife, in what church the child should be baptized. He spoke in the presence of a Mrs. Fowler, and from what he said in her presence, although he did not name any church, he practically consented to the mother baptizing it in the Roman Catholic Church, to which church she belonged. Under those circumstances it seems to me that that child was of Roman Catholic persuasion, and it having been admitted that this institution of the Church of Our Lady of the Holy Rosary, is also Roman Catholic, we have nothing else to consider except as to whether Mr. Alexander had the authority to make the order which he did.

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[*Tupper*: Will your Lordship allow me, my admission was only this: I made an admission for the sake of argument that all of the members of the Church of the Holy Rosary were Roman Catholics, but I denied in law that that amounts to a statement that that society is of the Roman Catholic persuasion.

CLEMENT, J.: I thought your admission went a little further, that it had been organized under Roman Catholic auspices.

Tupper: No, I said I would admit that every member happened to be a Roman Catholic, but that nothing that any member could do could charge it in law to be a religious corporation.]

IRVING, J.: I understand it that way; and that admission, it seems to me, is sufficient to make it of Roman Catholic religious persuasion.

The statute, section 39, seems to give the stipendiary magistrate when he discovers that he has given his first assignment under a mistake, power to rectify that mistake and send

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the child back to the home of its proper religion. I think on the evidence we have before us that he was justified in so doing. That order having been made, the guardian of the child was then this Roman Catholic institution. And by section 7 when the care of the child was committed to that institution, then that institution became the legal guardian of the child, and had a right to apply to a judge of this Court for a writ of *habeas corpus*. In my opinion the first order was properly made, and the same must be said of the second order.

MORRISON, J.: I agree with the conclusion of my brother IRVING and also with the findings of the learned judge who made the order.

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CLEMENT, J.: I agree that the appeals should be dismissed. It seems to me the two questions of fact before the magistrate in the first instance were: First, what is the child's religious persuasion? Secondly, what is the Society's religious persuasion?

On the first there was evidence from which Mr. Alexander could find as he did, and this Court has no jurisdiction to review that conclusion of fact. If, indeed, there was no evidence on which he could find as he did, an order based on such finding would be quashed; but that is clearly not this case.

CLEMENT, J.

The same legal proposition applies with regard to the religious persuasion of the society. The Act contemplates that societies organized under that Act may have a religious persuasion. And on the admissions made here, which I presume are the same as made before the magistrate, I think there was a proper finding that the society represented by Mr. *McPhillips* is a society of the Roman Catholic religious persuasion. That being the case, the child was illegally detained by the society represented by *Sir Charles Hibbert Tupper*, and *habeas corpus* I think was the proper remedy.

The second order is merely supplementary, and I see no flaw in the jurisdiction on the part of the learned judge.

Appeal dismissed.

Solicitor for appellant: *H. W. C. Boak.*
Solicitor for respondent: *L. G. McPhillips.*

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Divorce—Practice—Damages — Assessment of—Jury — Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial.)

The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for divorce having been pronounced, the judge proceeded to assess the damages, when the co-respondent invoked section 33 of the Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial), which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of a jury:—

Held, that, having consented to a trial without a jury, he was estopped from availing himself of this provision.

Statement

PETITION for divorce, heard by CLEMENT, J., at Vancouver on the 1st, 2nd and 9th of September, 1909.

Macintyre, and *W. C. Brown*, for petitioner.

Tiffin, for respondent.

Davis, K.C., and *C. B. Macneill, K.C.*, for co-respondent.

10th September, 1909.

Judgment

CLEMENT, J.: The petition in this case claims, *inter alia*, damages from the co-respondent. Upon the usual application for directions as to mode of trial, my brother MORRISON made an order that the trial should take place at Vancouver before a judge without a jury. This order was not objected to by any of the parties and was practically a consent order. At the trial I found the allegations as to adultery substantially proven and pronounced a decree of divorce. I then proceeded to assess damages against the co-respondent, when Mr. *Davis* interposed and objected that under section 33 of the Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial), in force in this Province, I have no jurisdiction in that regard; that, in the words of the section, "the damages to be recovered on any such petition shall in all cases be ascertained by the verdict of a jury." It must be apparent to any one that if I am now obliged to give

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effect to this objection the co-respondent's assent to the method of trying this petition (not part of it, but all of it) would be a notable example of a successful "Heads, I win; tails, you lose." On reflection I think I must hold that by his action before my brother MORRISON the co-respondent has fully submitted himself to the Court's arbitrament upon all matters in controversy upon the pleadings: *Burgess* v. *Morton* (1896), A.C. 136, 65 L.J., Q.B. 321; and I therefore adhere to the assessment of damages against the co-respondent in the sum of $5,000. This sum, or whatever amount may be recovered, will be paid into Court and until then further directions as to its disposition will be reserved.

Order accordingly.

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Criminal law—Justice of the peace—Statement by offending party—Summons issued thereon—Illegal issue of—Criminal Code, Secs. 654 and 655.

A constable released from custody before the expiration of his term of imprisonment an Indian who had been convicted and sentenced to 14 days' imprisonment. The constable then went before one of the convicting magistrates and told him that acting upon instructions from the Superintendent of Indian Affairs at Ottawa, he had released the Indian. The magistrate thereupon had a summons issued and served upon the constable calling upon him to appear in answer to a charge of unlawfully releasing the Indian. The constable appeared before two justices of the peace upon said charge and by his counsel objected that the magistrate had not jurisdiction to deal with the matter as there was no sworn information. The magistrate overruled the objection, held a preliminary enquiry and committed the accused for trial:—

Held, that accused could not set up section 654 of the Code providing that a sworn information was necessary before the magistrate could issue a summons.

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APPLICATION for a writ of *habeas corpus* heard by MARTIN, J., at Victoria, on the 18th of August, 1909.

Bodwell, K.C., in support.

Maclean, K.C. (D.A.-G.), contra.

17th September, 1909.

MARTIN, J.: This is an application for a writ of *habeas corpus*, and it is sought to set aside all proceedings before two justices of the peace at Salmon Arm, which resulted in the applicant (who is a municipal police constable), being committed for trial for having unlawfully set at liberty a prisoner in his custody. The main ground of objection is that there was no jurisdiction over the body of the applicant because no "information in writing and under oath" was taken by the justice under section 654 of the Criminal Code, before issuing a summons under section 655. It appears that the reason why the justice did not take such an information is because the applicant himself gave the information to the justice which fully established the case against himself, whereupon a summons was shortly thereafter issued. Upon the return of the same the accused appeared and was represented by another justice of the peace as his counsel, and I am satisfied that he had a fair trial and was given an opportunity to call witnesses but declined to do so, though his counsel at the outset took the objection in substance that the proceedings were invalid because there was no sworn information.

Judgment

Many authorities were cited on the argument but none of them touches the real point in the case which, so far as I can find is unique in its circumstances, though there is much to be found in *The Queen* v. *Hughes* (1879), 4 Q.B.D. 614, especially in the judgment of Mr. Justice Hawkins, and in *Dixon* v. *Wells* (1890), 25 Q.B.D. 249, to support the proceedings; it was admitted, however, by the Crown counsel on the argument that had a warrant been issued instead of a summons the contrary would be the case, but it is not necessary to pass upon that point.

The conclusion I have reached upon the peculiar facts herein is that the provisions of the said sections of the Code cannot be held to be imperative or necessary where the accused himself

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furnishes the information in full to the justice as he did here. The object of the written information is for the protection of the accused, so that later on when summoned he may know exactly what proceedings were taken and what charge was laid against him at the beginning. The statute pre-supposes ignorance on his part and therefore protects him from the consequences of what is happening behind his back. But when, as here, he has full knowledge of all the proceedings and is the actor against himself from the beginning, it seems to me that to require that he shall again be given that knowledge which from the first reposed in his own breast, is something which the statute could not possibly have contemplated, and I do not regard it as a condition precedent to jurisdiction over the individual. The written information in such special circumstances becomes a matter of form, not substance, and the accused must be taken to have waived that provision of the statute the necessity for which he himself has obviated. The magistrates had from the first jurisdiction over the offence, and when the accused appeared in answer to the summons their jurisdiction over the individual attached, because the only objection to the summons which he obeyed was the fact that his own complete verbal information had not been put into writing. If he wished to make his objection to the proceedings effective he should not have appeared in answer to the summons. The case at bar is, in my opinion, a much stronger one for the Crown than *The Queen* v. *Hughes*, *supra*, in regard to which Lord Chief Justice Coleridge said in *Dixon* v. *Wells*, *supra*, at p. 256:

Judgment

> "I cannot disguise from myself the fact that from the language of many of the judges in *Reg.* v. *Hughes* (1879), 4 Q.B.D. 614—although, perhaps, not necessary for the decision of the case—and the judgments of Erle, C.J., and Blackburn, J., in *Reg.* v. *Shaw* (1865), 34 L.J., M.C. 169, they seem to assume that if the two conditions precedent of the presence of the accused and jurisdiction over the offence were fulfilled, his protest would be of no avail. It would have been easy to say that a protest would have made a difference; but I find no such qualification in *Reg.* v. *Hughes*, although something like that is said in one of the cases. It is an important question well worth consideration in the Court of Appeal."

The application must be refused.

Application refused.

THE RUSSIA CEMENT COMPANY v. THE LE PAGE LIQUID GLUE, OIL AND FERTILIZER COMPANY, LIMITED.

MORRISON, J.

1909

Aug. 24.

THE RUSSIA CEMENT CO. v. THE LE PAGE LIQUID GLUE, OIL AND FERTILIZER CO.

Trade name—Sale of goodwill—Similar name—True personal name—Trade name of article—Tendency to deceive—Imitation—Fraud—Injunction.

While there is no property in the name of a manufactured article, yet where a particular article has for many years been manufactured and sold under a particular name, other persons fraudulently taking advantage of such name will be restrained.

A firm had for a number of years been manufacturing glue under the name of Le Page. They sold out their business and goodwill to a company which continued the manufacture and name of the article. A member of the original firm, named Le Page, subsequently formed a company and manufactured and sold glue under the old name:—

Held, that the term or name "Le Page" as applied to glue had acquired a trade distinctiveness, a secondary meaning, and that the plaintiffs were entitled to the relief asked for.

ACTION for an injunction restraining the defendant Company from using the term or name "Le Page" as applied to the manufacture or sale of glue. Tried by MORRISON, J., at Vancouver on the 3rd of May, 1909. Statement

A. D. Taylor, K.C., for plaintiffs.
Kapelle, for defendants.

24th August, 1909.

MORRISON, J.: The plaintiffs were incorporated in 1882 under the laws of Massachusetts with their head office at Gloucester.

About 1876, William N. Le Page and Reuben Brooks began the manufacture of liquid glue and other adhesives in partnership and adopted the name "Le Page" as a trade name to designate their productions. Under this name their goods were extensively sold in Canada, the United States and Europe. In 1882, this partnership sold out their interests and goodwill to the plaintiff Company who have ever since continued the manufacture of these articles still using the trade name "Le Page" as before. The sales became very extensive and the Le Page Liquid Glues Judgment

MORRISON, J.

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have become an article well and favourably known in the trade. On several occasions since 1882 Le Page sought to manufacture liquid glue and to use the name Le Page in its sale to the trade, but both in the United States and England he was restrained from infringement. The plaintiffs although they had registered the name in question in the United States and England have not done so in Canada. But this latter circumstance does not prevent them from suing in this country to protect their trade name here: *La Societe Anonyme des Anciens Etablissements Panhard et Levassor* v. *Panhard Levassor Motor Company, Limited* (1901), 2 Ch. 513. Le Page came to British Columbia and in 1906, pursuant to an agreement in that behalf purported to give the promoters of the defendant Company the right to use the name "Le Page" as applied to liquid glue and other adhesives in Canada and Newfoundland. Subsequently, the defendants, the Le Page Liquid Fish, Glue, Oil and Fertilizer Company, Limited, were incorporated in British Columbia, taking over and assuming this agreement, and began the manufacture of liquid glue and had prepared and printed labels and letterheads in which the name Le Page appeared, and were prepared for, and about to begin, the sale thereof under this trade name when the present action was brought to restrain them.

Judgment

It is admitted in the pleadings that Le Page's liquid glue has an extensive sale and a high reputation for superiority in Canada, the United States and Europe.

It appears from the evidence adduced that the name "Le Page" has been used exclusively by the plaintiff Company for many years and that glue designated as "Le Page's" is taken to be glue manufactured by the plaintiffs. I find that the plaintiff has discharged the onus of proving that the name "Le Page" has acquired a secondary meaning and that its use in the secondary sense has become widely known. I am also of opinion that from the use of the name "Le Page" as adopted by the defendants there is a probability of deception. The adoption and use by the defendants of the name and designation in this market on similar goods would directly tend to lead purchasers to believe they were getting glue made by the plaintiffs, thereby

deceiving them and injuring the plaintiffs. The defendants selling these goods with this name would be holding out their production as the production of the plaintiffs, thereby designedly causing the purchase of their article as and for that of the plaintiffs. The obvious intention is to make profits by trading on the established reputation of the name "Le Page."

There is of course a difference in the legend used by the plaintiffs and that used by the defendants, but the defendants have arranged and combined theirs in such a way that the variation would escape the notice of an ordinary purchaser.

"The right and duty of the Court always is to restrain a man from using a name, that has become to be recognized as the name of a particular trader's goods for his, the defendant's goods, so as to suggest that the defendant's goods are the plaintiff's goods, and to pass them off as such": *Valentine Meat Juice Co.* v. *Valentine Extract Co. Ltd.* (1900), 33 L.T.N.S. 259 at p. 264.

There will be judgment for the plaintiffs with costs for an injunction restraining the defendants from carrying on business as manufacturers or vendors of any preparation of glue or other adhesive under any name or title of which the name "Le Page" or "Le Page's" forms part, and also from carrying on any such business under any name or title without clearly distinguishing such business from that of the plaintiffs.

Judgment

Judgment for plaintiffs.

MARTIN, J. (At Chambers)

1909

July 5.

BAKER v. ATKINS

BAKER v. ATKINS (MARTIN, THIRD PARTY.)

Practice—Costs—Third party—Evidence—Discretion.

The question of allowing a third party his costs is purely one of discretion, dependent upon the circumstances of the case.

Statement

APPLICATION by third party for an order directing that his costs should be paid either by the plaintiff (who was unsuccessful), or the defendant. Heard by MARTIN, J., at Chambers, in Victoria in July, 1909.

Gregory, in support of the application.
Aikman, for plaintiff.
Higgins, for defendant.

5th July, 1909.

Judgment

MARTIN, J.: It is conceded that the question is wholly within the discretion of the Court. The case of *Hanbury* v. *Upper Inny Drainage Board* (1883), 12 L.R. Ir. 217, is one wherein the wide extent of discretion is exemplified, because there the plaintiff was ordered to pay the third party's costs, though the application as launched was to make the defendants pay them. On the other hand, the plaintiff's counsel herein cites the case of *Williams* v. *Buchanan* (1891), 7 T.L.R. 226, wherein the Court of Appeal decided under circumstances which in several material respects resemble the case at bar, that the third party was not entitled to his costs from either of the original litigants. It was therein said by the Master of the Rolls that the question depends on the circumstances of each particular case, and that the third party had chosen to appear separately and by different counsel, though "no one had a right unduly to increase the costs of litigation except at his own expense."

The present question I have found far from easy to decide, but after a careful consideration of the authorities cited, and the written request for the third party's guarantee and the evidence relating thereto, I can only reach the conclusion that I am

unable to say by the case at bar is stronger in the third party's favour than was *Williams* v. *Buchanan*, and it is quite different in principle from *Hanbury* v. *Upper Inny Drainage Board*; therefore I shall make no order for his costs.

MARTIN, J. (At Chambers)
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Application refused.

WHITLOW v. STIMSON.

CLEMENT, J.
1909
May 5.
WHITLOW v. STIMSON

Deed—Absolute conveyance—Reduction to mortgage as against devisee of grantee—Original arrangement for a loan—Alleged change in nature of transaction—Entries in diary of deceased grantee—Abandonment of right of redemption—Evidence—Inference from facts.

S. advanced to W. the amount required to pay off a mortgage upon his land, taking as security a deed of the property absolute in form. Further advances were subsequently made. S. having died, W. brought action for redemption against his widow, executrix and sole devisee under S's will:—

Held, that, when once it was established that the original position of S. and W. was that of mortgagee and mortgagor (as to which the onus was on W.), W. could not waive or abandon his vested right to redeem except by acts equivalent to a subsequent bargain so to do; and that the evidence failed to shew any such acts.

ACTION against the widow and devisee of Charles Stimson, deceased, for a declaration that a certain absolute conveyance by the plaintiff to deceased was intended only as security, and for redemption. Tried by CLEMENT, J., at Vancouver, on the 24th and 25th of March and the 3rd of May, 1909. Statement

A. H. MacNeill, K.C., for plaintiff.
Sir C. H. Tupper, K.C., for defendant.

5th May, 1909.

CLEMENT, J.: In this case the plaintiff has a very heavy burden upon him. In the first place, he has to convince the Judgment

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Court that a deed absolute in form was, in fact, delivered to and accepted by the grantee as a mortgage security merely; and, in the second place, he has to make good that claim against the devisee of the grantee after the grantee's death. It is hardly necessary to say that for both these reasons, and particularly for the latter, this Court should not give effect to the plaintiff's claim, unless the evidence is so clear and cogent as to convince the Court beyond all reasonable doubt that when the grantee died he held the property as mortgagee and not as the owner in fee beneficially entitled. The uncorroborated evidence of a plaintiff in such a case would hardly, apart altogether from our statute, bring conviction to the mind of a judge; in fact, speaking for myself and for my own mental attitude in such a case, I would hesitate if the main links in the plaintiff's case were not established by evidence other than his own.

When the evidence closed, I had a strong impression that the plaintiff had satisfied the requirements I have indicated, but, in order to satisfy myself thoroughly, I suggested an adjournment of the argument until I could read over the extended notes of the evidence, as well as the examination of the plaintiff for discovery, put in by counsel for the defendant with the evident intention of shewing that the plaintiff's various versions of the transactions in question were so inconsistent as to afford no safe guide in reaching a conclusion as to the actual facts. The effect of this perusal was not to weaken but rather to strengthen the impression I had formed; and the very comprehensive criticism of the evidence by *Sir Charles Hibbert Tupper*, followed by a re-perusal of the evidence in the light of that criticism, has not materially affected my view.

Judgment

In the main, the plaintiff and his witnesses were in my opinion truthful and reliable witnesses. If, indeed, one had to fix definitely from the evidence the exact chronology of all the events and transactions mentioned in the evidence in order to the plaintiff's success, the task would be well nigh impossible; but that might well be said of a large percentage of the cases one has to try. In this case no witnesses were called for the defence and, on the evidence adduced by the

plaintiff—without putting his own testimony into the scale at all—I think his case is clearly made out.

That the initial arrangement between the plaintiff and the late Charles Stimson (whose widow is the defendant in this action) was for a loan on the security of the property in question is hardly disputed, and is indeed clear beyond all dispute; and that no change took place in the relationship between them is, to my mind, clearly evidenced by the entries in the diaries of the deceased. The initial loan was made in April or May, 1904, to pay off the Charleson mortgage, and from that time until Mr. Stimson's death in May, 1906, every entry in his diaries of payments in respect of the property in question is debited to "Dan" (the plaintiff) or, perhaps I should say, treated as a payment on Dan's account. The last of these is of date June 10th, 1905, "Dan Taxes $558." In September of that year plaintiff moved over to North Vancouver and continued to reside upon the property in dispute during Mr. Stimson's lifetime and is living there still. This move was made (so plaintiff says) at Mr. Stimson's suggestion; at all events, it appears from entries in Mr. Stimson's diaries that he knew of all this, and, upon occasion, visited plaintiff in the course of Sunday walks. The plaintiff built a rough cabin upon the property and some chicken houses and proceeded slowly with clearing operations. In face of all this I am asked to find that, prior to Mr. Stimson's death the plaintiff abandoned his right of redemption. No doubt by subsequent bargain he might do so; *Gossip* v. *Wright* (1863), 32 L.J., Ch. 648; *Lisle* v. *Reeve* (1902), 1 Ch. 53, 71 L.J., Ch. 42, 768; but, once it is established that the original position was that of mortgagor and mortgagee, some evidence of such a subsequent bargain is required—a notion which finds expression in the maxim "once a mortgage always a mortgage." Where such a subsequent bargain is alleged, the Court will, as it is expressed by Kindersley, V-C., in *Gossip* v. *Wright, supra*, look at it "with the utmost jealousy and care and scrutiny." Here there is no real evidence of any such bargain; at most, it can only be suggested that, because the plaintiff had made no effort to repay any portion of the loan and because Mr. Stimson ceased apparently to make any further advances after December, 1905,

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therefore the plaintiff must be deemed to have abandoned his right to redeem; and that this is borne out by the memo of December 11th, 1905, found among Mr. Stimson's papers in which he inserts as one of the properties which would go to his wife upon his death the property in dispute in this action: "three lots North Vancouver, say 400." Assuming this evidence to be admissible as, in a sense, qualifying the admissions contained in the earlier entries in Mr. Stimson's diaries, it is very inconclusive. Possibly Mr. Stimson looked upon it as a very remote chance that the plaintiff would ever redeem; possibly the $400 was intended to represent the approximate amount necessary to redeem; however that may be, I cannot see my way to treat this entry as evidence against the plaintiff that he had agreed to abandon his right to redeem.

"Where there is a vested right or interest in any party, the principle of law as now firmly established is, that he cannot waive or abandon that right except by acts which are equivalent to an agreement or to a licence": *per* Lord Chelmsford in *Clarke and Chapman* v. *Hart* (1858), 6 H. L. Cas. 633 at p. 656; and see as to what is sufficient evidence in such a case *Palmer* v. *Moore* (1900), A. C. 293, 69 L.J., P.C. 64. If the advances made by Mr. Stimson were to an amount clearly beyond the then value of the property something might be said; but the evidence points very strongly in the opposite direction. In short, I can find no substantial basis for an inference that at some time before Mr. Stimson's death the plaintiff agreed to give up his right to redeem. Everything, apart from the memo of December, 1905, above mentioned, points the other way.

Judgment

After a most determined defence upon the merits, counsel for the defendant took at the last moment the objection that the personal representative of the late Charles Stimson is not before the Court, or, rather, that there was no allegation or evidence of the fact. I then intimated that at least a declaratory judgment could be pronounced which would bind the defendant as the admitted sole devisee of the property in question. I find, however, a letter in evidence in which the defendant's solicitors state that the defendant is the executrix of her husband's will; and I give leave to amend to cover this objection, the "last ditch" in this stubbornly contested field.

In the result the plaintiff is declared entitled to redeem and to his costs up to and inclusive of this judgment. There will be the usual reference to the registrar to take the accounts in case the parties differ. Final decree and subsequent costs reserved.

I should perhaps add that among the papers of the late Charles Stimson is a loose sheet admittedly in his own handwriting upon which, among a number of small items of advances to the plaintiff, is an entry "old debt 300 25." *Sir Charles Hibbert Tupper* stated that he had no evidence upon the question suggested by the entry other than the entry itself. The plaintiff denies absolutely that he ever owed any such old debt. It is not clear to my mind, upon inspection, that the "300" was intended to mean $300; and it is curious that in all the conversations in which Mr. Stimson took part in reference to taking up the Charleson loan, with Charleson, with Keene and with Bosomworth, no mention was made of any such old debt. The consideration, moreover, mentioned in the deed is the exact amount paid to take up the Charleson loan. In other words, all the evidence points strongly against the existence of any such old debt and there is no evidence in support of it beyond the dubious entry. I find therefore in the plaintiff's favour upon that item.

Judgment

Judgment for plaintiff.

MORRISON, J.

1909

Sept. 10.

MACPHERSON v. THE CORPORATION OF THE CITY OF VANCOUVER.

Municipal law—Defective sidewalk—Accident—Injury arising from—Duty of municipality to safeguard—Misfeasance—Non-feasance—Damages.

MACPHERSON v. THE CORPORATION OF THE CITY OF VANCOUVER

Plaintiff was injured by stepping on a wooden grating in a sidewalk, which grating, when put in was found on the evidence to be structurally defective. The grating was put in by the owners of the abutting property under a permit from the Corporation:—

Held, that notwithstanding the statutory provision as to notice to the Corporation of accidents so happening, the Corporation must be taken to have had knowledge of the originally defective construction of the grating, and were therefore liable.

Statement

ACTION for damages arising from a defective grating in a sidewalk. Tried by MORRISON, J., at Vancouver, on the 22nd of March, 1909.

J. A. Russell, for plaintiff.

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

10th September, 1909.

Judgment

MORRISON, J.: The plaintiff, a man of slight build, weighing about 130 pounds, whilst coming out of Seymour & Marshall's office on Granville street, stepped on a wooden grating in the cement sidewalk which is directly in front of the door and some five inches below the doorstep, sustaining injuries for which he is seeking damages from the City. From the evidence it appears that this wooden grating consisted of slats measuring about one-half inch to three-quarters of an inch wide and three-quarters of an inch deep, dove-tailed into half-inch wooden cleats, which were fastened each by one nail into a wooden frame-work. The grating was well worn and shaky and in general construction it was weak. The nails used were small and round and the cleats improperly nailed.

I am of opinion that the grating, when put in, was structurally defective and that the plaintiff received his injuries solely

through this structural defect in this sidewalk. It may well be that there were slats in this grating that would not have broken with even greater weight, distributed in a certain way, than that of the plaintiff, but I am quite satisfied that the slats upon which he unfortunately happened to alight on this occasion were as I find. There was, of course, no attempt by the defendants to attribute negligence contributing to the accident to the plaintiff, but counsel took the ground that the question involved is one of non-feasance for which an action will not lie against the City.

I think it is clearly a case of misfeasance. The old style wooden sidewalk was removed and replaced by sidewalks made of cement or concrete, leaving, in this particular instance, an opening for the purpose of furnishing light to the basement or area of the abutting building. Into this opening was placed the wooden grating in question by the owner of the building opposite which the aperture was placed. It appears that the usual course adopted by persons erecting buildings and requiring areas is to get a written permit therefor from the city. A dispute arose at the trial as to whether permission had been given to put in this particular area and grating. I am satisfied such permission was given. But whether given in the usual form or not, I am quite certain they were put in with full knowledge and consent of the defendants. There seems to me no substantial difference as to liability between putting an originally inadequate defective grating over the hole in the sidewalk and covering it with ordinary window glass. Indeed, if left entirely uncovered, the chance of pedestrians falling into it, it being on a well-lighted street and in close to the building, would be less than by placing such covering as in this case over it.

Judgment

Should I be mistaken in the view I hold as to this being a case of misfeasance, I am not prepared to go along with Mr. *Macdonald* in his contention that, this being, as he claims, one of non-feasance, therefore the City is not liable.

I think it was the intention of the Legislature to impose upon the City liability for non-repair. Section 219 of the Act of Incorporation enacts that:

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"Every such public street, road, square, lane, bridge and highway shall be kept in repair by the Corporation."

To this section there is an amendment passed on the 12th of March of this year (1909) as follows:

"Provided, however, that the Corporation shall in no case be liable for any damages occasioned by reason of the neglect of the said Corporation to repair any such road, square, lane, bridge or highway, unless notice in writing, setting forth the time, place and manner in which such damage has been sustained shall be left and filed with the City Clerk within two calendar months after the date on which such damage was sustained: Provided, that in case of the death of a person injured the want of notice shall be no bar to the maintenance of the action."

And the section goes on to provide that in a proper case the Court or trial judge may dispense with such notice. This seems to me a clear interpretation of the meaning and extent of section 219 of the Act of Incorporation (1900), Cap. 54.

Judgment

I think that the words of Lord Herschell used in the course of his speech in *Bank of England* v. *Vagliano Brothers* (1891), A.C. 107 at p. 145 are apposite here:

"The purpose of such a statute (the Bills of Exchange Act) surely was that on any point specifically dealt with by it, the law should be ascertained by interpreting the language used instead of, as before, by roaming over a vast number of authorities in order to discover what the law was, extracting it by a minute critical examination of the prior decisions."

There will be judgment for the plaintiff for $3,000 with costs.

Judgment for plaintiff.

CROSS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY.

MARTIN, J. (At Chambers)

1909

June 30.

CROSS v. ESQUIMALT AND NANAIMO RY. CO.

Practice—Jury—Certificate for special—Jurors Act, R.S.B.C. 1897, Cap. 107, Sec. 63.

A certificate for a special jury will not be granted unless it is shewn that a common jury cannot adequately pass upon the facts in issue.

APPLICATION by plaintiff for a certificate for a special jury, heard by MARTIN, J., at Chambers in Victoria in June, 1909.

Peters, K.C., for plaintiff.

Davis, K.C., and *McMullen*, for defendant Company.

30th June, 1909.

MARTIN, J.: My understanding of the meaning of the language of section 63 of the Jurors Act is that the judge would not be justified in granting a certificate for a special jury unless he is of the opinion that a common jury could not adequately pass upon the facts in issue, and obviously this is a matter which must often be difficult to satisfactorily determine. In the present case I was at first inclined to grant a certificate, but on further consideration I am now satisfied that the difficulty herein lay in the law, and not in the facts, and that once the law had been determined there was nothing in the facts which, if a proper direction had been given by the judge (had it been necessary to give a direction) would have rendered it more difficult than usual for a common jury to reach a just conclusion. I am, therefore, unable to certify for a special jury.

Judgment

Application refused.

HOWAY, CO.J.

1909

Feb. 11.

FULL COURT

Sept. 7.

COOKSLEY v. THE CORPORATION OF NEW WESTMINSTER.

Municipal law—Nuisance in the highway—Defective culvert—Damage from—Whether municipality liable for non-repair—Non-feasance—Misfeasance.

Plaintiff's horse stumbled through a rotten culvert on a public road within the municipal limits, and plaintiff and his wife were thrown from the vehicle and injured. The culvert, constructed of cedar, covered with a few inches of earth, had been placed there some 16 years previously, and it had never been inspected, repaired or renewed during that time:—

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Held, that the Municipality had been guilty of misfeasance in allowing the culvert to become a nuisance, and was therefore liable.

Borough of Bathurst v. *Macpherson* (1879), 4 App. Cas. 256, followed.

Observations on the immunity from liability to actions for damages enjoyed by English municipal bodies.

Statement

APPEAL from the judgment of HOWAY, Co. J., in an action tried by him at New Westminster on the 8th of February, 1909. The facts appear in the headnote and reasons for judgment.

Wheatller, for plaintiff.

McQuarrie, for defendant Corporation.

11th February, 1909.

HOWAY, Co. J.: This is an action for damages. The facts are not in dispute and in any event, I have had the advantage of a view of the scene of the accident.

I find the facts to be: that on the 7th of July 1908, the plaintiff was driving to his home at the corner of Eighth and St.

HOWAY, CO. J. Andrews streets, New Westminster. On arriving at the junction of these streets and as the plaintiff was turning into St. Andrews street, one of the horse's feet went through the crust of the road into a culvert beneath. On regaining its footing the horse bolted and the plaintiff was thrown out and severely injured. Mrs. Cooksley, who was in the rig at the time was also considerably injured, though not thrown out. The culvert in question had been constructed by the defendants over 16 years

before and was under their control at the time of the accident. It was covered with cedar planking three inches in thickness, placed about three or four inches below the surface of the street. The evidence satisfies me that the life of such a culvert is very uncertain; it may be anywhere between six and 20 years.

Since the culvert was made it has never been repaired or even inspected. I cannot call the cursory glance bestowed on the spot from time to time, inspection. An inspection of such a thing as a culvert should be to prevent mischief; what the Board of Works employees did was to repair damage. Hence the real state of the culvert was not known to the defendants; although when the plaintiff's horse went through it was clearly rotten.

Mr. *McQuarrie* for the defendants says that the accident occurred in a part of the road which the defendants were not obliged to keep in repair, as it was not a part of the travelled highway. On viewing the spot it appears to have occurred on the highway, though possibly not in the portion usually travelled. This disposes of that contention. See the authorities collected in notes to *Dovaston* v. *Payne* (1795), 2 Sm. L.C., 11th Ed., 160 at p. 166 and Denton's Municipal Negligence pp. 108 and 109.

Whatever the liability of the defendants to a criminal prosecution by indictment might be for pursuing this policy of "masterly inactivity," a totally different question arises on an action for damages. The only basis upon which such an action can stand is either as a statutory liability for negligence, or on the common law liability for causing a nuisance on the highway.

With reference to the first ground it is now too well-settled by decisions of the highest Courts in the land to admit of cavil, that a municipality is not liable for damages caused by mere non-feasance or neglect or omission to repair the highway, unless express statutory enactment imposes such a liability. *Cowley* v. *Newmarket Local Board* (1892), A.C. 345; *Municipality of Pictou* v. *Geldert* (1893), A.C. 524; *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433; *City of Saint John* v. *Campbell* (1895), 26 S.C.R. 1; *Clark* v. *City of Calgary* (1907), 6 W.L.R. 622. No such liability is imposed by the Municipal Clauses Act, 1906, and the various sections of the New Westminster City Act, 1888 (sections 195, 204 and 205) only

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carry the matter to the extent of providing that the streets "shall be kept in repair by the Corporation." Under the above authorities, this is not sufficient, as there is nothing in either of these Acts which subjects the Municipality to an action for damages for non-repair.

In the Province of Ontario there is a provision that a municipality failing to keep a road or street in repair "shall be civilly responsible for all damages sustained by any person by reason of such default." Similar provisions exist in Manitoba, Alberta and Saskatchewan. The absence of such an enactment in this Province prevents the plaintiff's recovering on this branch of the case. This state of the law should not, in my opinion, be allowed to continue, but the remedy is with the Legislature, not the Court.

With regard to the second branch of the case, Mr. *Whealler*, on behalf of the plaintiff, very strongly contended that the rotten culvert under the street was a nuisance and that the defendants were liable for the damages arising from the plaintiff's horse stepping into it. As I understand the authorities, however, it is only where the nuisance is caused by misfeasance on the part of the municipality that an action lies.

It is true that the case of *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, the leading case, standing by itself might appear to go further, but that case was the subject of explanation in *Municipality of Pictou* v. *Geldert* and *Municipal Council of Sydney* v. *Bourke, supra.*

HOWAY, CO. J.

In the *Bathurst* case a drain built by the municipality under the street had subsided, leaving a hole in the highway, of the existence of which the municipality was aware. It was held, as explained in the subsequent decisions, that this hole having made the road dangerous and the municipality having taken no steps to repair it, although aware of it, must be held to have caused a nuisance in the highway, and it was the same as if they had dug and left open the hole into which the plaintiff fell. The following quotations make this apparent:

In *Municipality of Pictou* v. *Geldert* (1893), A.C. 524 at p. 531:

"It is clear to their Lordships that the governing fact in the *Bathurst* case is that the conduct complained of was not in the view of the Committee non-feasance, but misfeasance."

In *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433 at p. 441:

"The (*Bathurst*) case was not treated as one of mere non-feasance, and indeed, it was not so. The defendants had created a nuisance. Having made the drain, and failed to keep it in such a condition that the road would not fall into it, they were just as much liable as if they had made the excavation without constructing the drain, and the road had consequently subsided and become founderous."

The facts in the present case do not bring it within the above decision in the *Bathurst* case. It is sufficient to say that here there was no long existing hole in the street, nor were the defendants aware of the dangerous state of the culvert; their conduct was simply non-feasance not misfeasance. In this connection the remarks of Osler, J. A., in *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529 at p. 535 are instructive.

I have given this whole question of nuisance in the highway very careful attention but am unable to distinguish the present case in principle from *Lambert* v. *Lowestoft Corporation* (1901), 1 K.B. 590, and must consequently hold that the plaintiff cannot succeed on this head either, as the condition of the street arose from non-feasance, not misfeasance.

I have not overlooked Mr. *Wheadler's* ingenious argument that the doctrine of *Rylands* v. *Fletcher* (1868), L.R. 3 H.L. 330 that if a person brings on his land anything, which, if it should escape, may cause damage to his neighbours, he does so at his peril, is applicable here. It appears to me that the short answer is nothing has escaped.

It is indeed to be regretted that in a case like this in which the plaintiff has clearly suffered injury he should not be entitled to succeed in a civil action. However, I must declare the law as I find it, leaving it to the Legislature to provide a remedy.

If, however, the Full Court should be of opinion that I am in error in this judgment, in order to save the parties the expense of a new trial or further proceedings, I find that the plaintiff suffered injury and damages to the amount of $505 by reason of the said defect in the defendants' streets.

The appeal was argued at Victoria on the 11th of June, 1909 before HUNTER, C.J., IRVING and CLEMENT, JJ.

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Davis, K.C., for appellant (plaintiff): We submit that the learned judge below was wrong. The City in the circumstances here are just as liable for neglect as any other ordinary corporation; they are also liable on the principle laid down in *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256. If they did not inspect and repair, they were guilty of negligence. They should have known of the condition of the culvert: *White* v. *Hindley Local Board* (1875), L.R. 10 Q.B. 219; *Blackmore* v. *Vestry of Mile End Old Town* (1882), 9 Q.B.D. 451; *Thompson* v. *Mayor, &c. of Brighton* (1894), 1 Q.B. 332; *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433.

McQuarrie, for respondent (defendant) Corporation: There was no negligence on the part of the Corporation; they took every reasonable precaution. Plaintiff should have given some evidence of the length of time the culvert was in the condition complained of and that the Corporation had not repaired it.

[HUNTER, C. J.: Your proposition is that the public must take chances on the condition of those rotten drains.]

There was no proof of knowledge on the part of the Corporation.

Cur. adv. vult.

7th September, 1909.

HUNTER, C.J.

HUNTER, C. J.: In this case I adhere to the opinion I expressed during the argument that there is no substantial distinction between this and the *Bathurst* case. If any, the present case is *a fortiori*, first, because in that case the nuisance caused by the neglected artificial construction was more or less visible, whereas here it became a concealed trap; and second, because in that case the artificial construction was of brick, whereas here it was of wood, which anyone knows must rot out in time.

I would allow the appeal with costs.

IRVING, J.

IRVING, J.: This is an appeal from his Honour Judge HOWAY, who dismissed the plaintiff's action on the ground that the Corporation was not liable for what he regarded as mere nonfeasance. He found that the accident occurred in consequence of the rotting of the wood in a culvert built by the Corporation

some 16 years ago across the roadway—the material used being cedar, the life of such a culvert may be anywhere between six and 20 years. The earth on top of this culvert was only three or four inches thick. The culvert had never been repaired or inspected.

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To understand the question discussed before us one must go to first principles. At common law the remedy for want of repair in highways was not by action but by indictment. So far back as the time of Charles II., Vaughan, C.J., said in *Thomas* v. *Sorrell* (1672), Vaugh. 330 at p. 340:

"If a man have particular damage by a foundrous way, he is generally without remedy, though the nuisance is to be punished by the King."

Russell v. *The Men of Devon* (1788), 2 Term Rep. 667, merely reiterated this principle. Two reasons were given for this judgment, first, the technical one, *viz.*: that an action could not be maintained against an unincorporated body like the inhabitants of a county, and second, the real common law reason, *viz.*: that it was better that an individual should sustain an injury than that the public should suffer an inconvenience.

Later on, when municipal bodies were incorporated or regarded as incorporated bodies, it was held, following up the second ground, that as at common law there was no liability in an action against the inhabitants of a county for mere non-feasance or inaction, the incorporation of them into a municipal body did not without more impose on the new body any additional liability. There must be some express enactment giving to the person injured a remedy by action, or a declaration that the corporation is to be liable for non-feasance.

IRVING, J.

From the decision of the Privy Council in *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, it seems to be well-settled that a plaintiff to maintain any action for damages from a corporation must shew that the corporation was guilty of misfeasance, or created a nuisance.

Irrespective of any statute as pointed out in the *Sydney* case, *supra*, at p. 439:

"There is no doubt, in a certain sense, a duty incumbent on the council to see to the maintenance of the highways. It is for them to exercise the powers conferred upon them by law for the benefit of the community. In

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these matters they represent the citizens, and ought to have regard to their interests. For their discharge of these duties they are responsible to those whom they represent. The members of the council are the choice of the citizens, and if they do not use their powers well they can be displaced. But if they fail to maintain in good repair the highways of the city, it is not a matter of which the Courts can take cognizance, or which can be the foundation of an action if any citizen should be thereby aggrieved."

