THE
BRITISH COLUMBIA REPORTS

BEING

REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS AND IN ADMIRALTY,

WITH

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

AND

A DIGEST OF THE PRINCIPAL MATTERS.

REPORTED UNDER THE AUTHORITY OF

THE LAW SOCIETY OF BRITISH COLUMBIA,

BY

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

VOLUME XV.

1893

VICTORIA, B. C.
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1911.

JUDGES

OF THE

Court of Appeal, Supreme and County Courts of British Columbia and in Admiralty

During the period of this Volume.

JUSTICES OF THE COURT OF APPEAL.

CHIEF JUSTICE:

THE HON. JAMES ALEXANDER MACDONALD.

JUSTICES:

THE HON. PAULUS ÆMILIUS IRVING.
THE HON. ARCHER MARTIN.
THE HON. WILLIAM ALFRED GALLIHER.

SUPREME COURT JUDGES.

CHIEF JUSTICE:

THE HON. GORDON HUNTER.

PUISNE JUDGES:

THE HON. AULAY MORRISON.
THE HON. WILLIAM HENRY POPE CLEMENT.
THE HON. DENIS MURPHY.
THE HON. FRANCIS BROOKE GREGORY.

LOCAL JUDGE IN ADMIRALTY:

THE HON. ARCHER MARTIN.

COUNTY COURT JUDGES:

HIS HON. JOHN ANDREW FORIN, - - - - - - - West Kootenay
HIS HON. FREDERICK McBAIN YOUNG, - - - - - - - - Atlin
HIS HON. PETER SECORD LAMPMAN, - - - - - - - - Victoria
HIS HON. PETER EDMUND WILSON, - - - - - - East Kootenay
HIS HON. JOHN ROBERT BROWN, - - - - - - - - - Yale
HIS HON. FREDERICK CALDER, - - - - - - - - - - Cariboo
HIS HON. DAVID GRANT, - - - - - - - - - - - Vancouver
HIS HON. FREDERIC WILLIAM HOWAY, - - - - - - Westminster
HIS HON. WILLIAM WALLACE BURNS McINNES, - - - - Vancouver
HIS HON. CHARLES HOWARD BARKER, - - - - - - - Nanaimo
HIS HON. JOHN DONALD SWANSON, - - - - - - - - Yale

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K.C.

TABLE OF CASES REPORTED

IN THIS VOLUME

TABLE OF CASES CITED.

A

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AT THE COURT AT WINDSOR CASTLE,

The 23rd day of January, 1911.

PRESENT:

The King's Most Excellent Majesty, H.R.H. the Duke of Connaught and Strathearn, Lord President, Lord Knollys, Sir Arthur Bigge.

WHEREAS by an Act passed in a Session of Parliament held in the seventh and eighth years of Her late Majesty Queen Victoria's reign (shortly entitled "The Judicial Committee Act, 1844"), it was enacted that it should be competent to Her Majesty by any Order or Orders in Council to provide for the admission of Appeals to Her Majesty in Council from any judgment, sentences, decrees, or orders of any Court of Justice within any British Colony or Possession abroad, although such Court should not be a Court of Error or Appeal within such Colony or Possession, and to make provision for the instituting and prosecuting of such Appeals and for carrying into effect any such decisions or sentences as Her Majesty in Council should pronounce thereon:

And whereas by an Order of Her Majesty Queen Victoria in Council dated the 12th day of July, 1887, provision was made to enable parties to appeal from the decisions of the Supreme Court of British Columbia to Her Majesty in Council:

And whereas by an Act passed by the Legislature of British Columbia in the seventh year of the reign of His late Majesty King Edward the Seventh, entitled "An Act constituting a Court of Appeal and declaring its jurisdiction," provision was made for the constitution of a Court of Appeal for the Province of British Columbia.

And whereas it is expedient, with a view to equalizing as far as may be the conditions under which His Majesty's subjects in the British Dominions beyond the Seas shall have a right of appeal to His Majesty in Council, and to promoting uniformity in the practice and procedure in all such Appeals, that the rules regarding Appeals from the said Supreme Court contained in the said Order in Council should be revoked and provision should be made for Appeals from the said Court of Appeal to His Majesty in Council:

IT IS HEREBY ORDERED by the King's Most Excellent Majesty, by and with the advice of His Privy Council, that the said Order in Council shall be and the same is hereby revoked, and that the Rules hereunder set out shall regulate all Appeals to His Majesty in Council from the Court of Appeal of British Columbia.

1. In these Rules, unless the context otherwise requires:—
"Appéal" means Appeal to His Majesty in Council;
"His Majesty" includes His Majesty's heirs and successors;
"Judgment" includes decree, order, sentence, or decision;
"Court" means the "Court of Appeal" for British Columbia;
"Record" means the aggregate of papers relating to an Appeal (including the pleadings, proceedings, evidence and judgments) proper to be laid before His Majesty in Council on the hearing of the Appeal;
"Registrar" means the Registrar or other proper officer having the custody of the Records in the Court appealed from;
"Month" means calendar month;
Words in the singular include the plural, and words in the plural include the singular.

2. Subject to the provisions of these Rules, an Appeal shall lie—
(*a*) as of right, from any final judgment of the Court, where the matter in dispute on the Appeal amounts to or is of the value of £500 sterling or upwards, or where the Appeal involves, directly or indirectly, some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards; and
(*b*) at the discretion of the Court, from any other judgment of the Court, whether final or interlocutory, if, in the opinion of the Court, the question involved in the Appeal is one which, by reason of its great general or public importance or otherwise, ought to be submitted to His Majesty in Council for decision.

3. Where in any action or other proceeding no final judgment can be duly given in consequence of a difference of opinion between the judges, the final judgment may be entered *pro forma* on the application of any party to such action or other proceeding according to the opinion of the Chief Justice or, in his absence, of the senior puisne Judge of the Court,

but such judgment shall only be deemed final for purposes of an Appeal therefrom, and not for any other purpose.

4. Applications to the Court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give the opposite party notice of his intended application.

5. Leave to appeal under Rule 2 shall only be granted by the Court in the first instance—

(*a*) upon condition of the Appellant, within a period to be fixed by the Court, but not exceeding three months from the date of the hearing of the application for leave to appeal, entering into good and sufficient security, to the satisfaction of the Court, in a sum not exceeding £500, for the due prosecution of the Appeal, and the payment of all such costs as may become payable to the Respondent in the event of the Appellant's not obtaining an order granting him final leave to appeal, or of the Appeal being dismissed for non-prosecution, or of His Majesty in Council ordering the Appellant to pay the Respondent's costs of the Appeal (as the case may be); and

(*b*) upon such other conditions (if any) as to the time or times within which the Appellant shall take the necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England as the Court, having regard to all the circumstances of the case, may think it reasonable to impose.

6. Where the judgment appealed from requires the Appellant to pay money or perform a duty, the Court shall have power, when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the Appeal, as to the Court shall seem just. And in case the Court shall direct the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such Order as His Majesty in Council shall think fit to make thereon.

7. The preparation of the Record shall be subject to the supervision of the Court, and the parties may submit any disputed question arising

in connection therewith to the decision of the Court, and the Court shall give such directions thereon as the justice of the case may require.

8. The Registrar, as well as the parties and their legal agents, shall endeavour to exclude from the Record all documents (more particularly such as are merely formal) that are not relevant to the subject-matter of the Appeal, and generally, to reduce the bulk of the Record as far as practicable, taking special care to avoid the duplication of documents and the unnecessary repetition of headings and other merely formal parts of documents; but the documents omitted to be copied or printed shall be enumerated in a list to be placed after the index or at the end of the Record.

