# Municipal Elections Act (Re)

**In re Municipal Elections Act**

**[1912] B.C.J. No. 11**

2 D.L.R. 349

British Columbia Supreme Court
Victoria, British Columbia

**Gregory J.**

January 5, 1912.

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**1** **GREGORY J.**:-- This is an application under the provisions of the Municipal Elections Act, section 17, chapter 14, British Columbia statutes, 1908, by a number of householders, to have their names placed on the voters' list for the City of Victoria.

**2** The names were originally placed on the list by the clerk of the Municipality under section 6 of the Act, but were struck off by the court of revision, acting under the authority of subsection (c) of section 14 of the Act, on the ground that the applicants had not made the statutory declaration required by section 6 before a commissioner for taking affidavits in the Supreme Court, but before a special commissioner for taking affidavits appointed under the Provincial Elections Act (section 13, chapter 17, British Columbia statutes, 1903-04).

**3** Mr. Maclean, for the applicants, raises two points, viz.: First: The court of revision had no jurisdiction to review the finding of the clerk as to the authority or qualification of the commissioner before whom the declaration was taken. Second: That a commissioner appointed under the Provincial Elections Act is qualified to take the declaration, inasmuch as be is a commissioner for taking affidavits, and the Court will ignore the qualification in the statute that he is appointed "for the purpose of acting under the Act," or will treat the words merely as a declaration of the reasons for making the appointment.

**4** It is undisputed that the applicants have the necessary qualifications, and are entitled to go on if the declarations are properly made.

**5** Mr. Maclean lays great stress upon his first point, and he frankly admits that his argument goes the length of holding that if the clerk put names on the list without any declaration at all, the court of revision would have no jurisdiction to remove them on that ground, citing Registration Appeals, Davies v. Hopkins (1857), 3 C.B.N.S. 376 [17 BCR Page34], where, although a very similar contention was successfully maintained, I do not think it assists him, because that decision turned upon

the wording of the statute (6 & 7 Vict., c. 18) then under consideration, and, Cockburn, C.J. and Williams, J. expressly drew attention to the peculiar wording of that statute, Williams, J. stating, at p. 387, that, if the application before the Court had been one to insert a mine omitted by the overseer, the decision of the Court would have to be different, as in such case it had to be proved before the revising barrister that the proper notice had been given, and that the applicant possessed the qualification named in that statute; but as the case before the Court was one to strike out a name on the list, the revising barrister could only inquire into such matters as the statute permitted him to inquire into in such cases, and the sufficiency of the notice was not one of them. Now, our statute makes no distinction. The duties of the court of revision are the same whether a name has been improperly placed on the list or improperly omitted from it. Sub-section 2 of section 14 of the Municipal Elections Act provides that the court of revision shall correct and revise the list, and shall have power "to determine any application to strike out the name of any person which has been improperly placed thereon, or to place on such list the name of any person improperly omitted," etc.

**6** If there has been no declaration, or a declaration made before an unauthorized person, and yet the name of the declarant appears on the list, it is beyond dispute that the requirements of section 6 of the Act have not been complied with, and the name has been improperly placed there; that is the exact situation which the court of revision is empowered to deal with under our statute.

**7** It seems to me, therefore, clear that Mr. Maclean's first contention is unsound.

**8** As to the second point, there may be some doubt. My attention has been called to the case of In re Provincial Elections Act (1903), 10 B.C.R. 114, and particularly to the remarks of WALKEM, J. at the bottom of p. 120, to the effect that franchise Acts are to be liberally construed, as their object is to [17 BCR Page35] enfranchise and not disfranchise persons possessing the necessary qualifications. In that case the language of the Act itself was broad, and the Court held that it could not be cut down by implication from the form of the jurat given in a specimen affidavit set out in a schedule to the Act. No one will be inclined to question the soundness of that decision, or Mr. Justice WALKEM'S remarks; but neither seems to justify me in ignoring the plain qualification of the powers of a commissioner appointed under section 13 of the Provincial Elections Act. That section is as follows:

> "The Lieutenant-Governor in Council may appoint any person who is a British subject as a commissioner for taking affidavits in the Supreme Court for a limited period without payment of any fee, for the purpose of acting under this Act in the Electoral District in which he resides."