If the facts disclosed in this action constitute mere non-feasance and nothing more, the learned judge was right, but in my opinion there was something more.

The case of *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, is on all fours with the present case. There the liability of the corporation to repair was not the point upon which the case turned. The plaintiff succeeded because the corporation had constructed a drain under a street and failed to make it of a material that would support the road. It was a case of misfeasance and the fact that it took two years at least to develop into a nuisance did not make it non-feasance. A municipal corporation for an act of misfeasance causing a nuisance has no greater privilege than any other body or person.

If any private person makes a drain under a street and omits to cover it up and there results an accident after the lapse of, say, several hours, that person will be liable to an action just the same as if he had dug a trench in the street and left it uncovered

IRVING, J.

What difference does it make if the accident does not occur for several days—or weeks—or even years, if the material is of perishable nature: *Lambert* v. *Lowestoft Corporation* (1901), 1 K.B. 590; and *O'Connor* v. *City of Hamilton* (1905), 10 O.L.R. 529, upon which two cases the learned County Court judge based his decision, may be distinguished. In those cases there was no want of care in inspecting. Here we have evidence of negligence, *viz.*: that there was no inspection.

In my opinion on the authority of the *Bathurst* case the defendants are liable. The defendants set a trap, and it makes no difference that several years elapsed before it was sprung.

It is not quite clear that they are fixed with liability by their own statute (section 205 of 1888) which enacts that:

"Every such public street, road, square, lane, bridge and highway shall be kept in repair by the Corporation."

In the *Municipality of Pictou* v. *Geldert* (1893), A.C. 524; and *Municipal Council of Sydney* v. *Bourke, supra*, the corporations escaped because the statutes did not confer upon the council the duty to repair.

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In the collection of judgments reported by Mr. Cameron is to be found the decision of the Supreme Court of Canada holding the City of Halifax liable in an action for non-feasance, by reason of the language used in the Halifax Act of Incorporation: *City of Halifax* v. *Walker* (1884), Cameron's S. C. Cases 569 at p. 575.

In *Municipal Council of Sydney* v. *Bourke, supra*, had the earlier statute set out on p. 436 remained in force, there might have been—I do not say there would have been—a different result to the litigation.

In my opinion the judgment below should be reversed, and judgment entered for $505 with costs below and of this appeal.

IRVING, J.

CLEMENT, J.: I find myself unable to draw any material distinction between these cases and *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, 48 L.J., P.C. 61, as explained in *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433, 64 L.J., P.C. 140. With all deference to the learned County Court judge he has, in my opinion, fallen into error in saying that "it is only where the nuisance is caused by misfeasance on the part of the municipality that an action lies." The nuisance in the *Bathurst* case was allowed to come into existence through failure to act on the part of the corporation, in other words, through non-feasance; the fact, however, that it was left there unabated was treated as misfeasance and not mere non-feasance. The maintenance across a highway of an artificial structure in such a state of disrepair as to constitute a menace to persons lawfully using the highway must be taken to be in itself misfeasance; the Corporation by its failure to repair has—to quote Lord Herschell in the *Sydney* case—"created a nuisance." That the danger in the case before us was not obvious made it none the less a nuisance in the proper legal sense of that term.

CLEMENT, J.

The appeal should be allowed and judgment entered for the plaintiff for the amount assessed by the learned judge below.

I wish to add that in putting my judgment upon this ground I must not be taken to hold that it could not have been put

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upon the wider ground that this Corporation having cast upon it an express statutory obligation to repair the streets within its bounds is liable in an action at the suit of a private individual who has suffered damage by reason of the failure of the Corporation to fulfil its duty in this regard. That this is the general rule is very forcibly stated by Fletcher-Moulton, L.J., in the recent case of *David* v. *Britannic Merthyr Coal Co.* (1909), 2 K.B. 146, 78 L.J., K.B. 659 at p. 666. Lord Justice Vaughan-Williams in *Maguire* v. *Liverpool Corporation* (1905), 1 K.B. 767, 74 L.J., K.B. 369 at p. 377, points out that the immunity enjoyed by English municipal bodies is anomalous and rests upon historical reasons; that they are the transferees of the old obligation which rested at common law upon the inhabitants at large of parishes and counties to keep the highways in repair, an obligation which did not carry with it a liability to be sued by private individuals; and that the various statutes discussed in the different English cases contained nothing which could be construed as imposing a wider liability upon the bodies to which the duty to repair had been transferred. To the same effect Lord Herschell in the *Municipal Council of Sydney* v. *Bourke* (1895), 64 L.J., P.C. 140 at p. 145. That case as I read the judgment was not based upon the English authorities, the series of cases ending with *Cowley* v. *Newmarket Local Board* (1892), 61 L.J., Q.B. 65, but upon the ground that the statute there in question did not impose upon the corporation any duty to repair.

CLEMENT, J.

Lord Herschell says:

> "In the present case there has been no similar transfer of duty in relation to the repair of the roads. No duty or liability in respect of their repair rested on any one prior to the Acts which committed their management and repair to the Corporation of Sydney. It is quite true therefore to say that the duty, if there be one, is original and not transferred. But if there be a duty or liability at all, it follows that it can only be because it has been imposed by an Act of the Legislature. Where is it to be found?"

It may be argued that the judgment in the *Sydney* case is authority for the proposition that the statute in such a case as this must impose in express terms not only the duty but the liability as well. That is the point upon which I desire to keep an open mind.

Appeal allowed.

Solicitor for appellant: *W. J. Whiteside.*
Solicitor for respondents: *W. G. McQuarrie.*

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Mechanics' liens—Filing of claim for lien—Time of completion of work—Notes discounted by bank—Notice to owner—Mechanics' Lien Act Amendment Act, 1907, Cap. 27, Sec. 2—Estoppel by receipted account.

By agreement dated the 23rd of December, 1907, the defendant, National Construction Company, Limited, agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course of construction. The Construction Company got into financial difficulties and was unable to complete its contract. On the 24th of October, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the Land Registry office with the application to register same. On the 28th of October, 1908, the plaintiffs' solicitors in the Coughlan case sent to the defendant, Jsong Mong Lin, by registered mail, a notice addressed to her, care of Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Company intend to file a mechanic's lien against your property in the City of Vancouver, being lots 1 and 2, westerly 10 feet of lot 3, in block 29, district lot 541, for the balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above mentioned lots, if not paid to us at once." On the same day that this notice was posted the plaintiffs filed a mechanic's lien in respect of their claim in the County Court office at Vancouver, and on the 27th of November, 1908, commenced action to enforce same. McLean Bros. and other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on the 7th of December, 1908, an order was made by GRANT, Co. J., upon the application of Loo Gee Wing, consolidating this and the other actions pending. McLean Bros. had served upon Loo Gee Wing a notice similar in terms to the above. On the trial the claim of the present plaintiffs (J. Coughlan & Company) came on first for hearing and upon the conclusion of the evidence the learned judge dismissed the plaintiffs' action on the grounds that Loo Gee Wing, the owner of the property, was not before the Court in the Coughlan case, that there was no notice given to the

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owner of the property in the terms of section 3 of the Mechanics' Lien Act Amendment Act, chapter 27 of the statutes of 1907, and that such notice as was given was not given within 15 days before the completion of the work:—

Held, that section 2 of the Mechanics' Lien Act Amendment Act, 1907, has no application where action is begun more than 15 days before the completion of the work.

Held, further, that "15 days before the completion of the work" means 15 days before the completion of the work of the building as a whole and not 15 days before the completion of the delivery of the material by the vendor.

Section 24 of the Mechanics' Lien Act Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal:—

Held, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is pre-supposed.

The plaintiffs, J. Coughlan & Company, Limited, having during the course of construction given a receipt for payments which they had never received:—

Held, that they were estopped from claiming such amount against the owner.

Promissory notes having been received and discounted by the lien holder for the materials supplied:—

Held, that the lien was not thereby waived.

Effect on lien of accepting note.

Statement

APPEAL from the judgment of GRANT, Co. J., in consolidated actions under the Mechanics' Lien Act, tried before him at Vancouver on the 8th of February, 1909.

The facts are as set out in the headnote. The Royal Bank of Canada, claiming the contract moneys under an assignment from the National Construction Company, was allowed in to contest the validity of the liens, which so far as good would reduce that fund.

The claim of J. Coughlan & Company, Limited, was first heard.

Reid, K.C., for plaintiffs, J. Coughlan & Company, Limited.

A. D. Taylor, K.C., for the liquidator of National Construction Company.

Woodworth, for defendants, Jsong Mong Lin and Loo Gee Wing.

Griffin, for the Royal Bank.

Brydone-Jack, for plaintiffs, McLean Bros.

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GRANT, Co. J.: The plaintiffs (J. Coughlan & Company, Limited) are contractors and steel work constructors, of Vancouver, B. C. The defendant, the National Construction Company, on the 23rd of December, 1907, entered into a contract with the defendant Jsong Mong Lin, to construct for her or her assigns on or before the 1st of September, 1908, in the City of Vancouver, a building agreeable to the plans, drawings and specifications prepared for the said work by Hooper & Watkins, architects, and to find and provide such good, proper and sufficient materials for the completing and finishing of said building, the contract price being $80,000.

The defendant Jsong Mong Lin, is the wife of one Loo Gee Wing and at the time of entering into the contract was the owner of the land built upon, but on or about October 21st, 1908, before the completion of the building, she conveyed all her interest in the said land to Loo Gee Wing, the conveyance being recorded in the Land Registry office on October 24th, 1908.

On or about January 2nd, 1908, the plaintiffs entered into a contract with the defendant, the National Construction Company, Limited, to furnish all structural steel work, American bar lock sidewalk lights, anchors, coal chute, sidewalk doors and fire escape for the sum of $9,305, also the bricks for the building, all said materials to be in accordance with the plans and specifications, and from the evidence I find that the plaintiffs finished their work of furnishing said materials on the 6th of October, 1908.

GRANT, CO. J.

Since the bringing of their action the National Construction Company, Limited, has gone into liquidation and the liquidator is represented in this action by Mr. *A. D. Taylor, K.C.*

The Royal Bank was by order of the Court made party defendant, being the assignee of debt due by the owner to the contractor, the National Construction Company, the Bank being represented in this action by Mr. *Griffin.*

On the 28th of October, 1908, the plaintiffs caused to be filed in the office of the registrar of this Court a claim for a lien against the property in question, alleging in the affidavit for lien that the said Jsong Mong Lin was the owner thereof and pro-

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ceedings to realize under the said lien were instituted in this Court on November 27th, 1908, in which the plaintiffs claimed that the National Construction Company may be ordered to pay forthwith to the plaintiffs the sum of $51,809 (this claim for judgment against the Company was abandoned on the trial) and (2.) for a declaration that the plaintiffs are entitled to a lien against the property mentioned for the amount that may be found due to them for materials so supplied.

There is no dispute about the fact that on the 21st of October, 1908, the defendant Jsong Mong Lin conveyed all her interest in the said lands, buildings, works and improvements mentioned in the plaint to her husband, Loo Gee Wing, by deed, which said deed was registered in the Land Registry office at Vancouver on the 24th of October, 1908.

The lien of the plaintiffs herein is not by any means the only lien filed against the said property, there being some 25 liens in all filed, and in many, before any steps looking towards consolidation of the actions were taken, the claimants had instituted proceedings to realize the lien. On January 4th, 1909, the matter came before me in Chambers through an application on the part of the defendants, Jsong Mong Lin and Loo Gee Wing, who had been made parties defendant in many of the other proceedings to consolidate the several actions and an order to that effect was made, all objections of any party in any action as to the parties in any way being reserved to said party.

GRANT, CO. J.

At the close of the plaintiffs' case, Mr. *Reid*, on behalf of the plaintiffs, contended that as Loo Gee Wing was a party defendant to most of the other lien proceedings, the consolidation of the actions made him a party defendant in all the actions. That not being my view of the effect of the order of consolidation, especially as the right to object to parties not being properly added had been reserved to all parties to the consolidation, Mr. *Reid* then moved to add Loo Gee Wing as a party defendant in the action.

Section 12 of Chapter 20 of the Act of 1900 provides that every lien upon any such building or lands shall absolutely cease to exist after the expiration of 31 days after the completion of the works or improvement unless in the meantime the person

claiming the lien shall file in the nearest County Court registry in the County where the land is situate an affidavit duly sworn setting forth the name and residence of the owner of the property to be charged.

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This affidavit does not create the lien, but the making and filing of such affidavit in accordance with said section is absolutely essential if the lien would be kept alive, and after this is done the action must be brought within the time limited against all parties whose rights it is intended to affect: see *Bank of Montreal* v. *Haffner* (1884), 10 A.R. 592 at p. 598. This not having been done as far as Loo Gee Wing was concerned within the 31 days after the completion of the work, I refused the application to add him as a party defendant, following *Davidson* v. *Campbell* (1888), 5 Man. L.R. 250.

Mr. *Taylor*, on behalf of the defendant the National Construction Company, Limited, then moved that the action be dismissed, because (1.) the owner of the property is not before the Court; (2.) there was no notice in the terms of section 2 of Chapter 27, Acts of 1907, to the owner of the property; (3.) and if there was a notice it was not within the 15 days before the completion of the work.

In the view I take of this Act, which with its various amendments is exceedingly difficult to construe, all these objections are fatal to the plaintiffs' claim for lien herein, and as a personal judgment is not sought against the defendants in the action, the action is dismissed and the lien filed against the property in question by the plaintiffs cancelled.

GRANT, CO. J.

If it were necessary in the disposition of the action to make specific findings as to who is the owner of the property and as to whom and when notice was given and when the work was completed, I find that since October 24th, 1908, Loo Gee Wing has been the owner and registered owner of the property in question: that there is no evidence of notice in writing of intention to claim a lien herein served on him as required by the Act; that the work or undertaking of the plaintiffs herein was completed on the 6th day of October, 1908, and that notice of intention to claim a lien against the property was sent to Jsong

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Mong Lin after the expiry of the 15 days from October 6th, 1908. Costs will be to the defendants.

His Honour then heard evidence in the McLean case and dismissed it on the ground that notice of intention to claim a lien, required by the amendment of 1907, should have been given 15 days before the completion of delivery of materials in respect of which the lien was claimed. Plaintiffs in both cases appealed, and the appeals were ordered to come on in immediate succession.

The appeal first came up for argument at Vancouver on the 29th of April, 1909, before HUNTER, C.J., IRVING and MORRISON, JJ., when

Griffin, for the Royal Bank, raised the point as to the right to appeal, in view of the amendment to the Mechanics' Lien Act by section 24 of Cap. 20, 1900. Here the plaintiffs' action having been entirely dismissed, the amount claimed to be owing was adjudged to be less than $250, and therefore the judgment was final.

Brydone-Jack, for respondents, McLean Bros.: The Legislature undoubtedly meant that if the amount claimed to be owing was less than $250, then there should be no appeal. Our contention will be on the amount claimed, not on the result.

R. M. Macdonald, for respondents, J. Coughlan & Company, Limited: In the Coughlan case the amount claimed is beyond the jurisdiction of the County Court, and the learned judge has not adjudicated upon it at all. He has adjudicated only upon the validity of our lien.

Argument

Griffin: The decision was that the action be dismissed. In the McLean case there was an adjudication for $250.12, but no lienable debt; but in the Coughlan claim, no amount found due.

The Court took time to consider this point, and on the 7th of June, 1909, the following judgment of the Court was read by

IRVING, J.: The preliminary objection we have to deal with is raised by the language made use of in section 24 of chapter 20 of 1900, amending the Mechanics' Lien Act (R.S. Cap. 132).

IRVING, J.

The principal Act gives an appeal from any judgment of the County Court in like manner as in ordinary cases.

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Section 24 of 1900 is as follows:

"Where in any action for a lien the amount claimed to be owing is adjudged to be less than $250, the judgment shall be final and without appeal."

In the case before us the learned County Court judge held that there was no lien properly filed, and therefore he dismissed the action. I think section 24 applies only where a sum of money has been awarded. The section is not very clear but it pre-supposes that there was a valid lien.

The Chief Justice authorizes me to say that he does not dissent from this view.

The McLean appeal was then proceeded with before IRVING, MORRISON and CLEMENT, JJ.

The meaning and effect of section 2 of the Mechanics' Lien Act Amendment Act, 1907, was argued first.

Brydone-Jack, and *R. M. Macdonald*, for appellant.

A. D. Taylor, K.C., for the liquidator of the National Construction Company, Limited.

Woodworth, for respondents, Jsong Mong Lin and Loo Gee Wing.

Griffin, for the Royal Bank.

IRVING, J.

IRVING, J.: As to this particular point, section 2 of the statute passed in 1907, says that no lien shall be had or claimed for materials unless notice in writing shall have been given to the owner or his agent of his intention to claim a lien on such material by the persons claiming a lien at least 15 days before the completion of the work. The learned County Court judge held that the words "before the completion of the work" meant before the completion of the delivery by the vendor of the material. And he therefore dismissed the plaintiffs' lien on the ground that notice of the intention had not been delivered 15 days before the completion of the delivery. In my opinion the completion of the work means the completion of the work as a whole; that is to say the work or structure being done for the owner. Section 2 of 1907 was introduced for the protection of the owner. Just before it was passed we had given judgment

GRANT, CO. J. in a case of very great hardship, in which case it appeared that the owner had paid the price of the work in full, but after the work had been completed certain material men came forward and were able to compel the owner to pay a second time. The amendment of 1907 was made in my opinion to correct that fault, to preserve a balance between the owner on the one hand and the workmen and material men on the other. I see no difficulty in reading the amendment of 1907 together with section 8 or section 12 of 1900. I think the learned judge was wrong.

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MORRISON, J.: I agree.

CLEMENT, J.: I agree.

Argument then proceeded on other points dealt with below.

IRVING, J.: We allow this appeal on the ground that section 2 must mean 15 days before the completion of the work as a whole.

Other questions were raised. First of all, the goods were not proved to have been delivered. With reference to that, Mr. McLean, one of the plaintiffs, had placed the goods on the tail of his waggon, the goods were intended for the Loo Gee Wing building; the man was instructed to go there; Mr. Hooper the architect in the employ of the owner says that when he heard McLean's action was about to be commenced, he sent his clerk about and ascertained what debts were due to the different material men, that he had obtained an itemized list and he presumed that he had one of these in his possession; he did not produce it; he did not deny, he said, he thought this had been initialled by the National Construction Company, but he was not sure. I think there is by that evidence raised a sufficient *prima facie* case to throw upon Loo Gee Wing the onus of shewing that he did not get these goods. My opinion is, and I believe the opinion of any jury in this country would be, that he did receive the goods.

IRVING, J.

The second point suggested was that these goods were sold on general account. I think the answer to that is that these goods were sold, as McLean says, for the Loo Gee Wing building, and placed upon the waggon and sent to that institution; they were

intended and appropriated for that very purpose; and they were not sold on the general account.

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With reference to the contention that the notice required by the amendment of 1907 did not reach the owner, I think that it is abundantly proved that it reached Hooper, and that Hooper was held out to be the owner's agent for that purpose. As to who was the owner in this particular case, Loo Gee Wing admitted in the pleadings that he was the owner.

As to Mr. *Griffin's* contention that there was no agreement, or no evidence to satisfy section 2 of the statement of defence that Loo Gee Wing requested these things to be supplied, in the first place I do not see that it is a material allegation; but if I am wrong on that point I think that the implied request made by Mrs. Loo Gee Wing at the time that she owned the building must be regarded as ratified and adopted by Loo Gee Wing when he bought the building before it was completed.

MORRISON, J.: I agree. MORRISON, J.

CLEMENT, J.: I agree. I just wish to say that in coming to that conclusion I am assuming that it is material to allege that there was a request from Loo Gee Wing. I think that is shewn on the evidence. It was not necessary to set out on the pleadings the proof by which it was to be supported. CLEMENT, J.

The Coughlan appeal was then proceeded with.

Reid, K.C., and *R. M. Macdonald*, for appellants.
A. D. Taylor, K.C., for the liquidator.
Woodworth, for the owners.
Griffin, for the Royal Bank.

The same arguments were submitted on the construction of the Act as in the McLean case, and in addition it was urged on the part of the respondents that Coughlan & Company, Limited, were estopped as to a large part of their claim by a receipted invoice given by them during the course of the building. Counsel for the appellants in answer urged that the receipt was only *prima facie* evidence of pay-

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ment, and it had been shewn that no such payment was in fact made; that it did not appear that such receipt had been in any way acted upon, and that such advances as the owners had made since the giving of such receipt had been largely used to pay off other liens and charges against the property and to that extent the owner was benefited and not prejudiced.

Cur. adv. vult.

7th September, 1909.

IRVING, J.: This is an appeal from his Honour Judge Grant who held that the plaintiffs were not entitled to a lien.

The National Construction Company had a contract to erect the building for Jsong Mong Lin, wife of Loo Gee Wing.

Plaintiff was supplying the Company with steel. His total account against the Company in respect of this building was $12,849.08, made up of various items of steel supplied between the 28th of January, 1908, and 6th October, 1908. Brick was supplied by plaintiff between the same dates, the last item for brick being dated 30th June, 1908. There were two contracts (so-called) for $9,000 and $305 respectively. There were several actions commenced, in some of these Loo Gee Wing was named defendant, and in others not.

The following dates are of importance: Transfer by Jsong Mong Lin, executed 21st October, 1908. Placed in Registry, 24th October, 1908. Notice to Mrs. Loo Gee Wing mailed to Vancouver, 28th October, 1908. Lien filed 28th October, 1908. Action begun 27th November, 1908. Notice to Loo Gee Wing, 7th December, 1908. Building completed 23rd December, 1908.

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On the 7th of December, on the application of Loo Gee Wing, a consolidation order was made (under, it is said, section 14.)

The Bank, which was represented by counsel below and before us, had advanced money to the Company.

In my opinion they had no right to be heard: *Power* v. *Jackson Mines* (1907), 13 B.C. 202 at p. 206, as the Bank was only indirectly interested in the result. It should be dismissed from this action and ordered to pay all parties such costs as it has caused by unnecessarily interfering.

First point: Was Mrs. Loo Gee Wing a proper party? Her

defence is that she executed a conveyance on the 21st of October. The deed was not registered until after the action was commenced. Section 4 declares such lien shall affect only such interest as is vested at the time the works are commenced. She was the owner beyond dispute until Coughlan finished.

Second: Is Loo Gee Wing properly a party? To that I should answer Yes. He is within the definition of owner, section 2, sub-section 3, and having applied for consolidation under section 14, he is estopped from denying that he is an owner. His name should be added to the style of cause.

Third: Notice to Mrs. Loo Gee Wing was mailed at Vancouver and lien filed the same day. It is impossible to hold she received this notice on the 28th. This raises the question, Does failure to give notice mentioned in B.C. Stat. 1907, Cap. 27, Sec. 2, before lien filed invalidate proceedings? I think not. The language of 1907 is "unless" not "until." The object of the section was to protect the owner. It says the lien shall not be "had or claimed," but the lien has already been obtained by virtue of the furnishing of the material (section 7 of 1900). I think "had or claimed" must mean be allowed by the Court. On this reading the notice given to her agent Loo Gee Wing on the 7th of December would be sufficient.

Fourth: Goods not delivered. The evidence put in was in my opinion sufficient to shift the onus to the defendants; as they declined to give evidence denying that the goods had been delivered, I am satisfied that they were delivered.

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4a. The lien for the bricks did not expire. They were items in a running account.

Fifth: As to the $305 contract. It would appear that all of the materials which were to be supplied by the plaintiff for a lump sum of $305 have not been supplied. The defendants rely on this to defeat the lien in respect of the material that was supplied. I think the Act contemplated the allowance of a lien for goods actually furnished and used whether there is a lump sum agreement or not. An owner cannot defeat a lien by becoming bankrupt or breaking off all relations with his contractor. The lien is given by virtue of supplying the goods, irrespective of the mode of payment. The $305 should be cut

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Sixth: As to the objection that Coughlan lost his right to a lien by taking a draft or drafts from the Company and discounting them. Our section (25) passed in 1900, declares:

"The taking of any security for, or the acceptance of any promissory note for, or cheque which on presentation is dishonoured, or the taking or any other acknowledgment of the claim, or the taking of any proceedings for the recovery of the claim or the recovery of any personal judgment for the claim, shall not merge, waive, pay, satisfy, prejudice or destroy any lien created by this Act, unless the lienholder agrees in writing that it shall have that effect; Provided, however, that a person who has extended the time for payment of any claim for which he has a lien under this Act to obtain the benefit of this section shall institute proceedings to enforce such lien within the time limited by this Act, but no further proceedings shall be taken in the action until the expiration of such extension of time: Provided further, that notwithstanding such extension of time, such person may, where proceedings are instituted by any other person to enforce a lien against the same property, prove and obtain payment of his claim in such suit or action as if no such extension had been given."

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To my mind it would render the statute nugatory if we were to put on this section the interpretation contended for by the respondents on the authority of two Manitoba cases. I prefer the reasoning of the Alberta Court in *Swanson* v. *Mollison* (1907), 6 W.L.R. 678; *Clarke* v. *Moore and Simpson* (1908), 1 A.L.R. 49; *Gorman & Co.* v. *Archibald*, *ib.* 524.

Seventh: On the 31st of August, 1908, the plaintiff gave to the defendant Company receipts shewing that he the plaintiff had received from the Company in respect of goods supplied to this building $11,775. This was done in order to enable the defendant Company to obtain from the owner further payments on account. This was, in my opinion, a dishonest practice and I think operates as an estoppel to the plaintiffs' claim to that extent.

The plaintiffs' lien as to the difference, *viz.*: $1,074.08, however, is good.

MORRISON, J. MORRISON, J., concurred in the reasons for judgment of CLEMENT, J.

CLEMENT, J. CLEMENT, J.: To deal first with the objection that no notice

in writing was given to the owner or his agent under sub-section 1 of section 4 of the Mechanics' Lien Act as enacted by section 2 of Cap. 27 of the B. C. Statutes of 1907.

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The material facts are that this action was begun on the 27th of November, 1908, and that "the completion of the work" was not until "sometime late in December" of that same year. Upon these facts the enactment above referred to has, in my opinion, no application. In other words, the amendment can be invoked only in the case of actions begun after "the completion of the work" or (possibly) after the fifteenth day before completion. That this was what was intended by the Legislature is clear to those who know the *raison d'etre* of the enactment as indicated in the judgment of my brother IRVING in the McLean case recently delivered; but that of course does not determine the question, which is: What is the true construction of the language employed? But, knowing what was aimed at, namely, the protection of the owner against stale claims, we are entitled to give effect to that intention if the language used will reasonably bear it and are not called on to stretch the enactment to cover matters not intended to be covered unless forced to do so by the language in which the legislation is clothed: *Brophy* v. *Attorney-General of Manitoba* (1895), A.C. 202, 64 L.J., P.C. 70. See also *Rex* v. *Ettridge* (1909), 2 K.B. 24, 78 L.J., K.B. 479, and the cases there collected. To my mind, the whole framework of the amendment shews that it was intended to apply only to the case of a claim put forward after the completion of the work and has reference to the effect which should be given by the Courts to such a claim thus tardily advanced. It could hardly be contended that the amendment was intended to weaken section 4, which distinctly provides that one furnishing material shall "by virtue thereof," *i.e.*, of the furnishing—have a lien. Had the amendment of 1907 said that the material man should have no lien "until" notice, that would be an amendment of section 4 itself and would create a condition precedent to any lien arising. But the word is "unless" and I take the sub-section to mean that the lien which section 4 undoubtedly gives will be lost if the furnisher of material allows the time to elapse to within 15 days of the completion of the work without giving notice of his inten-

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tion to claim a lien. After such lapse of time without notice, "no lien shall be had or claimed," that is to say, no lien shall be given effect to by the Courts or put forward by legal process. In the case before us, the lien (by the conjoint action of sections 4 and 8) was in full effect on the day the summons issued in this action; the plaintiffs' right was fixed as of that day and the adjudication must be (speaking generally) as to his right upon that day. Could it be asked upon that day: Was notice given 15 days before the completion of the work?—an uncertain event still in the future. Note, too, the phrase "shall have been given," indicating that the question could arise only in respect of an event perfected before action brought. It seems to me that the only construction which will avoid absurdities is the one I have adopted, namely, that the section has reference only to proceedings in Court begun after the time for giving notice has expired. It is not necessary to refine as to the position of parties during the period of 15 days immediately preceding the completion of the work, as this action was begun before that period of time was reached.

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Another objection to the plaintiffs' claim is that the owner of the property against which the lien is claimed is not before the Court. The facts are that the defendant Jsong Mong Lin, wife of Loo Gee Wing, was the registered owner of the property at the time the contract was entered into by her with her co-defendants and she so continues (for aught that appears) to the present time. It appears, however, that on the 21st of October, 1908, after the plaintiffs' lien had attached, but before action was brought to enforce it, the female defendant executed a transfer of the property to her husband and application to register this transfer was duly lodged in the proper land registry office on the 24th of the same month (this also before action brought), but, as already intimated, no registration has as yet been effected. Whatever the motive of this transfer, it is gratifying to find that the much canvassed section 74 of the Land Registry Act prevents it taking effect to the plaintiffs' prejudice. That section is express that until registration (the word this time is "until") no estate or interest either at law or in equity shall pass. The defendant,

Jsong Mong Lin, was therefore at the time of action brought the owner of the property. This objection therefore fails.

It was further objected that the plaintiffs had failed to prove delivery or that the material was furnished for the Loo building. These objections were I think practically disposed of on the argument. The evidence was, if anything, stronger than in the McLean case, in which judgment was delivered immediately before this appeal was heard. It can serve no good purpose to detail the evidence on this pure question of fact.

Objections were also urged based upon (1.) the fact (as alleged) that the deliveries, other than of steel, were upon independent contracts, and that the last of such deliveries took place many months before the lien-claim was filed; (2.) the fact that negotiable paper was accepted by the plaintiffs and discounted with their bankers for a large amount. Even if effect were given to these objections, it would not do more than reduce the plaintiffs' lien-claim to an amount which would still exceed $1,074.08; and as, for reasons yet to be stated, the plaintiffs' claim to a lien cannot be allowed to an amount beyond that figure, it becomes unnecessary to consider further the objections just mentioned.

This leaves for consideration the objection that the claim to a lien can stand good, if at all, for $1,074.08 only. That objection is based upon the fact that on the 31st of August, 1908, the plaintiffs gave to the defendant Company a receipt in full for an account rendered in respect of the Loo building deliveries to that date, amounting to $11,775. The plaintiffs' claim in this action is for $12,849.08, and the sum mentioned of $1,074.08 represents the difference between these two larger amounts. On the faith of the statement thus made that the plaintiffs had (and could have) no lien in respect of deliveries to that date the owner paid to the contractors (the defendant Company) nearly $11,000, and, of course, took no steps to protect herself as against a possible lien in favour of these plaintiffs. In my opinion we are not to measure in nice scales the resulting prejudice to the owner. The plaintiffs deliberately said on the 31st of August, 1908, "We have no lien for deliveries to date ($11,775); we cannot have, because we have been paid in full." A clearer case of estoppel it would be hard to imagine. It would be monstrous to

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allow the plaintiffs now to controvert the truth of their own clear statement of fact, made to be acted upon, and actually acted upon by the owner.

In the result therefore this appeal must be allowed with costs here and below and the plaintiffs declared entitled to a lien for $1,074.08. The defendant, Jsong Mong Lin, should have a set-off for all extra costs incurred by her in respect of her defence based upon estoppel, and the plaintiffs should not of course be allowed their costs of meeting that defence.

Appeal allowed.

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Trusts and trustees—Pre-emption worked in partnership by mother and son—Crown grant issued to mother as representative of deceased father—Quit claim by children—Effect of—Beneficial interest of son—Resulting trust—Evidence to establish—Absence of written agreement—Denial by son of interest—Estoppel.

Mother and son applied for a pre-emption of certain land which had been occupied by the father previous to his death, but to which he had acquired no rights from the Crown, the land having then been reserved from settlement. The land subsequently was declared open to settlers, and after consultation with the Government agent, it was agreed that the mother should apply for the land as legal representative of the father. Mother and son occupied and operated the land together, until the son's death. On the issue of the Crown grant, all the children, including the son referred to, executed a surrender in favour of the mother. The son took and held the Crown grant as security for what he considered his rights under an alleged understanding that the land was to descend to him on the decease of the mother. The mother denied this understanding. In an action by the mother against the widow of the son for the recovery of the Crown grant the widow set up a partnership between the mother and son in the possession and operation of the land:—

Held, on appeal (reversing the finding of CLEMENT, J., at the trial), that there had been no such partnership established, and that the land belonged to the mother free from any trust in favour of the son.

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APPEAL from the judgment of CLEMENT, J., in an action tried by him at Vancouver on the 2nd, 3rd and 4th of September, 1908.

Wilson, K.C., and *Bloomfield*, for plaintiff.

Martin, K.C., and *Craig*, for defendant.

10th October, 1908.

CLEMENT, J.: In this case both parties press for judgment. I should have liked to spend a little further time in looking into the authorities, particularly because of my anxiety that my strong view as to the injustice of the claim put forward by the plaintiff should not lead me to pronounce bad law to meet the hard case. But having reached a clear conclusion I had better pronounce judgment at once, so that the Full Court may, if an appeal is taken, pass upon it as speedily as may be.

The facts I find as follows: In the year 1892, Alexander Campbell went into occupation of the land in question here, residing in a small house or "shack" built by him thereon with his wife (plaintiff herein) and their youngest boy Donald, aged 14. This occupation lasted until shortly before the death of Alexander Campbell in March, 1894. The land is Dominion land within the railway belt of British Columbia and it was not then open for homestead entry, and no interest which the law could recognize had been acquired by Alexander Campbell at the time of his death, although he had with Donald's assistance rough-cleared some five or six acres and as above intimated had put up a "shack." After his death the widow left the place and with the exception of a summer visit to it by Mr. and Mrs. Thomas (son-in-law and daughter of the plaintiff) in 1894 or 1895 the property was practically derelict. In July, 1895, amendments were made to the land regulations (see B.C. Gazette, 1895, p. 707), so that instead of being held by the Crown for purchase at $5 per acre, the land in question became open for homestead entry at $1 per acre on conditions as to residence and cultivation for three years as set out in the regulations. That being the position the plaintiff returned to the land in 1896 or 1897 (the exact date does not clearly appear), with her son William Argyle Campbell, her other children, including Donald,

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having entered upon other walks in life, and together the mother and son (then aged 59 and 27 respectively), took steps to secure the land in question. The mother in her evidence before me said that her son did not confine his attention to this land, but "worked out" for the neighbours and otherwise, earning moneys in that way. She had a small income of from $10 to $8 per month from a house in Vancouver left her by her husband, and according to her own story her son paid all his earnings over to her, and out of this common fund all disbursements in connection with the property in question and its operations, the purchase of stock, implements, etc. (apparently very small), and living expenses were made. Together they went to the Dominion land agent at New Westminster and arranged for the homestead entry. The agent, Mr. John McKenzie, says the question came up as to whose name should be used in making the entry—the mother's or the son's—and it was decided to make the entry in the mother's name, the intention being, as Mr. McKenzie understood it, that the place was really to be William's. No doubt, however, the mother was to live upon the property and be maintained thereout. Taking the matter as it stood at this time I have no hesitation in finding that the taking up of this land was on joint account for their common benefit, but the evidence does not enable me to say in what proportions or in what respective interests it was to be held. As a matter of fact the

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entry was made at the instance of Mr. McKenzie in the name of the mother, as "representative of the estate of Alexander Campbell, deceased," a proceeding for which I can find no warrant in the regulations, and the matter was carried through to Crown grant in rough analogy to the regulations in accordance with the department's notion of what was necessary to keep the Crown clear of a possible family quarrel, but certainly not in accordance with the plain letter of the law. However, I need not enlarge upon this phase as I cannot see anything contrary to public policy (as shewn in the regulations), in the arrangements between mother and son for their common use and enjoyment of the property in question: see *Barton* v. *Muir* (1874), L.R. 6 P.C. 134, 44 L.J., P.C. 19.

Following upon the homestead entry and indeed before that

entry the mother and son took possession of the property, procured by donation of purchase out of the common purse what little stock, etc., they did procure, and proceeded to the performance of the conditions necessary to ensure the issue of a Crown grant. A good deal was made of the fact that for a time the son occupied a shack across the road from the quarter-section in question, with the idea of ultimately acquiring land there; but he never succeeded in getting a homestead entry for it and in fact he very soon went over to live with his mother on the property now in question. That the son did a man's work upon the farm or clearing is not disputed and indeed is clearly so stated in a letter from the mother to the Dominion Land Agent, Mr. McKenzie, of the 21st of July, 1900. Referring to a then recent order in council under which the cash payment of $1 per acre had been dispensed with, she proceeds: "Since my husband's death my son William has been clearing and working the land and I think Mr. McDonald if he saw what we have done would say we had fulfilled the requirements of the homesteading Acts."

Apparently the Crown was satisfied, but when it came to the issuance of a Crown grant the difficulty arose—one really of the Crown's own making as I have intimated above—that the plaintiff had been given entry in a representative capacity. This difficulty was surmounted by all the children "signing off" in favour of the mother to whom in August, 1903, the Crown grant was made. The fact that William Argyle Campbell was a party to the instrument by which the heirs of Alexander Campbell released their claims upon the property "in order"—as a recital puts it—"that the patent from the Crown may issue to the said Jane Ann Campbell in fee simple" is now urged as an estoppel against William Argyle Campbell and the defendant claiming under him. In my view this was simply a conveyancing precaution required by the department and had no reference to the actual position as between mother and son. The other children had absolutely no claim legal or moral upon the property acquired by the mother and son in the way I have detailed. No consideration is suggested as having passed from mother to son. From the date of the homestead entry the mother was, in my opinion, a trustee for herself and her son of whatever rights had

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been secured by that transaction with the Crown, and I cannot bring myself to view the son's act in joining in a conveyance necessary to bring about the vesting of the legal fee in his mother as conclusive against him and those claiming under him. It is nothing more than a piece of evidence and its weight is to my mind rendered infinitesimal by the subsequent conduct of the parties. The possession, use and enjoyment of the property in common, the common purse to which the mother deposed in her evidence was continuous right down from the time when they together entered upon this quarter-section in 1896 or 1897, to the date of the son's marriage in 1906. No question of wages was ever suggested. It was the most comprehensive partnership arrangement that one can imagine between two persons.

After the son's marriage trouble arose between the mother and her daughter-in-law (the defendant in this action) and the son awoke apparently to the necessity for a clearer defining of his interest in the property, and as the mother seemed loath to come to terms, he took and held possession of the Crown grant. Nothing came of the negotiations between the mother and son and the latter died in March, 1908, with the question still unsettled. During the period between the son's marriage and his death the mother was much away. The son built a new house on the place and remained in possession continuously until the illness which terminated in his death necessitated his removal. What cash went into the new house was from the common fund, the actual labour of construction being largely performed by the son. After his death the mother claimed the place and all on it, and the daughter-in-law and her infant child were practically driven off. An offer was at that time made to the son's widow of $1,500 which she refused. The offer was not repeated and the mother now insists upon her claim to all. She brings this action for the recovery of possession of the Crown grant and the daughter-in-law counter-claims for a declaration (to put it shortly) as to the son's beneficial ownership in the quarter-section and the stock, etc., thereon at the time of his death and her consequent title thereto under his will.

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As I intimated at the close of the evidence, I am not satisfied that any agreement was ever executed between mother and son

defining their respective interests in the property. It is absolutely denied by the plaintiff; the son's conduct after 1903 (the alleged date of the alleged agreement) was so inconsistent with any feeling of security such as an agreement of that sort would give him, that I must conclude that no such agreement was ever executed. The whole trouble has arisen, in my opinion, by reason of the fact that the mother and son at the date of the homestead entry and at the date of the Crown grant did not deliberately face the question as to the quantum or nature of the interest that each should take. That there was a resulting trust for mother and son is, in my opinion, clear; it was a joint or common venture for their mutual advantage from start to finish: *McKercher* v. *Sanderson* (1887), 15 S.C.R. 296; and as the parties never settled as between themselves the value to be placed upon their respective contributions to the purchase price exacted by the Crown in fees, residence and cultivation, the Court must, I think, decree equality: *Wells* v. *Petty* (1897), 5 B.C. 353. As I have said the whole business was one long partnership and the passage from Lindley on Partnership cited in *Wells* v. *Petty* is apposite.