9. Where in the course of the preparation of a Record one party objects to the inclusion of a document on the ground that it is unnecessary or irrelevant, and the other party nevertheless insists upon its being included, the Record, as finally printed (whether in British Columbia or in England), shall, with a view to the subsequent adjustment of the costs of and incidental to such document, indicate in the index of papers, or otherwise, the fact that, and the party by whom, the inclusion of the document was objected to.

10. The Record shall be printed in accordance with the Rules set forth in the Schedule hereto. It may be so printed either in British Columbia or in England.

11. Where the Record is printed in British Columbia the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council 40 copies of such Record, one of which copies he shall certify to be correct by signing his name on, or initialling, every eighth page thereof and by affixing thereto the seal, if any, of the Court.

12. Where the Record is to be printed in England, the Registrar shall, at the expense of the Appellant, transmit to the Registrar of the Privy Council one certified copy of such Record, together with an index of all the papers and exhibits in the case. No other certified copies of the Record shall be transmitted to the Agents in England by or on behalf of the parties to the Appeal.

13. Where part of the Record is printed in British Columbia and part is to be printed in England, Rules 11 and 12 shall, as far as practicable, apply to such parts as are printed in British Columbia and such as are to be printed in England respectively.

14. The reasons given by the judge, or any of the judges, for or against any judgment pronounced in the course of the proceedings out of

which the Appeal arises shall by such judge or judges be communicated in writing to the Registrar, and shall by him be transmitted to the Registrar of the Privy Council at the time when the Record is transmitted.

15. Where there are two or more applications for leave to appeal arising out of the same matter, and the Court is of opinion that it would be for the convenience of the Lords of the Judicial Committee and all parties concerned that the Appeals should be consolidated the Court may direct the Appeals to be consolidated and grant leave to appeal by a single order.

16. An Appellant who has obtained an order granting him conditional leave to appeal may at any time prior to the making of an order granting him final leave to appeal withdraw his Appeal on such terms as to costs and otherwise as the Court may direct.

17. Where an Appellant, having obtained an order granting him conditional leave to appeal, and having complied with the conditions imposed on him by such order, fails thereafter to apply with due diligence to the Court for an order granting him final leave to appeal, the Court may, on an application in that behalf made by the Respondent, rescind the order granting conditional leave to appeal, notwithstanding the Appellant's compliance with the conditions imposed by such order, and may give such directions as to the costs of the Appeal and the security entered into by the Appellant as the Court shall think fit, or make such further or other order in the premises as, in the opinion of the Court, the justice of the case requires.

18. On an application for final leave to appeal, the Court may inquire whether notice, or sufficient notice, of the application has been given by the Appellant to all parties concerned, and, if not satisfied as to the notices given, may defer the granting of the final leave to appeal, or may give such other directions in the matter, as in the opinion of the Court, the justice of the case requires.

19. An Appellant who has obtained final leave to appeal shall prosecute his Appeal in accordance with the Rules for the time being regulating the general practice and procedure in Appeals to His Majesty in Council.

20. Where an Appellant, having obtained final leave to appeal, desires, prior to the despatch of the Record to England, to withdraw his Appeal, the Court may, upon an application in that behalf made by the

Appellant, grant him a certificate to the effect that the Appeal has been withdrawn, and the Appeal shall thereupon be deemed, as from the date of such certificate, to stand dismissed without express Order of His Majesty in Council, and the cost of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

21. Where an Appellant, having obtained final leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of procuring the despatch of the Record to England, the Respondent may, after giving the Appellant due notice of his intended application, apply to the Court for a Certificate that the Appeal has not been effectually prosecuted by the Appellant, and if the Court sees fit to grant such a Certificate, the Appeal shall be deemed, as from the date of such Certificate, to stand dismissed for non-prosecution without express Order of His Majesty in Council, and the costs of the Appeal and the security entered into by the Appellant shall be dealt with in such manner as the Court may think fit to direct.

22. Where at any time between the date of the order granting final leave to appeal and the despatch of the Record to England the Record becomes defective by reason of the death, or change of status, of a party to the Appeal, the Court may, notwithstanding the order granting final leave to appeal, on an application in that behalf made by any person interested, grant a certificate showing who, in the opinion of the Court, is the proper person to be substituted or entered on the Record in place of, or in addition to, the party who has died, or undergone a change of status, and the name of such person shall thereupon be deemed to be so substituted or entered on the Record as aforesaid without express Order of His Majesty in Council.

23. Where the Record subsequently to its despatch to England becomes defective by reason of the death, or change of status, of a party to the Appeal the Court shall, upon an application in that behalf made by any person interested, cause a certificate to be transmitted to the Registrar of the Privy Council showing who, in the opinion of the Court, is the proper person to be substituted, or entered, on the Record, in place of, or in addition to, the party who has died or undergone a change of status.

24. The Case of each party to the Appeal may be printed either in British Columbia or in England and shall, in either event, be printed

in accordance with the Rules set forth in the Schedule hereto, every tenth line thereof being numbered in the margin, and shall be signed by at least one of the Counsel who attends at the hearing of the Appeal, or by the party himself if he conducts his Appeal in person.

25. The Case shall consist of paragraphs numbered consecutively and shall state, as concisely as possible, the circumstances out of which the Appeal arises, the contentions to be urged by the party lodging the same, and the reasons of appeal. References by page and line to the relevant portions of the Record as printed shall, as far as practicable, be printed in the margin, and care shall be taken to avoid, as far as possible, the reprinting in the Case of long extracts from the Record. The taxing officer, in taxing the costs of the Appeal, shall, either of his own motion, or at the instance of the opposite party, inquire into any unnecessary prolixity in the Case, and shall disallow the costs occasioned thereby.

26. Where the Judical Committee directs a party to bear the costs of an Appeal incurred in British Columbia, such costs shall be taxed by the proper officer of the Court in accordance with the rules for the time being regulating taxation in the Court.

27. The Court shall conform with, and execute, any Order which His Majesty in Council may think fit to make on an Appeal from a judgment of the Court in like manner as any original judgment of the Court should or might have been executed.

28. Nothing in these Rules contained shall be deemed to interfere with the right of His Majesty, upon the humble Petition of any person aggrieved by any judgment of the Court, to admit his Appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose.

ALMERIC FITZROY.

SCHEDULE.

I. Records and Cases in Appeals to His Majesty in Council shall be printed in the form known as Demy Quarto.

II. The size of the paper used shall be such that the sheet when folded and trimmed, will be 11 inches in height and 8½ inches in width.

III. The type to be used in the text shall be Pica type, but Long Primer shall be used in printing accounts, tabular matter, and notes.

IV. The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin.

RULES OF COURT.

HIS HONOUR the Lieutenant-Governor in Council, under the provisions of the Supreme Court Act, directs that the Supreme Court Rules, 1906, shall be amended as follows, and that the amendments shall take effect on the first day of September, 1910.

By Command.

HENRY ESSON YOUNG
Provincial Secretary.

Provincial Secretary's Office,
20th August, 1910.

1. That Marginal Rule 291 be amended by adding at the end thereof the words "or their solicitors."

2. That Marginal Rule 354 be amended by striking out all the words therein contained to and including the word "therein," in the fifth line of said Rule, and by substituting therefor the following:—

"Any party to a cause or matter may, by notice in writing require any other party to make discovery on oath of the documents which are or have been in his possession or power relating to any matter in question therein. If the party on whom such notice shall be served shall neglect or refuse to make such discovery within five days after service of such notice, or such further time as the Court may allow, or if the party serving the notice shall deem the discovery given unsatisfactory or insufficient, he may apply to the Judge in respect thereto."