**9** The commissioners before whom the declarations in question were made were appointed under that section, and the order in council appointing them, and their official notification of appointment expressly state that the appointment is "for the purpose of acting" under that Act. The applicants argue that the words of qualification in the Act, the order in council, and the notification mean nothing, are merely a declaration of the reason why the appointments are made, and that once made, the appointees have, as Mr. Maclean puts it, "the full appointment," and have full power and authority to take any declarations made in any cause or matter pending in the Supreme Court. I cannot agree with that; to me the language appears perfectly plain, and in addition, the temporary nature of the appointments, the limitation of the appointees' activities to the electoral district in which they reside; the fact that there is no fee payable and that they are not appointed by a judge of the Supreme Court under the Oaths Act (changed in 1911), and under which appointment on payment of a fee they re-

ceive a formal commission under the seal of the Supreme Court, and were entered on the roll of commissioners in the registry of that Court, all indicate, I think, that the Legislature intended expressly to restrict the powers of such appointees to the purposes of that Act. To accept the applicants' contention would be to treat these qualifying words as surplusage.

**10** It is a well known rule of interpretation of statutes that such [17 BCR Page36] a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent: Craies Statute Law, 2nd Ed., 112.

**11** If the persons taking the declarations had no authority to do so, then they cannot be looked at - they are not declarations under the Act: see Reynolds v. Williamson et al. (1875), 25 U.C.C.P. 49, and other cases referred to by Mr. McDiarmid.

**12** Although the declarants are possessed of the qualifications entitling them to be placed on the list on making the proper declaration, the making of that declaration is a condition precedent which must be complied with. The Municipal Elections Act, sections 6 and 7, provides not only that the declaration shall be made, but also the form of it, the particular month in which it shall be made, and that it must be filed with the clerk within 24 hours after it is made. That these provisions cannot be ignored will not be disputed; then, surely, neither can the provision directing before whom the declaration is to be made.

**13** The only possible doubt appears to me to arise from the fact pointed out by Mr. McDiarmid that both the Provincial and Municipal Elections Acts use the same expression, viz.: "Commissioner for taking affidavits in the Supreme Court," and strictly speaking, there is no such officer known outside of those Acts, the Oaths Act, section 1, stating that commissioners appointed under it "shall be styled commissioners for taking affidavits within British Columbia." But that Act goes on to provide that the acts of such commissioners are valid in all Courts of the Province, and it is common knowledge that they are always spoken of as commissioners for taking affidavits in the Supreme Court, which they in fact are. Neither of the Election Acts states that the commissioners therein named shall be styled in any particular way; and to hold that because of the mere similarity of the expression in those Acts, commissioners under the Provincial Elections Act are the persons named to take declarations under the Municipal Act, would not only greatly enlarge the powers of the former commissioners, in direct antagonism to the express words of that Act, but it would exclude commissioners as generally understood from taking them. I cannot [17 BCR Page37] think that the Legislature intended to do any such thing in so indirect a way, and by such uncertain language.

**14** The application will be dismissed, but by agreement between the parties, the City will pay the costs, fixed at $100.

Application, dismissed.

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## VOL. 2

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1912

B.C.
C. A.
1912
McARTHUR v. ROGERS.
Statement

of there being no chancery division in British Columbia, its scope and intention is the same, namely, that, subject to certain cases where the Judge is given discretion, the mode of trial is to remain as it was before the rules were passed, viz., when equity cases, except where a special issue was ordered to be tried by a jury, were tried by a Judge without a jury, and common law cases were tried with a jury where the cause does not come within rules 3, 4, or 5, a party making application within due time is entitled as a matter of right, to an order for trial with a jury, under rule 6.