The mother it is true denies positively that her son had any beneficial interest in the property. I can only say that her bitter feeling toward her son's widow blinds her to the position as it existed throughout and she has been persuaded that her legal estate carried with it throughout the entire beneficial ownership. In this connection I may refer to the language of James, L.J., in *Fowkes* v. *Pascoe* (1875), 10 Chy. App. 343, 44 L.J., Ch. 367, at p. 371:

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"Although I concur in that which the Master of the Rolls has said, and which this Court has more than once said, that it is too dangerous to rely on the mere evidence of a party interested as to conversations with a deceased person; yet it is legally admissible evidence, and it is not to be disregarded when adduced by a man in support of that which is his indisputably at law, and of which it is sought to deprive him. When the Court of Chancery is asked, on an equitable assumption or presumption, to take away from a man that to which, by the common law of the land, he is entitled, he surely has a right to say, 'Listen to my story, as to how I came to have it, and judge that story with reference to all the surrounding facts and circumstances.' And his story, in substance, is to be weighed, of course, with reference to that danger, but still to be, in fact, weighed, like every other piece of evidence, together with every other fact and inference in the case."

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In the case before me I might almost say that "every other fact and inference in the case" contradicts the mother's assertion of a sole beneficial ownership. The son has never, with the exception of one incident to which I shall presently refer, done other than assert his right as a right and not as a claim upon his mother's bounty. On the occasion of a contemplated sale to Hill-Tout the only question was as to how much she should have of the purchase price. She apparently conceded her son's right to the larger portion. The mother has gone so far as to have a conveyance prepared in her son's favour, although it is true she asserted in the box that she really never intended to consummate the arrangement agreed upon verbally between herself and her son and that she actually wrote him a lie as to her execution of a will in his favour. I can only hope that she did not really appreciate or mean the answers she was giving to counsel's question. To my mind it seems clear that she recognized that her son had a right to much more than half; to all in fact, subject to her life maintenance on and out of the property; and I regret that I cannot make a decree upon that basis. I must, I think, take the actual facts as they existed at the date of the acquisition of the property and on those facts declare and give effect to the intention which courts of equity have laid down as proper to be presumed in the absence of express declaration.

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The incident to which I referred a moment ago was this: that when the sheriff endeavoured to realize in November, 1904, upon a small execution against William A. Campbell, he was told by the execution debtor that everything belonged to the mother. The whole incident does not redound to the credit of either mother or son. The debt was for groceries supplied at the mother's house in Vancouver during one of her visits to it and yet she was content to let judgment go against the son as apparent head of the family and then alllow him to evade payment on the strength of the legal title being in her. The son's statement to the sheriff under these circumstances does not seem to me a very cogent piece of evidence in the mother's favour. It is to be said for her, however, that she repented and paid the bill.

It is set up in the pleadings and was not contradicted at the trial that the defendant is the sole devisee and legatee of the

deceased William Argyle Campbell. The will itself shews that the infant child is a joint beneficiary with the defendant and she should therefore be added as a party to this action.

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There will be a declaration that the plaintiff holds the land in question as trustee for herself as to a moiety and for the defendant and the infant child as to the other moiety; that the personal property upon the place at the date of the son's death in the shape of furniture, stock, farm implements, etc., was as to a moiety thereof, his property and as such passes to his widow and child under his will; that it be referred to the registrar at Vancouver to take an account of such personal property; that the Crown grant remain in Court for all concerned until further order; and that the plaintiff pay the defendant's costs of the action and counter-claim, with liberty to apply as to a sale or partition, a receivership or any other relief to which any of the parties may be entitled consequent upon the above declaration.

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In addition to the cases above mentioned see *Briggs* v. *Newswander* (1902), 32 S.C.R. 405; *Williams* v. *Jenkins* (1871), 18 Gr. 536; *Wray* v. *Steele* (1814), 2 V. & B. 388; *Mercier* v. *Mercier* (1903), 2 Ch. 98, 72 L.J., Ch. 511; *Rochefoucauld* v. *Boustead* (1897), 1 Ch. 196, 66 L.J., Ch. 74. I should perhaps add that *Barton* v. *Muir, supra,* is a complete answer to Mr. *Wilson's* contention that a Crown grantee cannot in any case be declared a trustee.

In *Sanderson* v. *McKercher*, too, as appears from the judgment (see (1886), 13 A.R. 561 at p. 562) part of the land was unpatented at the date of the joint purchase, and the result in the Supreme Court was to declare the Crown grantee a trustee for himself and his co-purchaser.

CLEMENT, J.

The appeal was argued at Vancouver on the 10th of December, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Wilson, K.C., and *Bloomfield*, for appellant.
Martin, K.C., for respondent.

Cur. adv. vult.

On the 7th of September, 1909, the judgment of the Court was delivered by

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HUNTER, C.J.: This is an action brought by a widow against the relict of her son for the recovery of the title deeds of a farm alleged to have been taken by the latter while temporarily residing in the plaintiff's house. The defence, besides a denial of the taking, alleges that the plaintiff had agreed in writing with her son, the defendant's husband, that the land in question, which had originally been taken up by the plaintiff's husband, should be applied for in the plaintiff's name; that the son should fulfil the settlement conditions, and support the plaintiff on the place in consideration of which the plaintiff was to bequeath the farm to him, and as security for this promise the Crown grant was to be deposited with him. The defence also alleges that the defendant knows where the grant was deposited by her husband for safe keeping, but says she is under no duty to inform the plaintiff; and she further counter-claims for a declaration that she is entitled to the lands in fee subject to the maintenance of the plaintiff. An amendment was allowed at the trial which alleged in the alternative that the plaintiff was trustee for herself and her son by reason of his agreeing to the land being homesteaded in her name, and of agreeing to do and doing the necessary work to receive the Crown grant. It also set up a verbal agreement to the same effect as the written one.

Judgment

The learned judge came to the conclusion that no agreement either written or verbal had been proved, but considered that the evidence warranted the inference that a partnership relation subsisted between the mother and the son, and accordingly declared the plaintiff a trustee for the defendant and her infant of an undivided one-half interest in the farm and the chattels thereon at the time of her son's death.

In brief outline the facts were these. The father settled on the land in May, 1892, and died in March, 1894, without having acquired any right against the Crown, the land not having been open to settlement. The plaintiff and her son William remained on, when in about a year the son went to Nanaimo, and in July, 1895, the plaintiff went to Ontario and returned to the place in about a year and a half, while in the interval her son-in-law, Thomas, occupied it. A few months after her return William returned, and took up his abode in a shack on a timber claim

across the road, but at her request came to live with her, and resided there till his death in March, 1908, working part of the time on the farm and part of the time elsewhere. Some of the chattels used on the place were furnished by the mother and others by the son, and the necessaries sometimes by one and sometimes by the other. Up to the time of his marriage in April, 1906, the mother and son lived together amicably, but after the marriage it was not long before there were family quarrels which led to the present litigation.

Some time after the father's death the Government consented to allow his legal representatives to be entered as applicants for the land, and as a result of interviews with the local agent the children, five in all, including William, joined in a release of all their claims to the plaintiff, and in August, 1903, a Crown grant of the land issued to the plaintiff.

On these facts I am unable to see that when she got the legal title it was encumbered with any trust in favour of William. There is nothing to shew that she had obligated herself to hold the property or any portion of it in trust for him. All that occurred was that all her children, including William, waived any right they had to be recognized by the Dominion Government in her favour, and she thus started with a clear title. As a matter of fact none of them had any rights as against the Crown which could be enforced in a Court. Then starting with a clear title which owes its origin to the bounty of the Crown, how does the defendant establish any trust? It is argued, because the son at the request of the mother came to live with her, and spent some of his means on the place, and on her support, that that of itself raises a resulting trust in respect of the property, but at most it could only create a debt, and in the absence of clear evidence of intention to create the relation of debtor and creditor, it must be referred to natural love and affection. There are none of the *indicia* such as keeping of accounts, to shew that either ever intended to be in the position of debtor or creditor.

Judgment

With regard to the contention that the circumstances warrant the inference of a partnership, I am unable to see that they do, for as already stated, William had no more claim than any other

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of the children, and they all waived whatever interest they thought they had in favour of their mother. The other children had no intention of transferring their rights to William but only to the mother, and there is nothing to shew that either before or after the mother obtained the grant she agreed with William to create a partnership and turn the land in as one of its assets. He had the use and benefit of the estate for assisting to maintain her, and while no doubt he had a natural expectation that the estate would come to him or his heirs on the death of his mother, the defendant has not in my opinion, discharged the burden which is on her to shew that the mother had ever agreed to form a partnership with her son with the property as one of its assets, and therefore the appeal should be allowed, and a declaration made that the property in question belongs to the plaintiff free from any trust in favour of the defendant.

Appeal allowed.

Solicitors for appellant: *Wilson, Senkler & Bloomfield.*
Solicitors for respondent: *Martin, Craig & Bourne.*

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FRASER v. VICTORIA COUNTRY CLUB, LTD.

Criminal law—Betting on race tracks—Criminal Code, Secs. 227 and 235—Lawful bookmaking.

The plaintiff, a director and shareholder in defendant Company, brought an action for an injunction restraining the defendants from carrying out an arrangement entered into with a bookmaker named Jackson. The material points of the arrangement were that Jackson should be allowed to carry on his business as a bookmaker at a race meeting to be held on the defendants' race-track at Victoria, provided that he carried on his betting operations at no fixed spot on the race-track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track:—

Held, following *Rex* v. *Moylett* (1907), 15 O.L.R. 348, that the proposed method of betting was legal.

Held, also, that the booth from which it was proposed to pay off the bets was not a common betting house within the meaning of section 227 of the Code.

Semble, that a corporation cannot be convicted of keeping a common betting house under sections 227 and 228 of the Code.

MOTION for an injunction, afterwards turned by consent into the hearing of the action, all material facts being before the Court. Argued before HUNTER, C.J., at Victoria on the 10th of September, 1909. The facts appear sufficiently in the head-note and arguments of counsel. The defendants were admitted to be an incorporated company.

Statement

Helmcken, K.C., for plaintiff: The defendant Company has entered into an arrangement which renders it liable to be indicted for keeping a common betting house under section 227 of the Code, and on that ground we ask for an injunction.

[HUNTER, C.J.: I doubt very much whether a corporation could be indicted under sections 227 and 228 of the Code. The punishment prescribed is imprisonment, which is not applicable to a corporation. The point was discussed in the recent case of *Hawke* v. *E. Hulton & Co., Limited* (1909), 2 K.B. 93.]

Argument

In any event we contend that the defendants contemplate a breach of the Criminal Code, and we are entitled to an injunc-

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tion to prevent that, whether the Corporation, as such, is indictable or not. The proposed betting is illegal in view of the decision of the Supreme Court of Canada in *Saunders* v. *The King* (1907), 12 C.C.C. 174, and in any event the booth which it is proposed to use for the purpose of paying off bets is a common betting house. Sub-section (*d.*) of section 227 of the Code extends the definition of a common betting house to any place opened, kept or used for the purpose of facilitating or encouraging or assisting in the making of bets. This covers the present case.

H. W. R. Moore, for the defence: A sale or lease of betting privileges is lawful where it does not appear that unlawful betting is contemplated: *Stratford Turf Association* v. *Fitch* (1897), 28 Ont. 579, and here the proposed arrangement is within the law: *Saunders* v. *The King, supra*, is distinguishable, as there the betting was done from a movable booth. Here no booth or fixed place is contemplated for betting purposes, and the facts are exactly similar to those in *Rex* v. *Moylett* (1907), 15 O.L.R. 348, which, following *Powell* v. *Kempton Park Race-course Company* (1899), A.C. 143, was decided adversely to the plaintiff's contention. The booth for paying off is not a common betting house, as no betting is done there. It was decided by five judges in *Bradford* v. *Dawson* (1897), 1 Q.B. 307, that a room in a public house used by a bookmaker for paying off his bets was not a common betting house, on the ground that paying a bet is no part of the making of the wager.

Argument

[HUNTER, C.J.: The Courts have kept the interpretation of the word betting to its literal meaning.]

Further, in *Davis* v. *Stephenson* (1890), 24 Q.B.D. 529, it was held that a place used by a bookmaker for keeping the stakes bet until after the races were over, was not a common betting house. On this point the Criminal Code is more lenient than the English Betting Act, as it in terms permits a man to be the custodian or depository of bets made on the race-course of an incorporated association during the actual progress of a race meeting. Also, the business of bookmaking is a lawful business.

Helmcken, K.C., in reply.

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HUNTER, C.J.: In this case Mr. Jackson seems to have been fully advised of his rights and he proposes to keep himself within *Rex* v. *Moylett* (1907), 15 O.L.R. 348. There is nothing illegal in the arrangement proposed, and so the application for an injunction must fail.

The law relating to race-track betting is in a very unsatisfactory condition. If a bookmaker moves about uncontrolled he is within his rights, but if he conducts his business in a place where he and the betting business generally can be controlled, he is amenable to the Criminal Code. But these considerations are for the Legislature, not for the Courts, which must give effect to the law as it is.

Judgment

Motion refused.

WHITE AND WHITE v. VICTORIA LUMBER AND MANUFACTURING COMPANY.

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WHITE v. VICTORIA LUMBER AND MANUFACTURING CO.

Master and servant—Locomotive engineer—Death of caused by jumping from train—Equipment of train—Efficiency of—Negligence of driver—Competency of fellow servants—Damages, excessive—New trial—Costs.

Plaintiffs sued defendant Company for damages for the death of their son, a locomotive engineer in the defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found $6,000 damages:—

Held, on appeal, *per* HUNTER, C.J., that the only verdict reasonably open to the jury was that the deceased lost his life by his own negligence.

Per IRVING, J.: That the damages were excessive.

Per MORRISON, J.: That the verdict should stand.

New trial ordered.

Reversed 80 L.J. P. 38.

APPEAL from the judgment of CLEMENT, J., in an action for damages tried by him with a jury at Vancouver, on the 12th, 13th and 14th of March, 1909.

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McCrossan, and *Harper*, for plaintiffs.

Bodwell, K.C., and *J. H. Lawson*, for defendant Company.

CLEMENT, J., in his charge to the jury, said in part:

It has been properly stated it is not in one view a matter of sentiment at all. You have heard the evidence with regard to what this boy did toward his parents; you have to do the best you can—come to a conclusion in your own mind as to just how these parents would have fared in coming years if that boy had lived. Bear in mind that he is under no legal liability whatever to support them; if he had lived for years to come, he need not have contributed one dollar to their living if he had not so desired. At the same time you are justified in coming to the conclusion that what he did in the past he would continue to do in the future. I am speaking now, of course, on the question of damages, taking it—supposing for the sake of argument—that you find there has been negligence here for which this Company should be held responsible. I am not suggesting whether that is so or not, but if you do come to that conclusion, and it becomes a question of damages, then I am endeavouring to state to you the way I think you should look at it. I think you can come to a conclusion as to just what monetary assistance the parents would have received from this boy during the time they have still to live. You have heard the evidence as to the probabilities of life, in other cases; and my own opinion always has been, not that you should give a sum, which if invested would give them an annual interest equal to what their boy might have given them, but rather what sum would provide an annuity lasting during their life, to the amount which on the evidence you think the boy would probably—judging from the evidence—have contributed to their support during their lifetime.

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I will not say anything more as to damages, because I do not wish anything I have said along that line to influence you in the slightest degree in coming to a conclusion on the real questions of fact upon which you will say whether these defendants are liable or not.

Now, the allegation here is that Leonard White met his death through the negligence of his employers. The burden is upon

these plaintiffs of putting their finger upon something which, in your opinion, was negligence, and that negligence (if you find there was such) must have been the cause of his death.

With regard to the relations between employers and employees, the law is that the employer must exercise reasonable care in providing and keeping safe plant, safe machinery—I say both in providing it safe and keeping it safe—during the time it is in use. As part of this plant are the fellow employees, and it is the duty of an employer in choosing his servants, his employees, to exercise reasonable care that he gets competent men, men competent for the work which they are set to do. The law does not set up any standard, because you can see that the circumstances vary. All the different avocations in life are different, not only different classes, but different circumstances in the case of the same industry, and the law simply says that the precautions must be such as a reasonable man would take, and it is for the jury in every case—taking all the circumstances into consideration—to set up for themselves a standard in that particular case. You can consider whether the dangers from carelessness are going to be serious. I may take as an illustration, say, the manufacturer of explosives; naturally, in a business of that sort the jury would say, if the employers were carrying on a business of that sort, they would hold them to a very great degree of carefulness, both as to the plant and as to hiring of competent men.

Now, you have heard all about the business carried on here, bringing out the uses of this railway, and I am not going to say anything more than just this: It is for you, as reasonable men, to set up in your own mind the standard to which you think these employers should live up, and the question then will be, did they, as against Leonard White, live up to that standard?

It, perhaps, would be better just at this stage to take the charges (if I might call them that) that are made by the plaintiffs here; they give particulars of the negligence; they say, in the first place, that the brakes or ratchets of the said train No. 6 were insufficient and defective. There is a good deal of evidence about that. It is not for me, as I have said before, to indicate to you what I think the fact actually was. I, perhaps, may say,

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perhaps should say, that you are entitled, and you only are entitled, to take into account not merely the words that fell from the lips of a witness, but his demeanour, his conduct in the box. I need not enlarge upon that, you simply have to use your best judgment as reasonable men as to the truth of the story the witnesses tell, and you must do the best you can in coming to a conclusion as to which side the truth is on.

The second charge is, that the rocker arm and eccentric strap of the engine of train No. 6 were insufficient and defective. I think I should say to you, as a matter of law, that there is no evidence of that. There is evidence of their having broken; but that they were insufficient and defective I do not think there is any evidence, and moreover, I do not think that you would be justified in saying that the breakage of the rocker arm and eccentric strap had really anything to do with Leonard White's death.

That the said train No. 6 was overloaded. There is the question; you have heard the evidence; I am not going to say that there is no evidence that the train was overloaded; you have, as I said, to set up a standard with regard to the way in which that business should be conducted by these defendants as reasonable men, having due regard to the safety of their employees.

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It is said that the grades of the said railway track were defective and dangerous. There is absolutely no evidence of a dangerous grade; but it is a thing that has to be taken into consideration as part of the entire business. You know there is a grade there; it may be that the fact that the grades are of that percentage will, in your opinion, call for greater care, perhaps in some other direction, and in that sense you may have to take the matter into consideration.

The safety switch, it was stated, provided by the defendant Company was too short and entirely inadequate and insufficient for the purposes for which it was intended. Now, that is a matter which I had perhaps better leave for a moment or two until I come to the question of contributory negligence.

The next charge is, that the safety switch was also defective by reason of a rail having been removed therefrom.

Then comes the charge that the brakeman on the said train No. 6 was inexperienced and incompetent and the defendant Company did not exercise reasonable care in the selection of a brakeman. I have told you that they must, as a matter of law, exercise reasonable care in the selection of their employees, and when you come to decide what is reasonable you must have regard to all the surroundings, and as I have said, put up a standard yourselves as to what care should be exercised in the selection of, in this particular case, a brakeman for that work. Did the defendant Company exercise reasonable care in the selection of this brakeman? If you say, "yes," that ends the case upon that frontage. If you say, "no, they did not exercise reasonable care," then the next question comes, Was that the cause of Leonard White's death? In that connection you have to find, as a fact, that this brakeman was incompetent and actually did himself fail in carrying out his duty, in other words that he failed to set up his brakes. Those are the questions of fact, as to which you must come to a conclusion.

Then the additional charge is made that the defendants were negligent in failing to properly instruct or instruct at all the brakeman employed by them to act as brakeman on said train No. 6. That really comes down to a question as to this particular brakeman, and it is mixed up with this question of their care in selecting competent workmen. I should do this: If you come to the conclusion that care was exercised in the choice of this brakeman in putting him to this work, then if in carrying on his work he is negligent, the defendant Company are not responsible. The law is, that after caution, care, on the part of the employer in selecting his staff, if one in his service is guilty of negligence by which an employee is hurt, he cannot recover from the employer at common law. This is not one of the cases that is covered by what we call the Employers' Liability Act, so that if you come to the conclusion that the Company exercised care in selecting Guy as brakeman on this train, and that the cause of this accident was not their lack of care in selecting him, but his own negligence in carrying out his duties, then this defendant Company is not liable.

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If you come to the conclusion that there was negligence, the next question is, was there contributory negligence on the part of the deceased, because a man has no right to shelter himself behind the plea that his employer was negligent, if the fact is he himself contributed to his own hurt. The contention is put forward on the evidence that White improperly allowed his train to get beyond control, and if it had not been for that this accident would not have happened. Of course, in considering this question of contributory negligence it really comes up in that shape only if you have found negligence on the part of the defendants; because if you find that the real cause of this accident was Leonard White's manipulation of his engine on that day, then the cause of his death was his own fault, and there was no negligence on the part of the Company; but if you start by saying that the Company were at fault, then the next question is, did Leonard White contribute to the casualty by his own negligence. First of all (I think I am right in putting it) in allowing his train to get away, and secondly in not acting as he should in checking his train, and thirdly, in jumping from his train. Those are the questions of fact for you. If you come to the conclusion that the Company is negligent, but notwithstanding their negligence, that this accident would not have happened if it had not been for Leonard White's contribution to it, then you have to find for the defendant Company, There is then

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further—and it is in this connection, perhaps, that the question of this safety switch at the bottom comes in. If you say they should have had a safety switch, and if the presence there of a safety switch would have, in your opinion, actually prevented White's death, then the defendant Company are liable notwithstanding the fact that you might find that there had been carelessness or negligence on the part of Leonard White in managing his engine on the way down.

The question of damages at common law is one that is open to you, subject to what I have said to you. It is not wide open; it is not entirely in your hands; they are entitled to such damages, they would be entitled, if you find all the other facts in favour of the plaintiffs, to the loss, measured in money as best you can measure

it, that these people have suffered by reason of their son's death.

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The appeal was argued at Vancouver on the 24th of November, 1908, before HUNTER, C.J., IRVING and MORRISON, JJ.

Bodwell, K.C., for appellant (defendant) Company: The engine was the best of its kind, equipped with first class brakes; the grades were not such as to tax the capacity of the engine or brakes, and the men were competent, and, with the exception of the engineer, did their duty properly. He went over the hill at too great a speed, notwithstanding the fact that he had been warned several times against doing so. It was proved that he had allowed his train to get out of his control, and the wheels began to skid. Furthermore, the orders were to jump if the train got away, and not to risk any life; they disregarded the positive instructions this time in not jumping. There must be a new trial in any event, because the case did not go to the jury on the Employers' Liability Act. If the brakeman, Guy, did not set up three of the brakes, and the jury believed that, then it was a case of negligence of a fellow servant in common employment. It is only by a system of analysis and deduction that we can find out how the jury came to their verdict, and this is not right; the point must be clear. There is a possibility that the ratchets on the brakes were broken, but if that were so, there is negligence if a fellow servant, knowing of it, failed to report it. Then the damages are excessive, and we should have a new trial on that point. As to the dependency of the parents on the earnings of the deceased, it must be borne in mind that he was about to get married, and that would result in a reduction of his contributions towards their maintenance. Therefore the jury have no right to go on the basis of an annuity.

Argument

McCrossan, and *Harper*, for respondents (plaintiffs): We say that the brakeman was incompetent; that the safety switch was insufficient; the brakes were defective; there was no footpath on the trackside for the brakeman, and that the Company did not exercise reasonable care in the selection of a brakeman.

Bodwell, in reply.

Cur. adv. vult.

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HUNTER, C.J.: This is an action tried with a jury for damages for the death of the plaintiffs' son, caused by injuries received in the course of his employment.

The action is laid both at common law and under the Employers' Liability Act. The deceased was employed as an engineer on one of the defendants' locomotives, and at the time of his death was driving a 50 ton geared engine to which was attached a train of eight cars loaded with logs. While going down grade he lost control of the train, jumped, and was killed.

The usual allegations of defective plant, defective system, incompetent or negligent fellow servants are made in the statement of claim, which are denied in the defence, which also sets up contributory negligence, or more properly speaking, negligence on the part of the deceased.

The learned trial judge in his charge practically withdrew the claim under the Employers' Liability Act from the jury and they found a general verdict for common law damages to the extent of $6,000.

There was some evidence adduced to prove that the brakeman was incompetent. It was his first trip, and although he had been used to platform brakes for several years, and had been instructed in the use of the brakes which were placed on the side of the cars instead of on the platform, this kind of brake was

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novel to him. At the same time, it would seem clear that any person of ordinary intelligence accustomed to railroad work could learn how to handle these brakes properly after a few minutes' instruction. There was also some evidence tending to shew that two or three of the brakes were out of order, and also that the footpath was encumbered with logs, and that this circumstance militated against the proper setting of the brakes which is done by the brakeman on foot, before the driver starts down the grade in question.

If then the defence of negligence on the part of the deceased should not have been maintained, it might be a question as to whether we could interfere in view of the late deliverances in *Toronto Railway* v. *King* (1908), A.C. 260; and *Toal* v. *North British Railway*, *ib.* 352, in which the jury is termed the con-

stitutional tribunal to try matters of fact. I think, however, that this defence was fully made out, and that it was not reasonably open to the jury to come to any other conclusion than that the deceased brought about his death by his own lack of caution through which he lost control of his train.

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The train in question was an ordinary load of eight cars and started out from what is called Camp 6 for Chemainus, the point on the seaboard where the saw mill is situate. At the commencement of the run the track is level and then descends from one to four per cent. It then descends a seven per cent. grade for about 900 feet. The track then runs level for about 300 feet, then proceeds up a grade varying between four and 5.3 per cent. for about 1,400 feet; then down a six per cent. grade for about 2,800 feet, to where there is a switchback up grade of between 10 and 12 per cent. The car brakes are not set until the train commences to descend the six per cent. grade; the braking on the seven per cent. grade being done by the engine alone. When the train gets near the switchback, it is stopped and the brakes released to enable the train to get up the switchback. As it backs down over the switch the brakes are again set, and it continues down a long grade which for about 1,200 feet towards the lower end of it averages eight per cent. The train is stopped at the foot of this eight per cent. grade, and the brakes released (the engine alone holding the train) to enable it to get up another switchback, which is a six per cent. up grade. As each car comes down again over this switch, the brakes are again set before commencing the next descent. When the last brake is set the conductor gives the "high-ball," *i.e.*, the signal that the brakes are set, which the engineer recognizes by two blasts, the train then being on a 5.2 down grade. If he finds that the brakes are not holding tight enough he should stop at once, which he can easily do if he starts out slowly, as he should do, and give one blast for more brakes, and the engine holds the train while this is being done. The train then descends this grade for about 1,800 feet until it reaches what is called the "hump" which consists of a 1.5 up grade on a 12 degree curve, and then a 1.5 down grade, the effect of the curve being to make the 1.5 up grade equivalent

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to five per cent. up grade, which generally necessitates the engine using steam in getting around the curve. It then proceeds down grades three per cent. or less until it reaches another curve slightly up grade, around which it is generally necessary to work steam; and then down 2,500 feet on a grade varying from five to six per cent. to Miller Creek, where the engine is detached and another engine proceeds with the train to Chemainus, the descent being more gradual.

It is undisputed that the engine regularly did, and did on that trip, bring its train in safety over descents of seven, six and eight per cent. respectively, all being steeper than the one in question, and its capacity to do this when in order and properly controlled is beyond question. In fact it is for the purpose of taking just such loads as the one in question down such grades that it is designed and used. The engine was a 50 ton Shay engine of the latest type; was practically new; had passed the usual inspection; and it is not pretended that it was not in good order on the trip in question, or that it had got out of order in any way before it started down the 5.2 or Miller Creek grade, or that the brakes were in any different condition; in fact Guy says that he saw that the ratchets were broken the first time he set up the brakes. It is also undeniable that the deceased never signalled for more brakes, which he should have done and stopped the train the moment he felt that the train was shoving him. Instead of doing so, he let it go with speed enough to take him around the "hump" without using steam. Even then he could easily have stopped or slowed down before he got to the Miller Creek grade, but instead of doing so he evidently proceeded without due care until when he got to that grade it speedily got beyond his control. It also appears from the evidence that when he found it getting beyond his control he did not go about braking the engine in the proper way, but jammed the brakes on suddenly thus causing the wheels to skid, instead of giving her a little steam and applying the brakes gradually.

HUNTER, C.J.

However, assuming that this last manœuvre would have failed even if properly executed, I see no escape from the conclusion that it was entirely his own fault that the train got

beyond his control, even supposing that some of the car-brakes were out of order. It is plain from the evidence of Cary, another engineer, who had experience with the same class of engine on the same run, that he could have taken the train down that trip without any difficulty, and so far as I can see there is no reason whatever why the deceased could not have done so if he had used the caution which he was bound to do, especially in view of the fact that he had the lives of others in his keeping besides his own. All he had to do was to stop the moment he found the train beginning to shove his engine, which according to the undisputed evidence can be felt instantly, and have the brakes set up tighter, and it seems to me hopeless to suggest, in view of the circumstances already mentioned, whatever view one may take of the evidence regarding Guy's incompetency or negligence, or of the alleged obstructions on the track, or as to two or three of the brakes being out of order, that it was impossible with reasonable care, to have kept control of the train as it was descending the Miller Creek grade.

The truth is that he did not exercise the vigilance and care which his post required, and this is borne out by the fact that some 300,000 cars had already been brought down with safety, and by the testimony of the superintendent who, on account of a report that the deceased had stated that he could take six cars down without brakes, stated that shortly before the accident he told Reid, the conductor of the train, in presence of the deceased, to give him plenty of brakes, whereupon the latter said that if he was given too much brakes he would pull the train in two; to which the superintendent replied that if he did so he would get a man who would not pull it in two. I therefore think as the lack of caution on the part of the deceased was the decisive cause of the accident, and for that reason a new trial would be of no use to the plaintiffs, we should do as was done in *Allcock* v. *Hall* (1891), 1 Q.B. 444, and order judgment to be entered for the defendants.

Even if the defendants were not entitled to judgment, I do not see how a new trial could be avoided, as, with great deference to the learned trial judge, I am unable to agree with his direction that notwithstanding that the jury should find that the

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deceased was negligent if they thought that a proper safety switch would have prevented his death, then the Company would be liable. I do not see how it can be positively affirmed that a "proper safety switch," so-called, placed at the foot of the grade, assuming that there was none such, would have saved the life of the deceased, when one considers the momentum of the train, and if it was meant that the Company could be deemed negligent for not having such switches along the course of the grade, then I think that that would be imposing an undue burden on the Company. Such a standard of care would require a safety switch every few hundred feet, and would virtually require the Company to insure its employees against their own negligence.

IRVING, J.: I think the jury have assessed the damages at too high a figure. It is to be remembered that the plaintiffs can recover for actual pecuniary loss alone—a loss which is capable to a certain extent of calculation.

Here the deceased was a young man (24) an engineer on a logging train—a very hazardous employment, it seems to me—earning, when in full pay, $85 a month and board, but on an average not receiving more than $75; not married, but, it is said, thinking of getting married.

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His father was 62 years of age; his expectation of life would be 13 years more. His mother's age was 56; she could reasonably look forward to 19 more years of life. They say that he promised them $50 a month.

Now, on that evidence the jury found a verdict of $6,000 against the defendants. With the division made by them of that sum, the defendants could purchase annuities of $235 or $240 each for their respective lives. That would be allowing them $6,000, on the basis that he, deceased, would contribute $475 a year. It is just within the bounds of possibility that he could live on $400 or $500 a year and allow them the other half of his income, but the jury cannot have taken into consideration that his ability to discharge this obligation might be stopped any day by his illness, or accident, or his marriage. These are elements

which ought to have been considered, and I think must have been ignored by the jury.

Subject to what I have said as to the amount, I think the verdict must stand on the ground that there was evidence which would justify the jury in reaching the conclusion that Guy was not a competent servant, and that the accident was the result of his incompetency, and that the Company had not taken sufficient care in selecting him.

The duty of taking care to select proper and competent servants is by common law one of the duties an employer owes to his workmen.

In the present case there was evidence which would justify the contention that the accident was the result of either negligence or incompetency on the part of Guy. The jury may have thought that it was in Guy's own interest to set the brakes properly, and that it was due to Guy's incompetency rather than to his negligence that he failed to set them. This suggestion would find favour as no one was called to swear how Guy had acquitted himself the night before the accident when he was instructed in the work, nor is there satisfactory evidence as to his previous experience with brakes fitted as these were—nor indeed with any kind of brakes. Further, his appearance in the box in a drunken condition would not favourably impress the jury as to his fitness for the work he was hired to perform.

IRVING, J.

The onus of proving Guy's incompetency was on the plaintiff, and that having been established, it was for the defendants to shew that they used due care in making the selection.

The case having been allowed to go to the jury without objection, the whole evidence must now be looked at. I have come to the conclusion, although not without doubt, that there was, taking all the circumstances of the case, something more than a scintilla of evidence on this point of incompetency, and as no proof was given to establish that due care had been taken before employing him, therefore the verdict in favour of the plaintiff must stand.

It is suggested that there was contributory negligence on the part of the deceased, and that by reason thereof we should set aside this verdict and enter judgment for the defendants. Let

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us see what this proposal involves. First of all we must reach the conclusion that the deceased was guilty of contributory negligence, and that the evidence of that negligence on his part was at the trial so strong that it would be unreasonable—nay almost perverse—for the jury to have found in the way they have done; and I think it would also involve this, that we are satisfied that no fresh evidence could be given to shew that the deceased was not guilty of contributory negligence.

I do not think we can take this view. In the first place the learned trial judge does not seem to have thought the verdict unreasonable. My brother MORRISON thinks it correct, and although I feel that the learned Chief Justice has made out a very strong case, I cannot say that the verdict on this point was one which the jury could not have properly found.

IRVING, J.

There was no notice of appeal on the ground of misdirection, so I do not think we should discuss the question of whether or not the learned judge properly directed the jury as to the switch at the foot of the grade.

I think there should be a new trial.

MORRISON, J.: The deceased was an engineer in the employ of the defendants at the time of the accident causing his death. There are specific acts of negligence on the part of the defendants charged by the plaintiffs which are alleged to have caused the death of White. The action was launched in the usual form by combining a common law claim with a claim under the Employers' Liability Act. Counsel for the defendants, after the verdict was announced and before the jury were discharged, requested that they would be asked as to what the specific act of negligence was which they found against the Company, for it might well be that the act in respect of which the jury found against the defendants was one the existence of which would not render them liable. The judge declined to put the question to the jury. The defendants now appeal, basing two of their grounds on this refusal. They likewise claim that the amount awarded is excessive and that the verdict and judgment are against the law and the evidence.

MORRISON, J.

There was conflicting evidence. At the conclusion of the plaintiffs' case there was no application to withdraw the case

from the jury. The learned trial judge reviewed the evidence fully and fairly to a special jury who returned a general verdict for the plaintiffs.

I make no doubt that the evidence was as fully and ably canvassed before the jury as it was before us. I have read that of the chief witnesses several times and I cannot conclude that the evidence for the plaintiffs which was sufficient to justify the case reaching the jury was displaced to such an extent that no jury could reasonably arrive at the verdict given. The principles upon which a Court of Appeal should be guided in a case of this kind are so familiar and so frequently referred to in cases already appearing in our reports that it is not necessary to reiterate them.

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At to what appears to me to be the substantial grounds of the appeal, those referring to the failure of the judge to ask and that of the jury to say what the specific act of negligence was as to which they found against the Company, I am of opinion that there has been no error. It may be unfortunate that the jury are not obliged to answer specific questions, but the situation is that they are not. The Legislature may have been actuated by motives of policy with which of course the Courts have nothing to do.

It is true that the liability of the employer under the Act is confined to the case of defective plant. For his own act the employer was always liable at common law, but experience soon shewed that in actions of this nature, it was advisable to join the common law claim with the other and thus make sure of a verdict on either branch. It does seem anomalous that under those conditions it is not obligatory upon a judge to put specific questions and for a jury to return answers to them.

MORRISON, J.

The question of damages is for the jury and the well-known rule enunciated by Lord Esher in *Praed* v. *Graham* (1889), 59 L.J., Q.B. 230, is applicable here.

"If the Court, when they have heard and considered all the circumstances of the case, can come only to this conclusion—We think that the damages are larger than we should have given, but we cannot say that they are so large that no reasonable men ought to have given them—in that case the Court will not interfere; but if the damages are so large that no reasonable men ought to have given them as damages, there the Court ought to interfere."

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I would dismiss the appeal with costs.

[NOTE:—On counsel speaking to the minutes, a new trial was ordered; costs of the appeal to the Company in any event; costs of the first trial to abide the result of the new trial.]

New trial ordered.

Solicitors for appellant: *Bodwell & Lawson.*

Solicitors for respondent: *McCrossan, Schultz & Harper.*

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HIRD v. ESQUIMALT & NANAIMO RAILWAY COMPANY.

Vendor and purchaser—Sale of land—Mistake of vendor—Failure to shew notice to purchaser—Rectification of deed—Refusal to grant decree of—Offer of refund before action—Judgment for amount of offer.

Costs—Recovery of small sum—"Event"—Rule 976.

Plaintiff having received a conveyance of certain mineral claims from defendant Company, it was discovered that some 38 acres of the same land had been conveyed to another purchaser. The mistake arose through an omission to mark off the mineral claims on the official map. The Company offered plaintiff a refund of the purchase price on this shortage proportionate to the acreage so disposed of, which he refused, and sued for damages:—

Held, that he was entitled to damages only for the purchase price of the acreage short, with interest thereon at the legal rate, as on the evidence, he had not established that the mineral claim in respect of which he claimed damages for such shortage was of any commercial value.

Remarks as to disposition of costs where the plaintiff recovers only a small proportion of the amount claimed.

Statement

ACTION for damages for alleged breach of a covenant to give a good title to all the land comprised in three mineral claims sold to plaintiff by defendant Company; tried by MARTIN, J., at Victoria on the 30th of March, 1909. The facts are sufficiently set out in the reasons for judgment.

Peters, K.C., and *Kitto*, for plaintiff.
Bodwell, K.C., for defendant Company.

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MARTIN, J.: In this case damages are claimed by the plaintiff because the defendant Company has been unable to perform the covenant and give him a good title to all of the land (135 and 27/100ths acres), comprising three mineral claims in Somenos district, which it had sold to the plaintiff and essayed to convey to him by deed containing the usual covenants, and dated the 19th of March, 1907. It appears that after said deed was delivered it was discovered that a portion of said lands, amounting to 38 and 35/100ths acres, had already been conveyed to another purchaser, but owing to the fact that the mineral claims had not been plotted upon the official map, this earlier disposition had been overlooked at the time of the execution of the deed to the plaintiff. I am unable to find that the plaintiff had notice, express or constructive, of this mistake, and I cannot take the view on the facts and authorities cited that this is a case for rectification of the deed as prayed by the defendant Company, notwithstanding the terms of the original receipt given in 1901 to Bell, the plaintiff's predecessor. But on the other hand, I am of the opinion that the plaintiff should have, as a matter of equity, accepted the offer of the Company as contained in the letter of its Land Commissioner, dated November 18th, 1907, wherein the very pardonable mistake was explained and a refund of $191.80 offered to compensate for the shortage in proper proportion to the purchase price, which was $676.35 for the whole area. It is true that this letter does not specially mention the payment of any interest on the amount over-paid, and it is therefore technically deficient in that respect, but I am satisfied from the tone of the letter and other circumstances that there would have been no difficulty about that small item had the plaintiff been disposed to act reasonably. However, as matters stand now upon the record and upon the evidence, the plaintiff is entitled to damages for the said sum of $191.80 and interest at the legal rate, but no more, because he gave no evidence which would justify my finding that the mineral claim, the Lion

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Fraction, in respect of which he asks for heavy damages, is of any commercial value whatever; indeed the evidence goes to shew that in the opinion of one of the former owners "it is like throwing good money after bad" to expend anything on it. Therefore, it is impossible to say that any damage has been done to the property by the defendants' oversight, and the claim to damages in that respect must be rejected.

There has been no payment into Court by the Company as required by Order XXII., and consequently the result is that the plaintiff will have judgment for the amount offered to be refunded with interest as aforesaid at the legal rate. The counter-claim will be dismissed.