3. That Order 36 be amended by inserting after Marginal Rule 439 the following Rules, as Marginal Rules 439 (A) and 439 (B) respectively:

"439 (A) 15 (*a*). In the Cities of Victoria and Vancouver, the Plaintiff or other party in the position of Plaintiff shall, on filing his record, apply to the District Registrar to set down the trial (or issue) for hearing on such suitable day as the District Registrar shall in writing (in Form 16 (B), Appendix B) appoint, and such day shall be at least twelve days after the date of said application, unless the Court or a Judge shall otherwise order; and a copy of said appointment shall take the place of the notice of trial required by these Rules or the Supreme Court Act, and shall be subject to all the rules and regulations as to

service and otherwise as by these Rules set forth and required as to notice of trial.

"439 (B) 15 (*b*). Said trial referred to in the preceding Rule shall be set down for the day appointed as aforesaid, and shall be heard on that day or as soon thereafter as conveniently may be; and all the trials so set down shall form one peremptory list, and shall be disposed of in the order in which they appear on said list, notwithstanding that any of said trials shall not be reached on the precise day for which it is set down."

4. That Order 36 be further amended by inserting after Marginal Rule 440 the following Rules, as Marginal Rules 440 (A) and 440 (B) respectively:—

"440 (A) 16 (*a*). Notwithstanding anything in these Rules contained, the Court or a Judge may make such order as may seem meet as to the date of the trial of any action or issue, and as to whether any trial shall take precedence of any other trial, whether set down for any particular day or not, and as to the adjournment of any trial.

"440 (B) 16 (*b*). Unless otherwise ordered by the Court or a Judge, a trial with a jury shall take precedence of all non-jury trials, whether said trials are set for the same day or are remanets, save such non-jury trials as have already been partially heard."

5. That Marginal Rule 454 be amended by inserting after the word "officer," in the second line of said Rule, the words "at the time of entering said action for trial."

6. That the following form be inserted in Appendix B to said Rules after Form 16 (A), namely:—

"FORM 16 (B). APP. B.

"(Heading as in Form 1.)

"Take notice that the trial of this (or of the issues in this ordered to be tried) (or as the case may be) has been set down for hearing at the Law Courts, Victoria (or Vancouver), for , the day of , 19 , at the hour of 11 o'clock in the forenoon, or so soon thereafter as the hearing may be held.

"Dated at this

"District Registrar."

7. That Schedule No. 1 in Appendix M to said Rules be amended by inserting after Item 232 the following:

"232 (A). Attending in Chambers on simple adjournment without argument, $2.00. (Provided that not more than two adjournments shall be taxable on any application without a special order as to the costs thereof.)

"232 (B). Attending in Court on simple adjournment, unless costs of the day ordered, $5.00. (Provided that not more than two adjournments shall be taxable in any matter without a special order for the costs thereof.)"

8. That Item No. 18 in Schedule 4 in said Appendix M to said Rules be amended by inserting before the word "Engineers," in the first line of said item, the word "Architects."

REPORTS OF CASES

DECIDED IN THE

SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL

TOGETHER WITH SOME

CASES IN ADMIRALTY

REX v. MUNICIPAL COUNCIL OF NORTH SAANICH.

HUNTER, C.J.B.C.

1910

Jan. 13.

REX v. MUNICIPAL COUNCIL OF NORTH SAANICH

Municipal law—Municipal Elections Act, B.C. Stat. 1908, Cap. 14—Elector, qualification of—Authorized representatives of company—Application to restrict number of—Injunction—Certiorari—Mandamus.

The authorized representative of an incorporated company is entitled, under the Municipal Elections Act, to vote at elections for mayor or reeve, and aldermen or councillors.

Held, that the provision is intended to restrict such voting power to one representative only for a company.

A voter in a municipality has no status to apply to the Supreme Court for an order expunging the name of another voter from the roll or for an injunction. His proper mode of procedure is by way of *certiorari* or *mandamus* to have the roll amended.

APPLICATION to expunge from the list of voters of the Municipality of North Saanich the names of four out of five persons entered on said list as authorized representatives of an incorporated company. Heard by HUNTER, C. J. B. C. at Victoria on the 12th of January, 1910. Statement

W. J. Taylor, K.C., for applicant.

Higgins, for defendants Porter.

Fell, for the Corporation.

HUNTER, C.J.B.C.

1910

Jan. 13.

REX v. MUNICIPAL COUNCIL OF NORTH SAANICH

13th January, 1910.

HUNTER, C.J. B.C.: In this case the promoter of the proceedings, a registered voter in a rural municipality, complains of the refusal by the Court of Revision on his application to expunge the names of four out of the five defendants from the electoral roll.

He first sought to enforce his objection by bringing injunction proceedings against the defendants, but it seems to me that he has no status, and that the fact that the defendants are on the roll is a good answer to those proceedings. No instance has been brought to my notice which shews that one voter may attempt to enjoin any other registered voter from attempting to exercise his franchise, and I should be surprised to find any such case, and I therefore dismiss the motion for an injunction.

However, the promoter has also proceeded by way of *certiorari* and *mandamus*, and now seeks to have the roll amended by expunging the names of four of the defendants. The proceedings were rightly enough directed against the Council, who acted as a Court of Revision, and the municipal clerk who has custody of the roll, but as Mr. *Fell*, who appeared for them disclaimed any desire to uphold the right of the other defendants, I sent for Mr. *Higgins*, who appeared and stated that he wished to be heard in opposition to the application, and the matter was accordingly adjourned till to-day to enable him to do so.

Judgment

Mr. *Higgins* now objects that the Court has no jurisdiction under these writs to make such an order, and urges that as no appeal is given by the statute from the decision of the Court of Revision, such decision is final.

There is no doubt that the decision impugned is of a judicial character (in fact the Council is directed by the statute to hold a court to hear and determine objections to the roll), and therefore it may be brought up for examination by a writ of *certiorari* in the absence of any enactment to the contrary. Now the roll shews on its face that five persons have been allowed to remain on the roll by the Court of Revision as the duly authorized representatives of an incorporated company which is desirous of exercising the franchise in the municipality,

whereas it is evident by section 10 that the legal entity known as a company is to be represented for voting purposes by only one individual, and not by an indefinite number. It is obvious that if it were otherwise there would be nothing to prevent a thousand persons from being so registered and thereby acquiring a right to vote in a particular municipality which they would not otherwise have, and in respect of a small parcel which could not otherwise be the foundation for more than one vote. That resident individuals should each be compelled to found their right to vote on a parcel of land, while a horde of non-residents could combine together and by means of an incorporated company all acquire an individual right of voting in respect of the same parcel is obviously not the intention of the Legislature, and any attempt to so acquire a vote is a fraud on the Act, and the electoral rights and privileges thereby conferred, and it is of course the duty of the Court to frustrate all such attempts if possible. There is no doubt that as a general rule, where the proceedings have been conducted in accordance with the fundamental rules of justice, *certiorari* will not lie where the tribunal has exercised its judgment on matters within its jurisdiction, and there is equally no doubt that it will lie where there has been either an excess, or total absence of jurisdiction; but I think that the power of the Court to interfere in the present case may rest either on the ground that there was an excess of jurisdiction in putting five persons on the roll when only one should have been put on, or on the ground (which I have not time to go into on the present occasion) that in so doing there is manifest error on the face of the proceedings.

Judgment

Mr. *Higgins* argued that the five persons were not put on the roll as representatives, but merely left there in that capacity. The argument is fallacious: what happened was that these five persons, whose names appeared on the roll as freeholders, were decided not to be so qualified on the objection being taken, but were adjudged to be qualified in their representative capacity. They were, in effect, struck off as freeholders, and then put on as representatives, although the formality of eliding and again inserting their names was not and need not have been adopted.

