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EDITOR:

ROBERT CASSIDY

BARRISTER-AT-LAW.

CONTENTS:

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THE
British Columbia Law Notes.

VOL. 1. MARCH, 1894. No. 2.

BRITISH COLUMBIA.

IN THE SUPREME COURT.

NOTES OF SOME OF THE UNPUBLISHED DECISIONS IN THE CURRENT NUMBER OF THE BRITISH COLUMBIA LAW REPORTS.

Re WING KEE.

JANUARY 10, 1893.] [BEGBIE, C. J.

Sanitary By-law, 1886—Overcrowding—"Suffering to be Occupied"—Scienter—Mens rea.

Case stated by Farquhar Macrae, a Police Magistrate under Rev. Stat. (Can.) 53 Vict., Cap. 37, Sec. 28, on the conviction of one Wing Kee for a breach of Victoria Con. Health By-Law, 1886, Sec. 17, by unlawfully suffering a certain room to be occupied as a dwelling or lodging, which did not contain at least 384 cubic feet of space for each person occupying the same.

The room in question was in a building of which defendant was lessee, containing in all 54 rooms and was, at the time of the alleged offence, sub-let by him for $1.50 per month. Defendant, who did not reside in the building or exercise any control over rooms sub-let, had notified his sub-lessees to comply with the terms of the by-law.

Lindley Crease for the appeal :—There is no evidence of the over-crowding having been with the privity or consent of the defendant.

Evidence is necessary of actual or constructive knowledge by the person charged of the commission of the offence

on his premises, going to show connivance by him. Bosley vs. Davies, 1 Q. B. D., 84.

D. M. Eberts, Q. C., contra:

The intention of the By-law being to fix the responsibility upon the owner or superior landlord, constructive knowledge will be imputed and is sufficient. A man "suffers a thing to be done" if done through his negligence. The dominion of a house is in the landlord.

Halligan vs. Ganly, 19 L. T., N. S., 268.

Held—

The facts in evidence were insufficient to fix the defendant with guilty knowledge or participation in the offence.

Appeal allowed with costs and conviction quashed.

RE THE MAPLE LEAF AND LANARK MINERAL CLAIMS.

(In the matter of the "Mineral Act, 1891," and Amendments.)

BEGBIE, C. J.

JANUARY 10, 1893.] [DIVISIONAL COURT—CREASE, J.

WALKEM, J.

Mineral Act—Adverse Claim—Extending statutory time for bringing Action—Appeal—Divisional Court—Jurisdiction—Practice—Notice abandoning appeal—Introduction of fresh facts and reviewing order after judgment and before order drawn up.

Appeal from an order of Mr. Justice Drake made in Chambers on 10th December, 1892, on the application of Alex. F. McKinnon, owner of the Maple Leaf Claim, extend-

ing for a further period of 30 days, the 30 days within which he was bound under the Mineral Act (1891) Amendment Act, 1892, sec. 37, to commence proceedings in respect of an adverse claim filed by him on 10th November, 1892, against the issuance of a certificate of improvement in favor of N. P. Snowden for the Lanark Mineral Claim.

W. J. Taylor for the Maple Leaf Company (respondents):—

We take the preliminary objection that the appeal does not lie. The order was not made in any action or proceeding pending in any court. The right to make such orders in mining matters is a special jurisdiction conferred by the Statute, and there is no appeal from them unless provided in express terms. Sec. 67 of the Supreme Court Act does not cover the case, as its language cannot be extended further than to cover appeals from orders, final or interlocutory, made in actions or matters pending in the Supreme Court. To cover the case the Statute should have provided for an appeal from any order which the Court was by any Statute empowered to make, whether in a matter pending in the Court or not.

E. V. Bodwell for the Lanark Company (appellants):

Sec 67 (supra) is wide enough to cover the right to appeal.

Held—

The Court had jurisdiction to entertain the appeal. Objection overruled.

E. V. Bodwell for the appeal:

At the time of the motion for the order appealed from, the respondents had commenced an action by issuing a Supreme Court writ. Mr. Justice Drake was not made

aware of this fact, which rendered his order useless, and left no foundation for the exercise of the discretion.

W. J. Taylor, contra:

We admit the issue of the writ before the motion to Mr. Justice Drake ; the fact of its issue was immaterial and would not have affected his discretion in granting the extension. Respondents did not intend to prosecute the Supreme Court writ if the extension was granted but to proceed in the County Court in the mining district.

The suggestion of suppression of facts in the original motion cannot be urged on an appeal, but should be raised by motion to the Judge below to rescind his own order.

Held—

That the commencement of the action was a fact material to be shown on the motion to the Judge below, and that its non-disclosure could be taken advantage of on appeal as well as on a motion to rescind.

Appeal allowed with costs, and order below dismissed with costs.

JANUARY 12, 1893.

By special leave, counsel spoke to the question of the order to be made upon the appeal.

W. J. Taylor for the Respondents:

After the judgment allowing the appeal and adjournment of the Court, Respondents' counsel were instructed that, before the argument of the appeal, appellant's solicitor had served notice of abandonment. Upon receipt of this notice the appeal was at an end, and no order could be made except to strike it out of the paper.

Conybeare vs. Lewis, 13 Ch. D., 469.

E. V. Bodwell, contra.

By not instructing counsel of the notice and permitting him to argue the appeal, respondents are estopped from now going back to the notice. In Conybeare vs. Lewis the action was discontinued. Neglect to place material before the Court is no ground to open a motion after judgment.

Held—

The appeal was at an end on the giving of the notice abandoning it, and the Court had no jurisdiction but to strike it out of the paper. The order allowing the appeal not having been drawn up, the appeal would stand as if struck out, and no order could be drawn up.

Appeal struck out of the paper.

MASON vs. OLIVER.

17TH JANUARY, 1893.] [DIVISIONAL COURT—WALKEM, J. DRAKE, J.

Appeal from County Court—Co. Ct. Amendment Act, 1892. Sec. 3—Question of Law—Jurisdiction.