With respect to the costs, it was strongly urged that the plaintiff should be deprived of them, or at best that he should only get County Court costs, because he has recovered so small a sum. But the Rule 987 (1.) purporting to preserve to this Court that power which was formerly beneficially exercised (*e.g.*, in *Richards* v. *Bank of B. N. A.* (1901), 8 B.C. 209; and *Crewe* v. *Mottershaw* (1902), 9 B.C. 246), was struck out by the order in council of March 28th, 1906, and therefore I am unable to say that now the mere recovery of so small an amount is "good cause" under rule 976 for my refusing to allow the costs to follow the event, even if the counter-claim here did not invoke the principle laid down in *Pacific Towing Co.* v. *Morris* (1904), 11 B.C. 173, and assist the plaintiff, as to which it is unnecessary to express an opinion. At the same time I feel bound to say that for the future advancement of justice this Court should, in my opinion, have restored to it the power to protect the public from exorbitant demands and oppressive legal expenses by controlling the costs when small verdicts are recovered in high courts, and that a rule should be passed corresponding to that which has for a long time been in force in Ontario, as follows:

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"Rule 1132. Where an action of the proper competence of a County Court is brought in the High Court, or an action of the proper competence of a Division Court is brought in the High Court, or in a County Court, and the judge makes no order to the contrary, the plaintiff shall recover only County Court costs, or Division Court costs, as the case may be, and the defendant shall be entitled to tax his costs of suit as between solicitor and client, and so much thereof as exceeds the taxable costs of defence

which would have been incurred in the County Court or Division Court, shall, on entering judgment, be set off and allowed by the Taxing Officer against the plaintiff's County Court or Division Court costs to be taxed, or against the costs to be taxed and the amount of the verdict if it be necessary; and if the amount of costs so set off exceeds the amount of the plaintiff's verdict and taxed costs, the defendant shall be entitled to execution for the excess against the plaintiff."

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This rule has been effective in removing in that Province the abuse thereby aimed at.

Judgment for plaintiff.

KRUZ v. CROW'S NEST PASS COAL COMPANY, LIMITED.

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Workmen's Compensation Act, 1902—Practice—Security for costs—Insolvency of administrator—Nominal trustee.

While as a general rule security for costs will be ordered in case proceedings are taken by an insolvent person for the benefit of other persons, this rule does not apply in the case of an executor. If he is authorized by statute to take proceedings for the benefit of other persons it makes no difference that the moneys recovered are not payable to the executor as part of the estate, but are payable directly to the persons beneficially interested.

Sykes v. *Sykes* (1869), L.R. 4 C.P. 645, and *White* v. *Butt* (1909), 1 K.B. 50, followed, and the principle applied to proceedings by an executor under the Workmen's Compensation Act.

An application for security for costs in an arbitration under the Workmen's Compensation Act should be made to the arbitrator and not to a judge in Chambers; and should be made promptly.

APPLICATION in proceedings under the Workmen's Compensation Act, 1902, for security for costs of respondent Company, heard by MORRISON, J., at Chambers in Vancouver on the 10th of September, 1909. The applicant being the administrator of the personal estate of the deceased, after the commencement of the proceedings, was convicted of theft and sentenced to a term

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in the penitentiary. It also appeared that he was insolvent. Whilst the proceedings were still pending before the arbitrator, an application was made to a judge in Chambers by the respondent Company for security for costs on the grounds that the applicant was not interested in the matter in issue, the estate of the deceased was insolvent, the applicant was under penal servitude, and the dependent wife of the deceased lived beyond the jurisdiction.

R. M. Macdonald, for respondents in the arbitration proceedings, in support of the motion: When an insolvent person takes proceedings in his own name but really for the benefit of another person, security will be ordered: *Malcolm* v. *Hodgkinson* (1873), L.R. 8 Q.B. 209. The fact that the applicant for compensation is a convicted felon and that the persons beneficially interested are resident outside the jurisdiction are additional reasons why security should be ordered.

Craig, for the applicant, shewed cause: The respondents' application should be dismissed for the following reasons:

(1.) It should be made to the arbitrator and not to a judge of the Supreme Court: *Follis* v. *Schaake* (1908), 13 B.C. 471; Workmen's Compensation Rules, 1904, Rule 34; *Thomas* v. *Crow's Nest Coal Co.* (not reported), decided by CLEMENT, J., in Chambers; Workmen's Compensation Act, Second Schedule, Sec. 3. (2.) The right to security for costs if such right existed, has been waived, because the arbitration took place on the 25th of August, and was completed except for the production of certain documentary evidence, which the Company had been subpœnaed to produce, and the arbitration was adjourned at the Company's request to enable them to produce the documents, and it was further adjourned from time to time at their request in order to get a transcript of the evidence for argument. After all this has taken place, it is too late to apply for security for costs: *Piper* v. *Burnett* (1909), 14 B.C. 209. (3.) The respondents are not entitled to security for costs on the facts alleged. It is true that ordinarily where an insolvent person brings an action for the benefit of some other person, security will be ordered, but this principle does not apply to the case of an executor. He brings the action in his own

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right, because by statute the action is authorized to be brought in the name of the executor. He is not a person put forward by the persons beneficially interested to act as plaintiff in order that they may escape liability for costs: *Sykes* v. *Sykes* (1869), L.R. 4 C.P. 645; *Denston* v. *Ashton* (1869), L.R. 4 Q.B. 590; *Cowell* v. *Taylor* (1885), 31 Ch. D. 34; Holmstead & Langton, p. 1324.

Macdonald, in reply. The cases of *Denston* v. *Ashton* and *Sykes* v. *Sykes* are distinguishable. In those cases the executor brought the action in his own right as representing the estate of the deceased, and was entitled to have payment of the money made to him as executor.

In the present case the executor is never entitled to receive payment of the money. His name is used; the money recovered is not payable to the executor but to the persons beneficially entitled.

An executor or administrator in proceedings under the Workmen's Compensation Act is not representing the estate of the deceased but is distinctly representing the dependant, in this case the wife. All the cases cited dwell upon the fact that the exception to the general rule is founded on the position of an executor or administrator as representing the estate of the deceased in the particular proceedings in question: see *Sykes* v. *Sykes, supra,* at pp. 647 and 648, *per* Bovill, C.J.

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If then the reasoning upon which the exception is founded is as above cited, it can have no application where an administrator is applying under the Workmen's Compensation Act, as in that case it does not represent the testator's estate, but solely the claim of the dependant, a claim which might have been made in the dependant's own name, in which case security would be ordered as a matter of course. It is submitted that under these circumstances the applicant is in no different position from any other insolvent person advancing a claim solely in the interest of a third party, and it comes within the rule laid down by Lord Blackburn in *Malcolm* v. *Hodgkinson* (1873), L.R. 8 Q.B. 209, that "where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs."

MORRISON, J. (At Chambers)

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9th November, 1909.

MORRISON, J.: The applicant is the administrator of the personal estate of Albert Kruz, deceased, who died in consequence of injuries received whilst in the respondents' employment. The claim for compensation was in due course brought before an arbitrator pursuant to the provisions of the Workmen's Compensation Act. The evidence was all substantially adduced with the exception of some documents from the respondents' side for the production of which an adjournment was granted. Further adjournments were also secured by the respondents to enable them to obtain a transcript of the proceedings for the purposes of their argument. Since proceedings commenced the applicant has become an inmate of the penitentiary on a charge of theft. There is little doubt that he is also insolvent. Whilst the arbitrator is still seized with the consideration of the matter, an application is made in Chambers by the respondents for security for costs on the grounds that the applicant is not interested in the subject-matter of the arbitration, the estate of the deceased is insolvent, the applicant is under penal servitude, and the dependent wife of the deceased lives beyond the jurisdiction.

The application is opposed first, because it is contended that it should have been made to the arbitrator; secondly, because the right to security, if such right existed, has been waived, and *Piper* v. *Burnett* (1909), 14 B.C. 209 is cited; thirdly, that on the facts set forth, the respondent is not entitled to security as asked.

Judgment

In the third objection is raised the substantial point of contention in answer to the respondents' real ground, *viz.*: the application of the well-known principle of law, that a nominal plaintiff, if without means, may be ordered to give security for the costs of the action.

Mr. *Macdonald* contends that an executor or administrator in proceedings under the Workmen's Compensation Act is not representing the estate of the deceased, but is distinctly representing the dependant (in this case the wife) and that therefore, the principle of law above referred to applies. I do not agree. He has not satisfied me as he must, that the applicant herein is merely nominal within the contemplation of the principle.

The case of *Malcolm* v. *Hodgkinson* (1873), L.R. 8 Q.B. 209, cited on behalf of the respondents, contains a general statement in the course of the argument by Blackburn, J., that " where an insolvent person is suing as trustee for another, it has long been the rule to require security for costs." But see *White* v. *Butt* (1909), 1 K.B. 50, 78 L.J., K.B. 65, where it is held that a plaintiff as trustee does not as such come within the rule. This case and the authorities referred to therein fully cover that phase of the application. In the present matter, the applicant is acting in an involuntary capacity, which differentiates his position from the illustrations urged by Mr. *Macdonald*, in which the plaintiffs were as Buckley, L.J., terms it in *White* v. *Butt*, *supra*, " fictitious," and the same learned judge proceeds to give examples of the exceptions to the well-established principle that a plaintiff cannot in a court of first instance be called upon to give security for costs merely because he is poor and he gives that of a plaintiff who is merely a bare trustee, and is a pauper, the matter having been transferred to him for the purpose only of suit.

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On the other points of objection, I think the application if it could have been made at all, should have been made to the arbitrator, and it should have been made in time.

The application is refused with costs.

Application refused.

MORRISON, J.

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KENDALL v. WEBSTER

KENDALL AND ANOTHER v. WEBSTER.

Company law—Winding-up—Action by liquidators—Sanction of Court—Necessity for—General manager—Duty as servant or agent—Transactions on his own behalf similar to those of company—Liability to account for profits—Trustee—Winding-up Act (Dominion), R. S. C. 1906, Cap. 144, Sec. 38.

In an order for the winding-up of a company, it was provided that the liquidators, with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act, without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. Section 38 of the Act enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court:—

Held, that it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of section 38:—

Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits":—

Held, in an action to account for the proceeds of the sale of this timber, that defendant was not acting as the representative of the company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances.

Statement

ACTION by the liquidators of the British Columbia General Contract Company, Limited, in the course of winding-up proceedings, against the former general manager of the Company, for an account of the profits accruing from a certain transaction alleged to have been entered into by the defendant on behalf of the Company, tried by MORRISON, J., at Vancouver, in March, 1909.

Burns, and *Walkem*, for plaintiffs.
L. G. McPhillips, K.C., and *Laursen*, for defendant.

16th March, 1909.

MORRISON, J.: The plaintiffs are the official liquidators of the British Columbia General Contract Company, Limited, appointed as such by order of this Court made on the 9th of March, 1908, pursuant to the provisions of the Winding-up Act, chapter 144 of the Revised Statutes of Canada, 1906. By the same order two inspectors were appointed to advise the liquidators in the liquidation of the Company. The order further provided that the liquidators, with the consent and approval of the inspectors, might exercise any of the powers conferred upon them by the Winding-up Act without any special sanction or intervention of the Court.

One of the powers conferred upon the liquidators is to bring or defend any action, suit or prosecution or other legal proceeding, civil or criminal, in their own name as liquidators or in the name or on behalf of the Company as the case may be. Section 38 of the Act enacts that

"The Court may provide, by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by this Act, without the sanction or intervention of the Court."

There had been no application made subsequent to the winding-up order. The statement of defence raised the point that the plaintiffs had not first obtained the requisite authority to bring the action as required by said section 38, and Mr. *McPhillips* duly pressed the point at the trial. The case cited by Mr. *Burns* in reply, *viz.*: *Sarnia Implement Manufacturing Co.* v. *Hutchison* (1889), 17 Ont. 676, does not carry us very far. The point was raised that no approval had been given pursuant to R.S.C. Cap. 129, Sec. 31, being the Winding-up Act of 1886, which does not contain a similar provision to section 38, *supra*. But whether the Court in that case, judgment in which was delivered in June, 1889, had considered section 12 of chapter 32 of the statutes of 1889, assented to on April 16th, which is in terms the same as section 38, *supra*, I cannot quite make out as the trial took place at the Spring Chancery sittings, 1889, at Guelph, no particular date appearing in the report.

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However, the preliminary point now involved is simply whether the term in the winding-up order, relied upon by the plaintiffs, obviates the necessity for obtaining a substantive order empowering the liquidators to sue without the sanction of the Court. I think it does not, and that there should have been an order subsequent to the winding-up order. In case I may be wrong in this view and in order to prevent the trial being gone over again, I shall deal with the merits.

The British Columbia General Contract Company was incorporated in British Columbia in 1904, having its head office in Vancouver. The defendant was general manager up to 1906, and in January of that year he became managing director.

On the 25th of January, 1906, McMullen, who represented the shareholders and directors in New York, wrote the defendant as to a revision of his contract with the Company, the last paragraph of which is as follows:

"We have stated above that we want you to enter into a five years' contract. Of course it is always understood that when you are dissatisfied or when we are dissatisfied that our relations can be terminated on a reasonable or say six months' notice to either party, but this offer is expressly made, however, on the basis that you serve the Company to the best of your ability at the compensation herein provided for a period of five years. If this arrangement is satisfactory to you, please sign and return the duplicate copy herein and same will constitute the basis of our future relations."

Judgment

The defendant signed his acceptance of this arrangement, and on the 31st of March following wrote McMullen in part as follows:

" . . . . . This matter now being disposed of, I will say I will give the business here my entire personal attention. . . . . and trust that the arrangement and business here will prove mutually satisfactory to us both."

The defendant forthwith entered upon his duties as managing director of the Company, one of the objects for which it was incorporated being to purchase or otherwise acquire timber lands and timber leases, to cut and manufacture lumber and to purchase and sell the same.

On the 4th of April, 1906, the defendant wrote to McMullen in New York:

"The Grand Trunk Pacific are now preparing to open up their work in the mountains and with a view to being early on the ground to bid on this work I sent a man up to the Skeena River and Bulkley Valley to make a

preliminary examination of the country, and also to select some timber limits which would be available to supplying ties and other material during the construction of the road. He just returned and has secured a lot of useful information, and also staked out six limits each one mile square. Three of these are near the Bulkley Valley and three on the Skeena River, west of the Copper River. You will find these on the map of B. C. which I sent you. . . . . I will make application at once to the Chief Commissioner for three or perhaps four of the limits which will be sufficient to secure the lot, as the ones I will take will control the others and the expenses will be $115 per annum for each limit. Good timber is scarce in that district and whoever secures the choice location will make well out of them. This is one of the reasons which induced me to take the matter up at this early date, as there will be a great rush for it as soon as anything absolutely definite is known as to its location."

On the 11th of April, McMullen wrote in reply:

"Yours of April 4th *re* locating timber claims and enclosing clipping giving approximate line G. T. R. R., Pacific end, received. I think your conduct in the premises is wise, judicious and enterprising, and it has my approval. As you say, by and bye there will be a big rush for not only timber but also grazing land, and if you come in right and intelligently you might make considerable money this way, quite aside from the value of the timber line for prospective contract work in the Grand Trunk line," etc.

On the 25th of April the defendant wrote in answer:

"In reply to your letter of the 11th inst., I am very glad to know that you approve of the steps I have taken to get on the 'ground floor' for the Grand Trunk Pacific work. While taking up timber limits is not legitimate contracting it is a necessary adjunct to it sometimes and I am sure it is so in this case, and I hope that what we have done will result in some profitable business when work begins up there."

Judgment

As early as the 15th of January, 1906, the defendant as general manager of the Company had entered into an agreement with a cruiser named Newell, as indicated in the above correspondence, to cruise timber in the Bulkley and Kispick valleys, which was done, and in respect of which there is no claim. But *en route* to Vancouver, after locating and staking the claims pursuant to that agreement, Newell passed through a quantity of timber in the Kitimat district and disclosed this fact to the defendant with whom he entered into another agreement similar to that of the 15th of January, but he distinctly declined to negotiate with the defendant in his capacity as a representative of the Company, as he did not wish the Company to acquire any interest in this particular timber for the reason that they would likely desire to

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hold the limits longer than he, Newell, would like. He did not wish to have them tied up. The defendant then joined Newell, who, in due course, located and staked the Kitimat limits at the defendant's expense. The defendant, when it became necessary to make the usual payments to the Government in respect of the acquiring of the berths so staked, drew on the funds of the Company by cheque, which was duly entered in the Company's books, but which, however, he did not cash and in the course of some 13 days the account was balanced. Those entries, together with several others, appear in the trial balance sheets as "Kitimat Limits." The defendant at once sold the limits thus acquired to one Cameron. The Company shortly afterwards went into liquidation. The liquidators upon investigating the affairs of the Company demanded of the defendant an explanation of those entries *re* "Kitimat Limits" and he explained the circumstances. Upon demand being made to account for the proceeds of the sale of this timber he refused, and the action was accordingly brought. The question to be determined is whether the defendant in acquiring this timber was acting as trusteee for the Company in respect of the transaction and is liable to account to the plaintiffs.

There are points of essential difference between this case and the numerous authorities cited on behalf of the plaintiff. Newell, the cruiser, was under no obligation to disclose the existence of the Kitimat limits to the Company. He would not have negotiated with the defendant in his capacity as managing director of the Company. The Company had no equity in or right to the information or the property the subject of the information. He desired the defendant's financial assistance to acquire the limits for the purpose of making a speedy turn over at a large profit and he knew that neither the Company nor the defendant acting for the Company were at all likely to purchase from him, and the defendant did not acquire his interest for the purpose of re-selling to the Company or in any way interfering or competing with them in the course of their business. The defendant was authorized to acquire the Bulkley valley timber along what was supposed to be the proposed Grand Trunk Pacific route and to hold it in anticipation of securing a contract

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for construction of a section or other portion of that railroad. He was not authorized to acquire timber limits elsewhere and for speculative purposes, and, indeed, it is doubtful if such transactions are within the scope of their corporate powers.

Lord Justice Cotton in the case of *Dean* v. *MacDowell* (1878), 8 Ch. D. 345 at p. 354, lays down three clear rules which entitled one partner to share in the profits made by a co-partner and those apply to the case of the fiduciary relationship claimed here:

"(1.) If profit is made by business within the scope of the partnership business, then the partner who is engaging in that secretly cannot say that it is not partnership business. It is that which he ought to have engaged in only for the purpose of the partnership. (2.) Again, if he makes any profit by the use of any property of the partnership, including, I may say, information which the partnership is entitled to, there the profit is made out of the partnership property, and therefore, of course, it must be brought into the partnership account. (3.) So, again, if from his position as partner he gets an interest in partnership property, or in that which the partnership require for the purposes of the partnership, he cannot hold it for himself, because he acquires it by his position of partner, and acquiring it by means of that fiduciary position, he must bring it into the partnership account."

I do not think that any of those principles apply to the case at bar. In the first place what was done cannot be deemed to have been a transaction properly within the scope of the authorized business of the Company, and in any case it was not done secretly. He could not have done it at all for the purposes of the Company, as Newell declined to deal with the Company. In the second place he did not make use of any of the Company's property within the meaning of the authorities upon which the second rule is based, *viz.*: *Burton* v. *Wookey* (1822), 6 Madd. 367; *Gardner* v. *McCutcheon* (1842), 4 Beav. 534; *Aas* v. *Benham* (1891), 2 Ch. 244; *Tarkwa Main Reef (Limited)* v. *Merton* (1903), 19 T.L.R. 367; *Kelly* v. *Kelly* (1908), 7 W.L.R. 542; nor was the information that to which the Company had any right. And in the third place it was not owing to his connection with the Company that he obtained the information leading to the acquisition of the property, even supposing it was property required by the Company. He did not acquire the property or information by means of his fiduciary position. The exact con-

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trary is the fact, for Newell, who had a substantial interest in the Bulkley limits along with the Company, and which the Company were holding, did not wish to dispose of any other limits or disclose their existence to the Company. The defendant did not acquire any interest which conflicted with his duty to the Company: *Sheppard Publishing Co.* v. *Harkins* (1905), 9 O.L.R. 504 at p. 505.

As Lord Justice Thesiger said in *Dean* v. *MacDowell*, *supra*, at p. 357:

"If we were in the present case to extend the principles beyond those which have been established by previous cases, there is no reason why the plaintiffs should not have sought to have recovered the profits of any business in which the defendant might have engaged, although that business might have been entirely unconnected with the subject-matter of the business of the partnership."

The circumstance that some of the correspondence was written on the Company's stationery and that the defendant signed his name on several occasions in dealing with this property under the rubric "The B. C. General Contract Co., Ltd.," and that he made the entries in question respecting the Kitimat limits does not estop him from explaining the matter; and he has done so to my satisfaction.

Judgment

I have carefully read all the authorities cited by Mr. *Burns* in his able argument on behalf of the plaintiffs and a number of others, but none of them seem to me to support his contention, the facts being in each case essentially different from those before me.

Although it was the duty of the liquidators to institute rigid inquiries upon discovering the *prima facie* evidence in the Company's books of these limits being an asset, I do not think they are entitled to an account from the defendant as asked for. The action is dismissed with costs.

Action dismissed.

BARNES v. BRITISH COLUMBIA COPPER COMPANY, LIMITED.

IRVING, J.

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BARNES v. B. C. COPPER CO. LTD.

Master and servant—Dangerous works—Knowledge of—Structural defect—Risk voluntarily incurred—Negligence—Contributory negligence.

The plaintiff, whilst engaged as a switchman on the defendants' electric-motor tramway, running between their ore-bins and smelter furnaces, after having set the switch for the motor which was about to return from the furnaces, started to re-cross the track in order to take his usual seat on the head end of the motor. His foot got caught in a hole in the floor between the rails. He shouted to the motorman who immediately cut off the current and applied the brakes, but the motor did not stop soon enough to prevent the accident, with the result that the motor ran upon the plaintiff breaking his leg in three places. The evidence disclosed the facts that the hole in question had been there some time previous to the accident; that the accident occurred just before daybreak and that the plaintiff had not been at work for more than one shift. There was also some suggestion in the evidence that the hole was left there for the purpose of making room for a bar connecting the two rails in the track:—

Held, on appeal (affirming the judgment of IRVING, J., at the trial), that the accident was caused by a structural defect in the ways of the defendant Company, and that the plaintiff was entitled to recover.

APPEAL from the judgment of IRVING, J., in an action for damages tried by him at Nelson on the 11th of February, 1909. The facts are set out above. At the close of the plaintiff's case, defendants moved for a non-suit and submitted no evidence.

Statement

S. S. Taylor, K.C., for plaintiff: We rely on three grounds: (a.) The state of non-repair of the brakes of the motor, in the face of the frequent and long-standing complaint of the workmen using the same, amounted to negligence on the part of the Company at common law, because it is their duty not only to equip the smelter with safe plant but thereafter to maintain such plant in a proper condition of repair; (b.) The existence of the hole in the floor was not due to accident, nor lack of repair, but arose in connection with new construction works, namely, it was left by reason of the old switch equipment being replaced

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by other equipment which did not utilize this space. This hole existed in this dangerous place for at least three weeks. Hence the Company must be held to have been aware of it, and their neglect to remedy the danger amounted at common law to negligence; (c.) There was no system provided for inspection and repair of the motor, or for inspection or repair of this floor, hence the Company's lack of a viewing system for the protection of its employees amounted at common law to negligence. He relied upon *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424, and *Smith* v. *Baker & Sons* (1891), A.C. 325, 60 L.J., Q.B. 683.

Lennie (*Hallett*, with him), for defendants: There is no evidence of negligence here. The hole between the tracks opposite the switch-bar is not a defect, nor can its existence be assumed to be a defect in the construction of the plant. The time when the bar was removed, assuming one existed, is not shewn. It might have been removed immediately previous to the accident. There is no evidence whatever on this point and, therefore, no proved negligence: *Wood* v. *The Canadian Pacific Railway Company* (1899), 30 S.C.R. 110. The negligence, if any, was that of the fellow servants of the plaintiff, whose duty it was to repair the hole or brakes, and who are admittedly competent men employed for the purpose, and were supplied with proper appliances. The action under the Employers' Liability Act is barred and has been abandoned, and the case at common law therefore fails: *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. The plaintiff's own evidence shews that the brakes operated successfully on the shift during which the accident happened; but, if defective, no complaint was made to anyone in authority regarding their condition: moreover, granting the driver's evidence to be true, the negligence causing the accident was his in putting and allowing the car to continue in motion at a time when it was necessary, if necessary at all, for the plaintiff to cross the track. The plaintiff did not exercise ordinary care in crossing the track when the train was in motion and there was no necessity for his so doing. He was guilty of contributory negligence from which the accident resulted.

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IRVING, J.: I have reached the conclusion that the defendants have been guilty of negligence and that the plaintiff is entitled to damages.

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The hole in which this unfortunate man placed his foot was originally covered by a bar connecting the two rails. This bar was removed (why, I do not know), but the hole was not filled up or guarded, although it had been visible to the motormen for some weeks. Under these circumstances I think knowledge of the defect or neglect of duty to know of the defect should be imputed to the Company. The continued omission to mend this manifest defect would justify a jury in inferring that the employer was guilty of negligence according to the common law in one of two ways: either by neglecting to take reasonable precautions for the workman's safety, or by omitting to provide a proper system of superintendence or inspection, which system, had it been in existence, would have resulted in the mending of this trap.

It must be remembered that this hole was in between the tracks, and extending from one rail to the other, opposite a switch, and so almost in the very spot where the brakeman was bound to go in regaining his seat on the motor after operating the switch.

I find that the plaintiff did not contribute to the accident. Nor can the defendants escape on the ground that the motorman was in fault. I can see nothing wrong with the way in which these two men performed their duties. IRVING, J.

The evidence establishes that the brakes on the motor would not hold. This was the result of their being worn down by work. Having regard to the complaints made by Turner, knowledge of this defect also must be imputed to the Company.

The damages I fix at $4,500.

The appeal was argued at Vancouver on the 22nd and 23rd of April and the 14th of September, 1909, before HUNTER, C.J., MORRISON and CLEMENT, JJ.

Davis, K.C., for appellant (defendant) Company.

S. S. Taylor, K.C., for respondent (plaintiff).

Cur. adv. vult.

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30th October, 1909.

HUNTER, C.J.: I concur in dismissing the appeal.

MORRISON, J.: The master is charged with the duty, not only of having a proper system adequately protecting his workmen, but charged also with the further duty of seeing that that system is properly adhered to. I adopt the language of Killam, J., in *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424 at p. 451:

> "It seems to me to be clearly established that the duty of an employer is not satisfied by the instalment of a sufficient set of appliances and the adoption of a sufficient system of working, leaving them to managers or superintendents of apparently sufficient skill to manage or operate. Some responsibility remains in the employer. And while the onus was upon the injured workman, at common law, to shew negligence in the employer himself, it might be discharged by evidence or circumstances raising an inference either of knowledge of the defects or of neglect of the duty to exercise care to acquire such knowledge and remedy them."

The common law duty is succinctly stated by Lord Herschell in *Smith* v. *Baker & Sons* (1891), A.C. 325: "An employer is bound at common law to so carry on his business as not to expose his workmen to unreasonable risks." It is not enough that proper animate agencies in the form of carpenters and motor drivers should be employed by the defendant at this part of the business and that there must be sufficient of them, but those agencies in workings of this nature must, in my opinion, be supplemented by proper and adequate inanimate agencies, in this case in the shape of a workable motor engine and proper facilities for the workmen to perform their assigned duties. Before an employer can avoid responsibility for the consequence of the improper discharge of their duties, without his knowledge, by the employees assigned to maintain his system of carrying on his works and keeping them in repair, he must at his peril do nothing or refrain from doing anything which may hamper not only those employees from performing their duties, but he must not limit the opportunity of the workmen from observing how those other employees are carrying out their assigned duties. Had this track been properly lighted, it may have been that the plaintiff would have brought the condition of the track to the notice of the defendants, when no doubt it would have been

repaired, and if it were not and he received injury without any contributory negligence, then he would not be deprived of his remedy against his employer. In this case, the motor driver may have been absolutely competent, but the employer placed a defective motor at his disposal. The carpenter no doubt was a master mechanic in his particular line, but he was circumscribed as to the scope of his work and as to the time in which to perform it. The plaintiff was on night shift.

There is no evidence that there was an inspection of the track during the night. The floor of the track was just as liable to be broken by ore falling through at night as in day time. There was therefore half the period of the working day in which there was no protection to the plaintiff as against holes in the track along which he worked. Can that state of affairs be said to constitute an adequate system for the proper protection of workmen, behind which an employer may shelter himself from liability? I submit not. I think the learned trial judge was right in drawing inferences of fact, and on the inferences of fact which he drew from the evidence, I would dismiss the appeal with costs.

CLEMENT, J.: Mr. *Davis*, for the appellant Company, conceded that if the hole in the floor in which the plaintiff's foot was caught was a structural defect, this appeal must fail; but he strenuously argued that the learned trial judge had found to the contrary. What my brother IRVING says upon this point is this: "The hole in which this unfortunate man placed his foot was originally covered by a bar connecting the two rails. This bar was removed (why, I do not know), but the hole was not filled up or guarded although it had been visible to the motorman for some weeks"; and he afterwards speaks of it as a manifest defect. I cannot quite see how this can be treated as a finding that the condition of things in connection with this hole was not in the nature of a structural defect. However that may be, this is a case in which the evidence upon the point in question consists of a few sentences in the evidence of a witness whose testimony was taken upon commission, and as to which therefore we are in the same position as was the learned trial judge.

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Kean's testimony (also taken upon commission) to the effect that the hole in question had been caused by "a rock or something" falling from the cars and breaking the planking was evidently and properly discarded, and apart from this piece of evidence the facts seem clear enough. At the time the plaintiff was hurt there was in the planking a clean cut aperture, three and a half or four inches wide, extending across the space between the rails and "there had been holes bored in a couple of pieces of iron as though there had been an iron bar there one time." It was in this aperture that the plaintiff's foot caught. My brother IRVING drew the inference that there had been such an iron bar there at one time and that for some unknown reason it had been removed. I must confess that it seems to me that one might just as plausibly draw the inference that the connecting rod had never been put in; that for some reason it never became or was deemed necessary to put it in. But, however that may be, when we have it in evidence that this state of things had long existed, and that no step had been taken to alter it although there was a repair staff to look after the planking and the tracks, the proper inference to my mind is that it was deliberately left as it was as a permanent structural condition. We should not, in my opinion, draw the other inference that it was a condition which was allowed to continue through the negligence of the repair staff. If the connecting bar which would cover the hole was never put in, there would, I think, be no question. If put in and afterwards taken out and left out for a long time, we ought not to assume a wrongful or accidental removal or a negligent omission to replace, but rather an intentional creation and maintenance of the *status quo*. The condition of things on its face points to a structural defect and the defendant Company was content to leave the evidence in that shape.

CLEMENT, J.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant Company: *I. H. Hallett.*
Solicitors for respondent: *Taylor & O'Shea.*

WOODWARD v. THE CORPORATION OF THE CITY OF VANCOUVER.

MORRISON, J.

1909

Nov. 8.

WOODWARD v. CORPORATION OF VANCOUVER

Municipal law—Construction of drain—Connection of private drain—Increase of drainage area—Act of corporation diminishing capacity of drain—Omission to enlarge capacity of original drain—Damages—Liability of corporation for.

In a drain constructed by the defendant municipality some 17 years before the cause of action, there had been placed a man-hole which reduced the capacity of the drain. In addition to this the drainage area had been greatly increased. Plaintiff's basement drain was connected with this drain with the knowledge and consent of the Corporation. The woodwork in the municipal drain having become decayed, some of it broke away and caused an obstruction which, in a heavy rainfall, flooded plaintiff's basement, causing damage:—

Held, following *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105, that the Corporation was liable, notwithstanding that the drain might have been sufficient for the purpose when first built; but that here there was the further element that the drain had been allowed to remain in a defective condition.

ACTION for damages caused by an obstructed drain, tried by MORRISON, J., at Vancouver on the 9th, 10th and 13th of September, 1909. Statement

A. H. MacNeill, K.C., and *Bird*, for plaintiff.

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

8th November, 1909.

MORRISON, J.: The plaintiff's departmental stores occupy lot 16 in block 4, old Granville Townsite, in the City of Vancouver. About 17 years ago the Corporation constructed a wooden basement drain for assembling the drainage of the lands at the corner of Abbott and Hastings streets, which included said lot 16. This drain has since been extended over a greater area of drainage as the city grew, increasing the quantity of water brought through it without enlarging its capacity. Some time subsequently the defendants placed a man-hole near the north-east corner of lot 16 cutting through this basement drain and in Judgment

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the method of its construction reduced the capacity of the drain. In the fall of 1908, about the 1st of November, the woodwork of this drain, having become decayed, broke and the debris caused by this break getting into the drain, the flow of water was obstructed in its course by the alleged defects in construction. On the night of the 3rd of November, 1908, there was a heavy rainfall and the drain received a large additional quantity of water and extra debris, which, meeting the obstruction aforesaid, was forced back through the plaintiff's basement drain, inundating the basement in which were stored large quantities of perishable merchandise.

The plaintiff's basement drain was put in at the request, to the knowledge, and with the consent of the defendants. It was constantly open to their inspection, particularly during construction, and I find that the defendants adopted and approved of the action of the plaintiff in constructing it. I find that the defendants' drain with which the plaintiff connected was structurally defective to the knowledge of the defendants and the damage to the goods of the plaintiff was caused by the defendants' negligence in building said drain and maintaining it in its originally defective condition. I am not satisfied that there is any element of *vis major* here. The rainfall was not of such a nature as to relieve the defendants of responsibility on that ground.

Judgment

It was further contended that the provisions of certain city by-laws were not complied with. I find that there was a substantial compliance with the requisite and usual requirements and that the usual steps were taken by or on behalf of the plaintiff in respect to the basement drain. The City engineer's evidence satisfies me on that point. The statement of defence raises the point that the plaintiff failed to comply with the by-law relating to plumbing before proceeding to construct the drainage of the building. As I understand the case and the evidence adduced, the general drainage of the building is not involved, for, apparently, the closets, lavatories, etc., did not drain into this particular drain at all. In a drain of this particular kind the City engineer states that if the street surface is not broken in its construction a written permit is neither usual nor necessary.

I also find that the drain on Abbott street was the proper drain with which to connect and not that on the lane north of plaintiff's buildings. It was strongly urged that the one circumstance that the plaintiff's drain did not contain a trap or flap to prevent a back flow of water is evidence of such a degree of negligence as to disentitle the plaintiff to relief. The judgment of Rose, J., in *Welsh* v. *Corporation of St. Catherine's* (1886), 13 Ont. 369 at p. 380, was cited as authority for this. But, I apprehend the learned judge based his finding upon the particular facts of that case where the basement drain was lower than the well from which the water backed up and that it was an act of obvious precaution to place some contrivance to prevent a backflow which must have been anticipated. Besides, in that case, the drain in question was constructed under entirely different circumstances than I submit exist here.

I think that the concluding portion of Lord Macnaghten's judgment in the Privy Council case of *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105 at p. 109, is apposite here:

"The municipal authorities might just as well pour this stuff directly on the plaintiff's land. The damage to the plaintiffs cannot be denied. It is nothing to the purpose, even if it be true, to say that the property in the plaintiff's hands and in the hands of his predecessors in title, was often flooded before the municipal authorities turned the watercourse into a public drain. Nor is it enough to prove that the work done in 1889 was sufficient at the time. It is insufficient now. It has been insufficient for some time past. The mischief grows as building increases, as new roads are made, new channels formed, and more and more of the surface becomes impervious to rainfall. It is not suggested that there is any real difficulty in remedying the mischief."

Judgment

There will be judgment for the plaintiff for $8,485.65 with costs [which the learned judge itemized].

I disallow the estimate of $1,500 claimed by plaintiff for loss of Christmas trade.

Judgment for plaintiff.

MORRISON, J.

1909

Nov. 10.

NELSON v. NELSON.

Husband and wife—Settlement in anticipation of marriage—Covenant—Separation—Public policy.

NELSON v. NELSON

The parties to an intended marriage (which was subsequently entered into) executed an indenture of settlement providing, *inter alia*, as follows: "The trusts and purposes for which the said respective trust funds shall be held as hereinbefore mentioned are as follows: Upon trust to pay the income thereof to the said Hugh Nelson so long as the said parties shall live together as husband and wife. In case of the death of either party in trust for the survivor absolutely, and in case for any reason whatsoever the parties shall cease to cohabit, then upon trust to sell and convert the said trust property and to hold one-half of the proceeds of such sale and conversion upon such trusts as may be agreed upon between the parties for the children of the said marriage (if any) and to divide the other half of the said proceeds between the said parties equally and if there shall be no such child or children then to divide the proceeds of such sale and conversion between the parties equally."

The defendant also joined in an instrument creating the plaintiff joint tenant with him in his real estate, which was duly registered:—

Held, that the agreement was void as being against public policy.

Statement

ACTION for the enforcement of an ante-nuptial agreement, tried by MORRISON, J., at Vancouver on the 15th of September, 1909. The clause of the agreement on which the action was launched is set out in the headnote.

A. D. Taylor, K.C., for plaintiff.

F. M. McLeod, for defendant.

10th November, 1909.

Judgment

MORRISON, J.: I have reserved judgment herein in the hope that the parties might come together, as I still think they should have done. The point involved in this case is whether an ante-nuptial agreement is void, as being against public policy, which in terms confers rights in property on the intended wife in the event of marriage taking place, subject to a provision varying those rights favourable to the wife if a separation, for any reason whatever, should take place.

The plaintiff, before her marriage to the defendant, was a widow who recently had arrived from England. She read an advertisement by the defendant in one of the evening papers soliciting the services of a housekeeper. In response to this general invitation, she called upon him at his residence in Fairview. The outcome of this call, and an interchange of visits affording frequent opportunities of mutual inspection, was an agreement by way of settlement on their intended marriage, which is the agreement in question. The plaintiff declined to enter into the marriage unless this settlement was first made and after some hesitation the defendant agreed. He is an old man, not in good health, and cannot be said to be prepossessing He lived alone and was anxious for a companion. He admitted that what he really wanted was not a housekeeper but a wife, and told the plaintiff so at the time. She, on the other hand, is not old and is of a healthy, prepossessing appearance. They are obviously ill-matched in appearance, and, from her admission at any rate, they are decidedly so in dispositions. Trouble arose immediately, whether due to her actions or his, or both, is the perplexing problem arising out of this sordid narrative. But, from the way in which the pleadings are shaped, I do not consider it necessary to attempt its solution here. The plaintiff in a short time left her husband's bed and board, and refuses to return.

Judgment

The ground of the defence is that the action is not maintainable for the reason that the agreement is wholly void as being against public policy. I agree with this contention. In my opinion, having regard to all the circumstances as disclosed at the trial, the agreement is one enuring to the benefit of the plaintiff upon their separation. The plaintiff left the defendant without his approbation or consent, and without those substantial reasons which usually justify such a serious step. In *Marlborough (Lily, Duchess of)* v. *Marlborough (Duke of)* (1901), 1 Ch. 165 at p. 171, Rigby, L.J., holds that, if the parties to a marriage settlement chose to bargain as to what should take place in the event of a future separation of the spouses, there can be no doubt that such a bargain is absolutely bad. The agreement in the case at bar contains on its face in terms a bargain of a nature

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which has repeatedly been held to be contrary to the policy of law. *Cartwright* v. *Cartwright* (1853), 3 DeG. M. & G. 982; *H.* v. *W.* (1857), 3 K. & J. 382; *Cocksedge* v. *Cocksedge* (1844), 14 Sim. 244; *Egerton* v. *Earl Brownlow and others* (1853), 4 H.L. Cas. 1 at p. 160.

The cases cited by Mr. *Taylor* do not, in my opinion, assist him in his contention on behalf of the plaintiff, *viz.*: *Jodrell* v. *Jodrell* (1845), 15 L.J., Ch. 17 and *Lord Rodney* v. *Chambers* (1802), 2 East 283, which are readily distinguishable.

Counsel for the plaintiff urged that in any event he is entitled to the appointment of a trustee during the lives of the parties. Well, for aught I know, they may be living together again in a most amicable way, as they should be. However that may be, holding the views I do of the evidence and the law involved, I cannot accede even to that request.

Judgment

The action is dismissed without costs.

Action dismissed.

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GOLDSTEIN v. THE VANCOUVER TIMBER AND TRADING COMPANY.

GOLDSTEIN v. VANCOUVER TIMBER AND TRADING CO.

Practice—Amendment of writ on ex parte application—Neglect to serve order amending—Application to add liquidator as party—Step in proceedings—Order LXIV., r. 13.