HUNTER, C.J.B.C.

1910

Jan. 13.

REX v. MUNICIPAL COUNCIL OF NORTH SAANICH

He then argued that it was merely a case of misconstruction of the statute, but it is needless to cite authority for the proposition that the Court could not give itself jurisdiction in this way to increase the number allowed by the statute.

With regard to the remedy to be applied, the Court of Revision has become defunct, and even if it had not, it might be illusory if I were to direct it to meet and correct the roll, inasmuch as the election takes place the day after to-morrow. The *mandamus* will therefore go to the municipal clerk, *viz.:* the defendant Brethour, in whose custody the roll now is, to expunge the names of all the Porters, except the first (Robert John Porter) from the roll.

Under ordinary circumstances the applicant would be entitled to the costs of these proceedings against all the defendants, but as the Council and the clerk disclaimed any desire to support the action of the Court of Revision, and in fact Mr. *Fell* quite candidly admitted that it could not be supported, there will be no costs against them, while the Porters who have been struck off will pay the costs of the applicant and of the Council and clerk.

On the other hand, the applicant will pay the costs of the motion for the injunction.

Judgment

I ought to add that when the question of costs was mentioned, Mr. *Higgins* took the ground that he was dragged into the proceedings by the Court; but if I had not given him the opportunity of resisting them if he saw fit, as his clients alone had any real interest in the matter, no doubt much would have been said about the injustice of deciding the matter behind his back.

I may also add that I have given my reasons to-day as soon as possible in order that any party aggrieved may be able to apply at once to the Court of Appeal.

Application allowed.

SIMPSON v. WIDRIG.

GREGORY, J.

1910

Jan. 17.

SIMPSON v. WIDRIG

Small Debts Court—Prohibition—Jurisdiction—Debt—Damages—Right of Appeal.

Under the Small Debts Act the magistrate's jurisdiction is limited to actions for debt.

Where defendant agreed to hire plaintiff's boat for a trip on certain terms, but before the trip commenced, notified plaintiff that he could not use the boat and same was not used, the plaintiff sued in the Small Debts Court:—

Held, that this was not an action for debt, but rather for damages, and that the Small Debts Court had no jurisdiction.

Where want of jurisdiction is shewn on the proceedings, even though the Court below has given itself jurisdiction by coming to an erroneous conclusion of law, a writ of prohibition will issue notwithstanding that the defendant appeared at the trial and launched an appeal which he subsequently abandoned.

Affidavits may be used on applications for prohibition to shew what the facts necessary to found jurisdiction were.

APPLICATION for a writ of prohibition to issue to the stipendiary magistrate at Vancouver, and also to the sheriff for the County of Vancouver, to prohibit the enforcement of a committal order made in an action in the Small Debts Court to recover the sum of $50 for boat hire. Heard by GREGORY, J., at Vancouver on the 15th of January, 1910. The evidence shewed that the plaintiff and defendant entered into an agreement for the use of plaintiff's gasoline boat to take the defendant to Pitt lake and return, the terms being $25 for the first day; $15 for the second day; and $10 for every day the boat was lying idle at Pitt lake; and $25 for the day occupied in making the return trip from Pitt lake. The defendant was to meet the boat at New Westminster on the day following the making of the bargain. On the day before the trip was to be commenced the defendant told plaintiff by telephone that he would not be able to use the boat. There was some conflicting evidence as to the exact conversation, but the boat was not used by the defendant.

Statement

GREGORY, J.

1910

Jan. 17.

SIMPSON v. WIDRIG

The stipendiary magistrate held that he had jurisdiction to try the action as the claim was one for debt, the defendant contending on the hearing that the action was not one for debt and that the Small Debts Court had no jurisdiction in the matter. Judgment was accordingly given for $50, a judgment summons issued and ultimately the magistrate made an order committing the defendant to gaol for seven days unless the judgment and costs were paid.

Hay, in support of the application.
Senkler, K.C., contra.

17th January, 1910.

GREGORY, J.: This is an application for a writ of prohibition prohibiting the enforcement of a committal order made by stipendiary magistrate H. O. Alexander, sitting in the Small Debts Court.

The defendant contends that the magistrate had no jurisdiction under the Small Debts Court Act, R.S.B.C. 1897, Cap. 55, Sec. 2, Sub-Sec. 2, to try the case, as it was not an action for debt, but rather one for damages for breach of an agreement. This contention appears to me to be sound: Stephen's Pleading (1866), p. 11; Stephen's Commentaries, 15th Ed., Vol. 3, p. 373. An action of debt is one to recover a liquidated or certain sum of money.

Judgment

It cannot be said that in this case the sum was liquidated without first alleging that the plaintiff had rendered the service contracted for and fixing the number of days his boat was employed. That being done, it would be a mere question of calculation. But it was not done; the boat was never used. The action is therefore similar to the old action of assumpsit to recover compensation in damages for an injury sustained by the non-performance of a parol agreement.

But the plaintiff contends that defendant having launched, but not perfected, an appeal is now too late, and that a writ of prohibition will not lie unless the want of jurisdiction appears on the face of the proceedings and he cites *Broad* v. *Perkins* (1888), 21 Q.B.D. 533; *Channel Coaling Company* v. *Ross* (1907), 1 K.B. 148; *Ricardo* v. *Maidenhead Local Board of Health* (1857), 27 L.J., M.C. 73; *Brown* v. *Cocking* (1868), L.R. 3 Q.B.

672; *Elston* v. *Rose* (1868), L.R. 4 Q.B. 4. But these cases hardly meet the present position. *Broad* v. *Perkins* is meagrely reported and only goes to the extent of saying that the writ is discretionary when the inferior Court has exceeded its jurisdiction and the House of Lords case referred to by Lord Esher in his judgment was a case where the defect was not apparent and the applicant for the writ had an opportunity of bringing it forward in the Court below, but without excuse thought proper not to do so.

In *Channel Coaling Company* v. *Ross, supra, Broad* v. *Perkins* was cited to the Court. The Court agreed that in some cases the granting of the writ was discretionary, but in that case the writ was granted although the defendant had an alternative remedy. The case therefore, so far as it affects the one before the Court, assists the defendant. In *Ricardo* v. *Maidenhead Local Board of Health, supra,* Martin, B., and Watson, B., held that after judgment the case must be apparent and clear (which it seems to me to be in this case), before the Court will grant the writ, and, in that case, had the application been acceded to, the matter would have been absolutely at an end. But here the plaintiff can proceed in the proper Court to recover any damage he has suffered, the proceedings before the stipendiary magistrate having been without jurisdiction.

Judgment

Brown v. *Cocking, supra,* only decided that the Court would not on an application for a writ of prohibition review the finding of the magistrate on conflicting evidence, though on a point going to his jurisdiction only. In the present case there is no conflict of evidence on the question of whether the plaintiff's claim is a debt or not, which is the question of jurisdiction here. It is a pure question of law on undisputed facts and in this connection *Elston* v. *Rose, supra,* is a distinct authority against him. There the rule *nisi* for the writ was made absolute, Cockburn, C.J., stating at p. 7:

> "When the judge has given himself jurisdiction by coming to an erroneous conclusion upon a point of law, the case is very different, and he is in fact without jurisdiction, and has no authority to entertain the question."

GREGORY, J.

1910

Jan. 17.

SIMPSON v. WIDRIG

The question to decide here is: Is the want of jurisdiction made apparent to the Court?

