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THE British Columbia LAW NOTES.

EDITOR:

ROBERT CASSIDY

BARRISTER-AT-LAW.

CONTENTS:

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THE

British Columbia Law Notes.

VOL. 1. FEBRUARY, 1894. No. 1.

SALUTATORY.

The necessity for some better method than that which at present obtains of bringing the decisions of the Courts in British Columbia before the Profession has been apparent for some time past. The plan which has been adopted, the only practicable one under the circumstances which have hitherto existed, of having the printing of the British Columbia Law Reports done by the Grace of Her Majesty's Provincial Government, and of the Queen's Printer, is very unsatisfactory, especially during the Session of the Legislative Assembly, when the printing of the Law Reports is in point of fact postponed pending execution of work which necessarily claims prior attention.

There has been expressed a very general wish on the part of the Profession to receive notes of decisions, particularly of those relating to matters of practice, as soon as possible after they are decided ; and, owing to the uncertainty and delay in the publication of the ordinary Reports, it has been practically useless to adopt a system of reporting short notes of practice cases, as such reports are necessarily in a somewhat different form to those of the full reports of decisions of the Courts, and their principal value consists in their early and regular publication.

The Editor, in view of the fact that he is in possession, from time to time, of all the materials necessary for a system of reporting advance notes of cases, has thought it well to venture the present publication in the hope that the members of the Profession will subscribe for it in each numbers as will realize a sum sufficient at least to pay the cost of printing.

We are in hopes that in the near future the Law Society may be able to effect some arrangement with the Provincial Government to obtain some monetary grant in aid of Law Reporting, in lieu of the services of the Queen's Printer, so that the printing of the Reports may be done on an ordinary business basis by some printing firm.

Our intention is to publish two numbers of "THE BRITISH COLUMBIA LAW NOTES" every month, each containing 20 or more pages. It is intended, at all events, to publish in advance of the regular Reports all decisions of the Courts, whether in Chambers or elsewhere. An arrangement has been made with a member of the Profession to sit in Chambers every day and take notes of the decisions which may be there given; and also to obtain on the spot, notes of all decisions rendered in the Courts, whether delivered orally or otherwise.

Owing to the comparatively small number of lawyers in practice in British Columbia, it is not expected that, at first at all events, a greater number of subscribers than say 60 or 70 can be obtained. It is therefore proposed that the subscription shall be $10.00 per annum; and it is considered that the Profession will not deem that sum, in two instalments, too much to pay for the advantages of keeping in immediate touch with the decisions of the Courts, particularly upon matters of practice.

It is not intended at present to use the BRITISH COLUMBIA LAW NOTES as a Law Journal in the full sense of the term, but, at the same time, it is proposed to introduce short

notes and comments on matters of interest to the Profession; and its pages, within proper limits, will be open to communications from members of the Profession on matters of professional interest.

We have taken the liberty of distributing this, our first number, among the members of the Profession, without having previously canvassed their support, and shall be pleased to receive the names of intending subscribers.

SCINTILLÆ JURIS.

Sir Matthew Baillie Begbie, Kt., C. J.

The opening of the sittings of the Full Court on 25th January last was the occasion of a very pleasing incident. Sir Matthew Begbie, owing to what has happily proved to have been only a temporary illness, had wisely sought a change of scene and rest, for a few months, from the arduous duties which devolve upon him as Chief Justice of British Columbia and which he has performed with untiring energy for the last 34 years.

He now occupied the Bench for the first time since his return to Victoria.

Nearly all the members of the bar at that time in Victoria attended the opening of the Court in their robes, as a mark of professional respect and personal welcome to the learned Chief Justice upon his return to the Bench.

Their Lordships Justices Crease, McCreight, Walkem and Drake also sat, constituting, with the Chief Justice, the whole court.

Upon the Registrar calling the first case on the list, Hon. Theodore Davie, the Attorney General, rose, and having asked permission of the Court, addressed his Lordship the Chief Justice as follows:—

Before the regular business of the Court proceeds, I wish, and in this I voice the unanimous sentiment of the

bar, to accord to your Lordship, the Chief Justice, our hearty congratulations upon your sufficient restoration to health, to again take your accustomed place upon the bench.

Your Lordships absence, and the cause of it, have been the occasion of many anxious moments to all ; and I cannot sufficiently express the gratification which we feel at your presence again amongst us, to continue that unflinching and impartial administration of justice, which this country has enjoyed at your hands for the last thirty-four years.

We trust that you will soon have completely regained your health, and that it will yet be very many years before the termination of Your Lordships usefulness will have arrived.

His Lordship said:—Mr. Attorney-General, I assure you that although I may not show it I am deeply moved by the kind remarks which have fallen from you. My chief anxiety during my absence has been the inconvenience which it must necessarily have caused the bar. Judgments in several cases heard before vacation should have been delivered before this. I do not know whether I am acting prudently in being here at the present time, although I feel fit to continue my work, excepting that occasional attacks of physical pain make it difficult to give my whole attention to the work that I am engaged in. I may remark, Mr. Attorney-General, that you yourself are looking well, and that all the members of the bar are looking extremely well.