It cannot be said here that the equitable jurisdiction of the Court is invoked. The action is brought to recover damages

giving notice within four days from the time of the service of notice of trial or within such extended time as the Court or a Judge may allow, or in the notice of trial to be given by him as hereinafter provided, signify his desire to have the issues of fact tried by a Judge with a jury, and thereupon the same shall be so tried.

427. All causes and matters relating to the following shall be tried by a Judge without a jury, viz.:—

The administration of the estates of deceased persons;

The dissolution of partnerships or the taking of partnership or other accounts;

The redemption of foreclosure of mortgages;

The raising of portions, or other charges on land;

The sale and distribution of the proceeds of property subject to any lien or charge;

The execution of trusts, charitable or private;

The rectification, setting aside, or cancellation of deed or other written instruments;

The specific performance of contracts between vendors and purchasers of real estates, including contracts for leases;

The partition or sale of real estates;

The wardship of infants and the care of infants' estates.

Probate:

All causes or matters other than those specified in this Rule, in which the equitable jurisdiction of the Court is invoked, unless the Court or Judge shall otherwise order.

428. The Court or a Judge may, if it shall appear desirable direct a trial without a jury of any question or issue of fact, or partly of fact and partly of law, arising in any cause or matter which previously to the passing of the Judicature Act, 1879, could without any consent of parties have been tried without a jury.

429. The Court or a Judge may direct the trial without a jury of any cause, matter, or issue requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot in their or his opinion conveniently be made with a jury, or where the issues are of an intricate and complex character.

430. In any other cause or matter, upon the application within four days after notice of trial has been given of any party thereto for a trial with a jury of the cause of matter or any issue of fact, an order shall be made for a trial with a jury.

431. (*a*) In every cause or matter, unless under the provisions of Rule 6 of this Order a trial with a jury is ordered, or under Rule 2 of this Order either party has signified a desire to have a trial with a jury the mode of trial shall be by a Judge without a jury; provided that in any such case the Court or a Judge may at any time order any cause, matter, or issue to be tried by a Judge with a jury, or by a Judge sitting with an assessor or assessors. And in the event of such trial being ordered to be held by a Judge sitting with an assessor or assessors, then



B.C.
C. A.
1912
McARTHUR v. ROGERS.
Statement.

for breach of contract and an injunction is claimed only as an ancillary remedy. The test is whether the action is in substance a common law or an equity action: see *Coles* v. *Civil Service Supply Association* (1884), 32 W.R. 407; *Gardner* v. *Jay* (1885), 29 Ch. D. 50; *Clairmonte* v. *Prince* (1897), 30 N.S.R. 258.

*G. E. McCrossan*, for respondent, not called upon.

PER CURIAM:—The appeal should be dismissed. It does not appear to be a case for a jury, but in any event, seeing that the learned Judge below has exercised his discretion, and has come to the conclusion not to grant a jury, we ought not to interfere.

*Appeal dismissed.*

such Judge may call in the aid of one or more assessors specially qualified and try the cause or matter wholly or partially with the assistance of such assessor or assessors. The Court or Judge may fix such remuneration for the assessor or assessors as may seem meet, and the amount so fixed shall form part of the costs of the action;

(*b*) The plaintiff in any cause or matter in which he is entitled to a jury may have the issues tried by a special jury, upon giving notice in writing to that effect to the defendant at the time when he gives notice of trial;

(*c*) The defendant, in any cause or matter in which he is entitled to a jury, may have the issues tried by a special jury, on giving notice in writing to that effect at any time after the close of the pleadings or settlement of the issues and before notice of trial, or if notice of trial has been given, then not less than six clear days before the day for which notice of trial has been given;

(*d*) Provided that a Judge may at any time make an order for a special jury upon such terms, if any, as to costs and otherwise as may be just.

432. Subject to the provisions of the preceding Rules of this Order, the Court or a Judge may, in any cause or matter, at any time or from time to time, order that different questions of fact arising therein be tried by different modes of trial, or that one or more questions of fact be tried before the others, and may appoint the places for such trials, and in all cases may order that one or more issues of fact be tried before any other or others.