Appeal from County Court of Westminster to two Judges of the Supreme Court sitting as a Court of Appeal from the County Court under County Court Amendment Act, 1892, 55 Vic., (B.C.), cap. 10, sec. 2, on the grounds :

1. Verdict against weight of evidence.
2. Non-suit should have been granted.
3. Misdirection.
4. Question of contributory negligence not left to the to the jury.
5. Verdict did not decide question of contributory negligence.

The Action was for damages, plaintiff's claim charging that the Defendant, who had hired the Plaintiff's horse, had so ill-used it that it died. The trial took place before Bole, Co. J., and a jury, and on the finding of the jury judgment was entered for Plaintiff for $125. No objection in point of law was taken at the trial except that there was no evidence to go to the jury.

Robert Cassidy, for the Respondent :

The County Court Amendment Act, 1892, (supra) sec. 3, excludes all grounds of appeal going to questions of fact or weight of evidence, and no objection to the alleged misdirection appears on the notes. The question of nonsuit is possibly open, but, it appearing there was some evidence to go to the jury, the Court on this appeal cannot inquire further. A nonsuit was moved for at the close of Plaintiff's case but no motion for nonsuit on the whole case was made. The question of law must appear to have been distinctly raised at the trial. —Smith *v.* Baker, App. Cas., 1891, p. 325.

J. Stuart Yates, contra.

Held : -

The only question open to appellant was whether there was any evidence to go to the jury, and as it appeared that there was such evidence.

Appeal dismissed with costs.

CROFT v. HAMLIN et al.

JANUARY 18TH, 1893.] [DIVISIONAL COURT—BEGBIE, C. J. DRAKE, J.

"Bills of Exchange Act"—Presentation for payment of note payable at particular place—Necessity for as against maker—Practice—Judgment under Order XIV—Special endorsement—Sufficiency of.

Appeal from an Order of Walkem, J., refusing an application to sign judgment under Order XIV upon a writ specially

endorsed to recover $1,850, the amount of a promissory note made by the Defendants, payable to Plaintiff at Bank of Montreal, Victoria. The endorsement did not state that the note had been presented for payment, and upon motion for judgment under Order XIV, Walkem, J., dismissed the application on the ground that the special endorsement disclosed no cause of action.

P. Æ. Irving, for the appeal :

The words in the English Act "in order to render the maker liable" being omitted in the Canadian Statute it is not in Canada necessary to prove presentation in order to maintain an action against the maker of a promissory note, whether made payable at a particular place or not.

D. M. Eberts, Q. C., contra.

Held :—

Per *Begbie*, C. J.:

Presentment at the proper place, or facts excusing such presentment, must be averred and proved in the pleadings if there are pleadings, and if judgment be desired under Order XIV., it must be endorsed on the writ according to all the cases from Spindler v. Grellet, 1 Ex. Rep., 384, down to Fruhauf v. Grosvenor, 8, The Times L. R., 744, and see Bullen and Leake, 4th Ed., 108, and authorities there cited. (More v. Paterson, 2 B. C., 302, distinguished.)

Drake, J., concurred.

Judgment of Walkem, J., affirmed, and appeal dismissed, with leave to amend the special endorsement.

YOUDALL *vs.* DOUGLAS.

MARCH, 1893.] BOLE, Co. Ct. J., sitting as Local J., Supreme Court.

Costs—Taxation—Scale—Procedure—Retrospective legislation.

Appeal from decision of the Registrar—upon taxation of costs of proceedings, some taken before the introduction by Statute on January 1st, 1893, of a new scale of taxation, and others since such introduction,—that costs incurred prior to January 1st, 1893, must be taxed according to the old scale, and the remainder according to the new scale.

E. A. Jenns for the Appellant.

A. J. McColl, Q. C., contra.

Bole, Co. J.:

Having regard to the rule laid down by Lord Blackburn in Gardner vs. Lucas, 3 App. Cas., 582, I think it is perfectly settled that if the Legislature intended to frame a new procedure then, clearly, the settlement of by-gone transactions must be conducted according to the new form of procedure. Alterations in the form of procedure are always retrospective, unless there is some good reason to the contrary. Now, the taxation of costs has been by Regina vs. Lon. Ch. and Dover Ry. Co., L. R. 3 Q. B., 170, 37 L. J., Q. B., 428, decided to be a "proceeding," and further, having regard to Brown vs. Burdett, 37 Ch. D. (C. A.) 207, and Todd vs. Union Bank of Can., 6 Man. L. R., 457; Wright vs. Hale, 30 L. J., Ex. 40; Atty.-Gen. vs. Sillem, 10 H. L. Cas., 704; Freeman vs. Moyes, 1 Ad. & E., 338; Burn vs. Carvalho, ibid, 883; Kimbry vs. Draper, L. R., 3 Q. B., 160; Ings vs. London & S. W. Ry., L. R., 4 C. P., 17, I am of opinion that the taxation of costs being a matter of procedure, the new rules must be taken to be retrospective, and that the costs incurred prior to 31st December 1892, should

be taxed according to the scale laid down in the New Rules, and I direct the said costs to be taxed accordingly.

Appeal allowed.

In re AH GWAY, *ex parte* CHIN SU.

MARCH, 1893.] [BEGBIE. C. J.

Habeas Corpus—Custody of infant—Affidavit—Translation from deponent's language—Evidence—Admissibility.

Motion for a rule *nisi* for a writ of *habeas corpus* directed to the managers of the Chinese Home, commanding them to produce Ah Gway alleged to have been forcibly seizen by them and detained from the custody of Chin Su, the applicant.

H. D. Helmcken for the motion, tendered the affidavit (drawn up in English) of the applicant, who, counsel stated, did not understand English, but that the affidavit had been read over and explained to her in her own language before it was sworn.

Held—

Inadmissible. An affidavit must be drawn up and sworn to in the language of the deponent, and a sworn translation of it may be read.

Leave granted to renew the application.

H. D. Helmcken afterwards obtained the *rule nisi* upon an affidavit in the language of the deponent, of which a sworn translation was read, and now moved rule absolute.

Thornton Fell for the managers of the Chinese Home, contra.