The Attorney-General.—I think I may safely assure your Lordship that we are all in good fighting trim.

His Lordship.—In conclusion I may say that I am deeply grateful to you for your remarks, which I feel are sincere.

The regular business of the Court was then proceeded with.

We are aware of the sentiment with which the learned Chief Justice, in common with all gentlemen of breeding, regards any unwarranted invasion of private life through the medium of printer's ink.

The Chief Justice is, however, of more than mere professional interest to the bar. His personality stands forth prominently in every page of its history and Jurisprudence from the time of his arrival in the Province. He had a large share in moulding its laws in the days when his knowledge and experience were of the greatest value. It was, however, in his stern administration of the law, and in the prevention of lawlessness, that the community was and is most indebted to him. It is common knowledge that in the early days, when he was the only Judge of the Supreme Court, his firm and fearless execution of the duties of his judicial office, in districts far from the centres of population, and the seat of the Courts, peopled by a turbulent horde of gold seekers and adventurers, caused life and property to be respected to an extent which was a matter of surprise, if not envy, in similar communities just south of the national boundary, where men were only too much of a law unto themselves.

Many things have been said and printed of the Chief Justice, which are always said at some time or other, by some persons or other of any man of a resolute and independent spirit who occupies a position which makes him an arbiter in affairs. It is sufficient to say that he is regarded with respect and admiration, we might say with affection, by the members of the Bar who practice before him. We look upon him as the most patient and painstaking of our Judges.

He is a man of unusual strength and decision of character, but, withal, eminently open to argument and very courteous to counsel.

The Chief Justice's figure is well known in the Province. Tall, beyond the common stature of man—he is considerably over six feet in height—he has preserved the ac-

tivity of youth to an age when most men have retired to the chimney corner, or, at least, ceased to be capable of such recreations as shooting and lawn tennis. In fact, it is said that his recent indisposition was brought on by a cold caught by sitting in the open air, without a coat, after playing tennis all afternoon. It is to be hoped that he will take better care of himself in future.

We heartily re-echo the wish expressed by the Attorney-General, that Sir Matthew Begbie may long enjoy such health as may enable him to continue to preside over the administration of justice in the Province.

PORTRAITS OF THE CHIEF JUSTICES.

While speaking of the Chief Justice, there is a matter which should be brought to the attention of the Bar and of the Law Society. In, we think, all of the Provinces of Canada, certainly in Ontario, Quebec and Manitoba, the Law Societies possess a complete series of portraits *in oils, of the* Chief Justices of their Provinces, from the first incumbents of the office downwards.

In Ontario they have the portraits of the Chief Justices of each of their Courts. These are hung in prominent positions in Osgoode Hall. The idea has much to recommend it. The writer remembers very well, when first a student at Osgoode Hall, the pleasure he took in walking round the corridors of that very fine building and looking at the pictures of the eminent lawyers who presided, and particularly of those who had formerly presided in the Courts. At a later period of his professional novitiate, it was interesting to endeavor to trace some association between the judicial style and manner of the different Chief Justices, and the counterfeit presentment of their personality as exhibited on the canvas.

Lawyers, past and present, are one great fraternity, and of necessity seek each other's acquaintance independently of

time or space, and that which we are and which we accomplish we leave as a record and as a legacy to our successors. There is no one of us, perhaps, who has not endeavoured to form, and in fact, who has not fabricated some picture in his own mind, of the personal appearance of the great English Judges. It is not a mere sentiment which would make us wish to begin a series of portraits of the Chief Justices of British Columbia. If it is, then the whole world is ruled by sentiment, and why should not we be? The Manitoba Bar has now life-sized portraits of Chief Justice Wood, Chief Justice Walbridge, and Chief Justice Taylor, the present incumbent of the office. If the Law Society or the Bar at large, do not move in the matter and persuade our Chief Justice to let us take his picture and hang it in the Court House, we think that our successors will blame us very much some day.

PARLIAMENTARY.

The following Bills of interest to the profession are now before the Provincial Legislature.

THE LODGERS' RELIEF ACT.

This Bill provides for the protection of the goods of lodgers from distress by the landlord for the rent of the immediate tenant. It is similar in effect to the English "Lodgers Relief Act, 1870," which came into force in Manitoba by the introduction of English Law when that Province was constituted, and to the Act of Ontario. Its justice is apparent.

AN ACT RESPECTING PARTNERSHIP.

The provisions of the English "Partnership Act" are taken without alteration, and consolidated with the statutory provisions in force in Ontario respecting the formation of limited partnerships and the compulsory registration of business firms. Slight alterations in the Ontario provisions appear in the Act. This is an Act which will doubtless prove of great benefit to the mercantile community.

AN ACT RESPECTING WITNESSES AND EVIDENCE.

This Bill is evidently intended to be a fairly complete codification of the various rules of evidence respecting witnesses and the proof of documents. The first twenty sections are practically identical with the first twenty sections of the "Canada Evidence Act, 1893," and the remaining clauses consist of the sections of the English "Common Law Procedure Act, 1852," dealing with this subject, together with a number of provisions based on the Ontario Legislation, with some few verbal variations.