An application, *ex parte*, to amend the writ by adding to the indorsement a description of certain real estate, is a step in the proceedings, although the amending order was not served on the defendants.

Statement

APPLICATION to add the liquidator of the defendant Company as a party plaintiff, heard by MORRISON, J., at Chambers in Vancouver on the 2nd of November, 1909. The writ was issued on the 6th of October, 1908, and appearance was entered

on the 14th. On the 18th of June, 1909, an application was made *ex parte* to amend the writ by adding to the indorsement a certain description of real estate referred to. This order was duly entered and the writ amended accordingly. But the order thus obtained was not served on the defendants nor was the copy which was served amended pursuant to the order. The plaintiff applied, on the 22nd of October, 1909, to add the liquidator as a party plaintiff and authorizing him to proceed with the action as such liquidator, and was met by the objection that as there had been no step in the proceedings for 12 months from the last proceeding in the action, therefore there should be a stay until the month's notice required by Order LXIV., r. 13 was given.

Statement

Sir C. H. Tupper, K.C., for plaintiff.
A. D. Taylor, K.C., for defendant Company.

2nd November, 1909.

MORRISON, J. [After stating the facts]: The point arises as to whether obtaining the order for amendment of the writ *ex parte* in June, 1909, is a step in the proceedings. The case of *Ochs* v. *Ochs Brothers* (1909), 2 Ch. 121, is the latest authority I can find on the point in which the learned judge deals with *County Theatres and Hotels, Limited* v. *Knowles* (1902), 1 K.B. 480; *Richardson* v. *Le Maitre* (1903), 2 Ch. 222. Lord Lindley says in *Ives & Barker* v. *Willans* (1894), 2 Ch. 478 at p. 484, that

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"The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is in the technical sense, a step in the proceedings."

Leave obtained by the plaintiff to administer interrogatories though got on a summons taken out by the defendant and though no interrogatories be in fact delivered was held in *Chappell* v. *North* (1891), 2 Q.B. 252, to be a step in the proceedings.

I therefore hold that the obtaining of the order of the 18th of June, 1909, was a step in the proceedings and that the 20 days' notice is not necessary.

Application allowed.

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Practice—Divorce and matrimonial causes—Petition by wife—Omission to aver non-collusion or non-connivance between petitioner and respondent—No appearance by respondent—No necessity for service of notice of subsequent proceedings in action—Matrimonial Causes Act, 1857, Sec. 41 (Imperial).

In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties:—

Held, that such allegation is a positive statutory requirement preliminary to the issue of a citation.

Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary.

Statement

MOTION *ex parte* by petitioner for directions under the Divorce Rules, No. 21, as to mode of trial. The petition was filed by the wife, seeking a decree of judicial separation, but her affidavit, filed with the petition, did not comply with section 41 of the Matrimonial Causes Act, 1857, 20 & 21 Vict., Cap. 85 (Imperial) as repeated in No. 3 of the British Columbia Divorce Rules, inasmuch as it did not state that no collusion or connivance existed between the petitioner and her husband, the respondent. Upon this petition a citation issued and the husband was personally served. He entered no appearance. The motion was heard by CLEMENT, J., at Chambers in Vancouver, on the 15th of December, 1909.

Brydone Jack, for petitioner.

28th December, 1909.

Judgment

CLEMENT, J.: This motion for directions is now made *ex parte* and in that respect is, I think, quite regular. The rules are silent upon the point, but the citation clearly warns a respondent that in default of appearance "a Judge of our said Court will proceed to hear the charge, ... your absence notwithstanding." Unless therefore some positive rule exists requiring

service of notice of subsequent proceedings or of some particular subsequent proceedings, a respondent who fails to appear is not entitled to further notice.

But before proceeding to trial the Court must see that the proceedings have been regularly taken, and I can find no rule or authority which would enable me to overlook or repair, *nunc pro tunc*, the petitioner's failure to comply with a positive statutory requirement laid down as a necessary preliminary to the due issue of a citation. As has been often emphasized, this Court in matrimonial causes must have a care for the interests of society as well as of the immediate parties and one of the large outstanding evils to be dreaded is that the Court's power to decree a separation between dissatisfied spouses should be collusively invoked when, perchance, there exists no legal ground therefor. Hence the necessity for the petitioner's oath at the outset; a guarantee, as it were, that the Court's aid is sought in good faith. In this connection I may point out that the Divorce Rules contain no provision such as is to be found in Order LXX., rule 1, marginal rule 1037, of the Supreme Court Rules, even if such a rule of practice could avail to cure the non-compliance with a statutory provision. This consideration distinguishes this case from *McLagan* v. *McLagan* (1905), 11 B.C. 325.

Judgment

I notice that the citation with certificate and affidavit of service has not been filed as required by rule 13. The reason for this rule is pointed out in *Cook* v. *Cook and Smaile* (1859), 28 L.J., P. 37, *viz.*: "to preserve evidence that the proper steps have been taken." Our rule differs from the English rule from which it was taken, the words "by the party effecting it" being added; why I do not know, unless it be that at the time our rules were first promulgated service of the Court's process was always effected through officers of the Court, who would naturally make their return to the Court's registry.

In the result, I can give no directions. The petitioner will have to begin *de novo*.

Motion dismissed.

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ESQUIMALT AND NANAIMO RAILWAY COMPANY v. FIDDICK.

Statute, construction of—Vancouver Island Settlers' Rights Act, 1904—Intra vires—Crown—Provincial government—Grant of land—Effect on prior—Validity of—Grant of minerals and timber by Dominion government—Locus standi of plaintiff company to attack grant to defendant—Absence of assent by Crown—Costs—Defendant indemnified against—Audi alteram partem.

The Vancouver Island Settlers' Rights Act, 1904, defines a settler as a person who, prior to the passing of the British Columbia statute, Cap. 14 of 47 Vict., occupied or improved lands situate within that tract of land known as the Esquimalt and Nanaimo Railway land belt with the *bona fide* intention of living thereon, and section 3 of said Act provides that upon application being made to the Lieutenant-Governor in Council within 12 months from the coming into force of the Act, shewing that any settler occupied or improved land within the said land belt prior to the enactment of said Cap. 14, with the *bona fide* intention of living upon the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant in 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.

The lands within the said belt had been conveyed by the Province originally to the Dominion for the purposes of the railway, and by the Dominion transferred to the Railway Company, which in giving grants or conveyances of portions thereof, reserved the minerals.

Defendant, who held from her predecessor in title, applied for and obtained a grant under said section 3.

Held, on appeal (MORRISON, J., dissenting), that the Railway Company was entitled to be heard upon such application.

Held, further, that a grant issued without such opportunity being given to the Railway Company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it.

Held, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor in Council, and the absence of compliance with such condition was fatal, but

Held, further, that in the circumstances here the defendant should be permitted, on giving notice to the Railway Company, to proceed with her application and that the Crown need not be a party to the action.

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Statement

APPEAL from the judgment of HUNTER, C.J., in an action tried by him at Victoria in December, 1907, and January, 1908, questioning the validity of a grant of land issued to the defendant under the provisions of the Vancouver Island Settlers' Rights Act, 1904. The validity of that statute was questioned in *E. & N. Ry. Co.* v. *McGregor* (1905), 12 B. C. 257, (1907), A. C. 462, and the Privy Council decided that the statute legalized a grant of land thereunder and superseded the title of the Railway Company. The defendant herein held as representative of a pioneer settler within the meaning of the Act and applied by virtue of the statute for a grant of the minerals. This grant was duly issued, and the Company attacked it on the ground that she had not complied with the terms of the statute as to producing evidence of settlement and intention, and that she was not a settler within the meaning of the Act.

Bodwell, K.C., and *Luxton, K.C.*, for plaintiff Company.
L. G. McPhillips, K.C., for defendant.

9th March, 1908.

HUNTER, C.J.: This is an action brought to determine the validity of a Crown grant purporting to have been issued to the defendant under the authority of the Vancouver Island Settlers' Rights Act, 1904.

The grant assumes to convey the fee simple without any reservation of the coal, base minerals or timber which belong to the plaintiffs' claim by virtue of their letters patent from the Government of Canada, dated 21st April, 1887, the Company not disputing that the defendant is entitled to the surface rights.

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It was finally decided by the Privy Council in the case of *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462, that the Act of 1904 was *intra vires* of the Legislature, and that a similar grant to the defendant McGregor superseded the plaintiffs' title under its letters patent. With regard to this decision, it may be proper to point out that their Lordships appear to have been under a misapprehension as to the ground of the judgment of the Full Court. Their Lordships, speaking by Sir E. Taschereau, say that we reversed the decision of the

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trial judge "and maintained the action on the exclusive ground that the British Columbia Act of 1904 did not authorize the grant of the said lot to the appellant and consequently," etc. With all deference, no Court could have so decided, as the Act authorizes the issue of the grant in plain and unmistakable language, but the ground of our judgment was that the Legislature intended that the issue of the grant should not operate *ipso facto* to transfer to the defendant property which had been adjudged by the Sovereign in Council to belong to the plaintiffs, but to re-open the question in the interest of the settler whose rights, if any, were to be maintained by the Province. In this, however, it appears we were wrong as their Lordships' opinion is clear to the effect that the issue of the grant to the defendant extinguished, *eo instanti*, the plaintiffs' rights under the patent.

The grant to the present defendant was admittedly issued by the Provincial Government without notice to the plaintiffs or without notifying them to shew cause why it should not issue; and therefore Mr. *Bodwell* contends that it is competent to the Court in such a suit as the present to examine into the proceedings leading up to the grant; and further, if that proposition is assented to, that it ought to be declared that there was no *bona fide* occupation of the land by the defendant's predecessor in title or that at any rate such occupation occurred as to only a small portion of the 160 acres pre-empted, and that

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therefore the defendant's grant is valid only to the extent of such occupied area.

It will be convenient to examine the first proposition, as if it is found to be untenable it will not be, as Mr. *Bodwell* admitted at the close of the argument, necessary to consider the others.

There is no principle better established in our law than that in an ordinary suit between subjects, a patent from the Crown which is *ex facie* valid cannot be attacked in the absence of statutory authority on the ground of any irregularity, mistake, misrepresentation or fraud, which is alleged to have occurred in the proceedings leading up to its issue, but such matters may be canvassed only in a suit properly framed for that purpose by or with the assent of the Crown, such as an action by the Attorney-General or by petition of right. If it were not so, no man's title

would be safe, and the foundations on which the right to real property at present rest would be swept away. I did not however, understand Mr. *Bodwell* to dispute this as a general principle, but he maintained that his clients, by reason of their patent, had a special *locus standi* to challenge a title which was of no greater solemnity than their own.

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But I cannot concede this, because as I read the decision of the Judicial Committee in the *McGregor* case; the statute in effect enacts that upon the issue of the defendant's grant, the plaintiffs' rights shall cease and determine. *Ex hypothesi*, then, the defendant's title destroys the plaintiffs', and there is nothing left to take the case out of the ordinary rule to which I have referred.

But even if the plaintiffs had any *locus standi* in this action to attack the proceedings leading up to the defendant's grant, they would make no headway, as the Act provides that the grant is to issue not on application to a ministerial officer who would be subject to the compulsory process of the Court, but on application to the Lieutenant-Governor in Council whose acts cannot be reviewed in an ordinary action between subjects in the absence of special legislative authority to do so, except, possibly, in a case where the act impugned was void on its face, in which case it would not, in reality, be the act of the Lieutenant-Governor in Council at all.

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I therefore must hold that the plaintiffs can have the proceedings leading up to the defendant's grant examined only in a suit brought either by the Crown or with its assent, and therefore the present action must be dismissed but without costs, as the statute requires that the defendant's rights shall be defended at the expense of the Crown, and costs are given only by way of indemnity and not as a bounty: see *e.g.*, *Richardson* v. *Richardson* (1895), P. 346; *Meriden Britannia Co.* v. *Braden* (1896), 17 Pr. 77.

The appeal was argued at Vancouver on the 11th of November, 1908, and at Victoria on the 4th, 5th, 6th and 7th of January, 1909, before IRVING, MORRISON and CLEMENT, JJ.

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Bodwell, K.C., for appellant (plaintiff) Company: On the point of notice to the plaintiffs, we rely on the case of *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281, and the cases cited in *Smith* v. *The Queen* (1878), 3 App. Cas. 614 at p. 624. Then the evidence shews that the issuance of the grant in question was not an executive act, in that the whole transaction was carried through to completion in the Lands and Works Department.

[*L. G. McPhillips, K.C.*, for respondent (defendant): That latter point was not raised in the pleadings or at the trial.]

Bodwell: We pleaded that section 3 of the schedule had not been complied with, no particulars were asked for, therefore we went to trial at large on that point.

The decision in the Precious Metals case, *Esquimalt & Nanaimo Railway Company* v. *Bainbridge* (1896), A.C. 561, on an Act similarly worded, is that this is not a transfer of land in the sense that the Dominion turned the land over to the Province, but it is the transfer of the right of administration. The attribute of sovereignty which is retained by the Crown in all other cases is here handed over to another jurisdiction. The Legislature divests itself of all right to interfere in the administration of those lands. They are marked with a certain trust, and are handed to the Dominion to be administered for the carrying out of that trust. It would be impossible after that for the Legislature to interfere with that jurisdiction without a repeal of the former Act, for the reason that any subsequent Act would simply be inoperative; it would be inoperative for the reason that there is no longer jurisdiction to deal with this land. There is no attempt in the Settlers' Rights Act to repeal the former Act: in fact there is a distinct affirmance of that former statute. Until they recall their former authority they have divested themselves of the right of administration over these lands, and over all coal and coal oil in and upon the lands. This point was opened in the *McGregor* case, but not dealt with on these lines. And while the Act is not unconstitutional in any sense, yet the Court ought to say that it is inoperative.

Argument

[CLEMENT, J.: The Dominion Government granted the coal rights to the Esquimalt & Nanaimo Railway; that therefore

became an ordinary piece of private property that the Esquimalt & Nanaimo own in the Province; and now the local Legislature has said, "Under certain conditions we are going to take it from them and give it to Thomas Jones." The administration by the Dominion Government has ended, and they have deeded all their powers to the Esquimalt & Nanaimo Railway.]

Bodwell: But the Privy Council seem to think it could not be done without a repeal of the former Act.

[CLEMENT, J.: The other Act has actually been worked out by the Dominion Government by a grant under that Act to the Esquimalt & Nanaimo Railway. It then became simply a piece of private property that the local Legislature has confiscated perhaps, but lawfully confiscated.]

Bodwell: Perhaps that may be the proper way to read that judgment; it did not strike me so at the time. Your Lordship would think that the trust is ended?

[CLEMENT, J.: The Dominion trust is ended.]

Bodwell: The Dominion trust is ended, their administration is over, and although the land has gone down ear-marked with that trust, still it can be confiscated by the Legislature?

[CLEMENT, J.: The trust is at an end, and it is a piece of private property absolutely. While it may be confiscated, perhaps—the Privy Council said it is not improper legislation.]

Argument

Now we come to the Act itself and the discussion of what must be established in order to entitle a person to receive a grant under this statute. The applicant must be a settler. A settler must be a person who prior to the passing of the Island Railway Act occupied or improved lands situate within the said railway belt, with the *bona fide* intention of living thereon. I shall argue relative to that Act and that definition that it necessarily implies that the land must be land which a man would be able to make his living from. In other words, that the idea there is of an agricultural settlement. It would be idle to say that a man would be a settler if he went on land with the *bona fide* intention of living thereon, if it is obvious that the land was of a character which could not produce him a living. In other words, no man can have a *bona fide* intention of living on land unless

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he could make his living off the land. And if the land was not agricultural land, that is land which is capable of supporting a person, it cannot be claimed that he went on there with the *bona fide* intention of living thereon. If it is known, for instance, as the evidence in this case does shew, that these lands were being taken up in that locality for the purpose of getting coal rights, and not for agricultural purposes, then the man would not be a *bona fide* settler within the meaning of this section. Because his intention would only be to live on the land until he could acquire a title to it with the ulterior purpose of getting the coal under the land, and not to make his living off the land. Of course it would not be the same in every case, because in this section there are lands, no doubt, which are agricultural lands, and there are coal measures lying beneath them which, perhaps, are not discovered until later.

The next thing is that under section 3 the application must be made to the Lieutenant-Governor within 12 months, and the application must shew that the settler occupied or improved land within said railway belt. The application must then shew the occupation or the improvement and the *bona fide* intention. Then the application must be supported by reasonable proof, that is, the proof that would convince a reasonable mind that the occupation and intention or improvement had taken place as a fact. And without an application that shews these things, and without the accompaniment of proof convincing to a reasonable mind that these things had occurred, there is no authority whatever to issue the grant.

Argument

The word is "occupation" or "improvement"; there is no room there, I submit, for applying the idea of constructive occupation. "Occupation" there must mean actual occupation. Because, if the Legislature had intended to allow constructive occupation to fulfil the Act, they never would have put the words "or improvement" in, because improvement would be constructive occupation. That being proved, a grant in fee simple for such land is to be made. That is, the land which is actually occupied or the land which is improved is the land which is to be in the grant, and no other land. Now there is a marked distinction in this statute from every other one which has been passed relating

to these lands. In the Esquimalt & Nanaimo Railway Act, section 23, when it was proved that any *bona fide* squatter had been upon land, and had improved any part of it, the statute said he could have the surface rights of 160 acres of land granted to him. But under this Act he is to have a Crown grant of the land he occupies, the land he improves. Because on proof of occupation or on proof of improvement he is to get a Crown grant of such land.

[MORRISON, J.: Was any survey made to shew what he had taken?]

Bodwell: A survey would only be constructive occupation and the statute excludes the idea of constructive occupation by putting the word "improvement" in. He made a survey once, but I submit that survey was made relative to getting his Crown grant from the Dominion of the surface.

[*McPhillips:* These were surveyed lands in 1864, and he was taking up surveyed land.]

Bodwell: The Department assumed that he was entitled to get 160 acres if he occupied any part of the land, and that is where they were wrong; they granted him 160 acres because the Esquimalt & Nanaimo Railway Act says he is to get 160 acres; but I submit the statute says he gets only the land he occupies or improves.

[MORRISON, J.: That would include more than a little path and a little part occupied?]

Argument

Bodwell: We must take the statute as it is drawn; it says he gets the part he occupies and the part he improves; he gets the part his cabin occupies, the improved land around his cabin, and more than that, if he improves any other portion. The Esquimalt & Nanaimo Railway Act allows 160 acres, if he improves part; but this Act says he gets the land he occupies or the land he improves.

[CLEMENT, J.: That is one of the things that was a competent matter for discussion and settlement before the Lieutenant-Governor in Council.]

Bodwell: Certainly one of the things that ought to have been passed on. It was to be a Crown grant in the form in which

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Crown grants are issued under these Acts; that is the meaning of that section.

[IRVING, J.: Would not the Land Act apply?]

Bodwell: No; because if you are going into that you must go the full length, and all the other provisions of the Land Act would have to be complied with, which it is not pretended was done. If that Act is to apply in any form, then it is clear that these people are out of Court, because they have not complied with the Act. The idea of this section is that the form of the grant is to be in the form that was issued under these Acts, and the reason for that was that they were to get the coal. If the Crown grant could only be issued in accordance with the Land Act in force at the time—that is to say that the provisions of the Land Act had to be complied with, then these people are out of Court, and have not begun to prove their case. But we do not make that point because the section means that the form of the Crown grant is to be such a form as would carry the coal rights. The recitals in the Act do not throw any light on it. They seem to me to be an attempt at apology on the part of the Legislature for an Act of confiscation, and it lacks the element of proof. We submit there is no proper application, and there is absolutely no proof even of the facts stated in the application. The application does not state the necessary facts; the evidence accompanying does not prove any of the facts which are required to be established. All they had was the declaration of Elizabeth Fiddick, the person to be benefited.

Argument

[IRVING, J.: There is a different word used—"taken up." Does the Act of 1883 use that expression?]

Bodwell: No; that is all there is of the application, and this is the declaration in support of it: it does not even swear to the truth of those statements.

[*McPhillips:* "Took up" is in the recital of the Act of 1903.]

Bodwell: There was a Settlers' Rights Act passed in 1903, which was repealed: 1903, Cap. 26. That means that every form of application under that Act can be used as a form of application under this Act, I suppose.

[IRVING, J.: That would be nonsense, because it will not work

out; settler means a man who has occupied and improved, in one Act; and in another it means he has taken up, not necessarily occupied or improved. Which is to govern?]

Bodwell: This Act is to govern as to the status of the parties surely. If their application under the Act of 1903 shewed the facts it could be deemed an application under this Act. But the Act of 1903 requires something in addition to occupation. We might put it this way: the Act of 1903 allowed a person to prove that he had taken up land.

[MORRISON, J.: What is meant by that?]

Bodwell: That is the word that is used. It is not the same word as occupied or improved with the *bona fide* intention of living thereon. This Act does not dispense with any one of the proofs in case the application is made under the Act of 1903.

[CLEMENT, J.: And those things must be proved in detail?]

Bodwell: I think there is no doubt that those things must be proved because the distinct enactment of the Legislature is that this application must be accompanied by such proof. It means the facts have to be proved, no matter what the form of application is.

[CLEMENT, J.: It says there that Grandam has received a grant from the Dominion authorities.]

Bodwell: Under section 23 of the Dominion Esquimalt & Nanaimo Railway Act he received the surface.

[CLEMENT, J.: Would not it shew that he occupied or improved?]

Argument

Bodwell: No: it would not shew that at all. The only thing that is proved by that is that he made an application to the Dominion Government, and that they concluded that he had occupied or improved some part of the land. That is the most that is proved. If this Crown grant is evidence at all, it is evidence that he made an application to the Dominion Government and stated that he had complied with the provisions of section 23 of the Esquimalt & Nanaimo Railway Act, which required occupation of any part. It would not really be proof that he had done it as a matter of fact.

Luxton, K.C., on the same side: As to attacking defendant's Crown grant there can be no doubt as to plaintiffs' right, we do

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not say to repeal or set it aside, but to question its validity or effect. The Crown holds land and disposes of it by the same operative words of inheritance or otherwise as a subject, and the same rules of construction as apply to the latter govern the former. See *Lord* v. *The Commissioners for the City of Sydney* (1859), 12 Moore, P.C. 473, and we may and do contend that the King did not grant these minerals to the defendant. See also *Baddeley* v. *Leppingwell* (1764), 3 Burr. 1,533 at p. 1,544; *Magdalen College Case* (1615), 6 Coke, 125; Co. Litt. 260 a.; *The Earl of Shrewsbury's Case* (1610), 5 Coke, 81; *Gledstanes* v. *The Earl of Sandwich* (1842), 4 Man. & G. 995 at pp. 1,027-8; *Great Eastern Railway Co.* v. *Goldsmid* (1884), 9 App. Cas. 927 at p. 941; *The Queen* v. *Eastern Archipelago Co.* (1853), 22 L.J., Q.B. 196 at p. 206.

We submit that it is clear that we may contend that Cap. 54 has not been complied with. There was no judicial enquiry under the Act. The principle of *audi alteram partem* has been applied in questions between two local Governments, where such questions were to be settled by order-in-council; see *President, &c., Shire of Kowree* v. *President, &c., Shire of Lowan* (1897), 19 A.L.T. 143, Victorian Digest (1895-1901), 685. Courts of justice may enquire into the validity of orders-in-council: *Attorney-General* v. *Bishop of Manchester* (1867), L.R. 3 Eq. 436.

Argument

The Crown's right to make the grant in question must fall within the authority and comply with the requirements contained within Cap. 54: *Nireaha Tamaki* v. *Baker* (1901), A. C. 561, and as there was no hearing, and no compliance with the requirements as to occupation or improvement and intention and no proof, the act of the Lieutenant-Governor in Council in making the grant was *ultra vires: Minister of Mines* v. *Harney* (1901), A. C. 347; see also *O'Keefe* v. *Malone* (1903), A. C. 365.

To obtain a right to a grant of land under the statutes of the Province all conditions must be complied with: *Tooth* v. *Power* (1891), A. C. 284; *Hoggan* v. *Esquimalt & Nanaimo Railway Co.* (1894), A. C. 429.

There was no "occupation" by defendant or her predecessor of the land (160 acres) granted. Occupation means actual occupation, and only three or four acres were occupied in this

case: See Stroud's Judicial Dictionary; *Inhabitants of Philipsburgh* v. *Bruch's Executor* (1883), 37 N.J., Eq. 482 at p. 486; *Clark* v. *Elphinstone* (1880), 6 App. Cas. 164.

There was and could be no constructive occupation; that is based on some right: *Wood* v. *LeBlanc* (1904), 34 S.C.R. 627; *Sherren* v. *Pearson* (1887), 14 S.C.R. 581; *Bentley* v. *Peppard* (1903), 33 S.C.R. 444; *Harris* v. *Mudie* (1882), 7 A.R. 414.

Defendant as to her claim to the land so far as it is based on the Land Act in force at the time of the original application to the Government agent to pre-empt is estopped; the title acquired was to the surface under the Dominion Act, Cap. 6 of 1884: *The Sydney and Louisburg Coal and Railway Company* v. *Sword* (1892), 21 S.C.R. 152.

The principal statute in question in this suit, Cap. 54, must be construed strictly: *Western Counties Railway Co.* v. *Windsor and Annapolis Railway Co.* (1882), 7 App. Cas. 178 at pp. 188-9; *Commissioner of Public Works (Cape Colony)* v. *Logan* (1903), A.C. 355; *Wells* v. *London, Tilbury and Southend Railway Co.* (1887), 5 Ch. D. 126 at p. 130.

We further contend that this statute Cap. 54 is *ultra vires*. First, the lands are held under the Dominion Act, Cap. 6, which provides for the construction of the plaintiffs' railway, its maintenance and operation, and provides also how these lands shall be disposed, and Cap. 54 purports to provide that the same shall be disposed of in a different manner; its provisions are repugnant to said Cap. 6. Secondly, plaintiffs' railway is a railway for the general advantage of Canada. The recitals in Cap. 6 and the whole tenor of that Act shew this; and an express declaration to that effect is not necessary where the work is one manifestly for the advantage of Canada: *Hewson* v. *Ontario Power Co.* (1905), 36 S.C.R. 596. Cap. 54 itself shews that the railway and its lands have their foundation in the Terms of Union. Moreover in 1889 it was authorized to run a ferry extending beyond the limits of the Province. Again, prior to the passing of Cap. 54, *viz.*, in 1901, it connected with the Canadian Pacific Railway, and under section 306 of the Railway Act of Canada it became as from that time such a railway (one for the general advantage of Canada).

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The said Dominion statute Cap. 6, and the plaintiffs' patent make their holding subject to the Dominion Act, one of the provisions of which requires the continuous operation, etc., of the railway and telegraph line, and the lands are held in consideration of, and to assist that continuous operation. Dominion legislation therefore is necessary to affect the railway and lands held with it: see *Dobie* v. *The Temporalities Board* (1882), 7 App. Cas. 136; *Bourgoin* v. *La Compagnie du Chemin de Fer de Montreal, Ottawa, et Occidental* (1880), 5 App. Cas. 381; *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A. C. 367; *Madden* v. *Nelson and Fort Sheppard Railway*, *ib.* 626.

L. G. McPhillips, K.C., for respondent (defendant): The judgment of the Chief Justice is right; a patent from the Crown cannot be attacked on the ground of irregularity, in the absence of statutory authority. There is no reason for reversing his findings of fact, and the findings of law are right on the authorities. These authorities, which were cited to him at the trial, will be found collected in Holmstead & Langton, 3rd Ed., at pp. 24 and 25, and at p. 18 of the edition of 1890; and see the latest case, *Farah* v. *Glen Lake Mining Co.* (1907), 17 O.L.R. 1, in which the authorities are also referred to.

Argument

In British Columbia the Courts are not given the statutory power given to the Ontario Courts.

American cases have been cited on this point; but such authorities are not in point, for the constitution of the United States expressly provides that the legislature of a State cannot interfere with vested rights.

Osborne v. *Morgan* (1888), 13 App. Cas. 227, cited against us, is really in our favour: see at p. 237.

The point suggested by the Court as to the right of the Railway Company to be heard upon the application for a Crown grant under the Settlers' Rights Act is not raised in the pleadings; was not raised in the Court below, and was not taken in the notice of appeal. But assuming that the plaintiffs would be entitled to be heard under the statute, if they had an interest,

we say that they have no interest whatever in these lands, and therefore no right to complain.

There was reserved to the Province by the Act (47 Vict., Cap. 14), under which the Crown grant was issued to the Dominion the right to grant pre-emptions to actual settlers. And according to that Act the grant shall not include any lands held under Crown grant, lease, agreement for sale or other alienation by the Crown.

As to the meaning of "alienation," see Mr. Justice McCREIGHT'S judgment in *The Queen* v. *Victoria Lumber Co.* (1897), 5 B.C. 288, at. pp. 299, 300.

And the Act, section 26, also provides that the existing rights of any persons or corporations in any of the lands so to be acquired by the Company shall not be affected. The Crown grant refers to the above section of the Act, and conveys the land to the Dominion subject to the several stipulations and conditions affecting the lands which were recited in the Crown grant and contained in the Acts of Parliament.

The order-in-council, which it is contended reserved the lands from settlement, including pre-emption, does not bear the construction contended for, when read in the light of the preamble. See the orders-in-council of July 1st and 25th, 1873.

The Crown land officers, however, construed the order of July 1st, 1873, as a reservation from pre-emption, and refused pre-emption entries to the defendant's predecessor in title, Grandam, among a number of other settlers; and it must be conceded in view of *Farmer* v. *Livingstone* (1883), 8 S.C.R. 140, that Grandam, and hence the defendant, was not before the Settlers' Rights Act legally entitled to any remedy against the Crown, though he had resided upon and improved the lands within the meaning of the Land Act then in force. Argument

The above Settlers' Rights Act declares (second preamble) that the "reserve was made in order to carry out the provisions of section 11 of the Terms of Union, which section expressly enacts that the Government of British Columbia shall not within the time mentioned in said section sell or alienate any further portion of the public lands of British Columbia in any other

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way than under the right of pre-emption requiring actual residence of the pre-emptor on the land claimed by him."

And that (last preamble) "all of said settlers are entitled to peaceable and absolute possession of said lands occupied by them and title thereto in fee simple in accordance with the statutes of British Columbia at the time existing governing the disposal of public lands."

The enacting clause is clear, and carries out the preambles.

The defendant contends that after this declaration (which relates back to the time when the defendant's predecessor in title, Grandam, took up the land) the defendant by virtue of the Act acquired all the rights of the pre-emptor as of that date, and the plaintiffs, if they ever had any interest in the lands prior to that date, ceased to have any interest in these lands.

If we are right in this, then the question of proof under the Settlers' Rights Act was a question between the Crown and the settler, in which the plaintiffs have no interest; for it is plain that the provisions with reference to proving residence, etc., contained in the Settlers' Rights Act are in lieu of the provisions of the general Land Act which were in force when Grandam first settled on the lands.

The Settlers' Rights Act is a remedial Act, and the preamble is part of the Act: sub-section 49 of section 10, Cap. 1, R.S.B.C. 1897.

Argument

With respect to remedial Acts, see Craies's Hardcastle's Statute Law, 4th edition, pp. 59, 60, 330; *O'Connor* v. *The Nova Scotia Telephone Company* (1893), 22 S.C.R. 276, at pp. 287, 291, 292.

But we contend that the Settlers' Rights Act does not give the plaintiffs the right to be heard; in fact, we say that the Act shews a contrary intention; and the intention must be looked at: *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281.

No case has been cited where the act of the King in Council has been held subject to the jurisdiction of the Court in a matter of this kind; and it is submitted that the Court has no right to say that the act of the Lieutenant-Governor in Council is of no effect.

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All the cases cited are cases with reference to the acts of Governors of Crown colonies. But the Lieutenant-Governor in Council of the Province of British Columbia is equal to the Governor-General in Council, and the Governor-General in Council stands in the same position as the King in Council: *Liquidators of the Maritime Bank of Canada* v. *Receiver-General of New Brunswick* (1892), A.C. 437 at p. 443, 61 L.J., P.C. 75, at pp. 77-8; *Hodge* v. *The Queen* (1883), 53 L.J., P.C. 1.

With reference to Mr. *Luxton's* argument, it is only necessary to say that the contest here is over the coal rights, and not with reference to the surface.

The Esquimalt & Nanaimo Railway is not a Dominion railway; but if it is, *The Canada Southern Railway Company* v. *Jackson* (1890), 17 S.C.R. 316, and *Canadian Pacific Railway* v. *Corporation of the Parish of Notre Dame de Bonsecours* (1899), A.C. 367, at p. 372, shew the Settlers' Rights Act is *intra vires*.

Argument

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IRVING, J.

IRVING, J.: By the statute 3 & 4 Edw. VII., Cap. 54, the Provincial Parliament imposed upon the Lieutenant-Governor in Council the obligation of issuing to certain settlers a Crown grant of certain lands in a certain form.

It was necessary on the part of any person claiming the benefit of the statute to make an application to the Lieutenant-Governor in Council within the time and in manner specified, with the necessary evidence, and a Crown grant would be issued to him.

A grant was issued under the Act to the present defendant, and is attacked on the ground, *inter alia*, that she (or rather her predecessor in title) was not a settler within the meaning of the Act, and that she had not complied with the terms of the statute as to supplying evidence as to settlement and intention, and on the further ground that the grant had been obtained by her without notice to the Railway Company.

It was conceded at the trial that the grant had been issued without notice to the plaintiffs, or without notification to them to shew cause why it should not issue.

The first question that we have to consider is the construction to be placed upon the Act. In my opinion, the obligation

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imposed by that statute according to the true construction of that statute, was to be exercised after due enquiry, of which the Railway Company were entitled to have due notice.

Every statute or rule conferring on any tribunal, be that tribunal the Lieutenant-Governor in Council, a municipal council, or the committee of a club, authority to adjudicate upon matters involving civil consequences to individuals, should be construed as if words stipulating for a fair hearing to all parties had been inserted therein. The Legislature omits them as unnecessary, knowing that the Courts will read these words into the Act. The only question upon which there can be any doubt is as to the consequence of the Lieutenant-Governor in Council omitting to observe this rule.

Let us assume that words appropriate to the securing of a hearing to both sides had been actually written into the statute, what would be the effect of a Crown grant issued if this preliminary requirement had not been complied with? I think the Court would be justified in holding it null and void. Possibly it might be necessary, in view of the fact that it was a grant by the Crown, to presume that the Crown had been misled by representation of the applicant that she had caused the present plaintiffs to be served with notice of the proceedings and they had permitted the matter to go by default. But, whether it is necessary to resort to such a presumption or not, I think there is jurisdiction for the Court to make a decree in an action between the parties.

IRVING, J.

There are numerous cases to establish that where a Crown grant, or an alleged Crown grant, is a nullity, the Courts have restrained an individual from making use of the document: *Holman* v. *Green* (1881), 6 S.C.R. 707; *Farwell* v. *The Queen* (1894), 22 S.C.R. 553; although the Crown was not a party to the litigation.

Our judgment in this case is not against the Crown, and on that point I wish to say that I express no opinion as to the merits of the applicant's claim. The proper forum for the consideration of that matter is the Lieutenant-Governor in Council, where both sides can be heard.

I agree with the remarks of the learned Chief Justice that as a general principle, a Crown grant is not open to attack except in an action to which the Crown is a party. Yet we must remember that in the old days when fines were the "foundation of the assurances of the realm," and were binding on courts of law, it was the practice of the court of equity to lay hold of the illconscience of the person who had taken an estate illegally by means of such a fine and compel him to do that which was necessary for restoring matters to their former situation.

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I think we have jurisdiction, and as the Crown grant was obtained without notice to the Railway Company, we should restrain the defendant from making use of it.

The judgment should be shaped so as to permit the defendant, on giving notice to the Railway Company, to proceed with her application which was made, as I understand it, under section 5 of the Act.

IRVING, J.

MORRISON, J.: The Act, a consideration of which is involved in this appeal, is the Vancouver Island Settlers' Rights Act, 1904, an Act to secure to certain pioneer settlers within the Esquimalt & Nanaimo Railway belt their surface claims and under surface rights.

The defendant claims as representative of a pioneer settler within the meaning of that Act, and pursuant to the authority of the Act he received, and holds, a Crown grant of lands which had previously been granted to the plaintiffs.

MORRISON, J.

The history of the legislation and litigation concerning the rights of the pioneer settlers to those lands within the Esquimalt & Namaimo Railway belt, leading to the passing of the Settlers' Rights Bill, will be found in the cases of *Hoggan* v. *Esquimalt and Nanaimo Railway Co.* (1894), A.C. 429; and *Esquimalt and Nanaimo Railway Co.* v. *McGregor* (1906), 12 B.C. 257; and therefore it is not necessary to repeat it here.

This Act, which has been held to be *intra vires* by the Judicial Committee of the Privy Council, sanctions the action of the Lieutenant-Governor in Council in granting the land in question to the defendant.

We have nothing whatever to do with the policy, or wisdom,

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or justice, or injustice of this legislation, assuming the words of the Act are not intractable or ambiguous. As to the alleged inequity of the Act, it has been held that in respect of legislation, equity is synonymous with the meaning of the Legislature.

But our limited function is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meant: *Rothschild & Sons* v. *Commissioners of Inland Revenue* (1894), 2 Q.B. 142 at p. 145.

"No doubt one is entitled to put one's self in the position of the Legislature at the time the Act was passed in order to see what was the state of knowledge, what were the circumstances brought before the Legislature, and what it was the Legislature was aiming at":

Attorney-General v. *Metropolitan Electric Supply Company, Limited* (1905), 1 Ch. 24 at p. 31.

"If the precise words are plain and unambiguous, in our judgment we are bound to construe them in their ordinary sense, even though it do lead in our view of the case to an absurdity or manifest injustice. Words may be modified or varied where their import is doubtful or obscure; but we assume the functions of legislators when we depart from the ordinary meaning of the precise words used, merely because we see or fancy we see an absurdity or manifest injustice from an adherence to their literal meaning":

Abley v. *Dale* (1851), 20 L.J., C.P. 233 at p. 235.

In construing statutory enactments, we must have regard to the history of the Act and the reasons which led to its being passed. We must look at the mischief to be cured as well as the cure provided: *Thomson* v. *Clanmorris* (*Lord*) (1900), 1 Ch. 718 at p. 725, 69 L.J., Ch. 337 at p. 340.

MORRISON, J.

We may not lightly conclude or assume that the enactment will work injustice, for as Brett, L.J., held in *Ex parte Corbett* (1880), 14 Ch. D. 122 at p. 129, there is a general rule of construction of statutes, namely, that unless you are obliged to do so, you must not suppose that the Legislature intended to do a palpable injustice.

Then coming to the construction of section 3, what is it that the Legislature said it meant?

"Upon application being made to the Lieutenant-Governor in Council, within twelve months from the coming into force of this Act, shewing that any settler occupied or improved land within said railway land belt prior to the enactment of chapter 14 of 47 Victoria, 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."

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There is here, in my opinion, in plain and unambiguous words a statutory obligation imposed upon the Lieutenant-Governor in Council to issue the grant, not because of any default, breach, misrepresentation or fraud on the plaintiffs' part; nor because there is any question of forfeiture or abandonment. The Act does not say that there is to be an investigation, enquiry, adjudication or arbitration as to the conditions under which the plaintiffs hold the land. There is nothing to investigate now: there is nothing to adjudicate: there is nothing to arbitrate.

And it is in this respect that the case of *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281, and the cases therein cited, are distinguishable. In those cases the claim for re-entry depended upon some alleged default, breach, or failure to comply with the terms of the lease on the lessee's part. I do not, therefore, think the plaintiffs were entitled to any notice of the defendant's application.

The Governmental department which is charged with the administration of land in British Columbia, being adequately equipped for the discharge of the onerous duties devolving upon it, presumably performed its functions when the application in question was made.

MORRISON, J.

The presumption is that the patent is valid and passed the legal title, and, furthermore, it is *prima facie* evidence of itself that all the incipient steps had been regularly taken before the title was perfected by the patent. *Minter* v. *Crommelin* (1855), 59 U.S. 87. There are a number of other American cases cited by counsel which follow on the same line.