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## IN RE MUNICIPAL ELECTIONS ACT.

*British Columbia Supreme Court, Gregory, J. January* 5, 1912.

B.C.
S. C.
1912
Jan. 5.

1. ELECTIONS (§ I B—12)—VOTERS' LISTS—CONDITIONS PRECEDENT TO BEING PLACED ON SAME—MUNICIPAL ELECTIONS ACT (B.C.).

Where an applicant to have his name placed upon the municipal voters' list, properly qualified in every respect, made the necessary declaration before a special commissioner for taking affidavits appointed under the provisions of the Provincial Elections Act (B.C.) instead of making the same before a Commissioner for taking affidavits in the Supreme Court, as required by the Municipal Elections Act (B.C.), such non-compliance with provisions of the last-mentioned Act is fatal, and the placing of his name on the municipal voters' list by the clerk of the municipality was improper and the Court of Revision rightfully struck his name from the list.

[*Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376, distinguished.]

B.C.
S. C.
1912
IN RE MUNICIPAL ELECTIONS ACT.

2. OATH (§ 1—3)—DECLARATION OF QUALIFICATION OF VOTERS—MUNICIPAL ELECTIONS ACT (B.C.)—PROVINCIAL ELECTIONS ACT (B.C.).

Where by the terms of the Municipal Elections Act (B.C.) the declaration of qualification of voters is to be made before a "commissioner for taking affidavits in the Supreme Court," a declaration of qualification made before a commissioner appointed under the provisions of the Provincial Elections Act (B.C.) is of no legal effect; the powers of the commissioners last referred to being restricted to those conferred upon him by the Act under which he was appointed. [*Boyd* v. *McNutt*, 9 Ont. P.R. 493; *Pollard* v. *Huntingdon*, 16 C.L.J. 168, and *Reynolds* v. *Williamson*, 25 U.C.C.P. 49, referred to.]

APPLICATION on the part of certain persons for an order that the names of such persons be added to the voters' list, as revised by the Court of Revision of the city of Victoria. Heard by Gregory, J., at Victoria, on the 2nd of January, 1911. At the last meeting of the Court of Revision for the city of Victoria, the names of a large number of persons otherwise entitled to be entered upon the list of voters for the municipality were stricken from such list on the ground that the declarations made by them were not taken before a properly authorized officer.

The declarations in question were taken before a commissioner appointed to take affidavits under the provisions of the Provincial Elections Act in the electoral district in which such commissioners resided. All declarations were made and taken in good faith.

The application was refused.

*H. A. Maclean*, K.C., in support of the application:—These persons were qualified to vote and the action of the Court of Revision practically disfranchises them. The Courts lean in the strongest way against an act operating as a disfranchisement of a citizen. The Elections Act should be liberally construed: *Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376. Commissioners appointed under the Provincial Elections Act are competent to take affidavits in the Supreme Court, not especially for the purposes of that Act: see also *Nuth* v. *Tamplin* (1881), 8 Q.B.D. 247 at pp. 252 and 253.

Messrs. *F. A. McDiarmid*, and *J. Y. Copeman*, *contra*:—*Davies* v. *Hopkins*, 3 C.B.N.S. 376, is not applicable, because the statute governing that case and this case are dissimilar. The British Columbia statute definitely states before whom declarations can be made. The statute also provides for the only thing which the clerk has power to check, viz., the delivery of a statutory declaration to him within a prescribed time, and the statute further provides for the duties of the Court of Revision. A declaration is not valid if made before a person who has no authority to take the same. Such declaration is not an instrument upon which perjury could be assigned. A commissioner appointed under the Provincial Elections Act is appointed as a commissioner for taking affidavits for the purposes of that Act



B.C.
S. C.
1912
IN RE MUNICIPAL ELECTIONS ACT.
Argument

in the electoral district in which he resides, and is restricted not only to that district, but to the purposes of that Act. Numerous cases demonstrate the strictness with which the Courts look upon affidavits: *Boyd* v. *McNutt* (1883), 9 Ont. P.R. 493; *Pollard* v. *Huntingdon* (1880), 16 C.L.J. 168. An affidavit sworn before an official having no power to take a deposition is invalid: *Reynolds* v. *Williamson et al.* (1875), 25 U.C.C.P. 49; Ontario Evidence Act, R.S.O. 1887, ch. 61. The Court has power to put only such names of voters on the list as have been improperly omitted.