The infant refused to return to the applicant. Evidence was given shewing that no restraint was placed upon the movements of the infant by the managers.

Held—

(*a.*) The applicant had not shown any valid right to the custody of the infant.

(*b.*) The Court will not interfere by *habeas corpus* to take an infant out of the custody of a person not lawfully entitled thereto, for the purpose of enabling a person equally unentitled to obtain possession of it.

Application refused without costs.

PARKS *vs.* BLACKWOOD.

APRIL 13TH, 1893.] [DIVISIONAL COURT—WALKEM, J. DRAKE, J.

Practice—Reference back by Divisional Court to supply evidence necessary to decision of motion for a new trial—Rule 446—Evidence.

Motion by defendant for a new trial upon the grounds that the verdict for plaintiff, for $400 damages found by Bole, Co. J., sitting as a local Judge of the Supreme Court without a jury on the trial of the action, was against the weight of evidence, and that there was no evidence upon which the amount of the damages could be calculated. The only evidence upon the question of damages consisted of expressions on the part of the plaintiff that he would not have been turned off in the manner described for $500, and other general expressions as to the extent to which he considered himself injured ; but there was no specific evidence as to the amount of profits which the plaintiff would have

made had the agreement been carried out ; or any evidence upon which a calculation could be made as to his damages for the breach of the contract.

Thornton Fell for the Plaintiff Respondent.

A. C. Brydone-Jack for the Defendant appellant.

Held—

(*a.*) The Judge at the trial was the sole Judge as to the credibility of the witnesses, and his findings upon the issues should not be interfered with.

(*b.*) There was no evidence upon which damages could have been properly estimated, and the verdict could not be sustained.

(*c.*) The Court would not re-open the question of the findings upon the issues, but under Rule 446, direct the present motion to stand over for further consideration, and direct an enquiry as to the amount of damages sustained by the plaintiff, to be taken before Bole, Co. J.

Order directing further enquiry as to damages, before Bole, Co., J.

TAI YUEN CO. *vs.* BLUM *et al.*

CREASE, J.

MAY, 1893.] [DIVISIONAL COURT—WALKEM, J.
DRAKE, J.

Divisional Court—Jurisdiction—Refusal of ex parte application—Appeal.

Appeal to the Divisional Court from an order of Begbie, C. J., dismissing an *ex parte* application by the plain-

tiffs for leave to issue concurrent writs of summons against all the defendants and to serve notice thereof on two of them who are citizens and residents of the United States.

A. P. Luxton for the Appeal.

Held—

There is no appeal to the Divisional Court from the refusal of such application as such application is not an interlocutory matter within sec. 60, Supreme Court Act.

Semble:—Such application is not a proceeding in an action. Smith vs. Cowell, 6 Q. B. D., 75.

Order refused.

WILSON *vs.* PERRIN.

BEGBIE, C. J.

MAY, 1893.] [DIVISIONAL COURT—CREASE, J.

WALKEM, J.

Practice—Order LVIII., Bule 15—Appeal—Security for costs—Jurisdiction.

Appeal from an order of Drake, J., dismissing the application of Plaintiff under Order LVIII., Rule 15, (684) for security for his costs on Defendant's motion to the Divisional Court for a new trial.

Robert Cassidy for the appeal.

The defendant's motion to the Divisional Court, is a motion by way of appeal within the meaning of the rules; the Divisional Court here, having a purely appellate jurisdiction.

A. E. McPhillips and *G. H. Barnard*, contra.

Held—

An application to the Divisional Court for a new trial is an appeal within the meaning of Rule 684, and a Judge has, under it, jurisdiction to order the applicant to give security for costs of the motion.

Referred back to the Judge below to order the giving of proper security.

VYE *vs.* McNEILL.

MAY, 1893.] [CREASE, J.

Exemption from execution—Homestead amendment Act, 1890.

Summons for an order declaring the defendant entitled to exemption to the extent of $500 out of the proceeds of sale by the Sheriff of a horse, appraised at $1000, taken in execution to satisfy judgment herein. The horse was the only property of the defendant exigible, or taken in execution.

Prior (Eberts & Taylor) for the summons.

E. E. Wooton, contra.

Held—

Defendant entitled to order for payment to him of $500 by the Sheriff out of the proceeds of the sale of horse.

Order accordingly.

HARPER *vs.* CAMERON.

August, 1892. | [Crease, J.

Estoppel--Default judgment whether operates as--Mental unsoundness--Practice--Res judicata.

Motion for judgment. The action was for a declaration that certain promissory notes dated 18th November, 1887, for $20,000, $10,000, and four for $5,000 each, made by the plaintiff, payable one year after date to the order of the defendant, and which were substituted for a note of the same tenor and date made by the plaintiff to defendant for $50,000, were obtained by defendant by fraud and without consideration and while the plaintiff was, to the knowledge of the defendant, of unsound mind, and for an order setting aside a judgment obtained by the defendant on 10th December, 1888, in default of appearance, for $50,029 debt and costs, in an action brought by him on the 28th November, 1888, against the plaintiff to recover the amount of said notes; and also to set aside all proceedings under said judgment and for repayment by the defendant to the plaintiff of $20,000 realized and paid over to him by the receivers appointed under the judgment. The receivers were appointed on 18th December, 1888, upon affidavit showing that all the available property of the defendant, the plaintiff herein, was mortgaged and the equitable estate alone outstanding.

On 14th January, 1889, the receivers being about to effect a sale of certain of the property, the plaintiff herein intervened and resisted the sale on the terms proposed but the Chief Justice before whom the motion was heard authorized the sale, whereupon the plaintiff appealed from that order to the Divisional Court which dismissed the appeal

On 12th July, 1889, the Chief Justice made an order on consent of the solicitors for both plaintiff and defendant for the sale by auction of a mill, part of the assets in the

hands of the receivers, and on 6th August, 1889, upon a similar consent, made an order postponing the sale.

On 17th August, 1889, the Chief Justice approved of a tender of $225,000 for the purchase of the whole of the remaining real and personal property in the hands of the receivers.