AN ACT FOR THE BETTER PREVENTION OF FRAUDLENT AND MISLEADING STATEMENTS BY COMPANIES AND OTHERS.

This is a copy of the Act in force in Ontario, passed in 1893. This line of legislation apparently owes its origin to the decision of the House of Lords in Derry vs. Peek, 14 Appeal Cases, 337, which has been so much criticised by Sir Frederick Pollock in the Law Quarterly Review, and elsewhere. Of course, in the Courts, the decision is now beyond criticism. Prevention is, at all events, said to be better than cure. The Act provides for a penalty not exceeding $200.00 and costs nor less than $50.00 and costs, to be recovered from any officer, agent or employee of any company, who causes to be made and published in any document connected therewith, any false statement affecting the credit or financial standing thereof; the fine to be recovered on summary conviction before a P. M. or J P., and in default of payment imprisonment for not less than one or more than three months.

The clause is rather cumbersome. It is noticeable also that it does not provide that the false statement must be knowingly made in order to be within the Act. That may be intentional, but it must make the provision very difficult to carry into effect. It is hard to understand a penal offence disassociated from *mens rea*

Speaking of statutory provisions relating to Public Companies, the remarks of Mr. Justice Drake in his judgment in

the recently decided case of Twigg vs. The Thunder Hill Mining Company, referring to the insufficient protection afforded by the supervision of the Registrar of Public Companies, are in point:—"If the Registrar of Joint "Stock Companies is to be merely a scribe to register whatever is laid before him, and not to ascertain whether or not a "Company claiming registration has or has not by its Memorandum of Association complied with the stipulations of the "Act, I think that his duties should be more clearly defined by "statute. The Act is intended to protect the public dealing "with limited companies, as well as shareholders who invest "their money, and the utter neglect of all statutory requirements by this Company points to the necessity of some more "stringent regulations for compelling obedience to these "provisions than at present exist."

AN ACT TO AMEND THE SUPREME COURT ACT.

This Bill provides for the establishment of a Nanaimo Judicial District. It also provides that the territorial limits of the C. C. Judges, when acting as local Judges of the Supreme Court, shall be co-terminous with the limits of their Judicial Districts as C. C. Judges. This is but fair. It was held in Hendryx v Hennessey by Mr. Justice Walkem on August 21, 1893, that the vicarious jurisdiction of a Supreme Court Judge to sit for a County Court Judge, under Sec. 15. C. C. Act, 1888 was subject to the territorial limitations affecting the C. C. Judge himself, *vide* post, p. 31.

AN ACT TO ABOLISH THE RIGHT TO ACCESS AND USE OF LIGHT BY PRESCRIPTION.

The title of this measure sufficiently explains its object. It contains a clause saving prescriptive rights already acquired. There are similar Acts in Ontario and Manitoba.

THE LEGAL PROFESSIONS ACT.

We are informed that a number of "Inferior Courts Practitioners" in Kootenay, Cariboo, Cassiar and Lillooet

intend to have an amendment to the Legal Professions Act introduced this session providing that the Benchers may call to the Bar and admit as solicitors, British subjects being English or Irish barristers or attorneys or Scotch advocates or writers to the Signet, or barristers or solicitors of any Province or Territory in Canada and who have in any of such cases been resident and actively engaged as inferior Courts practitioners in any of said Districts for six months. Such call and admission to be made without examination as to legal knowledge or previous notice in the B. C. Gazette, upon proof to the Law Society of the pre-requisites indicated above, and of good moral character.

This is of course a very modest request, which should only require to be mentioned in the legislature.

BRITISH COLUMBIA.

IN THE SUPREME COURT.

VARRELMAN *vs.* PHOENIX BREWERY CO.

JANUARY 20TH, 1894. [DIVISIONAL COURT—BEGBIE, C. J. McCREIGHT, J. DRAKE, J.

Master and Servant—Company—Contract of hiring—Construction of—Wrongful Dismissal—Evidence—Statements of Directors—Ratification—Offer of Compromise—Divisional Court.—Jurisdiction to set aside non-suit.

The action was for breach by Defendant Company of a contract in writing under its corporate seal to employ the plaintiff as brewmaster, in its lager beer brewery in Victoria, for three years, and during that period to pay him, as such brewmaster, a salary of $250. a month, at the end of each month. The claim alleged that the defendants wrongfully dismissed the plaintiff at the end of a year. The action was tried before Walkem, J., and a special jury. The plaintiff proved at the trial, that the President of the Company in that capacity wrote him a letter, informing him that the Company had amalgamated with another brewing company in Victoria, and that the Secretary of the Company and the President of the other Company had been appointed joint managers of the amalgamated concern and asking the plaintiff to attend a meeting next day in regard to the matter. The plaintiff attended. The learned judge refused evidence of what the President and Secretary of the defendant Company, and the joint Managers said to the plaintiff at that meeting on the ground that it was necessary to prove

express authorization by the Company to them to do anything which would bind the Company as amounting to a dismissal of the plaintiff. On an undertaking of counsel the evidence went in. It was proved that both Presidents and the Secretary demanded the keys which plaintiff held as brewmaster, and informed him of the amalgamation He gave up the keys, under protest, and on promise of the President of a settlement. The Brewery was dismantled and abandoned and the stock removed to the other brewery, where the amalgamated business was carried on under its former brewmaster. One of the directors of the Defendant Company endeavored to obtain other employment for plaintiff. The Secretary of the Company, being authorized at an informal meeting of the Directors, on its behalf made an unconditional offer of $1000 to the plaintiff in settlement of his claim for wrongful dismissal.