In *Re W. N. Bole* (1892), 2 B.C. 208, the Divisional Court (BEGBIE, C.J., and DRAKE, J.), held that statements of fact necessary to found jurisdiction appearing on the proceedings could be contradicted, the Chief Justice at p. 211, quoting from Paley on Convictions, 5th Ed., said:

"If the fact found be one essential to jurisdiction . . . . it may be shewn that there was no evidence . . . . to warrant the finding."

We have before us the minutes of evidence taken before the magistrate, made an exhibit to the plaintiff's affidavit, and also the affidavit of both plaintiff and defendant, and in *Ricardo* v. *Maidenhead Local Board of Health, supra*, affidavits appear to have been used, and, in the present case, the plaintiff has raised no objection to the reading of the defendant's affidavit.

The defendant cites the following cases to shew the Court will direct the writ to issue notwithstanding the defendant's appearance on the trial and his launching an appeal which he subsequently abandoned—and they appear to sustain his contention.

Farquharson v. *Morgan* (1894), 1 Q.B. 552 (C.A.) where it was held that the writ must issue when the total want of jurisdiction appears on the proceedings—though the defendant actually acquiesced in the exercise of jurisdiction by the inferior Court.

Judgment

This case was approved and followed by the Court of Appeal in *Alderson* v. *Palliser* (1901), 2 K.B. 833, which held that, as the want of jurisdiction appeared on the face of the proceedings, the want of jurisdiction could not be waived. This was a case very similar to the present one, the County Court judge having made an order for committal as here for non-payment of moneys directed to be paid on the hearing of a judgment summons. The practice only permitted the judgment summons to be issued upon affidavit setting out certain facts which had been omitted. There is no such practice here, the summons being issued on certificate of judgment only.

In *Re Thompson* v. *Hay* (1893), 20 A.R. 379, the defendant, as in this case, objected to the jurisdiction of the Court, and though he called no witnesses, he cross-examined the plaintiff's witnesses.

He had an immediate statutory remedy by applying to have the proceedings transferred to another Court, but did not avail himself of it, and the writ issued, Burton, J.A., stating at p. 382:

"Whenever the want of jurisdiction is established in the higher Court, but not till then, it is not a matter of discretion, but the Court is bound to interfere even though there may be a possibility of correcting it by appeal."

There will be a rule absolute for the issue of the writ and the costs will follow the event unless the plaintiff shall within three days and on 24 hours' notice, shew cause to the contrary.

Application granted.

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On a subsequent day the question of costs was argued and the order stood.

VAUGHAN-RYS v. CLARY, NEEDLER AND LAIDLAW.

MURPHY, J. (At Chambers)
1910
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Practice—Writ for service ex juris—Order XI., r 1 (b)—Timber Licences—Interest in lands.

An interest in a special timber licence issued under the Land Act is an interest in lands, to enforce which a writ may be issued for service *ex juris* under the provisions of Order XI., r. 1 (*b*.)

VAUGHAN-RYS v. CLARY, *et al.*

APPLICATION for a writ for service *ex juris*, heard by MURPHY, J., at Chambers in Vancouver, on the 1st of February, 1910.

Plaintiff obtained judgment, in another action, against defendant Clary for the unpaid balance of the purchase price of some timber licences, and in the decree there was a reservation of whatever rights he might have for a vendor's lien against the timber licences which were sold. Prior to the recovery of this judgment, defendant had conveyed away a portion of his interest in the timber licences to one Needler, and shortly after recovering the judgment he conveyed his remaining interest to the defendant Laidlaw. He then applied for leave to issue a writ for service *ex juris* against the three defendants, Clary, Needler and Laidlaw, who resided in Ontario. Defendants Laidlaw and Clary entered conditional appearance, and set up that it was not

Statement

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a proper case for service out of the jurisdiction under Order XI. Prior to delivery of the statements of claim and defence an arrangement was made under which the right of the parties to move to set aside the writ was reserved and the matter was brought up after delivery of the statements of claim and defence. The question argued was whether an interest in timber licences issued under the Land Act was an interest in lands, or lands and hereditaments under clauses (*a.*) and (*b.*) Order XI., r. 1.

Woodworth, for plaintiff.

A. H. MacNeill, K.C., for defendants Clary and Laidlaw.

2nd February, 1910.

MURPHY, J.: I think the point of law should be determined in favour of the plaintiff. By virtue of section 59 of the Land Act, a timber licence is, I consider, at least a *profit a prendre.*

In *Race* v. *Ward et al.* (1855), 24 L.J., Q.B. 153 at page 157, Lord Campbell states that a right to take trees from the soil of another comes under the category of *profit a prendre.* The definition of "land" set out in sub-section 21 of section 10 of the Interpretation Act is by section 4 of the Interpretation Act Amendment Act, 1907, extended to its use, *inter alia,* in orders in council.

The proclamation bringing the Supreme Court Rules into force shew them to be an order in council made pursuant to power conferred by section 108 of the Supreme Court Act. It follows that the word "land" as used in Order XI. of the Rules includes in the language of the Interpretation Act, *inter alia,* "messuages, tenements and hereditaments." There is nothing in Order XI. to restrict the meaning to tenements of some particular nature so as to make applicable the latter words of sub-section 21 of section 10 of the Interpretation Act. "Tenements" in its ordinary legal meaning according to Stroud's Judicial Dictionary and authorities there cited includes a *profit a prendre.* Assuming that a vendor's lien exists—a question to be determined at the trial—this action I think is therefore one brought to enforce a liability affecting land situate within the jurisdiction and is one in which an order for service *ex juris* could properly be made under sub-section (b.) of Order XI.

Judgment

Costs in the cause.

Application granted.

STAR MINING AND MILLING COMPANY, LIMITED v. BYRON N. WHITE COMPANY (FOREIGN).

CLEMENT, J. (At Chambers)

1910

Feb. 2.

STAR v. WHITE

Practice—Costs—Taxation—Interest on costs—When to be computed from.

Where the formal judgment decreed that "the defendants . . . . do pay forthwith after taxation thereof to the plaintiffs . . . . the costs . . . . :—

Held, that there was no judgment debt until the taxation was had, and that therefore interest could be computed on the costs only from date of taxation.

MOTION by defendants to stay further proceedings in the action on the ground that the judgment had been satisfied. Heard by CLEMENT, J., at Chambers in Vancouver on the 28th of January, 1910. The only question was as to interest upon the plaintiffs' taxed costs. The defendants had paid these costs with interest from the date of taxation. The plaintiffs contended that they were entitled to interest from the date of the judgment under which the costs were payable, invoking the Interest Act, R.S.C. 1906, Cap. 120, Secs. 13, 14 and 15: Statement

"13. Every judgment debt shall bear interest at the rate of five per centum per annum until it is satisfied.

"14. Unless it is otherwise ordered by the Court, such interest shall be calculated from the time of the rendering of the verdict or of the giving of the judgment, as the case may be, notwithstanding that the entry of judgment upon the verdict or upon the giving of the judgment has been suspended by any proceedings either in the same Court or in appeal.

"15. Any sum of money or any costs, charges or expenses made payable by or under any judgment, decree, rule or order of any Court whatsoever in any civil proceeding shall for the purposes of this Act be deemed to be a judgment debt."

The judgment under which the costs in question were claimed read as follows:

"(9.) That the defendants (respondents) do pay forthwith after taxation thereof to the plaintiffs (appellants) the costs of," etc.

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

J. H. Lawson, for defendant Company.

2nd February, 1910.