On 26th August, 1889, the plaintiff having appealed from the last mentioned order to the Divisional Court that Court dismissed the appeal.

On 12th February, 1890, Mathew Warmsley, the plaintiff's next friend therein filed a petition in the Supreme Court setting forth that the plaintiff herein was then and had for some time previously been of unsound mind and praying for a commission de lunatico inquirendo and certificate thereunder and the said petition was shortly thereafter heard before the Chief Justice and dismissed.

On 15th May, 1890, the plaintiff obtained a summons in Cameron v. Harper, calling upon the plaintiff therein, the defendant herein, to show cause why "the judgment signed herein on the 10th day of December, 1888, should not be set aside and the defendant be at liberty to appear and defend upon the ground that the promissory notes sued on were obtained from the defendant while he was in an unfit state of mind" and in support of the summons set up on affidavit in effect the same case as that made on the statement of claim herein. The summons was heard before Sir M. B. Begbie, C. J., and was dismissed. The plaintiff appealed to the Divisional Court, which, on 15th July, 1890, dismissed the appeal.

This action was commenced on the 12th day of September, 1890. The statement of claim alleged that plaintiff was a person of unsound mind, not so found by inquisi-

tion and sueing by his next friend. It set out that the he had receive an injury from the kick of a horse on 1st July, 1884, whereby he became and ever since continued of unsound mind and incapable of attending to business, and that defendant had taken advantage of his condition to obtain from him the note, and substituted notes, in question upon which the default judgment had been obtained.

The defence denied the allegations in the statement of claim. It also set forth the various proceedings taken in Cameron v. Harper, as above referred to, and maintained that the issues were *res judicata* by the judgment of the Chief Justice and of the Divisional Court on the motion against the judgment and that the plaintiff was further estopped by his laches, consents, acquiscence and waiver, arising out of his conduct during the proceedings under the judgment.

The action was tried before Crease, J., and a special jury. At the close of the case the learned Judge left the questions to the jury, which they answered as follows ;

1. Q—Was Harper at the time of the contract of unsound mind ? A—Yes.

2. Q—Was the transaction of the $50,000 note fair and bona fide ? A—No.

3. Q—Was the consideration inconsionable ? A—There was no consideration.

4. Q—Was the act without deliberation ? A—Yes.

5. Q—Was it without independent advice ? A—Yes.

6. Q—If Harper was of unsound mind at the time of the making of the notes was Cameron then aware of it ? the jury (having been out more than three hours, C. S. B. C., 1888, cap. 31, secs. 48 and 49) by a majority of 6 to 2 answered yes.

The jury also, *mero motu suorum*, said that they were all for a verdict for the plaintiff.

27TH JANUARY, 1892.

Hon. A. N. Richards, Q. C., and E. V. Bodwell, now moved for judgment for plaintiff and resisted a cross motion for judgment for defendant.

The findings of the jury are conclusive for judgment for plaintiff. He is not estopped by the judgment by default in Cameron v. Harper or by the judgment of the Chief Justice or of the Divisional Court on the motion to set it aside, or by his course of conduct or that of his solicitor in that action after notice of the judgment, from raising in this action the question of his mental unsoundness throughout from the time of the making of the note and substituted notes in question down to the date of the verdict, and the incidental question of the fraud of the defendant. A judgment by default does not operate as an estoppel. (Howlett v. Tart, 10 C. B., N. S., 813.) There must be an adjudication upon the merits for that purpose. (Baker v. Booth, 2 Ont. O. S., 373; Chisholm v. Moore, 11 U. C., C. P., 589; Palmer v. Temple, 9 A. E., 508; Sedden v. Tutop, 6 T. R., 607; Baggott v. Williams, 2 B. C., 235; Earl of Bandon v. Becher, 3 Cl, F., 479.) The application against the judgment was for leave to raise the issue of plaintiff's insanity in that action, and was to the discretion of the Court for an indulgence, which the Chief Justice, in view of the delay in moving, and the rules relating to waiver affecting such applications, refused, leaving the plaintiff to his remedy by independent action. A judgment may be relieved against by independent action upon the ground that the defendant was incompetent to defend himself. (Carew v. Johnson, 2 Sch. and Lef. at p. 292.) The Court could only have admitted plaintiff to defend by deciding in his favour on that motion the question of his unsoundness of mind up to that date, for, if he was of responsible and competent under-

standing, his conduct, laches and acquiescence barred him from setting it aside; and that question of his then or previous mental condition the Court rightly refused to decide in Chambers upon affidavit, as it was a proper subject of enquiry before a jury as a main issue in an independent action. It cannot be said that the plaintiff was estopped from bringing this action, or that the question of his mental unsoundness and the incident fraud of the defendant became *res judicata* by a judgment which refused to admit him to be heard upon those issues. The question must now be regarded in the light of the finding of the jury that plaintiff was of unsound mind. There are no laches as against a lunatic. (Carew v. Johnson, supra.) There is no express finding by the jury that plaintiff was of unsound mind at the date of or since the judgment by default, but insanity once found is presumed to continue. The verdict is also in effect a general verdict for plaintiff and includes all findings necessary to sustain it. Rules 36, 66, 117, 134, 357 and 244, for the protection of persons under mental disability in regard to legal process against them apply, and that judgment is now, by the finding of the jury, void as against the plaintiff for non-compliance with those rules.