The learned judge held that there was no evidence of dismissal by the Defendant Company of the plaintiff to go to the jury and non-suited the plaintiff with leave to bring another action. Plaintiffs' Counsel asked to have the question of damages left to the jury so as to avoid a new trial in the event of the non-suit not being sustained. This was refused.

Robert Cassidy for the plaintiff now moved to set aside the non-suit and for a new trial.

E. V. Bodwell, contra, took the preliminary objection that the Divisional Court had no jurisdiction to entertain the motion on the ground that the judgment appealed from was a final judgment.

Held—

That the Divisional Court has jurisdiction, concurrent with the Full Court, to grant new trials, besides its jurisdiction to entertain appeals from interlocutory orders. Objection over-ruled.

The motion for a new trial was then argued.

Held—

That there was abundant evidence to go to a jury that the plaintiff was dismissed by defandants Co.

New trial granted.

GABRIEL vs. MESHER.

JANUARY 21, 1894] [IN CHAMBERS—WALKEM, J.

Res judicata—Giving effect to order of Higher Court—Costs—Taxation—Divisional Court—Printed Appeal Book on motion to.

The action was under the Employer's Liability Act, for damages to a servant occasioned by the negligence of his master. It was tried before *Crease*, J., with a special jury. The plaintiff got a verdict for $3,500. The defendent moved the Divisional Court for a new trial, which was granted on the ground of misdirection, and it was provided in the order that the defendant's costs of the motion were to be paid by the plaintiff, as a condition precedent to his going down to a new trial. The plaintiff, after the order was drawn up and issued, moved the Divisional Court upon notice to reconsider the order as to costs, as being without precedent and unjust. The Court refused to vary its order. The defendant, on taxation, was allowed by the Registrar the costs of a printed appeal book used on the motion, the printer's charges for which were $312.20 ; the whole costs being taxed at $486. The plaintiff reviewed the taxation before Drake, J., who affirmed the allowance of the cost of the printed appeal book. The costs were not paid. The plaintiff obtained a summons to fix a day for the new trial.

Theodore Davie, A. G., and *H. Barnard*, now moved same absolute.

The Court will not give effect to a clearly erroneous order which must have been made originally *per incuriam*. A plaintiff who has a verdict which has been set aside for no fault of his own, but for misdirection, has a constitutional

right to go to a new trial, unhampered by restrictions. There was no fact upon which to found a jurisdiction to impose the terms in question.

E. V. Bodwell, contra. Newington vs. Levy, L. R. 7, S. B., is authority that so long as it is unreversed effect must be given to all the terms an order of the Court.

Held—

That a judge in Chambers has no jurisdiction to reconsider an order of the Court, particularly of a Court of Appeal, and that effects must be given to it. That as the payment of the costs was made a condition precedent to the plaintiff's right to go down to trial again; the summons must be dismissed with costs.

NOTE—The plaintiff appealed from this order to the Divisional Court. The appeal was argued on 1st February, when the court reserved judgment.

JENSEN vs. SHEPPARD.

JANUARY 26, 1894.] [IN CHAMBERS. DRAKE, J.

Arrest.—Ca. Sa.—Discharge from Custody.—Maintenance money.—Rules 976 and 977.

Application under Rule 977 for the release of defendant from custody under a writ of *Ca. Sa.* The affidavit of James Eliphalet McMillan was read in support of the summons. It set out: (1) That the dependent is sheriff of the County of Victoria and that the defendant was arrested by his deputy on the 2nd day of January, 1894, on a Writ of Ca. Re., and on the 4th day of January on a Writ of Ca. Sa. and (2) On the 3rd day of January the Plaintiff's solicitor paid him $3.50 and on the 10th day of January, a further sum of $3.50 for the defendant's maintenance; (3) That since the 10th day of January (the affidavit was sworn on the 22nd day of January) he had not received any further

sums for the defendant's maintenance, and that there was still due since the 17th day of January the sum of $3.50; (4) That the defendant was still in custody in the Provincial Gaol in and for the County of Victoria under the said Writ of *Ca. Sa.*

J. S. Yates, for the defendant contended that the language of Rule 977 is imperative; and as it was not complied with, the defendant should be discharged. It was a matter affecting personal liberty. He cited Fisher v. Bull, 5 Term Reports, 36., in which it was held that an insolvent debtor has a right to his discharge if his groats be not paid before ten at night of the day on which they were payable; and that this right was not waived by the turnkey on the felon's side accepting them after that time.

J. A. Aikman, for the plaintiff submitted that as the maintenance up to the 31st January was paid on the 23rd of January, that cured the defect and that there was nothing now due and owing.