In *Quinby* v. *Conlan* (1881), 104 U.S. 420 at p. 426, in delivering the opinion of the Court, Field, J., said:

"It would lead to endless litigation, and be fruitful of evil, if a supervisory power were vested in the Courts over the action of the numerous officers of the land department, on mere questions of fact presented for their determination. It is only when those officers have misconstrued the law applicable to the case, as established before the department, and thus have denied to parties rights which, upon a correct construction, would have been conceded to them, or where misrepresentations and fraud have

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been practised, necessarily affecting their judgment, that the Courts can, in a proper proceeding, interfere and refuse to give effect to their action."

It is not incumbent, even if it were competent, for us in the present case as launched to examine into the various steps leading to the issue of the patent. Presumably all the pre-requisites have been complied with.

I would dismiss the appeal.

CLEMENT, J.: In *McGregor* v. *Esquimalt and Nanaimo Railway* (1907), A.C. 462 at p. 466, their Lordships of the Privy Council held that:

"But for the British Columbia Act of 1904 and the grant to him (*i.e.*, to the appellant, McGregor) under its provisions, the respondents' title to the mines and minerals in question would be incontrovertible."

That is to say, when the Act came into force, there was no interest of any sort outstanding in the Crown in right of the Province in the lands in question; so that the effect of section 3 is to make the Crown the bare donee of a power in gross, not appendant or appurtenant to any estate or interest in the land. The power is to be exercised in favour of certain persons only, and only after certain conditions have been complied with as set out in the section. Then, and not before, "a Crown grant shall be issued." This, I think, means that the Crown shall then by an instrument in the form of a Crown grant execute this statutory power, the effect of that execution being not to pass any estate or interest of the grantor, but to despoil these plaintiffs of their property and vest it in those for whose behoof this Act was passed. Authority is hardly needed for the proposition that the requirements of such an Act as this should be strictly observed. In Farwell on Powers, 2nd Ed., p. 147, it is laid down that:

"A power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled; for until then it has in fact no existence."

And it is worthy of note that to such a power as this, given by statute, the jurisdiction of the Court to relieve against defective execution does not attach: *ib.* 343-4.

As the learned author puts it:

"If the Legislature has authorized certain acts to be done in a particular way, it is difficult to see how the Court can give validity to any such act if done otherwise than in accordance with the statutory requirements; to give relief in such a case would be to legislate afresh."

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What are the conditions prescribed by the statute? One clear condition is, in my opinion, that the applicant's claim should be passed upon by the tribunal named in the section, namely, the Lieutenant-Governor in Council. The evidence, I think, sufficiently shews that this condition has not been complied with. The proof of it would naturally be in the shape of a minute or order in council passing favourably upon the application, and it is not suggested that there is any such document. The evidence of the officers of the Land Department that these applications were put through as matters of ordinary departmental routine, and without any reference of them so far as they were aware to Council, was sufficient, in my opinion, to shift the onus to the defendant of proving compliance with the statute in this respect, if, indeed, the onus were not upon her from the outset, after production of the plaintiffs' elder Crown grant. I think, therefore, that we must take it that the statutory tribunal charged with the duty of passing upon the defendant's application never did in truth pass upon it, and this fact alone would, in my opinion, suffice to dispose of this case. As to the Lieutenant-Governor in Council being in this case a purely statutory tribunal, see *Emerson* v. *Skinner* (1906), 12 B.C. 154.

CLEMENT, J.

But assuming that the Lieutenant-Governor in Council did pass upon the application, it sufficiently appears, I think, that no notice of the application was ever given these plaintiffs, and that the whole matter indeed from start to finish was put through without notice to them. The learned Chief Justice states in his judgment that this was admittedly the position. But Mr. *McPhillips* contended that the statute contains no provision for such notice to the plaintiff Company, and that the Legislature must be taken to have intentionally omitted it. To so hold would be to ascribe to a British Legislature in this 20th century an intention to set up a tribunal empowered to disregard that fundamental rule of British jurisprudence expressed in the maxim "Hear both sides." As put by Blackburn, J., in *Reg.* v. *Saddlers' Co.* (1863), 32 L.J., Q.B. 337 at p. 344, it is "of the very essence of justice that every person should be heard before judgment is given against him." I need not enlarge on the authorities upon this point; they have been very recently the

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subject of discussion before the Supreme Court of Canada in *Bonanza Creek Hydraulic Concession* v. *The King* (1908), 40 S.C.R. 281. See also *Chang Hang Kiu* v. *Piggott* (1909), A.C. 312, 78 L.J., P.C. 89. We must, in my opinion, hold that this Act requires that elementary principle of justice to be observed. Not having been observed in this case, the statutory power to issue the Crown grant to defendant never arose, and the document is a nullity.

But it is said that we cannot declare the defendant's Crown grant inoperative in any suit to which the Crown is not a party. I must confess I cannot grasp the argument. What interest has the Crown here? Our judgment will not take from or add to the Crown the slightest possible interest in the property in question. This Crown grant is *sui generis*, as I have already tried to point out. It takes nothing out of the Crown, and our declaration that it is a nullity will give nothing to the Crown. That, I think, is the essential difference between this case and the case relied upon by the defendant's counsel: *Assets Company, Limited* v. *Mere Roihi* (1905), A.C. 176. There the setting aside of the instrument attacked would have the effect, so far as I can gather from the report, of revesting the property in the Crown, not of vesting it in the native plaintiffs.

In many reported cases Crown grants have been held void in actions to which the Crown was not a party, *e.g.*, *Doe, dem Hayne* v. *Redfern* (1810), 12 East, 96; *Alcock* v. *Cooke* (1829), 5 Bing. 340 (in both of which the earlier cases are referred to); *Warren* v. *Smith* [*Magdalen College Case*] (1615), 6 Coke, 125; *Meisner* v. *Fanning* (1842), 3 N.S. 97; *Wheelock* v. *McKown* (1835), 1 N.S. 41; *Miller* v. *Lanty* (1840), *ib.* 161; and my brother IRVING has drawn my attention to *Holman* v. *Green* (1881), 6 S.C.R. 707, in which, in an action to which the Crown was not a party, the Supreme Court of Canada held void a grant by the Crown (in right of the Province) of part of the foreshore of Summerside harbour, P. E. I. The subsequent criticism of that case by the Privy Council in *Attorney-General for the Dominion of Canada* v. *Attorney-General for the Provinces of Ontario, Quebec and Nova Scotia* (1898), A.C. 700, does not touch the point with which I am now dealing. In *Gledstanes* v. *The Earl*

of Sandwich (1842), 4 M. & G. 995, the Crown grant was upheld, but no one suggested that the Crown should have been a party to the action.

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Osborne v. *Morgan* (1888), 13 App. Cas. 227, seems to me to draw the distinction I have been endeavouring to point out. The plaintiffs there failed because their "miner's right" certificates gave them "no legal or equitable interest in the soil" and therefore no status to attack the title of defendants under certain crown leases which as their Lordships pointed out (p. 235) were voidable only, and not void. Those the Crown could affirm. Here for the reasons above indicated, the defendant's Crown grant is absolutely void, and incapable of confirmation.

We are not troubled by any question as to the necessity for *sci. fa.* proceedings. Such proceedings are not applicable to colonial Crown grants issued under statutory authority: *The Queen* v. *Hughes* (1865), L.R. 1 P.C. 81; so that no application for a fiat for the issue of such a writ need or indeed could be made in this Province.

I would allow the appeal with costs here and below. Judgment should be entered for the plaintiffs declaring defendant's Crown grant a nullity and enjoining her from making use of it. I agree with my brother IRVING that the judgment should be so drawn as not to prevent the defendant from proceeding, if so advised, with her application; but I express no opinion as to her rights in that regard.

CLEMENT, J.

MORRISON, J. (At Chambers)

1909

Nov. 10.

WILSON v. KELLY *ET AL.*

Practice—Workmen's Compensation Act, 1902—Plaintiff pursuing his common law and statutory remedies concurrently—Dismissal of common law action—Assessment under Workmen's Compensation Act—Costs—Discretion.

WILSON v. KELLY

Where the plaintiff fails in his common law action, the Court has power in its discretion to deal with the costs of the action or of proceedings under the Employers' Liability Act:—

Held, in the circumstances in this case, the plaintiff having been awarded compensation under the Workmen's Compensation Act, that he should have costs following the event upon the dismissal of the action.

ACTION tried by MORRISON, J., at Vancouver on the 20th of April, 1909, for damages for injuries sustained by plaintiff whilst employed by defendants. He also claimed under the Employers' Liability Act and the Workmen's Compensation Act. The writ was issued on the 16th of October, 1908. Appearance was entered on the 24th of October. The pleadings were closed on the 28th of October. A summons for directions was taken out on the 11th of December and on the 12th of December the defendants filed an admission of liability under the Workmen's Compensation Act. An application for particulars was made on the 7th of January and on the 6th of April notice of trial was given for the 20th of April. On the 15th of April the defendants' solicitors wrote in reference to their admission of liability and offering to pay at the rate of $10 per week. These offers were refused and the case came on for trial on the 20th of April, when the action was dismissed and compensation was assessed at the rate of $9 per week, after the second week. The plaintiff's rate of wages had been $18 per week.

Statement

C. B. Macneill, K.C., for plaintiff.

Craig, for defendants.

10th November, 1909.

Judgment

MORRISON, J. [After stating the facts]: The question of costs having been reserved to be spoken to later, I now decide,

under the circumstances peculiar to this case, that the defendants should have the costs following the event upon the dismissal of the action. The plaintiff shall have the costs of an undefended proceeding under the Act, as estimated by the registrar.

Mr. *Craig* for the defendants very strongly urged that the discretion to deduct from the compensation allowed, the costs which were caused by the plaintiff bringing this action instead of proceeding under the Act, should be exercised to the extent of not allowing the plaintiff any costs at all.

The plaintiff undoubtedly had the right to pursue his alleged remedy at common law and the Legislature has stepped in and given him another chance should he fail in that pursuit. But it has not deprived the Court of the power to deal in its discretion with the costs of the action or of proceedings under the Act in case the plaintiff fails.

If I understand Mr. *Craig's* contention it is this, that in every case in which an action is dismissed the costs should follow the event, which he expresses as meaning that the plaintiff in no event outside of the action should be allowed any costs. I do not agree with that. I do not think the Legislature intended that a club should be held over an employee's head when he came to decide as to what remedy he should seek. I do not admit, as has been contended, that if employees discover they shall not be deprived of costs the Courts will become congested by compensation suits. It certainly should not tend to increase the number of accidents and, as for the remedy, the Act is specific, that if a party fails in his action, still, if it is a case where he would succeed under the Act, he has his right to compensation, and, in my opinion, with such costs as the nature of the case admits.

Judgment

Order accordingly.

HUNTER, C.J. (At Chambers)

1909

Dec. 29.

RICHARDS v. VERRINDER *ET AL.*

RICHARDS v. VERRINDER

Practice—Costs, security for—Plaintiff resident temporarily out of the jurisdiction.

The plaintiff, having been returned by an examining board as having failed to pass the requisite examination to entitle him to practise his profession, brought an action against the board of examiners for damages for fraud and conspiracy. At the time of action brought, he was living and practising at a place without the jurisdiction. On an application for an order to compel him to give security for costs, he filed an affidavit stating that his absence was only temporary, that his home was in Victoria and that his intention was to present himself for examination again:—

Held, that his absence was due to the action of the defendants which compelled him to follow his profession outside the jurisdiction pending his admission.

Statement

APPLICATION for security for costs of plaintiff resident outside the jurisdiction. Heard by HUNTER, C.J., at Chambers in Victoria on the 21st of December, 1909.

W. J. Taylor, K.C., for plaintiff.
Helmcken, K.C., for defendants.

23rd December, 1909.

HUNTER, C.J.: In this case the plaintiff is suing named persons, who are members of the Examining Board of the Dental College of British Columbia, for damages for fraud and conspiracy to prevent him being admitted as a member of the profession by misreporting his examination papers, and the defendants apply for security for costs on the ground of his being resident out of the jurisdiction.

Judgment

The affidavit filed on behalf of the defendants makes out a *prima facie* case, as it shews that he is practising as a dentist in Seattle for a few weeks past; but the plaintiff files an affidavit in answer stating that he was born and brought up in Victoria; that he is only temporarily resident in Seattle, and intends to again present himself for examination to be admitted to practice in

HUNTER, C.J. (At Chambers)

1909

Dec. 29.

RICHARDS v. VERRINDER

British Columbia; and that his home is in Victoria where a large part of his personal belongings are situate. This affidavit, therefore, shews that he is ordinarily resident within the jurisdiction, and is only temporarily absent until he can get admitted to practice in British Columbia, and that his temporary absence is really due to the fact that by the action of the defendants he is compelled to make his living outside the jurisdiction in the meantime. If the plaintiff fails to present himself for examination again within a reasonable time, that may be good ground for renewing the application, but I think the present application must be refused without prejudice to any future application that may be made.

Under the circumstances the costs will be costs in the cause to the plaintiff. Judgment

Application dismissed.

BROOKS-SCANLAN-O'BRIEN COMPANY v. RED FIR LUMBER COMPANY.

CLEMENT, J.

1909

Dec. 23.

BROOKS v. RED FIR LUMBER CO.

Sale of goods—Acceptance—Delivery, place of—Inspection—Goods not equal to sample—Right of purchaser to reject—Sale of Goods Act, R.S.B.C. 1897, Cap. 196, Secs. 45, 46, 47—Costs.

Prima facie the examination by a buyer under section 45 of the Sale of Goods Act in order to ascertain whether the goods tendered are in conformity with the contract, should be had at the place of delivery; and a removal of the goods by the buyer without exercising his right of examination will prevent him from afterwards refusing to accept.

But if the goods delivered are not in fact in conformity with the contract, the buyer is entitled to a reduction in the agreed price on the principles enunciated in *Mondel* v. *Steel* (1841), 10 L.J., Ex. 426.

ACTION tried by CLEMENT, J., at Vancouver on the 8th of December, 1909, for the agreed price of a boom of logs sold and Statement

CLEMENT, J.

1909

Dec. 23.

BROOKS v. RED FIR LUMBER CO.

delivered by the plaintiffs to defendants. Defence, that the logs delivered were not in accordance with the contract and that upon inspection within a reasonable time the defendants refused to accept them and so notified the plaintiffs; or, in the alternative, that the defendants were entitled to a reduction being the difference between the agreed price and the value of the logs actually delivered.

Reid, K.C., for plaintiff.
Heisterman, for defendant Company.

23rd December, 1909.

CLEMENT, J.: The contract is contained in the correspondence put in at the trial. The order for the boom of logs followed upon a visit by defendants' foreman to plaintiffs' camp. He and the plaintiffs' camp foreman together went over a quantity of logs lying in a standing boom, about two-thirds of which would be required to fill the order afterwards given, and discussed the making up of a boom of eight swifters for the defendants. It is alleged, and indeed plaintiffs' camp foreman admits, that objection was taken to some of the logs in the standing boom and that a promise was made that these would not go into the boom for the defendants if the order were given; and if the contract had then been made by these two men, acting for their respective employers, I would have to find that there was a promise of something better than the "average run" of the standing boom. But it is quite clear that no order was then given and, as I have already said, the contract is contained in the correspondence read in the light of the understood fact that the logs ordered by defendants were to come out of a standing boom. Under these circumstances I must hold that the obligation resting upon the plaintiffs was to deliver a boom of eight swifters of logs drawn fairly from the standing boom, or to use the trade term, the "average run" of that boom. The delivery was to take place at plaintiffs' camp at Narrows Arm, the defendants agreeing to send for the eight-swifter boom when ready. They did send for it but made no inspection of it at plaintiffs' camp; no inspection, I mean, to ascertain whether or not the logs were as ordered. Upon the arrival of the logs

Judgment

at defendants' mill at Nanaimo, an inspection revealed, as the defendants claim, that the logs were not as ordered and they thereupon refused to accept them and so wrote the plaintiffs. The logs, however, were not returned to plaintiffs' camp and are still at defendants' mill at Nanaimo.

At the conclusion of the evidence at the trial, I inclined to the view that the plaintiffs had not supplied logs representing a fair average run of the standing boom, and a perusal of the extended notes of the evidence has but strengthened that view. I was not at all favourably impressed with the notions of commercial probity entertained by the plaintiffs. When defendants raised their objection to these logs, the plaintiffs intimated their willingness to pay for the towage of them to Anacortes and there take them off defendants' hands. As these logs were not cut upon Crown granted lands, and as Anacortes is in the State of Washington, the proposal was a direct invitation to the defendants to participate in a breach of the laws of the Province against export. Apart, however, from the unfavourable impression thus created, the evidence leads me to the conclusion that a fair average run of the logs in the standing boom would shew 20 per cent. clear. Page, defendants' foreman, so expressed himself when he went over the standing boom with McDougall, plaintiffs' camp foreman, and McDougall agreed with him at the time, though he disclaimed an expert's skill before me. The delivered boom would not shew any such percentage, and I am convinced that in some way and for some reason the defendants were given a most unfair selection. The reason is perhaps, not far to seek, and as to the way, that is immaterial if the delivered logs were not—as I find they were not—in accordance with the contract. The price agreed on was $8.50 per thousand. The value of those delivered was not more than $6.50 per thousand.

Judgment

Upon these facts what is the law? The defendants contend that the case comes within section 47 of the Sale of Goods Act, R.S.B.C. 1897, Cap. 169, which reads as follows:

"(47.) Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

CLEMENT, J.

1909

Dec. 23.

BROOKS v. RED FIR LUMBER CO.

There was here a refusal to accept as above mentioned, *i.e.*, at Nanaimo; and the question is: had the defendants the right then and there to refuse to accept? This involves consideration of sections 45 and 46 which read as follows:—

"(45.) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract:

"(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

"(46.) The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."

Prima facie the examination mentioned in section 45 should take place where the goods are delivered: *Perkins* v. *Bell* (1893), 1 Q.B. 193, 62 L.J., Q.B. 91; and I can see nothing in the evidence here to take this case out of the ordinary rule. There was nothing to prevent such an examination at plaintiffs' camp where the boom was actually delivered, and there is nothing here from which I could find an implied agreement on plaintiffs' part that the inspection should be had later or elsewhere. In the absence of such an agreement the taking away of the boom by the defendants was an act "inconsistent with the ownership of the seller" (section 46) and the defendants cannot therefore invoke section 47. In other words they accepted the goods at plaintiffs' camp and had not the right to refuse to accept at their own mill.

Judgment

Section 47 embodies the law as laid down in *Grimoldby* v. *Wells* (1875), 44 L.J., C.P. 203. In that case the delivery took place upon the road, the goods being unloaded from the plaintiff's cart to that of the defendant and carried by the latter to the defendant's barn; and Brett, J., points out at p. 207, that

"By agreement between the parties the defendant took delivery of the goods before he had a fair opportunity of inspecting them; for it cannot

properly be said that it would be reasonable to hold him bound to examine them when they were delivered to him at half way of the journey."

And in *Perkins* v. *Bell*, *ubi supra*, this feature of the earlier case is emphasized. See also *Heilbutt* v. *Hickson* (1872), 41 L.J., C.P. 228 as an example of a contract, which in the light of the known circumstances surrounding it, was construed as fixing the place of inspection at a place other than that of delivery. In the case at bar—to adopt the language of the Court in *Perkins* v. *Bell*, *ubi supra*, at p. 198:

"There is nothing in the contract itself, nor any evidence, to shew that by usage of trade as applied to such a contract or otherwise, the *prima facie* place for inspection had been altered."

The defendants, however, are entitled to an allowance in reduction of damages of the difference, which I fix at $2 per thousand, between the price of the goods agreed to be delivered and the value of those actually delivered. This claim is in the nature of a cross-action, but for very many years before the Judicature Acts it had become customary "to avoid circuity of action" to allow such a claim to be set up in reduction of damages, *i.e.*, in reduction of the price: *Mondel* v. *Steel* (1841), 10 L.J., Ex. 426, as recently recognized in *Bow, McLachlan and Co.* v. *The Ship "Camosun"* (1908), 40 S.C.R. 418, (1909), A.C. 597.

There will be judgment therefore for the plaintiffs for the amount claimed less a reduction as above. Nothing was said as to the boom chains. If there is any question as to them the matter may be mentioned again.

Judgment

As to costs: the plaintiffs are entitled to the costs of the action and the defendants to their costs of what is really a counter-claim. As part of their costs of the action the plaintiffs should not be allowed any costs incurred in proving or attempting to prove the character of the logs made up and delivered. As to the time occupied at the trial in reference to the claim and counter-claim respectively, I think one-quarter and three-quarters respectively may be taken upon taxation as a correct division.

Judgment accordingly.

MORRISON, J. CAMPBELL v. NATIONAL CONSTRUCTION COMPANY.

1909

Nov.24.

Bills of Exchange Act, R.S.C. 1906, Cap. 119—Cheque—Procurement by misrepresentation—Indorsement to third person—Holder in due course—Value—Notice of defect in title.

CAMPBELL v. NATIONAL CONSTRUCTION CO.

Plaintiff, who was a confidential clerk of a director of the defendant Company, and had been himself director of the Company, accepted from the said director a cheque of the Company for $2,663.59. The cheque had been issued on the understanding that it was to be used only for the purpose of exhibiting it to a tax collector to secure to the said director further time for the payment of taxes on his own property. On the disappearance of the director the defendant Company stopped payment of the cheque, and plaintiff brought action, claiming he was a holder in due course:—

Held, on the evidence, that plaintiff had given no value for the cheque and that he had notice of the defect in title when the cheque was indorsed over to him.

ACTION tried by MORRISON, J., at Vancouver, on the 2nd of November, 1909, upon a cheque post-dated 1st November, 1908, for $2,663.59, made by the National Construction Company in favour of W. J. Cavanagh, who, at that time, was president of the Company. It was alleged by the defendants that Cavanagh came to the other directors of the Company stating he owed the City of Vancouver a large sum of money for taxes on lands and that he had deposited a post-dated cheque for the payment of those taxes some time previously in order to save the discount and that this cheque was either then past due or that the due date was imminent. It was also alleged that he represented to the directors that if they gave him a post-dated cheque he could, by exhibiting it to the tax collector secure further time for the payment of his taxes. He would return it immediately. He also, it is alleged, assured the defendants upon their objecting to comply with his request, that the use which he intended to make of it was a matter between himself and the tax collector. The cheque was therefore on the 10th of October given, Cavanagh signing it as president of the Company, and, instead of utilizing

Statement

it as represented, he at once indorsed it over to the plaintiff, who also had been a director of the defendant Company and, up to this time, the confidential clerk of Cavanagh, holding his power of attorney. Cavanagh and he occupied a part of the same suite of offices as the defendant Company. He had constant access to Cavanagh's books and those of the Company. They likewise lived together. Cavanagh proceeded south next day, that is the 11th of October, beyond the jurisdiction—ostensibly for his health—where he was in a short period of time joined by the plaintiff, who secured a further indorsement on the same cheque. In the meantime, the defendants, hearing that Cavanagh had disappeared, notified the bank to stop payment of the cheque on the ground that it had been obtained by misrepresentation. The cheque was duly presented, payment refused and the usual proceedings for protest taken. Statement

The plaintiff had become hopelessly involved financially, as did also the defendant Company. In due course the case came on for trial, Cavanagh appeared at the hearing and gave evidence, being called by the defendants.

Abbott, for plaintiff.
A. D. Taylor, K.C., for defendant Company.

24th November, 1909.

MORRISON, J. [having stated the facts]: I am clearly of opinion, formed after hearing and seeing both the plaintiff and Cavanagh on the witness stand, that the cheque was obtained by means of a clumsy device formed between them to get a few thousand dollars which was not due them from the defendants, and which might, unfortunately, have succeeded had not apparently some misunderstanding arisen afterwards as to their own affairs, leading to the conflict between them at the trial. I accept the defendants' evidence as to how Cavanagh got the cheque and I am satisfied that the plaintiff knew, before indorsement, how Cavanagh obtained it. It is contended that the plaintiff is a holder in due course. I do not agree. Judgment

"A cheque is a bill of exchange drawn on a bank on demand": section 165, Bills of Exchange Act.

MORRISON, J.

1909

Nov.24.

CAMPBELL v. NATIONAL CONSTRUCTION CO.

Judgment

"A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions, namely: (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it":

section 56, Bills of Exchange Act.

This is exactly what, in my opinion, the plaintiff is not. In order to become a holder in due course he must have become a holder before receiving notice of defects: Russell on Bills, 210. And the same learned author in his valuable treatise on the Bills of Exchange Act deals fully at p. 205 *et seq.* with the definition of good faith and notice.

I find that the plaintiff did not give value for the cheque and that he had notice of the defect in Cavanagh's title—the breach of the special purpose for which it was given—before Cavanagh indorsed the cheque to him. The action is dismissed with costs.

Action dismissed.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada.

CROMPTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 224).—Reversed by Supreme Court of Canada, 15th February, 1910.

GORDON v. HORNE, HOLLAND AND HOLLAND (p. 138).—Reversed by Supreme Court of Canada, 28th May, 1909. See 42 S.C.R. 240.

LAIDLAW AND LAURIE v. THE CROW'S NEST SOUTHERN RAILWAY COMPANY (p. 169).—Affirmed by Supreme Court of Canada, 2nd November, 1909. See 42 S.C.R. 355.

Cases reported in 13 B.C., and since the issue of that volume appealed to the Supreme Court of Canada.

BRIDGMAN v. HEPBURN (p. 389).—Affirmed by Supreme Court of Canada, 10th November, 1908. See 42 S.C.R. 228.

CASTLEMAN v. WAGHORN, GWYNNE & Co. (p. 351).—Reversed by Supreme Court of Canada, 15th December, 1908. See 41 S.C.R. 88.

EASTERN TOWNSHIPS BANK *et al.*, THE v. VAUGHAN *et al.* (p. 77). Reversed by Supreme Court of Canada, 12th February, 1909. See 41 S.C.R. 286.

REAR v. THE IMPERIAL BANK OF CANADA (p. 345). Affirmed by Supreme Court of Canada, 11th May, 1908. See 42 S.C.R. 222.

STAR MINING AND MILLING COMPANY, LIMITED LIABILITY v. BYRON N. WHITE COMPANY (FOREIGN) (p. 234).—Affirmed by Supreme Court of Canada, 12th February, 1909. See 41 S.C.R. 377. (The Judicial Committee of the Privy Council on 29th June, 1909, refused leave to appeal.)

Case reported in 12 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council.

BLUE AND DESCHAMPS v. THE RED MOUNTAIN RAILWAY COMPANY (p. 460).—Affirmed by the Judicial Committee of the Privy Council, 31st March, 1909. See (1909), A.C. 361.

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2.——*Property injuriously affected—Lowering grade—Right of owner of abutting property to take arbitration proceedings—Vancouver Incorporation Act, 1900, Cap. 54, Sec. 133, Sub-Secs. 5 and 9.*] The owner of property abutting on a street, the grade of which has been lowered by the Corporation, is entitled to arbitration for determining whether his property has been injuriously affected. THE BISHOP OF NEW WESTMINSTER v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - - 136

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3.——*Reference to three arbitrators—Different awards made on different dates—Validity of award—Arbitration Act, R.S.B.C. 1897, Cap. 9—Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 36.*] In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators being unable to agree, drew up and rendered three separate awards. Two of the arbitrators agreed in their findings. MORRISON, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to section 10, sub-section 36 of the Interpretation Act:—*Held*, on appeal, *per* IRVING and CLEMENT, JJ., that said sub-section 36 does not apply to the construction of a document *inter partes*, as here, but to something done pursuant to statute. *Per* HUNTER, C.J.: The arbitrators having acted *separatim* in making their award, an objection to a finding so made is fatal. MCLEOD v. HOPE AND FARMER. - - - - - - - 56

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AUDI ALTERAM PARTEM—*Cont'd.*

for and obtained a grant under said section 3. *Held*, on appeal (MORRISON, J., dissenting), that the Railway Company was entitled to be heard upon such application. *Held*, further, that a grant issued without such opportunity being given to the Railway Company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it. *Held*, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor in Council, and the absence of compliance with such condition was fatal, but *Held*, further, that in the circumstances here the defendant should be permitted, on giving notice to the Railway Company, to proceed with her application and that the Crown need not be a party to the action. ESQUIMALT AND NANAIMO RAILWAY COMPANY V. FIDDICK. - - **412**

BILLS OF EXCHANGE—*Bills of Exchange Act, R.S.C. 1906, Cap. 119—Cheque—Procurement by misrepresentation—Indorsement to third person—Holder in due course—Value—Notice of defect in title.*] Plaintiff, who was a confidential clerk of a director of the defendant Company, and had been himself director of the Company, accepted from the said director a cheque of the Company for $2,663.59. The cheque had been issued on the understanding that it was to be used only for the purpose of exhibiting it to a tax collector to secure to the said director further time for the payment of taxes on his own property. On the disappearance of the director, the defendant Company stopped payment of the cheque, and plaintiff brought action, claiming he was a holder in due course:—*Held*, on the evidence, that plaintiff had given no value for the cheque and that he had notice of the defect in title when the cheque was indorsed over to him. CAMPBELL V. NATIONAL CONSTRUCTION COMPANY. - - - - - - - - **444**

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COMPANIES ACT, 1897—*Extra-provincial company—Incorporation by Dominion*

COMPANIES ACT, 1897—*Continued.*

Act—Doing business in Province without licence—R.S.B.C. 1897, Cap. 44, Sec. 123—Intra vires.] Plaintiff Company incorporated by the Dominion Companies Act, but not licensed in British Columbia, entered into an agreement in British Columbia, through their resident agent, to supply certain machinery to defendant Company, a British Columbia corporation. The machinery was rejected for faultiness, and also because it was not delivered within the time agreed, thus necessitating the purchase of other machinery:—*Held*, that plaintiffs were carrying on business within the Province as contemplated by the Companies Act, 1897, and should have taken out a licence to do so. *Held*, further, that section 123 of the Companies Act, 1897, is not in conflict with the Dominion Companies Act. The latter gives a company the capacity or status to carry on business in the various Provinces of the Dominion, consistently with the laws thereof, and in British Columbia, a prerequisite to doing business is the securing of a licence. WATEROUS ENGINE WORKS COMPANY v. OKANAGAN LUMBER COMPANY. 238

2.——*Unlicensed foreign company suing on a foreign judgment — "Doing business," what constitutes—Companies Act, 1897, Secs. 123, 143, 144.*] A foreign company is not precluded by any provision in the Companies Act, 1897, compelling registration before it can transact any of its business within the Province, from access to the Courts of the Province in the capacity of an ordinary suitor. *Per* IRVING, J. (dissenting on this point): That the bringing of an action within the jurisdiction by an unlicensed foreign company was carrying on business as aimed at by sections 123 and 143 of the Companies Act, 1897. THE CHARLES H. LILLY COMPANY v. THE JOHNSTON FISHERIES COMPANY, LIMITED, AND A. R. JOHNSTON. - - - - - - - - 174

COMPANY LAW—*Forfeiture of shares—Abandonment by acquiescence in forfeiture.*] The plaintiff, H. A. Jones, one of the original shareholders of the defendant Company, organized in 1891, transferred 240 shares to his wife, the co-plaintiff, Clara B. Jones, on September 26th, 1893, and on the same day took an assignment of the same shares from her to himself. The assignment was never registered. The par value of the shares was $100, on which 80 per cent. had been paid up. In May, 1895, a call of 2½ per cent. was made, payable on June 14th following, with the usual penalty of forfeiture in case of default. Default was made, and the shares were declared delinquent, were offered for sale, but there being no bid, were withdrawn. In March, 1896 (new by-laws having been adopted in the meantime), a call of 6 per cent. was made on all shares, including those of the plaintiff, Clara B. Jones. Default was made and in due course the shares were declared delinquent. In April, 1897, a further call of 9 per cent. was made. On the 21st of May, 1898, a resolution was passed by the directors that Mrs. Jones be served with a notice requiring her to pay the call of 2½ per cent. by the 24th of June, and that in the event of default the shares would be forfeited. At a meeting of the directors on the 25th of June, a resolution of forfeiture, reciting the facts, was put, when Mrs. Jones's husband and co-plaintiff, who was present and a director, offered to pay $100 on account if the shares were not forfeited for six months. This offer was refused and the resolution was passed. In May, 1907, Mrs. Jones's solicitors inquired of the Company whether the shares had been forfeited, and offered to pay up the arrears, but were informed that the shares had been forfeited. She then brought action:—*Held*, on appeal, affirming the judgment of CLEMENT, J., at the trial (HUNTER, C.J., dissenting), that the plaintiff, Clara B. Jones had elected to abandon the undertaking by acquiescing in the forfeiture at a time when the Company's prospects were doubtful, and such abandonment could not be recalled when it was found that the Company was prosperous. JONES AND JONES v. THE NORTH VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED LIABILITY. - - - - - - 285

COMPANY LAW—*Continued.*

2.——*Sale of shares—Resolution of company empowering president to sell—Note given for purchase price—Note and shares placed in bank in escrow pending payment of the note—Allotment.*] Defendant purchased 50 shares in plaintiff Company, giving his note for $5,000 therefor, payable 10 days after date, signing at the same time an application for the shares. There was some evidence of an arrangement between the defendant and the president of the Company that defendant was to be employed as foreman by the Company, and that if he proved unable to perform the work, the president would take back the shares and refund the money. Apparently there was no formal allotment of the shares by the Company, beyond a resolution empowering the president to dispose of the shares, but the president placed the shares and the note in escrow in the bank, the shares to be

COMPANY LAW—*Continued.*

delivered upon payment of the note:—*Held*, affirming the judgment of HUNTER, C.J., that upon the signing of the application and the delivery of the note the defendant became the owner of the shares. ANGLO-AMERICAN LUMBER COMPANY v. MCLELLAN. - - - - - - - - - - 93

3.——*Winding-Up Act* (*Dominion*), *Sec. 22—Action by seaman for wages—Proceedings in Admiralty Court—Arrest of vessel—Leave to proceed in Admiralty—Irregularity—Practice.*] Where a company is being wound up pursuant to the Dominion Winding-Up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages taken without leave of the Court having charge of the winding-up, are not void, but only irregular. *Held*, further, that, in the circumstances here the leave should be granted without the imposition of terms. *In re* B. C. TIE AND TIMBER COMPANY, LIMITED (No. 2), AND COLAN v. THE SHIP RUSTLER. - - - - - 204

4.——*Winding-up—Action by liquidators—Sanction of Court—Necessity for—General manager—Duty as servant or agent—Transactions on his own behalf similar to those of company—Liability to account for profits—Trustee—Winding-up Act* (*Dominion*), *R.S.C. 1906, Cap. 144, Sec. 38.*] In an order for the winding-up of a company, it was provided that the liquidators, with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act, without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. Section 38 of the Act enables the Court to provide by any order subsequent to the winding-up order, that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court:—*Held*, that it is necessary to obtain an order, subsequent to the winding-up order, so as to get the benefit of section 38:—Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits":—*Held*, in an action to account for the proceeds of the sale of this timber, that defendant was not acting as the representative of the company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances. KENDALL AND ANOTHER v. WEBSTER. - 290

5.——*Winding up—Mortgagees—"Proceeding against the Company"—Winding Up Act, R.S.C. 1906, Cap. 144, Sec. 22.*] A company being in liquidation, the mortgagees went into possession prior to the issue of the winding-up order. On an application to restrain the mortgagees from selling under their security, objection was taken that the attendance of the mortgagees on the application and the approving of the winding-up order was such a taking part in the winding up as gave the Court jurisdiction to restrain them. This being overruled, the liquidator sought to restrain the mortgagees from selling without the sanction of the Court on the ground that such sale would be a "proceeding against the Company under section 22 of the Winding-Up Act:—*Held*, that the mortgagees were proceeding rightfully. *In re* B. C. TIE AND TIMBER COMPANY. - - - - - 81

6.——*Winding-up proceedings—Notice of—Action against company in liquidation—Liquidator appearing for first time in action on appeal—Costs.*] Judgment having been obtained against defendants in a foreign jurisdiction, suit was brought in British Columbia on the foreign judgment. The defendant Company had been wound up prior to the commencement of the suit, but this was not pleaded and was only raised by counsel for defendant Johnston at the opening of the trial, the liquidator of the Company not being present or represented; nor was the permission of the Court obtained to sue the Company:—*Held*, that the plaintiff must pay the costs occasioned subsequent to the receipt of notice of the Company's legal position. The liquidator of such a company appearing for the first time in the action when it came to appeal:—*Held*, that he should have only such costs as he could have obtained on an application to a judge in chambers. THE CHARLES H. LILLY COMPANY v. THE JOHNSTON FISHERIES COMPANY, LIMITED, AND A. R. JOHNSTON. 174

CONSTITUTIONAL LAW—*Dominion and Provincial legislation—Conflict—Laws governing sale and quality of milk—Ultra*

CONSTITUTIONAL LAW—*Continued.*

vires—Adulteration Act, R.S.C. 1906, Cap. 133, Sec. 26—Health Act, R.S.B.C. 1897, Cap. 91.] Section 20 of the Provincial Board of Health regulations governing the sale of milk not being clear as to what was intended to be prohibited, or what allowed, the Court refused to interfere with a judgment quashing a conviction thereunder: see *Barton* v. *Muir* (1874), L.R. 6 P.C. 134 at p. 144. REX v. GARVIN. - - 260

CONTRACT—*Construction of — Informal agreement — Parol evidence — Intention of parties—"More or less."*] Where there is an informal agreement, and such agreement is embodied in an informal memorandum in writing, parol evidence may be given to shew what the parties were dealing about. EMBREE v. MCKEE. - - - - - 45

2. *Extraction of ore from mine—Right of contractor as against mortgagee of lessee to percentage of fund representing ore extracted —Bargain with lessee of mine—Right against mortgagee of ore claiming under lessee—Notice—Lien on fund—Fraud.*] Where a miner takes out ore on a percentage basis, *i.e.*, for a fixed percentage of the smelter returns on the ore extracted, one taking a mortgage with notice of the agreement between the owner and the miner, cannot claim in priority to the latter. FORREST v. SMITH AND TRAVES. - - - 183

3.——*Negotiation — Incompleteness — Acceptance of offer not proved.*] Defendant telegraphed "Propose to go in from Alert Bay over to west coast of Island hunt elk; guarantee one month's engagement at least from arrival here; take earliest date you could arrive here; Paget recommends; state terms; wire reply." Plaintiff telegraphed in reply: "Five dollars per day and expenses"; upon which the defendant telegraphed "All right please start on Friday," but received no reply, and on the same day telegraphed the plaintiff: "Sincerely regret obliged to change plans and therefore will not be able to avail myself of your services. Kindly acknowledge receipt this wire; collect":—*Held*, that there was no contract. The telegram from plaintiff to defendant was not an acceptance of defendant's offer, but was merely a quotation of terms and could not bind plaintiff except as to terms. The acceptance of the defendant's offer of an engagement must be expressed and could not be implied. *Harvey* v. *Facey* (1893), A.C. 552, followed. LITTLE v. HANBURY. - - - - - - 18

CONTRIBUTORY NEGLIGENCE. 89
See MASTER AND SERVANT. 2.