Charles Wilson and *A. E. McPhillips*, contra:

The proper course for the plaintiff was to apply as he did to set aside the judgment by default. (Vint v. Hudspith, 29 Ch. D., 322.) The conduct of the plaintiff after the judgment bars him from setting it aside in this action to the same extent as it did upon his motion in that action, the question being one of estoppel by waiver, which can only be rebutted by an express finding that he was not of competent mind to defend himself or to understand the nature and effect of the judgment against him. There is no such finding by the jury. The contrary was found by the Chief Justice on the plaintiff's affidavits made at the time, and the fact of his moving against the judgment shows that he knew its nature and effect, but, though he swore that he was of unsound mind at the time of giving the notes, he did not

pretend that he was so then, or that it was by reason of want of understanding that he suffered the judgment to go against him. A judgment by default constitutes an estoppel. (Williams v. Richardson, 36 L. T., N, S., 505; Kendall v. Hamilton, L. R., 4 App. Cas. 504.) No presumption of continuation of insanity arises except upon a general finding by inquisition ; in any case it is a presumption of fact and rebuttable, and must be left to the jury as a fact and a finding obtained upon it. It is not a conclusion of law. There is no such presumption as against a judgment, which, at all events, if it is not an absolute estoppel shifts the onus and is *prima facie* evidence of every fact necessary to sustain it. Where there was a finding of a jury on an inquisition of insanity which over-reached the period in dispute, it was held that the finding afforded a presumption of insanity, but there being some evidence that some time after the lunacy was stated to have existed or commenced, the party was not of unsound mind, an issue was directed whether he was of unsound mind at the time in question. (French v. Mainwaring, 2 Beav. 115.) Here there is evidence, and a previous finding, that the plaintiff was not of unsound mind at the date of the judgment and no finding to the contrary. The contract of a lunatic, who, by reason of lunacy, is not capable of understanding its terms or forming a rational judgment of its effect on his interests, is not void but only voidable at his option, and this only when his state is known to the other party, as was found here. (Pollock on Con. 4th Ed., p. 160 ; Moulton v. Camroux, 2 Exc. 487. 4 Exc. 17 ; Jacobs v. Richards, 23 L. J., Ch. 557 ; Matthews v. Baxter, L. R., 8 Exc., 132.) Adopting therefore the findings of the jury as to the unsound condition of plaintiff's mind at the time of making the original note, or even of the substituted notes, although that is not found, and that defendant knowingly and fraudulently obtained the notes, the contract was one capable of being ratified in a subsequent lucid interval, and the suffering of judgment to be obtained upon it, and the subsequent conduct

of plaintiff, in the absence of a finding of the jury that he was of unsound mind at that time, constitutes a ratification. The contract was also executed and the parties can not be restored to their original position.

Held--

1. That the Plaintiff was not estopped by the default judgment.

2. That the issues were not *res judicata* by the judgment of the Chief Justice, or of the Divisional Court, refusing to set aside the default judgment and admit the Plaintiff to defend in Cameron vs. Harper on grounds made the basis of Plaintiff's case herein, that motion being interlocutory on affidavit and an appeal to discretion, and did not decide but merely refused to admit in that action the introduction of the issue in question in this action.

3. That the answers, and general verdict, of the jury covered a finding that in fact the Plaintiff was *non compos mentis* at the time of and ever since the transaction in question, covering therefore the period of the proceedings in Cameron vs. Harper and the Plaintiff was not estopped thereby or by the part taken by him or on his behalf therein.

4. That, in order to set aside a contract as having been made by a person of unsound mind it is not necessary first to obtain a finding under a commission *de lunatico inquirendo* that the person in question is insane.

Judgment for Plaintiff.

IN THE VICE-ADMIRALTY COURT.

THE CUTCH.

APRIL, 1893.] [SIR M. B. BEGBIE, L. J. A.

Navigation Act—Articles 16 and 20—Party to Blame.

Action for damages for collision brought by the owners of the steamship Joan against the owners of the steamship Cutch. The trial took place on 26th and 27th April, 1893, before Sir Mathew Baillie Begbie, L. J. A., with Lieut. Masters, R. N., (H. M. S. Garnet) and Lieut. Nugent, R. N., (H. M. S. Champion) as nautical assessors.

The facts as proved at the trial, shortly stated, were, that the two steamships cleared from the same wharf at Nanaimo Harbour almost at the same time; the Joan, it was found as a fact, first. Each backed from the wharf in a direction different to the other, and each executed a manoeuvre in the harbour for the purpose of making exit to the sea, between an island at the mouth of the harbour and a shoal, through a narrow channel. They approached its entrance and each other in directions convergent and almost at right angles, the Joan being on the starboard side of the Cutch. Their relative courses and speed were such that unless there was an alteration of either or both by one or other, or both of them, a collision was imminent. Both held on their courses, and, in a few seconds the collision took place; the Cutch stopped and reversed her engines notwithstanding which she struck the Joan, which was then crossing her bow, forward of amidships, and almost at right angles.

C. E. Pooley, Q. C., for the owners of the Joan the Plaintiffs.

E. V. Bodwell and *P. Æ. Irving* for the owners of the Cutch, the Defendants.

Held—

1. That the Joan was not an overtaking ship within the meaning of article 20 or bound to keep out of the Cutch's way.

2. That the Cutch had the Joan on her starboard side within the meaning of article 16 and was bound to keep out of her way.

3. That the Cutch was solely responsible for the collision.

Judgment for Plaintiffs.

COUNTY COURT OF VICTORIA.

Re KWONG WO.

MARCH, 1893.] [BEGBIE, C. J.

Liquor License--Summary conviction—Appeal--Practice—Jurisdiction Evidence—Construction of words "spirituous liquor."

Appeal from a conviction dated 24th January, 1893, whereby the appellant, Kwong Wo, was convicted of having sold spirituous liquor without a license, contrary to the Municipal Act, 1892, sec. 204, sub-sec. 3, and the Revenue By law, 1889, Victoria City, and ordered to pay $50, and in addition the license fee of $75.

The convicting Magistrate, although notified, had not returned the conviction appealed from, or the deposit made by the appellant under sec. 77, Summary Convictions Act, 1886.

C. J. Prior for the convicting Justice and the City of Victoria :

The appeal should be dismissed. Till it is made to appear to the Court that the appeal is duly lodged, the jurisdiction to hear or adjourn it will not attach.—Trotter's Appeals from convictions, p. 54 ; Reg. v. Allen, 15 East, 333 ; Ryer v. Plows, 46, U. C., Q. B., 206, per Osler, J. ; Paley on Convictions, 5th Ed., p. 367. If the Magistrate, after notice, fail to return the conviction, he is liable to an action for special damages. -Prosser v. Hyde, 1 T. R., 414; Ex parte Hayward, 3 B. and S., 546. See Summary Convictions Act, (Can.), secs. 77 and 85, from which secs. 71 and 81 of the B. C. Act are copied. Decisions on the Canadian Act therefore apply.