CLEMENT, J. [having stated the facts]: There is no doubt if the judgment had followed the form as indicated in Appendix F. to our Supreme Court Rules and had adjudged "that the Judgment

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plaintiffs do recover their costs of, etc., to be taxed," or had simply ordered payment of these costs "to be taxed," the plaintiffs would be entitled to interest upon them, no matter when taxed, from the date of the judgment: *Pyman & Co.* v. *Burt* (1884), W.N. 100; *Boswell* v. *Coaks* (1887), 36 Ch. D. 444, 57 L.J., Ch. 101; *Taylor* v. *Roe* (1894), 1 Ch. 413, 63 L.J., Ch. 282. There is no material difference between the English Act as to interest and our own so far as the point before me is concerned.

The ordinary laymen would probably fail to appreciate that there might be a difference in effect between the form actually adopted in this case and the two forms I have mentioned, much less between the two latter; but a reference to *Oddy, In re. Major* v. *Harness* (1906), 1 Ch. 93, 75 L.J., Ch. 141 will shew that there is a decided difference, as to method of enforcement, between a judgment that a plaintiff do recover from the defendant and a judgment that a defendant do pay to the plaintiff. This, however, by the way.

I must confess that it is with regret that I have reached the conclusion that on the very language of this judgment there was no "judgment debt" within the statute until the taxation was had. In *Pyman & Co.* v. *Burt, ubi supra,* Mr. Justice Field draws attention to the form of an ordinary writ of *fi. fa.* (Appendix H, No. 1) in its reference to interest on costs, the form running thus: "with interest . . . . from the day of (*day of judgment or order, or day from which money directed to be paid, or day from which interest is directed by the order to run, as the case may be.*)" and continues:

Judgment

> "The meaning of that is that there may be a judgment simply, in which case the interest on the debt and on the costs will begin to run at once; or there may be a judgment directing money to be paid on a future day, in which case the interest will begin to run from that day; or there may be a judgment with a special direction as to the day from which interest on the debt or on the costs is to run."

The case before him he held to fall within the first class; the case before me falls clearly, in my opinion, within the second and the plaintiffs therefore are entitled to interest only from the date of taxation.

It was stated before me that it had been agreed that there should be no costs of this application. The order will go therefore without costs to carry out the view I have expressed.

Order accordingly.

CLAUDET v. THE GOLDEN GIANT MINES, LIMITED.

MORRISON, J.

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CLAUDET v. GOLDEN GIANT MINES, LTD.

Company law—Director—Managing director—Appointment by directors of one of themselves to salaried position—Evidence—Minutes taken by person, afterwards deceased, and re-transcribed into minute book—Admissibility of.

Plaintiff, a director in defendant Company, was appointed at a meeting of his co-directors to the position of managing director.

Held, on appeal, that the directors had no power to appoint one of their number a managing director and fix his rate of remuneration.

Minutes of a directors' meeting were taken down in shorthand by the solicitor for the Company and afterwards transcribed and handed to the secretary and re-transcribed into the minute book. They were not confirmed at any subsequent meeting. The solicitor died before the action came to trial.

Held, per MORRISON, J., at the trial, that such minutes or re-transcribed notes, were not admissible to prove what transpired at the meeting in question.

APPEAL from the judgment of MORRISON, J., in an action tried by him with a jury at Rossland on the 13th of October, 1908. Statement

Hamilton, K.C., for plaintiff.
Macdonald, K.C., for defendant Company.

16th February, 1909.

MORRISON, J.: As "the battle raged" around the point whether the minutes of the directors' meeting of the 8th of March, 1908, were admissible, I reserved my decision for the purpose of considering the authorities cited by counsel, to whom it is due to say that the delay in handing down my judgment (in which I said I would give my reasons, if required), was owing to a mis- MORRISON, J. adventure in mislaying my notes of argument. A request being now made for those reasons, I submit the following.

The minutes in dispute were taken down in shorthand by Mr. O'Brien, solicitor of the Company. These minutes, it is alleged, were transcribed next day, but it does not clearly appear by whom, but they were handed to Mr. Devlin, the secretary, next day by Mr. O'Brien, who has since died. This alleged transcript

MORRISON, J. was not inserted in the Company's books until a few days before the trial in October. In fact, there was no minute book kept at that time by the Company, nor for some months after, nor were those alleged minutes signed by the chairman. These notes were in the possession of the defendants from June until sometime in October and are not the original notes made at the meeting. They are not even the original notes said to have been given Devlin by O'Brien. The minutes as entered in the minute book, have not been confirmed. In short, none of the elements are present in respect to this document sought to be introduced which are necessary to enable it to be received as the declaration of a deceased person. It has been held in *The Henry Caxon* (1878), 3 P.D. 156, 47 L.J., Adm. 83, that the declaration by deceased persons in the course of duty in order to be admissible must be contemporaneous, must be made by a person who has no interest to misrepresent and must relate to his own acts only. Now, the notes in question are not the original notes taken at the meeting. This is not sufficient evidence to lead me to draw an inference that they are a transcript of the precise words taken at that meeting. They have been in possession of the defendants, who are of course adverse in interest to the plaintiff, and have been re-transcribed by them. Even were it clearly proved that the notes were the declarations of a deceased person —which I do not think they are in any sense—

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MORRISON, J. "The Courts must be cautious in admitting such evidence. From its very nature it is evidence not open to the test of cross-examination; it is very often produced at second or third hand, and it is therefore particularly liable to lose something of its colour in the course of transmission. It is so easily and so frequently fabricated that all Courts which have to dispose of such cases must be especially on their guard":

Per Jessel, M.R., in *Sugden* v. *Lord St. Leonards* (1876), 1 P.D. 154 at p. 241, 45 L.J., P. 49 at p. 65.

Supplementing these views with what I have said in the course of the argument at the trial, I sustain Mr. *Hamilton's* objection to reception of the evidence of Mr. Devlin as to those notes of the minutes of the meeting in question, as well as his objection to the reception of the alleged notes of the proceedings tendered.

That leaves the question of the right of plaintiff to his salary

I find that the position of Claudet, in respect of which he claims his salary, was that of an expert employee of the Company and his rights to remuneration are not governed by the charter and by-laws of the Company. Even as a manager, *qua* manager, though also a director, he is an employee of the board of directors and holds his position like any other agent or servant. A secretary, on the other hand, as Mr. Devlin was, is an officer of the Company. He is not a servant or employee of the Company within the meaning, for instance, of a statute creating a preference in form of wages of servants or employees. I mention this because counsel sought to make a point by comparing the respective salaries and positions of the plaintiff and Devlin.

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The appeal was argued at Victoria on the 10th of January, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

A. F. R. Martin, for appellants (defendants).

Hamilton, K.C., for respondent (plaintiff).

Cur. adv. vult.

11th February, 1910.

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

MACDONALD, C.J.A.

IRVING, J.A.: It is clear upon the authority of *Aberdeen Railway Co.* v. *Blakie Bros.* (1854), 1 Macq. H.L. 461, 9 Scots R.R. 365, that the plaintiff cannot enforce against the Company the contract made by him with his co-directors. The head note to that case so admirably summarizes the law that I reproduce it instead of citing from the speeches of the law Lords:

"It is a rule of universal application that no trustee shall be allowed to enter into engagements in which he has, or can have, a personal interest, conflicting, or which may possibly conflict, with the interest of those whom he is bound by fiduciary duty to protect. So strictly is this principle adhered to, that no question is allowed to be raised as to the fairness, or unfairness, of the transaction; for it is enough that the parties interested object. It may be that the terms on which a trustee has attempted to deal with the trust estate, are as good as could have been obtained from any other quarter. They may even be better. But so inflexible is the rule that no inquiry into that matter is permitted."