GREGORY, J.:—This is an application under the provisions of the Municipal Elections Act, sec. 17, ch. 14, British Columbia statutes, 1908, by a number of householders, to have their names placed on the voters' list for the city of Victoria.

The names were originally placed on the list by the clerk of the municipality under sec. 6 of the Act, but were struck off by the Court of Revision, acting under the authority of sub-sec. (*c*) of sec. 14 of the Act, on the ground that the applicants had not made the statutory declaration required by sec. 6 before a commissioner for taking affidavits in the Supreme Court, but before a special commissioner for taking affidavits appointed under the Provincial Elections Act (sec. 13, ch. 17, British Columbia statutes, 1903-04).

Mr. Maclean, for the applicants, raises two points, viz.: First: The Court of Revision had no jurisdiction to review the finding of the clerk as to the authority or qualification of the commissioner before whom the declaration was taken. Second: That a commissioner appointed under the Provincial Elections Act is qualified to take the declaration, inasmuch as he is a commissioner for taking affidavits, and the Court will ignore the qualification in the statute that he is appointed "for the purpose of acting under the Act," or will treat the words merely as a declaration of the reasons for making the appointment.

It is undisputed that the applicants have the necessary qualifications, and are entitled to go on if the declarations are properly made.

Mr. Maclean lays great stress upon his first point, and he frankly admits that his argument goes the length of holding that if the clerk put names on the list without any declaration at all, the Court of Revision would have no jurisdiction to remove them on that ground, citing Registration Appeals, *Davies* v. *Hopkins* (1857), 3 C.B.N.S. 376, where, although a very similar contention was successfully maintained, I do not think it assists him, because that decision turned upon the wording of the statute (6 and 7 Vict., ch. 18) then under consideration, and Cockburn, C.J., and Williams, J., expressly drew attention to the peculiar wording of that statute, Williams, J., stating, at p. 387, that if the application before the Court had been one to insert a

B.C.
S. C.
1912
IN RE MUNICIPAL ELECTIONS ACT.
Gregory, J.

name omitted by the overseer, the decision of the Court would have to be different, as in such case it had to be proved before the revising barrister that the proper notice had been given, and that the applicant possessed the qualification named in that statute; but as the case before the Court was one to strike out a name on the list, the revising barrister could only inquire into such matters as the statute permitted him to inquire into in such cases, and the sufficiency of the notice was not one of them. Now, our statute makes no distinction. The duties of the Court of Revision are the same whether a name has been improperly placed on the list or improperly omitted from it. Sub-sec. 2 of sec. 14 of the Municipal Elections Act provides that the Court of Revision shall correct and revise the list, and shall have power "to determine any application to strike out the name of any person which has been improperly placed thereon, or to place on such list the name of any person improperly omitted," etc.

If there has been no declaration, or a declaration made before an unauthorized person, and yet the name of the declarant appears on the list, it is beyond dispute that the requirements of sec. 6 of the Act have not been complied with, and the name has been improperly placed there; that is the exact situation which the Court of Revision is empowered to deal with under our statute.

It seems to me, therefore, clear that Mr. Maclean's first contention is unsound.

As to the second point, there may be some doubt. My attention has been called to the case of *In re Provincial Elections Act (1903)*, 10 B.C.R. 114, and particularly to the remarks of Walkem, J., at the bottom of p. 120, to the effect that franchise Acts are to be liberally construed, as their object is to enfranchise and not disfranchise persons possessing the necessary qualifications. In that case the language of the Act itself was broad, and the Court held that it could not be cut down by implication from the form of the *jurat* given in a specimen affidavit set out in a schedule to the Act. No one will be inclined to question the soundness of that decision, or Mr. Justice Walkem's remarks; but neither seems to justify me in ignoring the plain qualification of the powers of a commissioner appointed under sec. 13 of the Provincial Elections Act. That section is as follows:—

> The Lieutenant-Governor in Council may appoint any person who is a British subject as a commissioner for taking affidavits in the Supreme Court for a limited period without payment of any fee, *for the purpose of acting under this Act* in the electoral district in which he resides.