Drake, J.:—In this case the plaintiff is held in custody under a Writ of Ca. Sa. The plaintiff paid the weekly allowance to the sheriff up to the 17th day of January; the next weekly allowance was due on the 17th—this was not paid until the 23rd. The defendant applied to be discharged on the ground of non-payment of the weekly allowance due on the 17th day of January. The summons was dismissed as it had not been served on the plaintiff as required by the Rules. On the day of the dismissal of this summons, the plaintiff paid to the Sheriff the allowance up to the 31st January. On the 25th the defendant again applied for his discharge on the ground of the omission to pay on the 17th, claiming that no subsequent payment could cure the omission of payment in accordance with the terms of Rule 976. The language of Rule 977 is precise:—"in case the maintenance money is not paid as aforesaid, the defendant shall be entitled to be discharged." The

money, by the previous Rule is required to be paid in advance, $3.50 a week. Not being so paid I think the defendant is entitled to his discharge.

Defendant discharged.

GRAYS, et al, vs. McCALLUM, et al.

JANUARY 27, 1894.] FULL COURT—BEGBIE, C. J. CREASE, J. McCREIGHT, J. WALKEM, J.

Agency—"Placer Mining Act, 1891," Secs. 98 and 99.—Authority of Person other than foreman to bind Mining Partnership.—Ratification.

McCallum, a member, but not the foreman, of a mining partnership or Company, registered under the provisions of the "Placer Mining Act, 1891," purchased with his own money certain stores or *mining* supplies which were at that time on premises belonging to the Company, intending the purchase to be on behalf of the Company. He subsequently, in submitting certain accounts to the Company credited himself as against the Company, with the amount so paid by him. At a meeting of the Company afterwards held, a resolution was passed levying an assessment upon its members for the purpose of answering the claims submitted, including that in question.

C. E. Pooley, Q. C., for the appeal, amongst other grounds, contended that the purchase of the stores in question was outside the scope of the objects of the Company; and also, that as McCallum was not the foreman the Company was not liable, whether it then intended so to be or not, and that the transaction was incapable of ratification.

Theodore Davie, A. G., for the defendant McCallum, contra.

Held—

Per *Begbie*, C. J.:—The purchase in question could have been made by the Company and such

purchase would manifestly have been for its convenience since it is apparent that as there were no supplies to be had, and no trading posts in that District from which stores could readily be purchased from time to time as required, it was almost essential to the interests of the partnership to have a quantity of such stores on hand. But there is nothing in the Act to prevent a mining partnership or company formed thereunder from itself contracting liabilities, as, for instance, by a meeting at which a proper proportion of the shareholders are represented, and by proper resolutions.

I am of opinion therefore, that the act of the company in passing a Resolution levying an assessment upon its members for the purpose of paying the amounts of the account produced to the meeting, among which amounts was that paid by Capt. McCallum for the purchase in question, constituted a distinct ratification by the Company of that purchase.

Per *Crease*, J.:—If Capt. McCallum had not authority at the time of the purchase, there was a clear ratification afterwards.

Per *McCreight*, J.:—I am inclined to the opinion that the company might have repudiated the action of Capt. McCallum, as he was not the foreman of the partnership. Ratification must be by a solemn act binding on the company and with the intention of ratifying—which I think was the case here.

Per *Walkem*, J.:—Sections 98 and 99 of the "Placer Mining Act, 1891," provide :—

98. Every such partnership shall appoint a foreman or manager who shall represent the partnership, and who shall sue and be sued in the name of the partnership ; and his contracts in relation to the business of the partnership shall be deemed to be the contracts of the partnership.

99. No such partnership shall be liable for any other indebtedness than that contracted by its foreman or manager, or by its agent duly authorized in writing

The policy and intention of those provisions was to prevent any mining partnership or company from being bound for debts contracted, except by the one person selected for that purpose; and it may be that, as Capt. McCallum was not the foreman of the company, it would not have been bound by the purchase made by him in its name.

I agree, however, that there had been a distinct ratification by the partnership of the purchase.

Appeal dismissed with costs.

VARRELMAN *vs.* PHOENIX BREWERY.

BEGBIE, C. J.
JANUARY 29TH, 1894.] [DIVISIONAL COURT—McCREIGHT, J.
DRAKE, J.

Practice.—Divisional Court.—Extending time to appeal to.—Ex parte Order.—Irregularity.

The action was tried on the 31st July, 1893, when the Plaintiff was non-suited. Vacation commenced August 1st and ended September 30th. Plaintiff on 3rd August obtained from *Walkem*, J., an ex parte order extending the time for applying to the Divisional Court for a new trial to the 10th October. On the 8th August, Defendants served Notice of Appeal to the Divisional Court from the ex parte order, on the ground that there was no jurisdiction to make the same ex parte, and set down the appeal on the same day. The Plaintiff after receiving the Notice of Appeal, and on the same day, set down his Motion to the Divisional Court for a New Trial. That Motion and the Defendants' appeal from the ex parte order now came on to be heard, the Defendants' appeal first.