IRVING, J.A.

Mr. *Hamilton* relied on *Eales* v. *Cumberland Black Lead*

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Mine Co. (1861), 6 H. & N. 481, where the Company was incorporated under 19 & 20 Vict., Cap. 47 (1856). It was pointed out that the determination of that case turned on the construction of that statute, which specially authorized the appointment by the board of a director to an office of profit. All the judges except Channel, B., alluded to the inexpediency of permitting directors to appoint one of their own number to an office. I think the alteration made in the Act of 1862 (and upon which the defendants rely), was designed to put a check on this objectionable practice.

I would allow the appeal.

GALLIHER, J.A.: The plaintiff sued as manager and managing director for five months' salary at $150 per month from February 1st to June 30th, 1908. The case came on for hearing at Rossland before Mr. Justice MORRISON without a jury on the 13th of October, 1908, and judgment was delivered on the 16th of February, 1909, in favour of the plaintiff for the full amount claimed. Against this judgment the defendants appeal to this Court.

The appeal is based on the ground that the learned trial judge erred in not dismissing the plaintiff's action as there was no resolution passed by the shareholders in general meeting entitling the plaintiff to remuneration as provided in the by-laws of the Company—Table A of the Act.

GALLIHER, J.A.

The evidence is that the Company was duly incorporated under the Companies Act, 1897, and as there were no by-laws of the Company, therefore Table A of the Companies Act governs. It is admitted that at the time of his appointment as managing director, the plaintiff was already a director of the Company, and there is no dispute as to the salary fixed, although there is as to when it should be paid.

Section 53 of Table A provides that the future remuneration of the directors and their remuneration for services performed previously to the first general meeting shall be determined by the Company in general meeting. From this it is clear that directors cannot fix their own remuneration as directors.

Under section 55 of Table A, under the heading "Powers of Directors" there seems no doubt that directors of a company can appoint a manager and fix his remuneration, and counsel for

the plaintiff, Mr. *Hamilton*, contends that they could appoint that manager from among their number, and upon the one appointed accepting the office, he, *ipso facto*, ceased to be a director under the provisions of section 57 of Table A—that such act does not invalidate the contract, and the only effect is that from the moment of acceptance, the party appointed ceases to be a director, and he cites *Eales* v. *Cumberland Black Lead Mine Co.* (1861), 6 H. & N. 481.

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Rule 46 of the English Act, Table B, which governed that case is the same as section 55, Table A of our Act. The appointment was that of manager of the mine, and the judges were unanimous that it was legal for the directors to appoint a director to an office of profit and the only effect is as in our own Act, that such a director vacates his office of director.

Mr. *Hamilton* also cites the case of *Melliss* v. *Shirley Local Board* (1885), 14 Q.B.D. 911, as an authority that the contract is not illegal, but the judgment in this case was reversed on appeal: see (1885), 16 Q.B.D. 446. The statute in that case prohibited the entering into the contract, and it was upon this that the judgment of the Court of Appeal proceeded.

The case of *In re Dale and Plant, Limited* (1890), 43 Ch. D. 255, also cited by Mr. *Hamilton*, was under the Winding-Up Act, and the question was whether Dale, the managing director of the company, was entitled to prove for salary due him as managing director in competition with the other creditors. In that case, Dale became managing director by virtue of an agreement entered into between the company and himself. The legality of his appointment was not in dispute, as in the present case, and the only point decided was that the moneys due Dale were not due him in his character as a member of the company, and therefore he was entitled to prove in competition with other creditors.

GALLIHER, J.A.

I agree with Mr. *Hamilton's* contention that a director's office is vacated automatically as soon as he accepts a position of emolument under the company: *In re The Bodega Company, Limited* (1904), 1 Ch. 276, is an authority on that point.

Counsel for the defendant, Mr. *Martin*, directed our attention to section 72 of the Companies Consolidation Act, 1908 (Imperial),

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giving directors power to appoint one of their number manager or managing director, and to fix his remuneration, and pointed out that this section does not appear in the English Act, 1862, nor in our Act, arguing that Parliament evidently deemed it necessary to pass such an enactment in order that the directors should have such powers of appointment.

Under our Act, it appears clear to me that directors of a company have no power to appoint a managing director from one of their number and fix his remuneration. That is what was done in the case before us, but Mr. *Hamilton* argues that although the term used is "managing director," their intention was to appoint the plaintiff manager, that the work he performed was not the ordinary work of a director, but work requiring special skill and knowledge, and that immediately on his appointment he ceased, *ipso facto*, to be a director. It appears to me, however (though it may seem a hardship in this case), that the directors appointed him precisely what they intended him to be; that they desired him to remain associated with them as a director, but to have the management of the work. The words "managing director" mean exactly what they imply, *viz.:* a director having the management of affairs. The salary is fixed at the lump sum of $150 per month, and the plaintiff sues in the dual capacity of manager and managing director. Now, how is the Court to segregate this amount and say how much is to be applied in his capacity as manager and how much as managing director? If he had been appointed manager simply, he would have come within the principle laid down in *Eales* v. *Cumberland Black Lead Mine Co., supra.*

GALLIHER, J.A.

I am (if I may say so), with regret forced to the conclusion that this appeal must be allowed with costs.

Appeal allowed.

Solicitor for appellant: *A. F. R. Martin.*
Solicitor for respondent: *C. R. Hamilton.*

GREENSHIELDS & CO., LTD. v. REEVES.

GRANT, CO. J.

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GREENSHIELDS v. REEVES

County Court—Married woman—Judgment summons against—Judgment confined to her separate property—Execution—County Courts Act, B. C. Stat. 1905, Cap. 14, Sec. 147—Rule 447 (d.)

A married woman against whom a judgment has been obtained under the provisions of the Married Women's Property Act is not a judgment debtor within the meaning of section 147 of the County Courts Act.

MOTION to set aside a judgment summons against a married woman, the judgment being restricted to her separate property. Heard by GRANT, Co. J., at Vancouver on the 10th of December, 1909.

Woods, for the motion.
A. E. Garrett, contra.

GRANT, Co. J.: This was a motion by the defendant to set aside a judgment summons against the defendant who is a married woman, the judgment being restricted to her separate property. The chief ground of application—and the only one considered herein—was that the Court had no jurisdiction whatever to hear same, it being contended on the argument that the judgment in this case created no personal liability but merely charged the defendant's separate estate.

Judgment

By section 147 of our County Courts Act any party having an unsatisfied judgment or order, in any County Court . . . . may . . . . procure from any County Court within the limits of which the judgment debtor shall then dwell . . . . a summons . . . . requiring him to appear at a time and place therein expressed to answer such things as are therein named.

The question for me to decide is, is a married woman against whom a judgment has been entered payable out of her separate estate and not otherwise a judgment debtor within the meaning of said section?

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In *Ex parte Jones* (1879), 12 Ch. D. 484 at p. 490, Cotton, L.J., says:

"It is not the woman, as a woman, who becomes a debtor, but her engagement has made that particular part of her property which is settled to her separate use a debtor, and liable to satisfy the engagement."

In *Scott* v. *Morley* (1887), 20 Q.B.D. 120 at p. 126, Lord Esher, M.R., uses these words:

"That is, the damages recovered are not to be payable by the married woman; they are to be payable out of her separate property. . . . . If this be so, does section 5 of the Debtors Act, 1869, apply to a judgment of this nature? Section 5 says that the Court may commit to prison any person who makes default in payment of 'any debt due from him' in pursuance of any order or judgment of the Court. What is the real meaning of those words 'due from him?' It appears to me that they point to a debt which the defendant is personally liable to pay. If you treat the Debtors Act as an Act which authorizes the Court to commit people to prison, then you must construe it strictly . . . . If it is treated as a penal Act it must not be stretched. In either view of the Act, it appears to me that section 5 of the Debtors Act does not apply to the judgment which can be recovered against a married woman only by virtue of the Married Women's Property Act, 1882. On these grounds I agree with the decision in *Draycott* v. *Harrison* (1886), 17 Q.B.D. 147."