H. D. Helmcken, for the appellant, contra :

This is a hearing, de novo, a re-opening ab initio of the prosecution at the instance of the defendant, and it is immaterial whether the original conviction is before the Court or not. The default is not that of the appellant, and, if necessary, we will ask an adjournment to obtain the conviction.

Prior :—There is no power to adjourn, as the adjournment must be by endorsement on the conviction.—Sum. Con. Act, sec. 71, (B. C.)

Helmcken :—That provision is not imperative. Reg. v. Read, 17 Ont. R., 185.

Held :—

The Court had power to hear and determine the appeal notwithstanding the failure of the Magistrate to return the conviction and deposit.

Objection as to jurisdiction overruled.

Evidence was then called in support of the charge and contra. The prosecution did not prove the Revenue By-law, 1889, referred to in the information.

Helmcken :—The appeal must be allowed. The charge is that of infraction of the By-law, and there is no power to substitute another charge on the appeal, but merely to amend formal defects in the charge as laid. There is no evidence that the liquor sold was spirituous liquor.

Prior, contra : The words " and the Revenue By-law, 1889," are surplusage. The offence was fully provided for by 55 Vic. (B. C.), cap. 33, secs. 204 and 208. The Court may entertain the appeal and upon conviction amend the charge in accordance with the case made on the evidence.—McKenna v. Powell, 20 U. C., C. P., 394.

Held :—

(*a.*) That an appeal from a conviction is a proceeding de novo, as if the information were then first brought to be tried.

(*b.*) That sec. 208 of 55 Vic. (B.C.) cap. 33, made it an offence to sell liquor by retail, without a license in that behalf, independently of whether a By-law providing for the issue of such licenses and fixing the amount of fees thereon had been passed or not, and that the appeal could proceed as a hearing de novo, for such statutory offence.

(*c.*) It having been shown that the liquor sold was intoxicating, but no evidence being given as to its having been produced by distillation, that the evidence was insufficient to sustain a charge of selling spirituous liquor.

(*d.*) That the absence of proof of the By-law would have been fatal, on proceedings by way of certiorari and motion to quash the conviction.

Conviction quashed without costs, the deposit to be returned.

SPEEDY TRIALS COURT.

REGINA *vs.* MORGAN.

FEBRUARY 4, 1893.] [WALKEM, J.

Criminal Law—Speedy Trials Act—Substituting charge at trial—Adjournment during trial—Depositions—Evidence of witness being out of Canada—Forgery.

The prisoner, having been committed for trial and elected to be tried under the Speedy Trials Act, now came up for trial upon the charge that he "on the 18th January, "1893, did forge and utter, well knowing the same to be "forged, a certain cheque upon the Bank of British Colum-"bia, Victoria, for the sum of $65, with intent to defraud."

Evidence was given that the prisoner cashed the cheque in question, pretending that he had received it from and that it was the cheque of one H. F. Sieward, by whom it purported to be signed.

Gordon E. Hunter, for the Crown, proposed to put in, under Sec. 222, Criminal Procedure Act, the deposition of H. F. Sieward taken at the preliminary examination, upon proof that he was absent from Canada; and called for that purpose a Customs' Clerk who produced the Outward Report of the vessel of which Sieward was master, for the North Pacific Ocean, and a seaman who saw the vessel preparing to leave but did not actually see her leave the harbour and could not state where the vessel was; and submitted that he had furnished evidence sufficient to warrant a finding that Sieward was out of Canada, citing Reg. vs. Nelson, 1 Ont. Rep. 500.

Held--

No sufficient evidence on which to admit deposition.

Hunter then moved for an adjournment to procure further evidence.

Robert Cassidy, for the prisoner, contra.

In order to justify the postponement there must be a clear case of legal necessity, which can be created only by the act of God or the conduct of the prisoner or his friends (Hale, P. C., note to Reg. vs. Windsor, 4 F. & F. at p. 268), and even in a civil case a Judge could not adjourn the trial after the jury were charged with the evidence (ibid, p. 371, Reg. vs. Russell, 4 Taunt, 129.) The discretion should be exercised according to the rule governing at the Assizes.

Walkem, J.:—Some definite rule should be adopted. My own opinion was that I ought not to remand the prisoner, and, after retiring for that purpose, without stating my own opinion, I put the point to the Chief Justice, who thought that to remand in such a case would be contrary to the spirit of the Speedy Trials Act. I will, therefore, refuse the adjournment

Adjournment refused.

The Crown conceded that the evidence was insufficient to secure a conviction upon the charge as laid, but moved to substitute the charge of obtaining money by false pretences.

Argument of this question was adjourned by consent.

FEBRUARY 7.

Gordon E. Hunter, for the Crown :

The lesser charge is necessarily included in the charge laid. The Crown have proved the falsity of the pretense

and of the document, and only failed to prove the actual forgery because of the strictness of proof required. Forgery is very closely allied to obtaining by false pretences. (Fitz J. Stephen, 141; Harris' Criminal Law, 306.) We admit that if the prisoner had elected to be tried speedily for the lesser offence there would be no jurisdiction to try or convict him for the greater. Goodman vs. Reg., 3 Ont. Rep., 18, but having elected to be tried for the greater, prisoner is not injured by being convicted of a lesser offence included in it.

Robert Cassidy, for the prisoner, contra.

The test is whether a jury, on an indictment for forgery, could, as an alternative, find the prisoner guilty of obtaining the money by false pretences. They could not. The Judge here has no more power. Sec. 13, Speedy Trials Act, governs.