2.——*See* MASTER AND SERVANT. - 397

COSTS—*Indemnity for—Where party attacked is protected against—Vancouver Island Settlers' Rights Act, 1904.*] In a statute declaring certain settlers entitled to mineral rights on their lands, there was a provision that any action attacking such rights should be defended by and at the expense of the Crown. Plaintiff Company applied to strike out the statement of defence on the ground that the matters raised therein had been disposed of in the plaintiff Company's favour in a former action of *Esquimalt and Nanaimo Railway Company* v. *Hoggan* (1894), A.C. 429. The application was dismissed and plaintiff Company appealed:—*Held*, on appeal (affirming the ruling of IRVING, J.), as to costs, that defendant was not in a position to claim any costs against plaintiff Company as his rights were being asserted by and defended at the expense of the Crown. ESQUIMALT AND NANAIMO RAILWAY COMPANY v. HOGGAN. - - - 49

COUNTY COURT—*Jurisdiction — Prohibition — Appeal — Judge acting outside his County at request of another judge—Persona designata—Municipal Clauses Act, B.C. Stat. 1906, Cap. 32, Sec. 137—Costs.*] The judge of the County Court mentioned in section 137 of the Municipal Clauses Act is *persona designata*, and the authority conferred upon him by said section may not be exercised by the judge of another County acting on his request and in his absence. The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal. CORPORATION OF THE CITY OF SLOCAN v. THE CANADIAN PACIFIC RAILWAY COMPANY. - - - - - 112

CRIMINAL LAW—*Appeal—Case stated—Circumstantial evidence—Identity—Weight of evidence—Criminal Code, Secs. 1,017, 1,018, 1,021.*] The deceased was murdered, according to the only eye witness (a girl of about 8 years), by a dark man with a fat face, dressed in brown trousers, in the seat of which were two rents. He also had on a black shirt with white stripes, and a dark coat. Prisoner had been seen in the vicinity of the murder, within 1,000 feet of the place, some 20 or 30 minutes previously. His dress corresponded with the shirt, coat and trousers mentioned, in addition to which he wore a stiff black hat. A knife, sworn to as having been in the prisoner's possession three days before, was found on the afternoon of the murder, still wet with

CRIMINAL LAW—*Continued.*

blood, a few feet from the murdered woman's body. When arrested, three days later, prisoner was without the dark shirt:—*Held*, refusing an application for a new trial, that the jury was justified on the evidence in coupling the prisoner with the crime. In a criminal, as in a civil case, on an application for a new trial on the ground that the verdict is against the weight of evidence, the Court will be governed by the fact whether the evidence was such that the jury, viewing the whole of the evidence reasonably could not properly find a verdict of guilty. While, under the criminal law, the accused person is not called upon to explain suspicious circumstances, there may yet come a time when, circumstantial evidence having enveloped him in a strong network of inculpatory facts, he is bound to make some explanation or stand condemned. REX v. JENKINS. - - - - - 61

2.——*Appeal—Certiorari—Right of appeal from single judge—Federal legislation—Necessity for to give such right—Criminal Code—Crown Office Rules.*] No appeal lies to the Full Court from the decision of a single judge quashing a conviction under the Criminal Code. REX v. CARROLL. - 116

3.——*Betting on race tracks—Criminal Code, Secs. 227 and 235—Lawful bookmaking.*] The plaintiff, a director and shareholder in defendant Company, brought an action for an injunction restraining the defendants from carrying out an arrangement entered into with a bookmaker named Jackson. The material points of the arrangement were that Jackson should be allowed to carry on his business as a bookmaker at a race meeting to be held on the defendants' race-track at Victoria, provided that he carried on his betting operations at no fixed spot on the race-track, but kept moving about. He was, however, to be allowed to pay off his bets at a booth on the track:—*Held*, following *Rex* v. *Moylett* (1907), 15 O.L.R. 348, that the proposed method of betting was legal. *Held*, also, that the booth from which it was proposed to pay off the bets was not a common betting house within the meaning of section 227 of the Code. *Semble*, that a corporation cannot be convicted of keeping a common betting house under sections 227 and 228 of the Code. FRASER v. VICTORIA COUNTRY CLUB, LIMITED. - - - - - - 365

4.——*Charge to jury—Exception to—When to be taken—Application for a case stated—Criminal Code, Secs. 1,014 and 1,021.*] After verdict, but before sentence, it is too late to move for a reserved case. Section 1,014, sub-section 2 of the Code provides that the Court before which any person is tried may, either during or after the trial, reserve any question of law arising either on the trial or on any proceedings preliminary, subsequent or incidental thereto, or arising out of the direction of the judge, for the opinion of the Court of Appeal . . . .:—*Held*, that this means that any reservation of a case after verdict must be of the Court's own motion. REX v. PERTELLA. REX v. LEE CHUNG. 43

5.——*Counselling a person in Canada to submit in the United States to an operation which in Canada would be criminal—Evidence—Corroboration.*] Counselling a person in Canada, to submit in a foreign jurisdiction to an operation which, if performed in Canada, would be a crime, is not an offence against the criminal law of Canada. New trial ordered, MORRISON, J., dissenting. REX v. WALKEM. - - - - - 1

6.——*Habeas corpus—Offence by foreign sailor on British ship—Leave of Governor-General for prosecution—Criminal Code, Sec. 591—Territorial Waters Jurisdiction Act, 1878 (Imperial), 41 & 42 Vict., Cap. 78.*] A preliminary hearing before a magistrate of a charge against a foreign seaman for an indictable offence committed on board a British ship within the English Admiralty jurisdiction is not such a proceeding for the trial and punishment of such person as to require the consent of the Governor-General pursuant to section 591 of the Criminal Code. REX v. TANO. - - - 200

7.——*Hotel keeper employing bar tender—Illegal act of latter—Knowledge of employer.*] A hotel keeper, having delegated authority to his porter or bartender to sell intoxicating liquors on the hotel premises, is responsible for his servant's infraction of the law regulating such sale. REX v. GATES. 280

8.——*Idle and disorderly person—Statutory offence — Necessity for person charged to properly account for herself—Police officer—Disclosure of his authority to accused person.*] A police detective, in plain clothes, questioned accused as to what she was doing in a certain house. He did not inform her that he was an officer:—*Held*, that the officer should have first disclosed his authority, and then expressly asked the accused to give an account of herself. REX v. REGAN. - - - - - - - 12

CRIMINAL LAW—*Continued.*

9.——*Justice of the peace—Statement by offending party—Summons issued thereon—Illegal issue of—Criminal Code, Secs. 654 and 655.*] A constable released from custody before the expiration of his term of imprisonment an Indian who had been convicted and sentenced to 14 days' imprisonment. The constable then went before one of the convicting magistrates and told him that acting upon instructions from the Superintendent of Indian Affairs at Ottawa, he had released the Indian. The magistrate thereupon had a summons issued and served upon the constable calling upon him to appear in answer to a charge of unlawfully releasing the Indian. The constable appeared before two justices of the peace upon said charge and by his counsel objected that the magistrate had not jurisdiction to deal with the matter as there was no sworn information. The magistrate overruled the objection, held a preliminary enquiry and committed the accused for trial:—*Held*, that accused could not set up section 654 of the Code providing that a sworn information was necessary before the magistrate could issue a summons. *In re* THOMPSON. - 314

10.——*Mandamus—Adjournment of preliminary examination — Discretion of the magistrate—Limitations of control exercised by the Supreme Court.*] Accused was one of 16 Chinamen charged with the same offence on similar evidence. Fourteen, including accused, were remanded pending decision of the other two as test cases. Upon resumption of proceedings, evidence similar to that on which the two first cases were committed for trial was put in, whereupon a remand of a week was granted to permit the procuring of further evidence. At the end of that time a second remand was granted. Upon application for a *mandamus* requiring the magistrate forthwith to commit the accused for trial:—*Held*, that a writ of *mandamus* will not issue directing a magistrate to commit prior to his adjudication of the case. That it is the duty of the magistrate to take the evidence of all concerned, and that the Court must not interfere with the discretion of the magistrate as to remands when that discretion is being exercised legally and in good faith. *In re* YING FOY. - - - - 254

11.——*Perjury—Criminal Code, Secs. 170 and 171 (2)—Judicial proceeding — Cross-examination on affidavit filed in civil proceedings — Absence of registrar during cross-examination.*] Where an order had been made in a proceeding under the Guardian's Appointment Act for cross-examination on an affidavit:—*Held*, that the judicial proceeding ended when the registrar left the room in which the cross-examination was being held after swearing the witness, leaving the official stenographer to take the cross-examination in shorthand. REX v. RULOFSON. - - - - - - 79

12.——*Perjury — Statutory declaration — Statutory form not followed—Jurat—Persons "authorized by law" to declare—Criminal Code, Secs. 174, 175, 1,002.*] There is a marked difference between taking an oath and a solemn declaration. In the one case, the false swearing itself constitutes the offence; in the other, before the procedure becomes a solemn declaration the statutory form must be followed. The permission to receive a solemn declaration includes the authority to make it. A solemn declaration is not made unless the declarant reads over to the officer receiving the declaration the form as given in the Act, or unless the officer reads over that form to the declarant. REX v. PHILLIPS. - - - - - 194

13.——*Summary trial—Police magistrate—Stipendiary magistrate for County acting in absence of and on his request—Persona designata—Criminal Code, Sec. 777, Sub-Sec. 2—B. C. Stats. 1900, Cap. 54, Sec. 168; 1908, Cap. 25.*] Even though a stipendiary magistrate for a County may have conferred upon him by a Provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under section 777 of the Criminal Code. It is desirable that there should be uniformity of decisions in all the Courts of Canada on Federal legislation. REX v. NAR SINGH. 192

14.——*Vagrancy — Means of support — Gambling — Evidence — Criminal Code, Sec. 207 (a.)*] Accused, when arrested, had on his person $27.20. Evidence was given that he lived by "following the race track," and that his general associates were gamblers and other criminal classes:—*Held*, that although he might be convicted under subsection (*b.*) of section 238 of the Code, yet he could not, on the evidence, be convicted of being a loose, idle, disorderly person, with no visible means of support, and that evidence that the money found on his person was obtained by gambling, was immaterial to the charge in this case. REX v. SHEEHAN. - - - - - - - 13

CRIMINAL LAW—*Continued.*

15.——*Warrant of commitment——Jurisdiction of magistrate not shewn—Conflicting descriptions.*] Where the warrant of commitment stated that the prisoner was convicted before a justice of the peace "in and for the said County of Westminster," but the document was signed "J. Pittendrigh, Cap'n, S. M.":—*Held*, that the warrant was bad. REX v. HONG LEE. - - 248

DAMAGES—Excessive. - - 367
See MASTER AND SERVANT. 4.

DEED—*Absolute conveyance—Reduction to mortgage as against devisee of grantee—Original arrangement for a loan—Alleged change in nature of transaction—Entries in diary of deceased grantee—Abandonment of right of redemption—Evidence—Inference from facts.*] S. advanced to W. the amount required to pay off a mortgage upon his land, taking as security a deed of the property absolute in form. Further advances were subsequently made. S. having died, W. brought action for redemption against his widow, executrix and sole devisee under S's will:—*Held*, that, when once it was established that the original position of S. and W. was that of mortgagee and mortgagor (as to which the onus was on W.), W. could not waive or abandon his vested right to redeem except by acts equivalent to a subsequent bargain so to do; and that the evidence failed to shew any such acts. WHITLOW v. STIMSON. - - - 321

DENTIST—"*Unprofessional conduct,*" *what constitutes—Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 66—Statute, construction of.*] Where a professional class is governed by a statute applying specifically to that profession, and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise. *In re* MOODY AND THE COLLEGE OF DENTAL SURGEONS. - - - - - 206

DENTISTS—*Authority of Council—Statute, construction of—Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 39—Whether retrospective.*] Section 39 of the Dentistry Act, empowering the Council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act. G. v. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA. - - - - 129

DIVORCE—*Appeal—Jurisdiction of Full Court.*] The Full Court of the Supreme Court of British Columbia possesses no jurisdiction to hear appeals, final or interlocutory, in divorce matters. *Scott* v. *Scott* (1891), 4 B.C. 316, followed. BROWN v. BROWN. - - - - - - - 142

2.——*Dissolution—Husband's suit for—Domicil—Foreign, matrimonial—Wife banished by husband.*] Petitioner in 1895, when aged about 19, came from Ontario to British Columbia, where he spent some three or four years in different places. In 1899 he married and at once removed to the North-West Territories. In 1907, satisfied of his wife's infidelity, he "made her go away," and after some financial arrangements between the couple, she left for New York, since which time no communication had passed between them. In the autumn of 1908, he came to Vancouver, B. C., and took a position in a mercantile house, and in January, 1909, filed a petition for divorce, alleging that he and the respondent were domiciled in British Columbia:—*Held*, that he had not acquired a domicil in British Columbia to entitle him to a divorce. ADAMS v. ADAMS. - - - - - 301

3.——*Petition by husband—Infidelity of wife—Husband also leading an immoral life—Discretionary power of Court—Exercise of—Refusal of husband's petition.*] The Court will not, unless under very exceptional circumstances of excuse or palliation, grant a divorce to a petitioner guilty of adultery. A. v. A. AND K. - - - - - 165

4.——*Petition by wife—Omission to aver non-collusion or non-connivance between petitioner and respondent—No appearance by respondent—No necessity for service of notice of subsequent proceedings in action—Matrimonial Causes Act, 1857, Sec. 41 (Imperial)—Practice.*] In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties:—*Held*, that such allegation is a positive statutory requirement preliminary to the issue of a citation. Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary. TIMMS v. TIMMS. - - - - - - - 410

5.——*Petition for dissolution of marriage signed by solicitor—Petitioner within the jurisdiction—Leave of Court—Dismissal of petition.*] Where the petitioner for divorce resides within the jurisdiction, the petition must be signed by the petitioner personally,

DIVORCE—*Continued.*

except when cause is shewn to justify the Court in dispensing with that formality. PLOWMAN v. PLOWMAN. - - - 164

6. *Practice—Damages—Assessment of—Jury—Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial).*] The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for divorce having been pronounced, the judge proceeded to assess the damages, when the co-respondent invoked section 33 of the Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial), which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of the jury:—*Held*, that, having consented to a trial without a jury, he was estopped from availing himself of this provision. WILLIAMS v. WILLIAMS AND HUTTON. - - 313

EXECUTION DEBTOR—*Dry legal trustee—Judgments Act, B.C. Stat. 1908, Cap. 26, Sec. 3.*] Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of section 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that section 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands, governed:—*Held*, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff. *Levy* v. *Gleason* (1907), 13 B.C. 357, explained. ENTWISLE v. LENZ & LEISER. - - - - - - - 51

FRAUD. - - - - - - 317
See TRADE NAME.

HIGHWAY—*Obstruction—Removal of—Nuisance—Prevention of access to property—Right of action—Individual injury.*] The right of ingress from and egress to a public highway parting a person's land is a private right differing not only in degree but in kind from the right of the public to pass and repass along such highway; and any

HIGHWAY—*Continued.*

disturbance of the private right may be enjoined in an action by the land owner alone. HARVEY v. BRITISH COLUMBIA BOAT AND ENGINE COMPANY. - - - 121

HUSBAND AND WIFE—*Husband and wife—Judicial separation—Cruelty—Residence within jurisdiction at commencement of suit—Cruelty committed outside of jurisdiction—Continuation of within jurisdiction—Apprehension of future—Jurisdiction.*] The petitioner, owing to acts of cruelty and misconduct, left her husband in Montreal, where the parties were domiciled, and came to British Columbia, bringing her child of the marriage, a girl of eight years, with her. The husband followed and commenced proceedings in British Columbia for the custody of the child. While in British Columbia he renewed the acts of cruelty, and apprehensive of further cruelty, the wife commenced proceedings for a judicial separation. He opposed the suit, on the ground that there was not jurisdiction in the Court inasmuch as he was not domiciled or resident in British Columbia:—*Held*, that the husband had established sufficient residence to give the Court jurisdiction to entertain the suit. JAMIESON v. JAMIESON. - - - 59

2.——*Settlement in anticipation of marriage—Covenant—Separation—Public policy.*] The parties to an intended marriage (which was subsequently entered into), executed an indenture of settlement providing, *inter alia*, as follows: "The trusts and purposes for which the said respective trust funds shall be held as hereinbefore mentioned are as follows: Upon trust to pay the income thereof to the said Hugh Nelson so long as the said parties shall live together as husband and wife. In case of the death of either party in trust for the survivor absolutely, and in case for any reason whatsoever the parties shall cease to cohabit, then upon trust to sell and convert the said trust property and to hold one-half of the proceeds of such sale and conversion upon such trusts as may be agreed upon between the parties for the children of said marriage (if any) and to divide the other half of the said proceeds between the said parties equally and if there shall be no such child or children then to divide the proceeds of such sale and conversion between the parties equally." The defendant also joined in an instrument creating the plaintiff joint tenant with him in his real estate, which was duly registered:—*Held*, that the agreement was void as being against public policy. NELSON v. NELSON. - - - - - - - 406

INFANT—An infant having been injured in the course of employment obtained by false representation, signed a release, but subsequently tendered repayment of the consideration for the release:—*Held*, that this was not a bar to his recovering. DARNLEY v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - - - - - 15

2.——*Custody of—Children's Protection Act of British Columbia, B.C. Stat. 1901, Cap. 9—Charitable institution—Religious persuasion of parent—Order of magistrate awarding custody—Change of such order—Jurisdiction—Habeas corpus.*] A magistrate made an order under the provisions of the Children's Protection Act of British Columbia awarding the custody of an infant to the Children's Aid Society of Vancouver, an undenominational Society, but, upon further evidence being submitted, made a second order committing the child to the care of the Children's Aid Society of Our Lady of the Holy Rosary, a Roman Catholic institution:—*Held*, on appeal, affirming the decision of MARTIN, J., that the magistrate had power to make the second order in the circumstances. *In re* HOWARD. - 307

INJUNCTION. - - - - 317
See TRADE NAME.

INSURANCE—*Accident—Death by drowning—Evidence sufficient to go to the jury.*] Deceased was insured in the defendant Company "against loss of life while sane, resulting directly and independently of all other causes from bodily injuries effected from external, violent and accidental means." There was evidence that he had been drinking heavily just previous to his death, which occurred while he was on a fishing trip. His companion had left him cooling his bare feet in a stream, but on returning to him in less than half an hour afterwards found him lying in about 27 inches of water, his boots and socks on his feet, and his fishing rod on the bank, with the handle in the water. There was an ante-mortem bruise on the back of the head. It was suggested that he was subject to fainting spells, or dizziness, and evidence was given that he had had one of such spells a few weeks before the accident. There was also evidence that he was not in a firm condition, physically, and had to take a rest several times during his walk to the fishing place on the day of the accident:—*Held*, on appeal (*per* HUNTER, C.J., and MORRISON, J.), upholding the verdict of the jury at the trial, that the direct cause of death was by drowning, and that the Company was liable. *Per* IRVING, J.: That there was not sufficient

INSURANCE—*Continued.*

evidence to justify the case going to the jury. YOUNG v. MARYLAND CASUALTY COMPANY. - - - - - - - - - - 146

INTERPRETATION ACT—*R. S. B. C. 1897, Cap. 1, Sec. 10, Sub-Sec. 36.*] In an agreement between the parties, provision was made for the submission of any dispute to three persons as arbitrators, the arbitration to be in accordance with and subject to the provisions of the Arbitration Act. On a reference, following a dispute, under the agreement, the arbitrators being unable to agree, drew up and rendered three separate awards. Two of the arbitrators agreed in their findings. MORRISON, J., came to the conclusion that the agreement of a majority constituted an award, pursuant to section 10, sub-section 36 of the Interpretation Act:—*Held*, on appeal, *per* IRVING and CLEMENT, JJ., that said sub-section 36 does not apply to the construction of a document *inter partes*, as here, but to something done pursuant to statute. MCLEOD v. HOPE AND FARMER. - - - - - - - - 56

JURISDICTION. - - - 142
See APPEAL. 3.

2.——*See* COUNTY COURT. - - 112

3.——*Board of Railway Commissioners—Full Court—Co-ordinate jurisdiction.*
See RAILWAYS. - - - 83

JURY—*Certificate for special—Jurors Act, R.S.B.C. 1897, Cap. 107, Sec. 63—Practice.*] A certificate for a special jury will not be granted unless it is shewn that a common jury cannot adequately pass upon the facts at issue. CROSS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY. - - - 329

2.——*Evidence sufficient to go to.* - 146
See INSURANCE.

LAND REGISTRY ACT—*B.C. Stat. 1906, Cap. 23, Sec. 74—Non-registration of conveyance.*] Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of section 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title, the learned trial judge ruled that section 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in

LAND REGISTRY ACT—*Continued.*

equity, to lands, governed: — *Held*, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff. *Levy* v. *Gleason* (1907), 13 B.C. 357 explained. ENTWISLE v. LENZ & LEISER. - - **51**

MASTER AND SERVANT—*Dangerous works—Knowledge of—Structural defect—Risk voluntarily incurred—Negligence—Contributory negligence.*] The plaintiff, whilst engaged as a switchman on the defendants' electric-motor tramway, running between their ore-bins and smelter furnaces, after having set the switch for the motor which was about to return from the furnaces, started to re-cross the track in order to take his usual seat on the head end of the motor. His foot got caught in a hole in the floor between the rails. He shouted to the motorman who immediately cut off the current and applied the brakes, but the motor did not stop soon enough to prevent the accident, with the result that the motor ran upon the plaintiff breaking his leg in three places. The evidence disclosed the facts that the hole in question had been there some time previous to the accident; that the accident occurred just before daybreak and that the plaintiff had not been at work for more than one shift. There was also some suggestion in the evidence that the hole was left there for the purpose of making room for a bar connecting the two rails in the track:—*Held*, on appeal (affirming the judgment of IRVING, J., at the trial), that the accident was caused by a structural defect in the ways of the defendant Company, and that the plaintiff was entitled to recover. BARNES v. BRITISH COLUMBIA COPPER COMPANY, LIMITED. - - - **397**

2.——*Injury af workman—Negligence—Contributory negligence—Serious and wilful misconduct—Serious neglect.*] Plaintiff was employed as a brakeman at defendant Company's smelter. Part of his duty was to indicate to the engineer to stop at the required spot where the slag-pots brought out from the smelter were to be emptied, and the engineer was not to move again until signalled to do so. Certain points existed where there were chains which were used to anchor the frame of the car to the track in order to prevent the locomotive being capsized when the pot, weighing about 12 tons, was being emptied. On the occasion in question, the engineer reached the chain point, when, considering he had gone too far, reversed, going back about two feet. Plaintiff, meanwhile, had dismounted and thinking the engineer was not going to back up, put his hand under to draw the chain through and anchor the car. In doing so his hand was run over and seriously injured. There were hooks supplied for this purpose, but plaintiff did not use one:—*Held*, on appeal, *per* HUNTER, C.J., and MORRISON, J. (affirming the judgment of MARTIN, J., on different grounds), that the accident was due to a natural misunderstanding in the circumstances and that there was neither negligence nor contributory negligence. *Per* CLEMENT, J.: That the evidence did not warrant a finding that the engineer was guilty of negligence and the action was rightly dismissed. HARRIGAN v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY, LIMITED. - **89**

3.——*Injury to and resulting death of servant—Workmen's Compensation Act, 1902—Negligence—Elevator—Warning—Accident arising out of and in course of employment—"Serious and wilful mis-conduct"—Disobedience of directions.*] Deceased, a foreigner, but able to speak and understand, though not to read or write, English, entered the employment of defendants at work in which he had no previous experience. Before commencing work, a fellow labourer was cautioned by the foreman, in presence of the deceased, not to allow the latter to use a freight lift. He nevertheless attempted to use it, and was cautioned not to do so. He was later in the day killed in the lift:—*Held*, that he was guilty of serious and wilful misconduct. GRANICK v. BRITISH COLUMBIA SUGAR REFINERY COMPANY. **251**

4.——*Locomotive engineer—Death of caused by jumping from train—Equipment of train—Efficiency of—Negligence of driver—Competency of fellow servants—Damages, excessive—New trial—Costs.*] Plaintiffs sued defendant Company for damages for the death of their son, a locomotive engineer in the defendants' employ, who was killed by having jumped from a train over which he had lost control. The jury found $6,000 damages:—*Held*, on appeal, *per* HUNTER, C.J., that the only verdict reasonably open to the jury was that the deceased lost his life by his own negligence. *Per* IRVING, J.: That the damages were excessive. *Per* MORRISON, J.: That the verdict should stand. New trial ordered. WHITE AND WHITE v. VICTORIA LUMBER AND MANUFACTURING COMPANY. - - - - **367**

MASTER AND SERVANT—*Continued.*

5.——*Workmen's Compensation Act, 1902—B.C. Stat. Cap. 74—Employment obtained by infant misrepresenting his age—Whether this constitutes "serious and wilful misconduct"—Release signed by infant.*] The making of a false representation by an infant to the effect that he is of full age in order to secure employment is not such "serious and wilful misconduct or serious neglect" as disentitles the applicant to recover under the Workmen's Compensation Act, 1902, it not appearing that the accident in question was "attributable solely" to such misrepresentation. An infant having been injured in the course of employment so obtained, signed a release, but subsequently tendered repayment of the consideration for the release:—*Held*, that this was not a bar to his recovering. DARNLEY v. CANADIAN PACIFIC RAILWAY COMPANY. - - 15

6.——*Workmen's Compensation Act, 1902—Injury affecting claimant's earning power—Estimating compensation—Injury partial, though permanent.*] In estimating compensation under the Workmen's Compensation Act, for the loss of a thumb, consideration must be given to the fact that while the claimant is not thereby entirely prevented from carrying on his occupation, his chances of employment in competition with others are lessened, and his earning power consequently reduced. ROYLANCE v. CANADIAN PACIFIC RAILWAY COMPANY. - - 20

MECHANIC'S LIEN—*Charge against a mine—Assignment of proceeds of ore extracted—Mechanics' Lien Act Amendment Act, 1900, Sec. 12.*] The lien upon a mine as provided in section 8 of the Mechanics' Lien Act, R.S.B.C. 1897, Cap. 132 (as enacted by section 12 of Cap. 20, 1900), is a lien on the mine itself and not on any fund arising from the sale of ore extracted from the mine. LAW v. MUMFORD. - - 233

2.——*Filing of claim for lien—Time of completion of work—Notes discounted by bank—Notice to owner—Mechanics' Lien Act Amendment Act, 1907, Cap. 27, Sec. 2—Estoppel by receipted account.*] By agreement dated the 23rd of December, 1907, the defendant, National Construction Company, Limited, agreed with the defendant Jsong Mong Lin to construct a building upon the property of the last named defendant for the sum of $80,000. The plaintiffs furnished material from time to time during the course of construction. The Construction Company got into financial difficulties and was unable to complete its contract. On

MECHANIC'S LIEN—*Continued.*

the 24th of October, 1908, a deed of the property from Jsong Mong Lin to her husband, Loo Gee Wing, was executed and deposited in the Land Registry office with the application to register same. On the 28th of October, 1908, the plaintiffs' solicitors in the Coughlan case sent to the defendant, Jsong Mong Lin, by registered mail, a notice addressed to her, care of Loo Gee Wing, Victoria, B.C., which notice was in the following terms: "We beg to notify you that J. Coughlan & Company intend to file a mechanic's lien against your property in the City of Vancouver, being lots 1 and 2, westerly 10 feet of lot 3, in block 29, district lot 541, for the balance due, amounting to $5,180.92, for goods and materials supplied and work done by the National Construction Company on the building on the above mentioned lots, if not paid to us at once." On the same day that this notice was posted the plaintiffs filed a mechanic's lien in respect of their claim in the County Court office at Vancouver, and on the 27th of November, 1908, commenced action to enforce same. McLean Bros. and other lien claimants had meanwhile commenced their actions in which Loo Gee Wing was made party defendant as owner, and on the 7th of December, 1908, an order was made by GRANT, Co. J., upon the application of Loo Gee Wing, consolidating this and the other actions pending. McLean Bros. had served upon Loo Gee Wing a notice similar in terms to the above. On the trial the claim of the present plaintiffs (J. Coughlan & Company) came on first for hearing and upon the conclusion of the evidence the learned judge dismissed the plaintiffs' action on the grounds that Loo Gee Wing, the owner of the property, was not before the Court in the Coughlan case, that there was no notice given to the owner of the property in the terms of section 3 of the Mechanics' Lien Act Amendment Act, chapter 27 of the statutues of 1907, and that such notice as was given was not given within 15 days before the completion of the work:—*Held*, that section 2 of the Mechanics' Lien Act Amendment Act, 1907, has no application where action is begun more than 15 days before the completion of the work. *Held*, further, that "15 days before the completion of the work" means 15 days before the completion of the work of the building as a whole and not 15 days before the completion of the delivery of the material by the vendor. Section 24 of the Mechanics' Lien Act Amendment Act, 1900, enacts that where in any action for a lien the amount claimed to be owing is adjudged to be less

MECHANIC'S LIEN—*Continued.*

than $250, the judgment shall be final and without appeal:—*Held*, that this applies only where a sum of money has been awarded, and that the existence of a valid lien is pre-supposed. The plaintiffs, J. Coughlan & Company, Limited, having during the course of construction given a receipt for payments which they had never received:—*Held*, that they were estopped from claiming such amount against the owner. Promissory notes having been received and discounted by the lien holder for the materials supplied:—*Held*, that the lien was not thereby waived. Effect on lien of accepting note. J. COUGHLAN & COMPANY, LIMITED v. NATIONAL CONSTRUCTION COMPANY AND JSONG MONG LIN AND MCLEAN v. LOO GEE WING. - - - - - - 339

MINING LAW—*Contract—Extraction of ore from mine—Right of contractor as against mortgagee of lessee to percentage of fund representing ore extracted — Bargain with lessee of mine—Right against mortgagee of ore claiming under lessee—Notice—Lien on fund—Fraud.*] Where a miner takes out ore on a percentage basis, *i.e.*, for a fixed percentage of the smelter returns on the ore extracted, one taking a mortgage with notice of the agreement between the owner and the miner, cannot claim in priority to the latter. FORREST v. SMITH AND TRAVES. - - - - - - - - - - 183

MISFEASANCE. - - - 330
See MUNICIPAL LAW. 6.

MORTGAGE—*Redemption of—Sufficiency of notice of exercising power of sale—Notice unsigned—Conditional — Waiver of — Mortgagee—Selling on credit—Sale carried out by mortgagees in form as absolute owners not as mortgagees under a power of sale—Non-disclosure of sale.*] In an action by the purchaser of the equity of redemption in mortgaged premises to redeem the same upon the ground, *inter alia*, that no proper or sufficient notice of exercising power of sale had been served upon him:—*Held*, *per* IRVING and CLEMENT, JJ. (MARTIN, J., dissenting), no objection to the validity of such notice that it was expressed to be a notice by the agent of the mortgagee: or that it was unsigned, it having been mailed to the plaintiff accompanied by a letter signed by the agent in his own name; nor was such notice conditional by reason of a statement in such letter that if the plaintiff refused to sign a certain document "the only course open to me is to serve you with the enclosed notice of my intention to sell"; nor was it a valid objection to the sufficiency

MORTGAGE—*Continued.*

of such notice that the unsigned document stated such sale would be after the expiration of one calendar month while the signed letter accompanying it informed the plaintiff "I purpose to sell as soon as possible"; nor was such notice waived or abandoned by the mortgagee having served a fresh notice of exercising power of sale some two years subsequently. The above notice was served on the plaintiff in October, 1897, and by articles of agreement dated the 8th of December, 1899, and expressed to be made between the defendant Corporation as vendors and the defendant Lemon as purchaser, the defendant Corporation agreed to sell the mortgaged premises for $1,200:—*Held*, not a valid objection to such sale that it did not purport to be in pursuance of the power contained in the mortgage; nor that the mortgagee agreed to sell as absolute owner; nor that such sale was on credit. *Held*, also, that neither the non-disclosure by the mortgagee of said sale of the 8th of December, 1899, nor the service in January, 1902, of a fresh notice of exercising power of sale, entitled the plaintiff to redeem but, *Held*, affirming HUNTER, C.J., that the plaintiff was entitled to an account of such sale. Judgment of HUNTER, C.J., decreeing an account, but refusing redemption affirmed. LOCKHART v. YORKSHIRE GUARANTEE AND SECURITIES CORPORATION, LIMITED *et al.* - - - - - - - - 28

MUNICIPAL LAW—*Alderman—Contract or agreement with the Corporation—Debt due to Corporation—Compromise of—Disqualification—Penalty—Bona fides—Supreme Court Act—Discretion.*] Defendant, having a judgment against him by the City for taxes in a test case, entered into an understanding with the City whereby in consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected an alderman:—*Held*, that this agreement came within the disqualification clause of the Municipal Clauses Act. *Held*, further, that as in this case the defendant had acted *bona fide*, the Court would exercise its discretion under the Supreme Court Act, to relieve against the penalty. MASON v. MESTON. - - - - - - - - 22

2.—— *Arbitration — Property injuriously affected—Lowering grade—Right of owner of abutting property to take arbitration proceedings—Vancouver Incorporation Act, 1900, Cap. 54, Sec. 133, Sub-Secs. 5 and 9.*] The owner of property abutting on a street, the

MUNICIPAL LAW—*Continued.*

grade of which has been lowered by the Corporation, is entitled to arbitration for determining whether his property has been injuriously affected. THE BISHOP OF NEW WESTMINSTER v. THE CORPORATION OF THE CITY OF VANCOUVER. - - - 136

3.——*By-law regulating hawkers — Construction of—Validity—Regulation and prohibition—Difference between—Vancouver Incorporation Act, 1900, Cap. 54, Sec. 125, Sub-Sec. 110.*] Where a municipal by-law was passed prohibiting hawkers and peddlers of vegetables and similar products from pursuing their calling throughout the municipality during certain hours on market days:—*Held, per* HUNTER, C.J., dissenting, that the by-law was regulatory and not prohibitory in its provisions and therefore *ultra vires* the Council. *Per* IRVING, J.: The by-law in question was not authorized by the statute. *Per* MORRISON, J.: A statutory power to pass by-laws regulating a trade does not authorize the prohibition of such trade or the making it unlawful to carry on a lawful trade in a lawful manner. REX v. SUNG CHONG. - - 275

4.——*Defective sidewalk—Accident — Injury arising from—Duty of municipality to safeguard — Misfeasance — Non-feasance — Damages.*] Plaintiff was injured by stepping on a wooden grating in a sidewalk, which grating, when put in, was found on the evidence to be structurally defective. The grating was put in by the owners of the abutting property under a permit from the Corporation:—*Held*, that notwithstanding the statutory provision as to notice to the Corporation of accidents so happening, the Corporation must be taken to have had knowledge of the originally defective construction of the grating, and were therefore liable. MACPHERSON v. THE CORPORATION OF THE CITY OF VANCOUVER. - - 326

5.——*Drain—Construction of—Connection of private drain—Increase of drainage area—Act of corporation diminishing capacity of drain—Omission to enlarge capacity of original drain—Damages—Liability of corporation for.*] In a drain constructed by the defendant municipality some 17 years before the cause of action, there had been placed a man-hole which reduced the capacity of the drain. In addition to this the drainage area had been greatly increased. Plaintiff's basement drain was connected with this drain with the knowledge and consent of the Corporation. The woodwork in the municipal drain having become decayed, some of it broke away and caused an obstruction which, in a heavy rainfall, flooded plaintiff's basement, causing damage:—*Held*, following *Hawthorn Corporation* v. *Kannuluik* (1906), A.C. 105, that the Corporation was liable, notwithstanding that the drain might have been sufficient for the purpose when first built; but that here there was the further element that the drain had been allowed to remain in a defective condition. WOODWARD v. THE CORPORATION OF THE CITY OF VANCOUVER. 403

6.——*Nuisance in the highway—Defective culvert—Damage from—Whether municipality liable for non-repair—Non-feasance—Misfeasance.*] Plaintiff's horse stumbled through a rotten culvert on a public road within the municipal limits, and plaintiff and his wife were thrown from the vehicle and injured. The culvert, constructed of cedar, covered with a few inches of earth, had been placed there some 16 years previously, and it had never been inspected, repaired or renewed during that time:—*Held*, that the Municipality had been guilty of misfeasance in allowing the culvert to become a nuisance, and was therefore liable. *Borough of Bathurst* v. *Macpherson* (1879), 4 App. Cas. 256, followed. Observations on the immunity from liability to actions for damages enjoyed by English municipal bodies. COOKSLEY v. THE CORPORATION OF NEW WESTMINSTER. - - - 330

7.——*Obstructing thoroughfare—Nuisance—Municipal by-law dealing with—Validity of.*] Under a power to pass by-laws "for preventing and abating public nuisances" a municipal council may impose penalties for obstructing public thoroughfares by congregating thereon in crowds and for refusing to disperse when so requested by the police, for such an obstruction is a public nuisance at common law. REX v. TAYLOR. - - - - - - - - - 235

8.——*Sale of liquor—Regulation of—Conflicting by-laws—Offence committed by employee—Vancouver Incorporation Act, 1900, Secs. 125 (19), 161, 162—Certiorari.*] By a by-law passed in November, 1900, the Licensing Board, pursuant to sections 161 and 162 of the Vancouver Incorporation Act, 1900, defined the conditions governing the sale of liquor within the municipality. The Board again dealt with the subject in August, 1905, forbidding the sale of liquor "from or after the hour of 11 o'clock on Saturday night till six of the clock on Monday morning thereafter," and provided that

MUNICIPAL LAW—*Continued.*

"such portions of any and all by-laws heretofore passed regulating the sale of intoxicating liquors in the City of Vancouver as conflict with the provisions of this by-law are hereby repealed." Sub-section 19 of section 125 of the Vancouver Incorporation Act, 1900, empowers the City Council to pass by-laws for "the closing of saloons, hotels and stores and places of business during such hours and on Sunday as may be thought expedient." In pursuance of this sub-section, the Council, in May, 1902, passed a by-law preventing the sale of liquor between the hours of 11 o'clock on Saturday night and six o'clock on Monday morning:—*Held*, that the Council, in passing this last mentioned by-law, had gone beyond the powers meant to be conferred by sub-section 19 of section 125. *In re* ROBERTS. - 76

NEGLIGENCE. - - - - - 89
See MASTER AND SERVANT. 2.

2.——*See* MASTER AND SERVANT. - 397

NEW TRIAL. - - - - - 1
See CRIMINAL LAW. 5.

NON-FEASANCE. - - - 330
See MUNICIPAL LAW. 6.

PARTITION—*Lands subject to agreement to convey — Agreement — Construction of— Taxation — Evasion of — Exemption from— Railway subsidy lands—B. C. Stat. 1896, Cap. 8.*] There is a substantial distinction between a conveyance and an agreement to convey. Where, therefore, an agreement provided for a formal conveyance by one party to the other party of the latter's moiety, upon the latter's request:—*Held*, that provisions respecting partition of the property did not come into effect until the execution of such conveyance. *Held*, also, that the question that the clause providing for the formal conveyance was merely a device to escape taxation, could be raised only in a proceeding by the Crown. ANGUS AND SHAUGHNESSY AND THE COLUMBIA AND WESTERN RAILWAY COMPANY v. HEINZE. 157

PARTNERSHIP—*Action to establish— Declaration that one partner is trustee for the others—Profits—Dissolution of partnership —Accounting.*] Plaintiff and the two defendants Holland were real estate agents in partnership, but entered into certain investments on their own account (aside from the agency business), in the purchase of three lots, on account of which they paid down $294. Being unable to meet the succeeding calls when due, they invited defendant

PARTNERSHIP—*Continued.*

Horne into the transaction, he to pay 85% of the purchase money and the remaining three to contribute 15%, the profits to be divided. Horne took over the agreements to purchase and eventually received a conveyance of the lots. There was a verbal agreement that if a sale could be effected before the second instalment of the purchase money became due, and if that sale netted a profit of over 15% the old partnership should share with Horne equally in the profits. This sale was not made, but four months after the due date of the instalment, Horne sold a half interest:—*Held*, on appeal (*per* HUNTER, C.J., and CLEMENT, J.), that Horne was a trustee for the partnership consisting of the plaintiff, himself and his two co-defendants. *Per* IRVING, J.: That Horne was not called upon to account until he had been re-imbursed the money he had been compelled to put into the transaction. GORDON v. HORNE, HOLLAND AND HOLLAND. - - - - - - - - - 138

PENALTY — *Power of Court to relieve against.*] Defendant, having a judgment against him by the City for taxes in a test case, entered into an understanding with the City whereby in consideration of a promise to pay, and an extension of time for payment, a release of one-half the amount of such taxes was given. He was afterwards nominated and elected an alderman:—*Held*, that as in this case the defendant had acted *bona fide*, the Court would exercise its discretion under the Supreme Court Act, to relieve against the penalty. MASON v. MESTON. - - - - - 22

PERJURY. - - - - - - 79
See CRIMINAL LAW. 11.