E. V. Bodwell for the Defendant.

Robert Cassidy, for the Plaintiff, contended that there was jurisdiction to make order ex parte, because although prior to the passing of the B. C. Rules, 1890, by Rule 75, of 1880, every application at Chambers authorized by those Rules must be made in a summary way by Summons, that rule is omitted in the Rules of 1890. and Rule 572 provides for the making of applications in Chambers ex parte, and otherwise than by summons. That the motion for an extension of time, if it was not unnecessary was, at all events, a motion of course. See Dan. Ch. Pr. 6 Ed. 1546-47. In Re Laurence, 4 Ch. Div. 139, was held that after the time for appealing has expired, special leave will not be granted ex parte, implying that before it has expired, it can be so granted. See also re Universal Discount Co., 32 Solicitors' Journal, 721. The Plaintiff, in effect abandoned the ex parte order by setting down his appeal within eight days after the day of trial, as provided by Rule 434. At all events, there is nothing involved in this appeal but costs, since the plaintiff can take nothing by it, as the plaintiff is entitled to proceed with his motion for a new trial. The Court should not permit an appeal to be argued for the purpose only of deciding who is to pay the costs of it. Even if the plaintiff were out of time, the Court could now extend the time and hear the Appeal. Manchester Economic Building Soc., 24 Ch. Div. 496.

Held—

That the Court had jurisdiction to extend the time for appealing and hear the motion for a new trial, whether the ex parte order extending the time was proper or not, but the order extending ought not to have been made ex parte. The Court expressed no opinion as to whether the words in the Rule "within eight days after the trial" excluded the day of trial or not.

Order that plaintiff pay the costs of the defendant's appeal from the ex parte order.

The plaintiff's motion for a new trial was then argued

BEER BROS., vs. COLLISTER.

JANUARY 29, 1894.] IN CHAMBERS—DRAKE, J.

Practice—Pleading—Amendment—Counterclaim—Adding after case on paper for trial.

Robert Cassidy for the defendant applied for leave to amend the Statement of Defence by adding to it a Counterclaim.

Notice of Trial had been given for February 3rd, and the case was in the paper for trial.

Thornton Fell for the plaintiff, contra, opposed the motion on the ground that the order could not be made after the action was set down for trial; citing Ware vs. Gwynn, W. N. 1875–7, page 240.

Held—

It was a matter of discretion to grant or refuse the motion, dependent on the convenience of the parties, and as it was not shown that any inconvenience would result to the plaintiff or that he was taken by surprise, the application must be granted. Costs of the application, and costs occasioned to the plaintiff by the amendment to be costs in the cause to him in any event.

JENSEN *vs.* SHEPPARD.

JANUARY 30TH, 1894. DRAKE, J.

Practice.—Examination of Judgment Debtor.—Whether necessary to have return of nulla bona on execution before obtaining.—Rule 486.—Con. Stat. B. C., Cap. 42, Sec. 11.

Application upon Summons by the Plaintiff for

Order requiring the Defendant to attend and be examined before the Registrar as to whether any and what debts are owing to him, and as to what property and means he has of satisfying the judgment, and that he produce any books or documents relative to the matter.

The affidavit in support of the Motion set out that on 5th January, 1894, the Plaintiff recovered a Judgment against the Defendant for $316.36; that the said Judgment remained wholly unsatisfied, and that the Defendant was in the city of Victoria, within the jurisdiction of the Court.

J. A. Aikman for Plaintiff, supported the application.

Lampman, (Yates & Jay) for the Defendant, contra, contended that no Order for the examination of a Judgment Debtor could be made until a *Fi Fa*, Goods, had been placed in the Sheriff's hands, and had been returned *nulla bona*, or the Sheriff had notified the Judgment Creditor that, if called upon to return the execution, such would be his return.

Rule 486 is similar to the Ont. Rule 926, which is taken from R. S. Ont., 1877, Cap. 49, Sec. 17, and Cap. 50, Sec. 304, and which are in effect the same as Con. Stat. B.C., Cap. 42, Sec. 11. Under the Ontario Rule 926, it was held in Ontario Bank vs. Trowern, et al, 13 Prac., Rep. 422-- that the examination could not take place until a Fi Fa had been issued and returned nulla bona. See also Carscaden vs. Zimmerman, Can. Law Times, Vol. 13, p. 414.

Held—

That under the "Execution Act" Con. Stat. B. C., Cap. 42, Sec. 11, and Rule 486, the Order could properly be made against the Judgment Debtor, even before a Writ of Fi Fa was issued.

Order made.

FOOT vs. MASON.

JANUARY 31, 1894.] [DIVISIONAL COURT—McCREIGHT, J
BEGBIE, C. J.
DRAKE, J.

Practice—Ex parte Order extending time—Discretion to make any necessary order on Appeal.