Walkem, J.:—Whatever my opinion as to the merits of this case may be, I am clear that I cannot convict the prisoner. When he was brought before me to elect as to the mode of his trial, I stated to him, as was my duty under sec. 7 of the Speedy Trials Act, that he was charged with the offence of forging and uttering the cheque in question, and that he had the option of being tried upon it speedily before me or awaiting trial at the next assizes before a jury. He elected to be tried before me. Now, in the proceedings under this Act, there is no formal indictment, but the prisoner stands charged with the offence stated in the same manner as if there were one drawn up formally, setting out the charge stated to the prisoner. He cannot be tried for any offence with which he is not charged, or which is not included in that charge. Here I have proceeded to the end of the trial, and find no evidence upon which I can convict him of any offence included in the charge stated to him. It is suggested that I should convict him of a different offence, on the ground that the evidence adduced would

support a charge for that offence. I am in the same position as a jury would occupy if the prisoner were on trial before them on the charge of forgery. I do not see how I can convict the prisoner of one offence after trying him for another. I think a Court of Appeal would look upon that with considerable astonishment. The prisoner must be discharged.

Prisoner discharged.

NOTES OF CURRENT DECISIONS.

BRITISH COLUMBIA IRON WORKS CO. *vs.* BUSE *et al.*

FEBRUARY, 1894.] [DIVISIONAL COURT—BEGBIE, C. J. WALKEM, J.

Practice—Divisional Court—New Trial—Extending time for motion after lapse of the 8 days.

Appeal from an order of Drake, J., made on 15th February, at Vancouver, extending the time for giving notice of motion for a new trial until the 6th day of March. The trial was concluded and verdict entered for the plaintiff on 23rd January. Crease, J., upon application to him made within 8 days from the verdict had made an order extending the time for giving the notice until 13th February, and a notice of motion for a new trial was given on the 12th February, returnable 8 days thereafter, but the motion was not set down nor the appeal books entered.

A. E. McPhillips for the appeal.

The order is wrong in form. The notice of motion for a new trial had been given and the order should have been to extend the time for bringing on the appeal, but the order allowed a fresh notice to be given. [Per *Cur.* The order is incorrect in form but is in effect an order extending the time for the hearing of the appeal.]

Bodwell, contra.

Held—

The Court has power under Rule 743 to extend the time for appealing after the lapse of the 8 days.

Appeal dismissed. Costs to be costs in the cause to the Respondent in any event.

GABRIEL *vs.* MESHER.

FEBRUARY, 1894.] [DIVISIONAL COURT—BEGBIE, C. J. CREASE, J.

Costs—Taxation—Copies of Appeal Book on Appeal to Divisional Court—Printed copies disallowed—Rule 678—Amendment of Bill of Costs after successful appeal from Taxation not Allowed.

Appeal from an order made by Mr. Justice Drake on June 16th, 1893, upon a motion made before him by way of review of the decision of the Registrar allowing certain items in the Defendant's Bill of Costs of a motion to set aside the verdict and for a new trial, which was granted upon the ground of misdirection by the learned Judge at the trial, with costs, and Plaintiff was ordered to pay the costs as a condition precedent to his right to take the case down to trial again.

The Plaintiff without paying the costs had taken out a summons to fix the day of trial, which was dismissed by Walkem, J., on January 21st, (see ante, p. 15). The Plaintiff appealed from that order to the Divisional Court which (Crease and McCreight, J. J.) dismissed the appeal upon the ground that it was concluded by the order as to costs of the Divisional Court upon the motion for a new trial though they did not agree with it, but being of opinion that the items in question—(Reading proof of printed case, $43.20. Paid for printing case, $312.75)—ought not to have been allowed on taxation; gave the Plaintiff leave to bring the present appeal from the order of Mr. Justice Drake notwithstanding the lapse of time

A. E. McPhillips for the appeal.

E. V. Bodwell, contra.

Held—

That there was no provision in the Rules or item in the schedule of costs permitting the printing of appeal books upon appeals to the Divisional Court. Appeal allowed with direction to the Registrar to re-open the taxation and disallow the items.

Bodwell then moved for an order to amend the Defendant's Bill of Costs by inserting a charge for five written copies of the appeal book, which would have been a proper charge under Rule 678, in place of the charge for printing.

Held—

That after a successful appeal from a taxation the Court should, in a proper case, exercise its discretion by refusing such an amendment and as defendant had made and maintained an improper charge.

Amendment refused.

ATHERTON *vs.* LYNE.

FEBRUARY 22.] [IN CHAMBERS—DRAKE, J.

Pleading—Slander—Alternative Denial.

Motion to strike out paragraph in defence as embarrassing. The action was for slander, which as stated in the statement of Claim was in the following words alleged to have been spoken by the Defendant: "He (Atherton) kept over "one hundred dollars of my money during the fair." The defence was a denial of the utterance and an alternative (par. 6) as follows: "If it should appear that the defendant spoke "the said words as alleged, then the defendant in the alter- "native says that before speaking the same the plaintiff on "or about the said 10th day of October, dishonestly con- "verted to his own use $25 and more, the property of the "Plaintiff."

Potts (Belyea & Gregory) for the Plaintiff applied to strike out par. 6, as irrelevant, disclosing no answer to the Plaintiff's statement of claim and tending to prejudice and delay the fair trial of the action. He contended that if the defence is justification the proper plea is that alleged words are true in substance and in fact, Odgers, p. 44.

A. E. McPhillips contra.

Held—

Following Rassam vs. Budge, 1893, 1 Q. B. D., that the plea was embarrassing.

EDITOR'S NOTE—A number of notes of current cases have been crowded out and will appear in the next number.

PLEADING UNDER THE JUDICATURE RULES.