PERSONA DESIGNATA—*Police magistrate — Stipendiary magistrate for County acting in absence of and on his request— Criminal Code, Sec. 777, Sub-Sec. 2.*] Even though a stipendiary magistrate for a County may have conferred upon him by a Provincial statute the powers of a police or stipendiary magistrate for a city or incorporated town, nevertheless he is not a police or stipendiary magistrate for the purpose of trying offences summarily under section 777 of the Criminal Code. REX v. NAR SINGH. - - - - - - - - 192

PRACTICE—*Admiralty law—Reference to registrar—Inspection of ship and cargo.*] On a reference to the registrar to ascertain the damages caused by a collision he has power of his own motion to inspect the ships and cargoes concerned. STOCKHAM v. THE SPRAY. - - - - - - 191

PRACTICE—*Continued.*

2.——*Affidavit in Supreme Court action sworn before a notary—Oaths Act, R.S.B.C. 1897, Cap. 3; Interpretation Act, R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 50.*] A notary public within the Province of British Columbia has not authority to take an affidavit in an action in the Supreme Court. LAITNEN v. TYNJALA. - - - -

3.——*Amendment of writ on ex parte application—Neglect to serve order amending—Application to add liquidator as party—Step in proceedings—Order LXIV., r. 13.*] An application, *ex parte*, to amend the writ by adding to the indorsement a description of certain real estate, is a step in the proceedings, although the amending order was not served on the defendants. GOLDSTEIN v. THE VANCOUVER TIMBER AND TRADING COMPANY. - - - - - - 408

4.——*Costs—Third party—Evidence—Discretion.*] The question of allowing a third party his costs is purely one of discretion, dependent upon the circumstances of the case. BAKER v. ATKINS (MARTIN, Third Party). - - - - - - - 320

5.——*Costs, security for—Plaintiff resident temporarily out of the jurisdiction.*] The plaintiff, having been returned by an examining board as having failed to pass the requisite examination to entitle him to practise his profession, brought an action against the board of examiners for damages for fraud and conspiracy. At the time of action brought, he was living and practising at a place without the jurisdiction. On an application for an order to compel him to give security for costs, he filed an affidavit stating that his absence was only temporary, that his home was in Victoria and that his intention was to present himself for examination again:—*Held*, that his absence was due to the action of the defendants which compelled him to follow his profession outside the jurisdiction pending his admission. RICHARDS v. VERRINDER *et al.* - - - - - - - - - 438

6.——*Costs—Increased counsel fee—Fiat for—Application to judge—Procedure applicable—Principles governing.*] On an application for increased counsel fee, no formal summons is necessary; merely a letter notifying the other side of intention to apply at a time mutually convenient, and the applicant should have a certificate from the registrar, shewing dates and extent of sittings and the highest fee taxable by the registrar. These facts should be submitted without any argument. Observations on the reasons which will be taken into consideration by a judge in exercising this discretion. BRYCE *et al.* v. CANADIAN PACIFIC RAILWAY COMPANY. - - - - 155

7.——*Divorce—Damages—Assessment of—Jury—Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial.)*] The parties in an action for divorce consented to an order that the trial should take place before a judge without a jury. A decree for divorce having been pronounced, the judge proceeded to assess the damages, when the co-respondent invoked section 33 of the Divorce and Matrimonial Causes Act, 20 & 21 Vict., Cap. 85 (Imperial), which provides that the damages to be recovered in any such petition (for divorce) shall in all cases be ascertained by the verdict of a jury:—*Held*, that, having consented to a trial without a jury, he was estopped from availing himself of this provision. WILLIAMS v. WILLIAMS AND HUTTON. - - - 313

8.——*Divorce—Petition for dissolution of marriage signed by solicitor—Petitioner within the jurisdiction—Leave of Court—Dismissal of petition.*] Where the petitioner for divorce resides within the jurisdiction, the petition must be signed by the petitioner personally, except when cause is shewn to justify the Court in dispensing with that formality. PLOWMAN v. PLOWMAN. - - - 164

9.——*Divorce and matrimonial causes—Petition by wife—Omission to aver non-collusion or non-connivance between petitioner and respondent—No appearance by respondent—No necessity for service of notice of subsequent proceedings in action—Matrimonial Causes Act, 1857, Sec. 41 (Imperial).*] In the affidavit filed by the petitioner for a judicial separation it was not alleged that there was no collusion or connivance between the parties:—*Held*, that such allegation is a positive statutory requirement preliminary to the issue of a citation. Where the respondent has been served with a citation and has not appeared, service of notice of subsequent proceedings in the cause is not necessary. TIMMS v. TIMMS. - - - - - 410

10.——*Examination of parties—Discovery of documents—Delivery of pleadings—Rules 225 (c.) 241, 370 (1).*] The examination of on officer of a corporation may be had without an order being specially made for that purpose. ROBINSON v. MCKENZIE BROTHERS, LIMITED. MARSHALL v. THE CORPORATION OF THE CITY OF VANCOUVER. - 220

PRACTICE—*Continued.*

11.——*Examination of parties—Officer of municipal corporation—Order XXXIA.*] A park commissioner, being a legislative functionary, and not subject to the control or direction of the municipal corporation, is not an officer of the latter body within the meaning of Order XXXIA, and is not examinable under said order before trial in proceedings against the corporation. ANDERSON AND ANDERSON v. THE CORPORATION OF THE CITY OF VANCOUVER. - - 222

12.——*Jury—Certificate for special—Jurors Act, R.S.B.C. 1897, Cap. 107, Sec. 63.*] A certificate for a special jury will not be granted unless it is shewn that a common jury cannot adequately pass upon the facts in issue. CROSS v. ESQUIMALT AND NANAIMO RAILWAY COMPANY. - - - 329

13.——*Pleading—Parties—Joinder of defendants—Fraudulent conveyance—Action by judgment creditor to set aside—Grantor not a necessary or proper party—Insolvent defendant.*] The execution debtor is not always a necessary or proper party to an action by an execution creditor to set aside a conveyance as fraudulent. GALLAGHER v. BEALE *et al.* - - - - - - - - - - 247

14.——*Postponement of statutory sittings—Fresh notice of trial—Whether necessary in consequence—Rule 440.*] It is not necessary to give fresh notice of trial in consequence of the postponement of the statutory sittings. ATWOOD v. KETTLE RIVER VALLEY RAILWAY COMPANY. - - 203

15.——*Security for costs—Insolvency of administrator—Nominal trustee—Workmen's Compensation Act, 1902.*] While as a general rule security for costs will be ordered in case proceedings are taken by an insolvent person for the benefit of other persons, this rule does not apply in the case of an executor. If he is authorized by statute to take proceedings for the benefit of other persons it makes no difference that the moneys recovered are not payable to the executor as part of the estate, but are payable directly to the persons beneficially interested. *Sykes* v. *Sykes* (1869), L.R. 4 C.P. 645, and *White* v. *Butt* (1909), 1 K.B. 50, followed, and the principle applied to proceedings by an executor under the Workmen's Compensation Act. An application for security for costs in an arbitration under the Workmen's Compensation Act should be made to the arbitrator and not to a judge in Chambers; and should be made promptly. KRUZ v. CROW'S NEST PASS COAL COMPANY, LIMITED. - - 385

PRACTICE—*Continued.*

16.——*Security for costs of appeal—Order LVIII., r. 15A.—Discretion.*] A respondent must make his application for security for costs of appeal with due promptness, and it is too late to apply when the appeal is set down and about to be heard. *Held*, on appeal, that this order was within the discretion of the judge below and should not be interfered with. *Ward* v. *Clark* (1896), 4 B.C. 501, overruled. PIPER v. BURNETT *et al.* - - - - - - - 209

17.——*Special case—Questions of fact—Proceedings extra cursum curiæ.*] A special case asking the Court to determine suggested or possible points of law in advance of an agreement or determination as to the facts, is not to be encouraged. NATIONAL TRUST COMPANY, LIMITED v. DOMINION COPPER COMPANY. - - - - - - 190

18.——*Stay of proceedings pending appeal—Terms.*] An application for a stay of proceedings is generally an application for an indulgence, and the applicant should pay the costs.] ALEXANDER v. WALTERS. 250

19.——*Winding-Up Act (Dominion), Sec. 22—Action by seaman for wages—Proceedings in Admiralty Court—Arrest of vessel—Leave to proceed in Admiralty — Irregularity.*] Where a company is being wound up pursuant to the Dominion Winding-Up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular. *Held*, further, that, in the circumstances here the leave should be granted without the imposition of terms. *In re* B. C. TIE AND TIMBER COMPANY, LIMITED (No. 2), AND COLAN v. THE SHIP RUSTLER. - - - 204

20.——*Workmen's Compensation Act, 1902—Arbitration Act, R.S.B.C. 1897, Cap. 9—Procedure to set aside award under former Act—Costs where procedure uncertain—Prohibition—Discretion.*] The Arbitration Act applies to an award under the Workmen's Compensation Act, and a motion to set aside such an award may be made under the former Act. Where, therefore, an award was attacked by a motion for a writ of prohibition, the motion was properly dismissed, particularly as the applicant admitted that the award should have provided for weekly payments instead of a lump sum and undertook to have the register amended in this particular. Where there is a doubt as to procedure based upon a decision of the Court, the Court in its discretion will not

PRACTICE—*Continued.*

order costs to the successful party: *Murphy* v. *Star Mining Co.* (1901), 8 B.C. 421 at p. 422. DISOURDI v. SULLIVAN GROUP MINING COMPANY. - - - - - - 241

21.——*Workmen's Compensation Act, 1902—Plaintiff pursuing his common law and statutory remedies concurrently—Dismissal of common law action—Assessment under Workmen's Compensation Act—Costs—Discretion.*] Where the plaintiff fails in his common law action, the Court has power in its discretion to deal with the costs of the action or of proceedings under the Employers' Liability Act:—*Held*, in the circumstances in this case, the plaintiff having been awarded compensation under the Workmen's Compensation Act, that he should have costs following the event upon the dismissal of the action. WILSON v. KELLY *et al.* - - - - - - - - 436

PRINCIPAL AND AGENT — *General manager of company—Duty as servant or agent—Transactions on his own behalf similar to those of company—Liability to account for profits—Trustee.*] Defendant, as general manager of a company, engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber, which he disclosed to defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits":—*Held*, in an action to account for the proceeds of the sale of this timber, that defendant was not acting as the representative of the company, and was not a trustee; and that the making of the entries in the books did not estop him from explaining the circumstances. KENDALL AND ANOTHER v. WEBSTER. 390

2.——*Listing land for sale or exchange—Purchaser using knowledge gained from agents to open negotiations with vendor.*] Defendant listed with plaintiffs for sale or exchange ten acres of land. One Callaghan opened negotiations for an exchange. While the deal was being transacted defendant telephoned plaintiffs asking if any disposition of his property had been effected, and was replied to in the negative. He then said that he withdrew the property, and at or about the same time, consummated a deal for the property mentioned by Callaghan to the plaintiffs, Callaghan having opened up negotiations with him direct:—*Held*, on appeal, affirming the judgment of GRANT, Co. J., at the trial (MORRISON, J., dissenting), that the relationship of vendor and purchaser had been brought about by the plaintiffs, and that Callaghan had endeavoured, by approaching defendant, to deprive them of their commission. LALANDE & CLOUGH v. CARAVAN. - 298

PRINCIPAL AND AGENT—*Continued.*

PROHIBITION—*Judge acting outside his County at request of another judge—Persona designata.*] The judge of the County Court mentioned in section 137 of the Municipal Clauses Act is *persona designata*, and the authority conferred upon him by said section may not be exercised by the judge of another County acting on his request and in his absence. The remedy of an aggrieved party in such a case is by application for prohibition, and not by way of appeal. CORPORATION OF THE CITY OF SLOCAN v. THE CANADIAN PACIFIC RAILWAY COMPANY. 112

PUBLIC POLICY. - - - 406
See HUSBAND AND WIFE. 2.

RAILWAYS—*Board of Railway Commissioners—Full Court—Co-ordinate jurisdiction—Order made by Board—Action in Supreme Court for non-compliance with such order—Appeal—Stay of proceedings.*] In an action by a municipality for an injunction against a railway company to restrain the latter from closing up or interfering with a certain road, it developed that the Board of Railway Commissioners had made an order authorizing the railway company to divert a portion of the said road and construct their line between certain points of such diversion. The trial judge decided that the municipality could maintain such an action only by the Attorney-General as plaintiff:—*Held*, on appeal, that, while the Court had jurisdiction to grant all proper relief, the Board of Railway Commissioners having dealt with the matter, the plaintiffs should apply to the Board for relief as they had complete control over their order. THE CORPORATION OF THE MUNICIPALITY OF DELTA v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY. - 83

2.——*Fire on right of way spread to adjoining property—Condition of right of way—Origin of fire—Evidence—Burden of proof—Negligence—Dismissal of action.*] Fire was seen smouldering in a dry stump on a high bank, about level with an engine smokestack, on defendant Company's right of

RAILWAYS—*Continued.*

way. Evidence was given that one engine passed the place ten hours, and another six hours previously. Evidence also went to shew that the right of way contained inflammable material, and that there were other fires, whose origin was unknown, in the vicinity of the right of way. The fire in question was first seen by some of plaintiffs' workmen, when it was insignificant in extent and the weather was calm, but the wind rising, the fire spread and burnt plaintiffs' mill property and a large extent of timber area:—*Held*, on appeal (affirming the finding of IRVING, J., at the trial, dismissing the action), that there was no evidence to connect the setting of the fire by sparks from the defendant Company's engines. LAIDLAW AND LAURIE v. THE CROW'S NEST SOUTHERN RAILWAY COMPANY. - 169

SALE OF GOODS—*Acceptance—Delivery, place of—Inspection—Goods not equal to sample—Right of purchaser to reject—Sale of Goods Act, R.S.B.C. 1897, Cap. 196, Secs. 45, 46, 47—Costs.*] *Prima facie* the examination by a buyer under section 45 of the Sale of Goods Act in order to ascertain whether the goods tendered are in conformity with the contract, should be had at the place of delivery; and a removal of the goods by the buyer without exercising his right of examination will prevent him from afterwards refusing to accept. But if the goods delivered are not in fact in conformity with the contract, the buyer is entitled to a reduction in the agreed price on the principles enunciated in *Mondel* v. *Steel* (1841), 10 L.J., Ex. 426. BROOKS-SCANLAN-O'BRIEN COMPANY v. RED FIR LUMBER COMPANY. 439

2.——*Action for price—Late delivery—Inferiority—Counter-claim—Amount overpaid.*] Plaintiff Company, incorporated by the Dominion Companies Act, but not licensed in British Columbia, entered into an agreement in British Columbia, through their resident agent, to supply certain machinery to defendant Company, a British Columbia corporation. The machinery was rejected for faultiness, and also because it was not delivered within the time agreed, thus necessitating the purchase of other machinery:—*Held*, on the facts, that the machinery was faulty in construction and the rejection of it was justified; also that defendants knew that it was being held at their disposal and risk. WATEROUS ENGINE WORKS COMPANY v. OKANAGAN LUMBER COMPANY. - - - - - - 238

SALE OF LAND—*Contract for—Vendor and purchaser—Purchaser dealing with agent*

SALE OF LAND—*Continued.*

—Offer—Acceptance—Correspondence.] Defendant, being in Montreal and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400; $900 or $950 cash, balance C.P.R., subject to owner's confirmation, and telegraphed defendant Hamilton, "Deposit on lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply: "$1,400 O.K. Letter instructions," at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was satisfactory he would complete the transaction on his return to Vancouver:—*Held*, affirming the judgment of HUNTER, C.J. (MORRISON, J., dissenting), (1.) That the agents were not authorized to sell; (2.) that there was no completed contract; and (3.) that there was no memorandum to satisfy the Statute of Frauds. WILLIAMS v. HAMILTON AND FORBES & FRANKLIN. - - - - 47

SEAMAN—*Action by seaman for wages—Proceedings in Admiralty Court—Leave to proceed in Admiralty—Irregularity.*] Where a company is being wound up pursuant to the Dominion Winding-Up Act, in the Supreme Court, proceedings in the Admiralty Court on a claim for seaman's wages, taken without leave of the Court having charge of the winding-up, are not void, but only irregular. *Held*, further, that, in the circumstances here the leave should be granted without the imposition of terms. *In re* B. C. TIE AND TIMBER COMPANY, LIMITED (No. 2), AND COLAN v. THE SHIP RUSTLER. - - - - - - 204

2.——*Offence by foreign sailor on British ship—Leave of Governor-General for prosecution—Territorial Waters Jurisdiction Act, 1878 (Imperial), 41 & 42 Vict., Cap. 78.*] A preliminary hearing before a magistrate of a charge against a foreign seaman for an indictable offence committed on board a British ship within the English Admiralty jurisdiction is not such a proceeding for the trial and punishment of such person as to require the consent of the Governor-General pursuant to section 591 of the Criminal Code. REX v. TANO. - - - 200

SHIP——*Mortgage—Registration—Priority—Right of execution creditors against holder of unregistered mortgage—Merchant Shipping Act—Bills of Sale Acts.*] Ships being specially exempted from the operation of the

SHIP—*Continued.*

Bills of Sale Acts, and there being no provision in the Merchant Shipping Act penalizing neglect to register a mortgage on a ship, an execution creditor cannot seize and sell in priority to an unregistered mortgage. IMPERIAL TIMBER AND TRADING COMPANY, LIMITED v. HENDERSON *et al.* - - 216

STATUTE—20 & 21 Vict., Cap. 85. - 313
See PRACTICE. 7.

20 & 21 Vict., Cap. 85, Sec. 33. - 313
See DIVORCE. 6.

20 & 21 Vict., Cap. 85, Sec. 41. - 410
See DIVORCE. 4.
PRACTICE. 9.

41 & 42 Vict., Cap. 78. - - - 200
See CRIMINAL LAW. 6.
SEAMAN. 2.

B.C. Stat. 1894, Cap. 63. - - 224
See STATUTE, CONSTRUCTION OF. 4

B.C. Stat. 1896, Cap. 8. - - - 157
See PARTITION.

B.C. Stat. 1896, Cap. 55, Secs. 29, 50, 60. 224
See STATUTE, CONSTRUCTION OF. 4.

B.C. Stat. 1897, Cap. 3, Secs. 123, 143, 144. - - - - - - - - - 174
See COMPANIES ACT, 1897. 2.

B.C. Stat. 1899, Cap. 69, Sec. 4. - 235
See SUMMARY CONVICTION.

B.C. Stat. 1900, Cap. 20, Sec. 12. - 233
See MECHANIC'S LIEN.

B.C. Stat. 1900, Cap. 54, Secs. 125 (19), 161, 162. - - - - - - - 76
See MUNICIPAL LAW. 8.

B.C. Stat. 1900, Cap. 54, Sec. 125, Sub-Sec. 110. - - - - - - - 275
See MUNICIPAL LAW. 3.

B.C. Stat. 1900, Cap. 54, Sec. 133, Sub-Secs. 5 and 9. - - - - - - 136
See ARBITRATION. 2.
MUNICIPAL LAW. 2.

B.C. Stats. 1900, Cap. 54, Sec. 168; 1908, Cap. 25. - - - - - - 192
See CRIMINAL LAW. 13.

B.C. Stat. 1901, Cap. 9. - - - 307
See INFANT. 2.

STATUTE—*Continued.*

B.C. Stat. 1902, Cap. 74. - - 241
See ARBITRATION.
PRACTICE. 20.

B.C. Stat. 1902, Cap. 74. - 251, 15, 20
See MASTER AND SERVANT. 3, 5, 6.

B.C. Stat. 1902, Cap. 74. - 385, 436
See PRACTICE. 15, 21.
WORKMEN'S COMPENSATION ACT, 1902. 4.

B.C. Stat. 1902, Cap. 74. - 273, 256
See ULTRA VIRES. 2.
WORKMEN'S COMPENSATION ACT, 1902. 3.

B.C. Stat. 1904, Cap. 54. - - 412
See AUDI ALTERAM PARTEM.
STATUTE, CONSTRUCTION OF. 6.

B.C. Stat. 1904, Cap. 54. - - - 49
See COSTS.

B.C. Stat. 1905, Cap. 50. - - 282
See ASSESSMENT.

B.C. Stat. 1906, Cap. 23, Sec. 74. - 51
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STATUTE, CONSTRUCTION OF. 3.

B.C. Stat. 1906, Cap. 32, Sec. 137. - 112
See COUNTY COURT.

B.C. Stat. 1907, Cap. 27, Sec. 2. - 339
See MECHANIC'S LIEN. 2.

B.C. Stat. 1908, Cap. 2, Sec. 39. - 129
See DENTISTS.
STATUTE, CONSTRUCTION OF. 2.

B.C. Stat. 1908, Cap. 2, Sec. 39. - 206
See DENTIST.
STATUTE, CONSTRUCTION OF. 5.

B.C. Stat. 1908, Cap. 26, Sec. 3. - 51
See EXECUTION DEBTOR.
STATUTE, CONSTRUCTION OF. 3.

Criminal Code, Secs. 170 and 171 (2). 79
See CRIMINAL LAW. 11.

Criminal Code, Secs. 174, 175, 1,002. - 194
See CRIMINAL LAW. 12.
STATUTORY DECLARATION.

Criminal Code, Sec. 207 (*a*.) - - 13
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Criminal Code, Secs. 227, 235. - 365
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Criminal Code, Secs. 654 and 655. - 314
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STATUTE—*Continued.*

Criminal Code, Sec. 777, Sub-Sec. 2. 192
See CRIMINAL LAW. 13.
PERSONA DESIGNATA.

Criminal Code, Secs. 1,017, 1,018, 1,021. 61
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Criminal Code, Secs. 1,104, 1,021. - 43
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R.S.B.C. 1897, Cap. 1, Sec. 10, Sub-Sec. 36. - - - - - - - - - 56
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INTERPRETATION ACT.

R.S.B.C. 1897, Cap. 3. - - - 246
See PRACTICE. 2.

R.S.B.C. 1897, Cap. 9. - - 56, 241
See ARBITRATION. 3.
PRACTICE. 20.

R.S.B.C. 1897, Cap. 44, Sec. 123. - 238
See COMPANIES ACT, 1897.

R.S.B.C. 1897, Cap. 91. - - - 260
See CONSTITUTIONAL LAW.

R.S.B.C. 1897, Cap. 107, Sec. 63. - 329
See JURY.

R.S.B.C. 1897, Cap. 190, Sec. 36. - 266
See WATER AND WATER RIGHTS.

R.S.B.C. 1897, Cap. 196, Secs. 45, 46, 47. 439
See SALE OF GOODS.

R.S.C. 1906, Cap. 119. - - - 444
See BILLS OF EXCHANGE.

R.S.C. 1906, Cap. 133, Sec. 26. - 260
See CONSTITUTIONAL LAW.

R.S.C. 1906, Cap. 144, Sec. 22. - 81, 204
See COMPANY LAW. 3, 5.
PRACTICE. 19.

R.S.C. 1906, Cap. 144, Sec. 38. - 290
See COMPANY LAW. 4.

STATUTE, CONSTRUCTION OF. 238
See COMPANIES ACT, 1897.

2.——*Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 39—Whether retrospective.*] Section 39 of the Dentistry Act, empowering the Council of the College of Dental Surgeons to erase the name of a practitioner guilty of infamous or unprofessional conduct, applies to acts committed by a member before registration under the Act. G.—— v. THE COLLEGE OF DENTAL SURGEONS OF BRITISH COLUMBIA. - - - - - - 129

STATUTE, CONSTRUCTION OF—*Continued.*

3.——*Judgments Act, B. C. Stat. 1908, Cap. 26, Sec. 3—Land Registry Act, B.C. Stat. 1906, Cap. 23, Sec. 74—Non-registration of conveyance—Execution debtor—Dry legal trustee.*] Execution creditors registered their judgment in April, 1907, against the lands of the judgment debtor, pursuant to the Judgments Act. Previous to this, in January, 1906, the debtor conveyed a certain lot to plaintiff, who neglected, through ignorance of section 74 of the Land Registry Act, to register his conveyance until August, 1907, when he found this judgment registered against the lot. In an action to set aside this cloud upon his title the learned trial judge ruled that section 74, making registration of conveyances a *sine qua non* to the passing of any title, at law or in equity, to lands, governed:—*Held*, on appeal, that the Judgments Act gives the judgment creditor only a right to register against the interest in lands possessed by the judgment debtor; and that in this case the debtor, having conveyed the land to plaintiff so long before the execution creditors' judgment was obtained, was a dry trustee of the land for plaintiff. *Levy* v. *Gleason* (1907), 13 B.C. 357, explained. ENTWISLE v. LENZ & LEISER. - - 51

4.——*Statutory limitation of actions—Consolidated Railway Company's Act, 1896—Cap. 55, Secs. 29, 50, 60—Victoria Electric Railway and Lighting Company, Limited, B. C. Stat. 1894, Cap. 63.*] The statutory exemption as to limitation of actions provided by section 60 of the Consolidated Railway Company's Act, 1896, does not enure to the benefit of the British Columbia Electric Railway Company's operations as carried on in the City of Victoria. The doctrine that private legislation must be strictly construed against the company or corporation obtaining the same, applied. CROMPTON v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - 224

5.——*"Unprofessional conduct," what constitutes—Dentistry Act, B. C. Stat. 1908, Cap. 2, Sec. 66.*] Where a professional class is governed by a statute applying specifically to that profession, and such statute prescribes the manner in which the members of the profession shall carry on their business, it is unprofessional conduct to carry it on otherwise. *In re* MOODY AND THE COLLEGE OF DENTAL SURGEONS. - 206

6.——*Vancouver Island Settlers' Rights Act, 1904—Intra vires—Crown—Provincial government—Grant of land—Effect on prior*

STATUTE, CONSTRUCTION OF —*Continued.*

—*Validity of—Grant of minerals and timber by Dominion government—Locus standi of plaintiff company to attack grant to defendant —Absence of assent by Crown—Costs—Defendant indemnified against.*] The Vancouver Island Settlers' Rights Act, 1904, defines a settler as a person who, prior to the passing of the British Columbia statute, Cap. 14 of 47 Vict., occupied or improved lands situate within that tract of land known as the Esquimalt and Nanaimo Railway land belt with the *bona fide* intention of living thereon, and section 3 of said Act provides that upon application being made to the Lieutenant-Governor in Council within 12 months from the coming into force of the Act, shewing that any settler occupied or improved land within the said land belt prior to the enactment of Cap. 14, with the *bona fide* intention of living upon the said land, accompanied by reasonable proof of such occupation or improvement and intention, a Crown grant in 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. The lands within the said belt had been conveyed by the Province originally to the Dominion for the purposes of the railway, and by the Dominion transferred to the Railway Company, which in giving grants or conveyances of portions thereof, reserved the minerals. Defendant, who held from her predecessor in title, applied for and obtained a grant under said section 3:—*Held*, on appeal (MORRISON, J., dissenting), that the Railway Company was entitled to be heard upon such application. *Held*, further, that a grant issued without such opportunity being given to the Railway Company to be heard on the application, was a nullity, and that the defendant should be restrained from making use of it. *Held*, further, that one of the conditions in the statute was that the claims of applicants thereunder should be passed upon by the Lieutenant-Governor in Council, and the absence of compliance with such condition was fatal, but *Held*, further, that in the circumstances here the defendant should be permitted, on giving notice to the Railway Company, to proceed with her application and that the Crown need not be a party to the action. ESQUIMALT AND NANAIMO RAILWAY COMPANY V. FIDDICK. - - 412

STATUTORY DECLARATION—*Statutory form not followed — Jurat — Persons "authorized by law" to declare—Criminal Code, Secs. 174, 175, 1,002.*] There is a marked difference between taking an oath and a solemn declaration. In the one case, the false swearing itself constitutes the offence; in the other, before the procedure becomes a solemn declaration the statutory form must be followed. The permission to receive a solemn declaration includes the authority to make it. A solemn declaration is not made unless the declarant reads over to the officer receiving the declaration the form as given in the Act, or unless the officer reads over that form to the declarant. REX V. PHILLIPS. - 194

STATUTORY DECLARATION —*Continued.*

SUMMARY CONVICTION —*Motion to quash—Summary Convictions Act Amendment Act, 1899, Cap. 69, Sec. 4.*] Where the information omitted a material allegation of fact but the issue as to that fact was fairly fought out before the magistrate who found the fact against the accused, the conviction will not be quashed. Section 4 of B. C. Stat. 1899, Cap. 69, is imperative to that effect. REX V. TAYLOR. - 235

SURVEYOR—Authority of to determine location of posts destroyed by fire. - - - - - - - 126
See TRESPASS.

TRADE NAME—*Sale of goodwill—Similar name—True personal name—Trade name of article — Tendency to deceive—Imitation — Fraud — Injunction.*] While there is no property in the name of a manufactured article, yet where a particular article has for many years been manufactured and sold under a particular name, other persons fraudulently taking advantage of such name will be restrained. A firm had for a number of years been manufacturing glue under the name of Le Page. They sold out their business and goodwill to a company which continued the manufacture and name of the article. A member of the original firm, named Le Page, subsequently formed a company and manufactured and sold glue under the old name:—*Held*, that the term or name "Le Page" as applied to glue had acquired a trade distinctiveness, a secondary meaning, and that the plaintiffs were entitled to the relief asked for. THE RUSSIA CEMENT COMPANY V. THE LE PAGE LIQUID GLUE, OIL AND FERTILIZER COMPANY, LIMITED. - - - - - - 317

TRADE UNION—*Member of—Interference with employment—Threatening employer —Refusal by union men to work with non-*

TRADE UNION—*Continued.*

union man — Coercion of employer — Contractual relationship between employer and employee.] Plaintiff, a stone-mason, applied for membership in the union of which defendants were officers. He made a payment on account of his application fee, but not being vouched for by two members of the union, the executive returned the fee and requested him to submit to a test of workmanship preliminary to his being enrolled. Considering the test an unfair one, he declined to submit to it, whereupon the union refused him membership. The test proposed was what is known as "boulder work," but plaintiff stated that he had been accustomed to "sandstone work." After some delay, plaintiff was told he could submit to a test in any kind of stone work he chose, but he did not accept the offer. Subsequently, while he was at work on a building, the union at a meeting passed a resolution instructing the secretary to notify the employer that unless the plaintiff was discharged the union men would be called out. Plaintiff having been discharged, brought action, claiming an injunction and damages:—*Held*, on appeal (reversing the judgment of LAMPMAN, Co. J.), that plaintiff had not shewn that the purpose of the defendants was to molest him in pursuing his calling and prevent him, except on conditions of their own making, from earning his living thereby. GRAHAM v. KNOTT *et al.* - - - - 97

TRESPASS—*Encroachment—Proof of location—Authority of surveyor to determine.*] The posts planted at the time of the survey of a city lot having been destroyed by a general fire which swept over the block of land in which the lot was included:—*Held*, on appeal, that a surveyor could not determine the location of the lot by apportioning the apparent shortage among all the lots in the block. BARRY v. DESROSIERS. - 126

TRUSTS AND TRUSTEES—*Pre-emption worked in partnership by mother and son—Crown grant issued to mother as representative of deceased father—Quit claim by children — Effect of — Beneficial interest of son — Resulting trust — Evidence to establish — Absence of written agreement—Denial by son of interest—Estoppel.*] Mother and son applied for a pre-emption of certain land which had been occupied by the father previous to his death, but to which he had acquired no rights from the Crown, the land having then been reserved from settlement. The land subsequently was declared open to settlers, and after consultation with the Government agent, it was agreed that the mother should apply for the land as legal representative of the father. Mother and son occupied and operated the land together, until the son's death. On the issue of the Crown grant, all the children, including the son referred to, executed a surrender in favour of the mother. The son took and held the Crown grant as security for what he considered his rights under an alleged understanding that the land was to descend to him on the decease of the mother. The mother denied this understanding. In an action by the mother against the widow of the son for the recovery of the Crown grant the widow set up a partnership between the mother and son in the possession and operation of the land:—*Held*, on appeal (reversing the finding of CLEMENT, J., at the trial), that there had been no such partnership established, and that the land belonged to the mother free from any trust in favour of the son. CAMPBELL v. CAMPBELL. - - - 354

TRUSTS AND TRUSTEES—*Continued.*

ULTRA VIRES. - - - 22
See MUNICIPAL LAW.

2.——*Workmen's Compensation Act, 1902, Sec. 6—Rules made thereunder.*] The applicant was injured in the employment of the defendant mining Company, which during the proceedings to establish his claim against them, went into liquidation. He was awarded compensation in $1,500. The Insurance Company disputed their liability, under their policy of insurance issued to the Mining Company. Under these circumstances the applicant applied under section 6 of the Act for an order that the Mining Company and the insurers proceed to the trial of an issue with him:—*Held*, that the rules made under section 6 are *ultra vires*. DISOURDI v. SULLIVAN GROUP MINING COMPANY, LIMITED. DISOURDI v. MARYLAND CASUALTY COMPANY (No. 3.) - - 273

VENDOR AND PURCHASER—*Contract for sale of land—Purchaser dealing with agent—Offer—Acceptance— Correspondence.*] Defendant, being in Montreal, and owning property in Vancouver, instructed his agents to obtain a purchaser at $1,400, offers to be first submitted to him. They received an offer and gave a receipt for a deposit of $25, "price $1,400; $900 or $950 cash, balance C.P.R., subject to owner's confirmation, and telegraphed defendant Hamilton, "Deposit on lot Kitsilano, $1,400. Wire approval and instructions." Defendant wired in reply: "$1,400 O.K.

VENDOR AND PURCHASER—*Cont'd.*

Letter instructions," at the same time writing that his papers were in the bank and could not be obtained until his return to Vancouver; that he wanted $1,400 net to him, and if this was not satisfactory he would complete the transaction on his return to Vancouver:—*Held*, affirming the judgment of HUNTER, C.J. (MORRISON, J., dissenting), (1.) That the agents were not authorized to sell; (2.) that there was no completed contract; and (3.) that there was no memorandum to satisfy the Statute of Frauds. WILLIAMS v. HAMILTON AND FORBES & FRANKLIN. - - - - 47

2.——*Sale of land—Mistake of vendor—Failure to shew notice to purchaser—Rectification of deed—Refusal to grant decree of—Offer of refund before action—Judgment for amount of offer. Costs—Recovery of small sum—"Event"—Rule 976.*] Plaintiff having received a conveyance of certain mineral claims from defendant Company, it was discovered that some 38 acres of the same land had been conveyed to another purchaser. The mistake arose through an omission to mark off the mineral claims on the official map. The Company offered plaintiff a refund of the purchase price on this shortage proportionate to the acreage so disposed of, which he refused, and sued for damages:—*Held*, that he was entitled to damages only for the purchase price of the acreage short, with interest thereon at the legal rate, as on the evidence, he had not established that the mineral claim in respect of which he claimed damages for such shortage was of any commercial value. Remarks as to disposition of costs where the plaintiff recovers only a small proportion of the amount claimed. HIRD v. ESQUIMALT & NANAIMO RAILWAY COMPANY. - - - - - - - - - - 382

WATER AND WATERCOURSES—*Defined watercourse—Existence of—Diversion of water—Different levels—Adjoining proprietors of land—Obstruction—Nuisance.*] Until water reaches a watercourse, the lower of two proprietors owes no servitude to the upper. He is at liberty to protect himself, and is not liable for the damage which the other suffers from the exercise of such right of protection. GRAHAM v. LISTER. - - - - - - - - 211

WATER AND WATER RIGHTS—*Water Clauses Consolidation Act, 1897, R.S. B.C., Cap. 190, Sec. 36—Appeal under—Hearing de novo—Scope of—Point of diversion of water—Effect of on other records.*] Section 36 of the Water Clauses Consolidation Act, 1897, R.S.B.C., Cap. 190, provides that any person affected by any decision of a commissioner or gold commissioner under the Act, may appeal therefrom to the Supreme or County Court in a summary manner by filing a petition pursuant to the procedure prescribed in the section:—*Held*, that a hearing so had is a trial *de novo* and that the judge is bound to go fully into the merits of the application, as he must make such order in relation to the matters dealt with in the decision appealed from, and respecting the rights of all parties in interest and affected by the decision appealed from, whether named in the petition or not, as he deems just. *Held*, further, on the facts, that as the change in the point of diversion of the water sought, meant a serious interference with a prior record, the learned judge below rightly refused to allow such change. EAST KOOTENAY POWER AND LIGHT COMPANY, LIMITED v. CRANBROOK ELECTRIC LIGHT COMPANY, LIMITED. - - 266

WATER AND WATER RIGHTS—*Continued.*

WORDS AND PHRASES—"Event." - - - - - - - - 382
See VENDOR AND PURCHASER. 2.

2.——"*More or Less.*" - - 45
See CONTRACT.

3.——*Personata designata.* - - 112
See COUNTY COURT.

4.——*Persons "authorized by law" to declare.* - - - - - 194
See STATUTORY DECLARATION.

5.——"*Serious and wilful misconduct.*" - - - - - - - - 15, 251
See MASTER AND SERVANT. 5.
WORKMEN'S COMPENSATION ACT, 1902. 2.

6.——"*Transaction,*" *meaning of.* 282
See ASSESSMENT.

7.——"*Unprofessional conduct.*" - 206
See DENTIST.

WORKMEN'S COMPENSATION ACT, 1902. - - - - - - - 15, 20
See MASTER AND SERVANT. 5, 6.

2.——*Accident arising out of and in course of employment—"Serious and wilful misconduct"—Disobedience of directions.*] Plaintiff, a foreigner, but able to speak and understand, though not to read or write, English, entered the employment of defendants at work in which he had had no previous experience. Before commencing work, a fellow labourer was cautioned by

WORKMEN'S COMPENSATION ACT, 1902—*Continued.*

the foreman, in presence of the plaintiff, not to allow the latter to use a freight lift. He nevertheless attempted to use it, and was cautioned not to do so. He was later in the day killed in the lift. *Held*, that he was guilty of serious and wilful misconduct. GRANICK v. BRITISH COLUMBIA SUGAR REFINERY COMPANY. - - - **251**

3.——*Order directing insurers to pay amount into Court—Liability to third party—B. C. Stat. 1902, Cap. 74, Sec. 6.*] There must be an admission of liability on the part of the insurer, or a finding by a competent tribunal, before the provisions of section 6 of the Workmen's Compensation Act, 1902, as to payment into Court, can be invoked. DISOURDI v. SULLIVAN GROUP MINING COMPANY AND MARYLAND CASUALTY COMPANY. (No. 2.) - - - **256**

4.——*Plaintiff pursuing his common law and statutory remedies concurrently—Dismissal of common law action—Assessment under Workmen's Compensation Act—Costs—Discretion.*] Where the plaintiff fails in his common law action, the Court has power in its discretion to deal with the costs of the action or of proceedings under the Employers' Liability Act:—*Held*, in the circumstances in this case, the plaintiff having been awarded compensation under the Workmen's Compensation Act, that he should have costs following the event upon the dismissal of the action. WILSON v. KELLY *et al.* - - - - - - **436**

5.——*Practice—Security for costs—Insolvency of administrator—Nominal trustee.*] While as a general rule security for costs will be ordered in case proceedings are taken by an insolvent person for the benefit of other persons, this rule does not apply in the case of an executor. If he is authorized by statute to take proceedings for the benefit of other persons it makes no difference that the moneys recovered are not payable to the executor as part of the estate, but are payable directly to the persons beneficially interested. *Sykes* v. *Sykes* (1869), L.R. 4 C.P. 645, and *White* v. *Butt* (1909), 1 K.B. 50, followed, and the principle applied to proceedings by an executor under the Workmen's Compensation Act. An application for security for costs in an arbitration under the Workmen's Compensation Act should be made to the arbitrator and not to a judge in Chambers; and should be made promptly. KRUZ v. CROW'S NEST PASS COAL COMPANY, LIMITED. - **385**

6.——*Procedure to set aside award under former Act—Costs where procedure uncertain—Prohibition—Discretion.*] The Arbitration Act applies to an award under the Workmen's Compensation Act, and a motion to set aside such an award may be made under the former Act. Where, therefore, an award was attacked by a motion for a writ of prohibition, the motion was properly dismissed, particularly as the applicant admitted that the award should have provided for weekly payments instead of a lump sum and undertook to have the register amended in this particular. Where there is a doubt as to procedure based upon a decision of the Court, the Court in its discretion will not order costs to the successful party: *Murphy* v. *Star Mining Co.* (1901), 8 B.C. 421 at p. 422. DISOURDI v. SULLIVAN GROUP MINING COMPANY. - - **241**

7.——*Rules made thereunder—Ultra vires—Insolvency of employer—Procedure by applicant to establish liability of insurer.*] The applicant was injured in the employment of the defendant mining Company, which during the proceedings to establish his claim against them, went into liquidation. He was awarded compensation in $1,500. The Insurance Company disputed their liability, under their policy of insurance issued to the Mining Company. Under these circumstances the applicant applied under section 6 of the Act for an order that the Mining Company and the insurers proceed to the trial of an issue with him:—*Held*, that any right which the applicant might have against the insurers under said section 6 must be decided in an action commenced in the ordinary way. *Held*, further, that the rules made under section 6 are *ultra vires*. DISOURDI v. SULLIVAN GROUP MINING COMPANY, LIMITED. DISOURDI v. MARYLAND CASUALTY COMPANY (No. 3.) **273**