This was an appeal from an ex parte order of Mr Justice Crease, dated 22nd instant, extending for two days the time (seven days) limited by an order of Mr. Justice Drake, made upon Summons on the 15th instant, within which the Plaintiffs were to give security for the costs of the action, and providing that otherwise the action should be dismissed; this order read:

"I do order that this action be for want of prosecu-
"tion, dismissed, with costs, to be paid by the plaintiffs to
"the defendants, unless the said plaintiffs do within one
"week from the date of this order give security to the satis-
"faction of the Registrar for the costs of each of the
"defendants to the extent of $75.00."

The Defendants had moved in Chambers to rescind the ex parte order of Crease, J., but that Motion had been refused.

The grounds of appeal were:—

1. That there is no jurisdiction to vary by an ex parte order the terms of an order made upon summons after hearing the parties.

2. That the order of Mr. Justice Crease made no provision for dismissing the action on default of the security being given within the extended time.

W. J. Taylor for the defendant, appellant.

J. P. Walls for the plaintiffs, respondent.

The Court expressed an opinion that the ex parte order was irregular, and that the plaintiffs were out of time.

J. P. Walls, for the Respondents, submitted that the Court had now jurisdiction to grant the extension of time. The reason the security was not given within the extended time was owing to the question raised as to the validity of the ex parte order, as, if it were held to be inoperative, the giving of the security would have been too late to prevent the dismissal of the action ; but the plaintiffs were now prepared to submit to terms, and give the security if the Court in the exercise of its discretion, extended the time. Re Manchester Economic Building Society, 24 Ch. Div., 496.

W. J. Taylor, contra :—By the terms of the order of Mr. Justice Drake, the action was out of Court upon the lapse of the time for giving the security ; and if the extending order of Mr. Justice Crease is inoperative, the whole matter is now *coram non judice*, and the Court has no jurisdiction to extend the time or make any order.

Held—

Per *Begbie*, C. J.:—The Court has jurisdiction by Rule 674 to give any judgment and make any order which may be just and which the case may require. We do not think that it would be just to dismiss the action and put the parties to the cost of another action, when the plaintiff is now ready to give the security. The Order will therefore be that, upon payment by the plaintiffs of the costs of this Appeal and of the defendant's Motion to review the ex parte Order in Chambers, and upon giving the security under the Order of Mr. Justice Drake within forty-eight hours, the plaintiffs be at liberty to proceed, otherwise the action to stand dismissed with costs.

Per *Drake*, J.:—Our judgment is not to be taken as an expression upholding the granting of ex parte orders on such motions, or irregularities such as have occurred here. The next case of the kind that comes before the Court may be dealt with in a different manner.

JACKSON vs. JACKSON & MYLIUS.

FEBRUARY 1, 1894. | BEGBIE, C. J. | FULL COURT—McCREIGHT, J. DRAKE, J.

Pleading—Order XIX, Rule 19—Partnership—Denial of as alleged—Negative pregnant—Party, on appeal, held estopped by implied admission, in a pleading treated at the trial as a complete traverse.

Action against defendants, as partners to recover money lent. The plaintiff signed judgment by default against defendant Jackson, who was her son. The statement of claim against the defendant Celia Mylius alleged. 2. "The defendants (Alexander James Jackson and Celia Mylius) entered into partnership as watchmakers and jewellers on the 22nd day of April, A. D. 1891 for a period of five years." 5. That the defendants have paid to the plaintiff, interest on the sums so advanced at the respective dates aforesaid *amounting* to the sum of $976.75 but have not repaid to the plaintiff the principal sums so advanced or any portion *thereof*.

The statement of defence of Celia Mylius 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 James Jackson as alleged in "paragraph 2 of the statement of claim."

The advancing of the money was then denied and paragraph 3 continued:—"This Defendant has no knowledge "of the matters alleged in paragraphs 4, 5 and 6 of the "statement of claim, except as therein alleged."

Issue was joined by the Plaintiff and the case came on for trial before Mr. Justice Crease without a jury, who gave judgment in favor of the Plaintiff for the full amount claimed with costs.

In the course of his judgment, which was in writing. Mr. Justice Crease said "The pleadings in this case are simple. The plaintiff's claim is that the defendants Alexander

James Jackson and Celia Mylius entered into partnership. * * The defence denied the partnership. * * Another document which Jackson claimed was the new and real deed of partnership was tendered in evidence but could not be either accepted or examined, and the plaintiff had to fall back on the evidence which existed, oral and documentary, to show that the two defendants had given themselves out to be partners."

Defendant Celia Mylius appealed asking that the judgment be set aside and judgment entered for her on the grounds that there was no evidence to sustain the judgment against her on the issue of the partnership.

2. That she was a married woman and there was no evidence that she had separate estate so as to be capable of contracting.

It was objected on behalf of the plaintiff, on the appeal for the first time, that the defendant admitted the partnership in paragraphs 1 and 3 *supra* of her defence.

H. D. Helmcken for the plaintiff.

F. B. Gregory for the defendant Celia Mylius.

Held—

Per *Begbie*, C. J., and *Drake*, J.:—That there was an admission of the partnership by defendant Celia Mylius, in her statement of defence. That paragraph 3 was a clear admission of the payment of interest. The defendant has no knowledge, save as therein alleged, in other words the allegation is true. She knows the facts is as alleged and not otherwise ; and that paragraph 1 of the Statement of Defence, by not complying with Rule 173, must be read as admitting the partnership.