The commissioners before whom the declarations in question were made were appointed under that section, and the order in council appointing them, and their official notification of appointment expressly state that the appointment is "for the purpose of acting" under that Act. The applicants argue that the



B.C.
S. C.
1912
IN RE MUNICIPAL ELECTIONS ACT.
Gregory, J.

words of qualification in the Act, the order in council, and the notification mean nothing, are merely a declaration of the reason why the appointments are made, and that once made, the appointees have, as Mr. Maclean puts it, "the full appointment," and have full power and authority to take any declarations made in any cause or matter pending in the Supreme Court. I cannot agree with that; to me the language appears perfectly plain, and in addition, the temporary nature of the appointments, the limitation of the appointees' activities to the electoral district in which they reside; the fact that there is no fee payable and that they are not appointed by a Judge of the Supreme Court under the Oaths Act (changed in 1911), and under which appointment on payment of a fee they receive a formal commission under the seal of the Supreme Court, and were entered on the roll of commissioners in the registry of that Court, all indicate, I think, that the Legislature intended expressly to restrict the powers of such appointees to the purposes of that Act. To accept the applicants' contention would be to treat these qualifying words as surplusage.

It is a well-known rule of interpretation of statutes that such a sense is to be made upon the whole as that no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent: Craies Statute Law, 2nd ed., 112.

If the persons taking the declaration had no authority to do so, then they cannot be looked at—they are not declarations under the Act: see *Reynolds* v. *Williamson et al.* (1875), 25 U.C.C.P. 49, and other cases referred to by Mr. McDiarmid.

Although the declarants are possessed of the qualifications entitling them to be placed on the list on making the proper declaration, the making of that declaration is a condition precedent which must be complied with. The Municipal Elections Act, secs. 6 and 7, provides not only that the declaration shall be made, but also the form of it, the particular month in which it shall be made, and that it must be filed with the clerk within twenty-four hours after it is made. That these provisions cannot be ignored will not be disputed; then, surely, neither can the provision directing before whom the declaration is to be made.

The only possible doubt appears to me to arise from the fact pointed out by Mr. McDiarmid that both the Provincial and Municipal Elections Acts use the same expression, viz., "Commissioner for taking affidavits in the Supreme Court," and strictly speaking, there is no such officer known outside of those Acts, the Oaths Act, sec. 1, stating that commissioners appointed under it "shall be styled commissioners for taking affidavits within British Columbia." But that Act goes on to provide that the acts of such commissioners are valid in all Courts of the Province, and it is common knowledge that they are always

B.C.
S. C.
1912
IN RE MUNICIPAL ELECTIONS ACT.
Gregory, J.

spoken of as commissioners for taking affidavits in the Supreme Court, which they in fact are. Neither of the Election Acts state that the commissioners therein named shall be styled in any particular way; and to hold that because of the mere similarity of the expression in those Acts, commissioners under the Provincial Elections Act are the persons named to take declarations under the Municipal Act, would not only greatly enlarge the powers of the former commissioners, in direct antagonism to the express words of that Act, but it would exclude commissioners as generally understood from taking them. I cannot think that the Legislature intended to do any such thing in so indirect a way, and by such uncertain language.

The application will be dismissed, but by agreement between the parties, the city will pay the costs, fixed at $100.

*Application dismissed.*

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## McKENZIE v. GODDARD.

B.C.
C. A.
1912
April 2.