That the system of pleading provided by the Judicature Rules in place of the old common law and Chancery systems has proved itself, after a long trial, to be of very questionable utility for the purpose which it was intended is exemplified by the fact that the new English rules of December, 1893, do away with formal pleadings except where specially ordered, and provide for the trial of actions upon a mere denial of the claim as endorsed on the writ. The profession have indeed long regarded the pleadings in an action under the existing system as rather a source of danger than an assistance. The advantages of pleadings which consist of a mere recital of the facts relied on, "divided unto paragraphs, "numbered consecutively, and each paragraph containing as nearly as may be, a separate allegation" usually put in chronological order—though there is no rule of which we are aware why they should not be put in alphabetical or any other order—are not so easy to see as the disadvantages. They serve the purpose of affording a discovery of the story of the other side, arranged in accordance with his views, but a more substantial discovery is obtained by examination of parties. It is of course of the highest consequence, if possible, accurately to understand the causes of action or defence which are respectively proposed to be maintained at the trial by the different parties, but that is precisely the most difficult thing to pick out of Judicature pleadings. In practice, at least in Common Law actions, counsel have to arrive at the legal effect of the pleadings and get at the issues as they must be presented by re-arranging the facts alleged in the old form as they necessarily group themselves in the mind of a lawyer. So long ago as January, 1886, Lord Justice Bowen took the rather unusual course, for a Lord Justice of Appeal, of setting forth his views upon the

operation of the Judicature system generally in an exhaustive criticism in the Law Quarterly Review, (Vol II., p. 1) under the title "The Law Courts under the Judicature Acts." Upon the question of pleading he said, "What was believed "ten years ago by the authors of the Judicature Rules to be "a simplification of pleading, and an abolition of pleading "technicalities, turned out to be the introduction of a mode "of pleading so confused and inartistic as to be, in many "instances, only a source of embarrassment and expense."

There is only too much support for this pronouncement to be found in the pages of the Reports, and a great deal more resides in the minds of practising counsel. To solicitors the new system of "pleading made easy" may have appeared, at first, a boon, avoiding the intervention of the special pleader, who has naturally become as extinct as the Dodo. The fact of the matter is that the drawing of pleadings cannot be made easy. It is not too much to say that, under the old system, the highest test of the pure lawyer was the drafting of pleadings. In the days of special demurrers, writs of error, motions in arrest of judgment, and for judgment *non obstante verdicto*, and before the extension of full powers of amendment, so highly refined a system often defeated its purpose.

That the system itself was superior to that which took its place is, we believe, generally conceded, and ample powers of amendment, liberally exercised, should have been a sufficient guarantee against permitting the process of adjusting the pleadings in an action to defeat the merits which they were intended to present for determination in the most accurate possible form.

The effort to conduct a difficult Common Law action upon Judicature pleadings is somewhat similar to the difficulty of picking up a needle with one's hands encased in a pair of duffle mittens. Sir Matthew Begbie in his judgment in

Hudsons' Bay Co. vs. Green, delivered in 1881, shortly after the introduction of the Judicature system into this Province, regretfully observed in speaking upon the same subject: "The voice is the voice of the Common Law, but the hands "are the hands of the Court of Chancery."

The most serious objection to the existing method of pleading is that a system, inherently loose and lacking in scientific accuracy, has been hedged about with a number of rules of the strictest application; so that estoppels by pleading are in full force. The Courts in England have recently shown a tendency to disregard the strict letter of some of the rules. For instance, Order XIX, R. 7, requires a defendant to deal specifically with each allegation of fact of which he does not admit the truth. In Adams vs. North Metropolitan Tramways Co., the Divisional Court, (1894, Q. B. D., Dec. 19) had to consider, upon a motion to strike out as embarrassing a defence which merely alleged that defendants "denied each and all the several allegations in the statement "of claim." The statement of claim was for injuries alleged to have been caused by the defective state of the defendants tramway line. The Court (Hawkins and Lawrence. J. J.) in giving judgment held that "the form of defence might not "be in strict accordance with Rule 17, which does say that "each allegation of fact to be denied is to be specifically "dealt with, yet as the plaintiff had to admit that if the "statement of defence were lengthened out so that there was "an actual denial to each and every of the statements in the "statement of claim, he could not complain, that was a "ground for saying that a form of defence which did, in "effect, deny each and every allegation ought not to have "been complained of and was not embarrassing." This was in effect saying. that there was no sound reason for the requirements of the rule and that the Court would not apply it strictly. In our own Court, Jackson vs. Jackson and Mylius, ante p. 26, is a strong illustration of the truth of Lord Justice Bowen's remarks above quoted. There the statement of

defence in an action against defendants, as partners, to recover money lent alleged "The defendant denies that on "the 22nd day of April, A.D., 1891, or at any other time "she entered into partnership with the defendant Alexander "Jackson as alleged in paragraph 2 of the statement of "claim" and the Court held it a bad traverse, and therefore an implied admission of the partnership, under Rule 173, which provides "if an allegation is made with divers circum- "stances it shall not be sufficient to deny it along with those "circumstances." The case of Thorp vs. Holdsworth, 3 Ch. D. 637, and Tidesley vs. Harper, 7 Ch. D. 403, which are referred to in the written judgment of Mr. Justice Drake support the strict application of the rule, at least where the objection is taken at or before the trial; though we should say that where the discussion arises after verdict the course taken at the trial ought, if possible, to be looked at rather than the form of the pleadings and the latter amended to conform.

The loss of the demurrer as piece of machinery for the determination of that large class of disputes, in which if parties are compelled to state their cases with strict accuracy of form, it is found that there is nothing but a point of law between them is perhaps, the greatest loss of all. Nothing so greatly tended to saving of expense, and swift quietus to untenable propositions.

Odgers in his work on pleading cynically advises the pleader not to take on the pleadings objection in point of law to the case set up by the opposite party. As he says you are not bound, but only "entitled" to raise such an objection, (Rule 233) and not much benefit to you comes of it. You merely teach the other side his case, and put his pleadings in order He says (p. 96): "Unless the defect is "seriously embarrassing it is often better policy to leave it "unamended, you only strengthen your opponent's position "by reforming his pleading. But be careful in drawing the

"defence not to aid the defect in any way, the less said about "that part of the pleading the better. Do not admit it, if "need be traverse it in so many words but after such denial "avoid the whole topic, if possible, leaving the plaintiff's "counsel to explain it at the trial, if he can."

As a commentary on the conditions, induced by the present system of pleading, under which actions are tried, the above advice is almost sardonic. We will be very much surprised if the old scientific system of pleading with proper safeguards against any defeat of the merits in the process of arriving at an accurate statement of the issues, is not reverted to before many years wherever the Common Law of England still holds it own.