Per *McCreight*, J.:—That there could not be a more distinct answer than is contained in the defence to the point of substance. The partnership is the basis of the allegation, and it is most distinctly traversed. This is

the usual form of traverse laid down in Bullen & Leake. Our rule is the same as the English rule, and these forms of traverses are especially framed in compliance with those rules. We must give the authority to these precedents, to which their use and established standing entitles them. On hurriedly glancing over this copy of Bullen & Leake, which I have just had placed in my hands (Library Edn. 1888.) I find no less than a dozen precedents; p. p. 92, 93, 96, 97, 104, 109, 146, 156 twice, 177, 199 and 217. I cannot understand how such a traverse can be held to be an admission.

Per Curiam (*McCreight*, J. dissenting)—Judgment reduced for error in amount to $5,270 No costs of appeal to either party. Defendant may amend and have a new trial on terms. (This was refused.)

Per *McCreight*, J.:—The appeal should be allowed.

IN THE VICE-ADMIRALTY COURT.

RE THE SHIP "AINOKA."

JANUARY 4th, 1894.] [CREASE, J. R.

The Seal Fishery (Behring Sea) Act, 1891.—Ship found within prohibited limits with skins on board.—Vis major.—Lawful excuse.

It was found, as a fact, that the ship, a sealing schooner, was driven into the prohibited waters of Behring Sea by a succession of gales, assisted by a current of the existence of which her master was ignorant.

C. E. Pooley, Q. C., for the Crown.

H. Dallas Helmcken, for the owners.

Held—

That the presence of the schooner at the point in question was sufficiently accounted for as being involuntary and with lawful excuse. Judgment for the vessel's owners, without costs.

DUNSMUIR vs. THE SHIP "HAROLD."

JANUARY 26, 1894.] [CREASE, J.

Maritime Law.—Towage Contract.—Concealment of circumstances affecting —Extraordinary towage or Salvage.

Action by the owners of the Tug Lorne for $5,000.00 for alleged salvage services rendered above ship in towing her from the vicinity of Race Rocks, a dangerous reef in the Straits of Fuca, about 5 miles from Victoria, into Esquimalt Harbour.

On the morning of 16th Nov., 1894, the Harold ran ashore at Race Rocks, sustaining some injuries which caused the leakage of a certain amount of water. She got afloat without assistance about six o'clock and shortly afterwards

the tug came alongside when an agreement was entered into between the masters of the ship and tug to tow the ship into Esquimalt Harbour for $50.00. On arrival at Esquimalt it was found necessary to dock the vessel for repairs.

C. E. Pooley, Q. C., for the plaintiffs, contended that by reason of the injuries which the Harold had received and her critical position when discovered, she was in such danger that the services rendered by the tug, if there had been no contract, would have entitled her to a salvage reward; that the contract to tow for $50.00 was void for non-disclosure of the fact that the ship had been ashore and was in a leaky and dangerous condition.

E. V. Bodwell and *P. Æ. Irving*, for the defendants, contended that it was not incumbent on the master of the ship to disclose to the master of the tug when making the contract, a circumstance which was immaterial to the trouble and risk incurred by the tug in performing the towage services and, as the evidence did not show that there had been any additional trouble or risk to that involved in an ordinary towage service, the contract for $50.00 should stand.

Held—

That the services were more than ordinary towage services, and that there was an additional risk *dans locum contractui* assumed by the tug in making the tow, over and above that contemplated at the time of making the agreement, of which there was a non-disclosure, for which the owners of the tug were entitled to avoid the agreement. The services were extraordinary towage services, though not salvage services.

Judgment for plaintiff for $250.00 for extraordinary towage with costs.

IN THE COUNTY COURT OF KOOTENAY.

HENDRX vs. HENNESSEY.

August 21, 1893] [Walkem, J.

County Courts—Jurisdictionof Supreme Court Judges in—Limitiations of—C. C. Act, 1888, Sec. 15.

The action was pending in the County Court of Kootenay. Defendant moved to set aside a lis pendens filed by plaintiff against certain Mineral Claims, the title to which was brought in question in the action, on the ground that the plaintiff had no claim and that the proceedings and lis pendens were vexatious and without colour of right. There was no affidavit that the office of C. C. Judge of Kootenay was vacant.

Robert Cassidy, for defendant, showed cause. He objected to the jurisdiction to hear the motion, on the ground that the pre-requisite of the vacancy of the office of C. C. Judge of the domicile was not proved; and also, that, apart from that, the jurisdiction conferred on the Supreme Court judges by the act was vicarious and co-terminus with that of the C. C. judge of the District, and consequently could not be exercised outside the territoral limits of the County Court in question.

Lindley Crease, contra, contended that by section 10 of of Supreme Court Act, the Supreme Court and its judges had cognizance of all pleas whatsoever.

Cassidy in reply: That is admitted when the action is brought in the Supreme Court, when the only question is one of costs.

Held—

That both objections to the jurisdiction were fatal. That there was no power to make any order except as to costs.

Summons dismissed with costs.