*British Columbia Court of Appeal, Macdonald, C.J.A., Irving and Galliher, JJ.A. April 2, 1912.*

1. ASSIGNMENT (§ III—28)—ASSIGNMENT OF LAND CONTRACT—EQUITIES—RIGHTS AND LIABILITIES OF PARTIES.

Where a contract for the sale of land has been cancelled by the vendor because of the non-payment by the vendee of all of the initial payment, which, however, the contract recited had been paid in full, an assignee thereof takes subject to all equities between the vendor and vendee, and can not, in the absence of allegation and proof of equitable rights as an innocent purchaser without notice, upon tender of the balance due upon the contract, obtain specific performance thereof.

[*Goddard* v. *Slingerland*, 16 B.C.R. 329, distinguished; *Rimmer* v. *Webster* (1902), 71 L.J. Ch. 561, and *Winter* v. *Lord Anson*, 3 Russell 488, referred to.]

2. ESTOPPEL (§ III D—67)—EQUITABLE ESTOPPEL—RECITAL IN CONTRACT.

Where the assignee of a contract desires to set up a claim against the other contracting party which would not be available if set up by his assignor, *ex. gr.*, his purchase without notice that a part of a sum recited in the contract to have been paid, had not in fact been paid by reason of dishonour of the cheque given therefor, and the estoppel against the other contracting party by reason of the assignee's innocent reliance upon the recital, the onus of proving such claim of equitable estoppel is upon the assignee.

[Halsbury's Laws of England, vol. 13, p. 371, par. 523, approved.]

AN appeal by the plaintiff from the judgment of Grant, Co. Ct. J., who dismissed the action.

The appeal was dismissed.

*J. A. Findlay*, for appellant.

*W. B. A. Ritchie*, K.C., for respondent.



B.C.
C. A.
1912
MCKENZIE v. GODDARD.
Irving, J.A.

MACDONALD, C.J.A., concurred in the judgment of GALLIHER, J.A.

IRVING, J.A.:—It is said that the recital in the deed that the $50 has been paid in full estops the defendant from setting up this non-payment: 13 Hals., par. 365.

That we may assume to be so if the plaintiff innocently acts upon the faith of the representation.

In this case we have no evidence that the plaintiff innocently acted upon the representation.

I think the plaintiff must at least pledge his oath to that fact. In *Rice* v. *Rice*, 2 Drew. 73, evidence appears to have been given.

I would dismiss the appeal.

GALLIHER, J.A.:—The learned County Court Judge was under the impression (the case not then being reported) that *Goddard* v. *Slingerland*, 16 B.C.R. 329, decided by this Court, concluded the case at bar, and so decided. That case, however, has no application, as the rights here are *inter partes*.

The plaintiff claims under an agreement entered into between the defendant and one Franks, for the sale to Franks of certain lands in the agreement set out, and which agreement was assigned to him. In the agreement the receipt of $50 is acknowledged as being paid, and the balance $200 is to be paid in monthly instalments. As a matter of fact only $26 of this $50 was paid in cash, and a cheque for $24 payable some months afterwards, which turned out to be worthless, given for the balance.

When the defendant discovered that the cheque was worthless, he notified Franks that the agreement was cancelled, but prior to such notification Franks had assigned to the plaintiff.

The plaintiff some time afterwards tendered the balance due and requested a conveyance, but the defendant refused, claiming the agreement was cancelled.

This action is for specific performance, the plaintiff paying the amount tendered into Court.

Apart from the Land Registry Act, the defendant relies on the fact as he contends that the plaintiff stands in the shoes of Franks, and that his rights are subject to any equities existing between the defendant and Franks.

If the plaintiff is an innocent purchaser without notice, he does not stand in Franks' shoes, and the defendants are estopped from setting up that they did not receive the payment acknowledged in the agreement: Halsbury, vol. 13, p. 371, par. 523: *Rimmer* v. *Webster* (1902), 71 L.J. Ch. 561.

In *Winter* v. *Lord Anson*, 3 Russell 488, cited by Mr. Ritchie, Lord Anson purchased with notice of the plaintiff's claim, and retained sufficient out of the purchase monies to indemnify him.