In *Draycott* v. *Harrison*, Mathew, J., at p. 152, says:

"The question here is, had he (the County Court judge) power under the Debtors Act, 1869, to make the order? I am under the opinion that he had not, because, looking at the language of the Act, I think the provisions of section 5 are intended to apply to debts which the judgment debtor is under a personal obligation to pay. . . . . Now a judgment in its ordinary form imposes upon the defendant a personal obligation to pay the debt. A judgment in the form of the judgment in the present case does not impose that obligation."

Judgment

In Ontario the same point came before the Court in *Re McLeod* v. Emigh (1888), 12 Pr. 450. Rose, J., in delivering the judgment of the Court at p. 451 says:

"It is clear that a judgment against a married woman under the statute creates no general personal liability, but merely charges her separate estate."

After reviewing the above cited English authorities and shewing the similarity between the provisions of the Debtors Act of 1869 and chapter 47 of the R.S.O. 1877, as amended by 43 Vict., Cap. 8, touching the examination of debtors, says, at p. 453:

"In my opinion the provisions of section 177, as amended by 43 Vict., Cap. 8 (which is in effect section 147 of the B. C. County Courts Act), are not applicable to a married woman against whom judgment has been obtained by virtue of the Married Women's Property Act, but are applicable only where there is a personal liability to pay."

From the aforegoing authorities I hold that a married woman against whom a judgment has been obtained under the provisions of the Married Women's Property Act does not come within the meaning of the words "judgment debtor" as used in section 147 of our County Courts Act, and cannot be proceeded against by way of judgment summons.

If it is desired to examine a married woman in aid of execution upon a judgment recovered as in this case, the mode of procedure is laid in marginal rule 447 of our County Court Rules, subsection (*d.*) of which makes this rule expressly applicable to married women against whom a judgment has been obtained restricted to their separate property. If authority for this is required it can be found in *Countess of Aylesford* v. *Great Western Railway Co.* (1892), 2 Q.B. 626, 41 W.R. 42.

On the part of the plaintiff it was contended that if the order went setting aside the judgment summons it should be without costs. I have looked into the matter very carefully and I cannot see upon what principle I can accede to that request. In my judgment the costs should follow the event.

Judgment

The order setting aside the judgment summons will go with costs.

Motion allowed.

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REX v. LUM MAN BOW AND HONG.

Criminal law—Stealing and receiving—Possession of property recently stolen—Onus on party in possession.

REX v. LUM MAN BOW AND HONG

Where a person is found in possession of stolen property, recently after the theft has been committed, an onus is cast upon him to account for such possession, and in the absence of a satisfactory explanation it is reasonably to be presumed that he came by the property dishonestly.

Where, therefore, chickens had been stolen, and were some hours afterwards found in the accused's shop, and no clear account was given of how they came to be there:—

Held, that a conviction for receiving stolen property was right.

CASE stated by MCINNES, Co. J., in a criminal trial before him under the Speedy Trials Act. The case stated is, in part, as follows:

"On the application of *Sir C. H. Tupper, K.C.*, of counsel for the prisoners, I reserve the following case for the opinion of the Court of Appeal: Lum Man Bow and Hong were tried before me on the 18th and 21st of December, without a jury upon their election to be so tried, upon indictment charging that on the 4th day of December, 1909, they did unlawfully retain stolen property in their possession to wit, the property of William Kinnear, being over the value of $10, and knowing the same to have been stolen, contrary to the form of the statute in such case made and provided.

Statement

"The property consisted of some 26 chickens. I found that the chickens belonged to William Kinnear, that they were stolen from him on the night of December 3rd-4th and were found on the afternoon of December 4th in the possession of the accused. The accused failed to give a satisfactory account of how they came by the property and I accordingly found them guilty of the offence charged and sentenced them to nine and six months' imprisonment respectively. The sentence has been suspended pending a determination of the following question, namely: Whether recent possession of stolen property raises a

presumption which, when not rebutted, warrants a conviction on the above charge?"

The appeal was argued at Victoria on the 5th of January, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Sir C. H. Tupper, K.C., for the accused: One of the accused is a partner in a firm which does a large business in poultry, and is a man of irreproachable character; the other accused is an employee of the firm. There must be something beyond the mere possession of property recently stolen in order to secure a conviction. Where the charge is simply one of retaining goods, it is necessary for the Crown to establish the theft by some one else. There is no identification of the birds alleged to have been stolen.

Maclean, K.C. (*D.A.-G.*), for the Crown: The prisoners were proceeded against not because they had received, but because they had retained the birds knowing them to have been stolen. Even if they had stolen the birds, they could have been prosecuted for retaining them as well. The law throws a certain onus on a person to account satisfactorily for the possession of stolen goods. Here we have no satisfactory account.

Argument

Tupper, in reply: There is no authority for the contention as to shifting the onus. The judge below went on the ground that on the evidence he was practically bound to find the prisoners guilty. Therein he was in error. The acccused produced account books shewing where all the stock was obtained from.

Cur. adv. vult.

11th February, 1910.

MACDONALD, C.J.A.: The question of law submitted for the opinion of the Court is "Whether recent possession of stolen property raises a presumption which, when not rebutted, warrants a conviction on the above charge?"

MACDONALD, C.J.A.

The accused were charged that on the 4th day of December, 1909, they did unlawfully retain stolen property in their possession contrary to the form of the statute in such cases made and provided. The case proceeded on the assumption that the property had been stolen, not by the accused, but by some other person or persons.

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It appears from the statement of fact submitted by the learned County Court judge, that the property in question had been stolen from one William Kinnear on the night of December 3rd, and was found on the afternoon of the 4th in the possession of the accused; and that the accused failed to give a satisfactory account of how they came by it.

It was contended before us by *Sir Charles Hibbert Tupper*, on behalf of the accused, that the only presumption which arose on these facts was a presumption that the accused had stolen the property, and that this excluded the presumption that they had retained it knowing it to be stolen. In my opinion, the question must be answered in the affirmative, that is to say, that recent possession of stolen property under the circumstances of this case did raise a presumption which, when not rebutted, warranted a conviction.

It seems to me that the question is fully covered by the decision in *Reg.* v. *Langmead* (1864), 9 Cox, C.C. 464, where precisely the same question arose, and where the judges were unanimously of the opinion that whenever circumstances are such as to render it likely that the accused did not steal the property, the presumption is that he received it.

MACDONALD, C.J.A.

In this case the charge is for retaining, not receiving, but I think the principle, so far as the presumption is concerned, is the same. The section of the Code extending the offence to "retaining" was, I think, intended, as Mr. *Maclean* argued, to remedy a defect in the law which failed to reach persons who were indicted for the offence of receiving, but who afterwards were proven to be the thieves. The same person could not be the thief and the receiver, but under the present section he may be convicted of retaining notwithstanding that it should turn out on the trial that he had actually stolen the goods.

IRVING, J.A.

IRVING, J.A.: It was argued before us that the doctrine of recent possession was not applicable to the offence of receiving or retaining stolen property, and *Reg.* v. *Lamoreux* (1900), 4 C.C.C. 101 at p. 104, was cited. I cannot agree to that argument. *Reg.* v. *Langmead* (1864), 9 Cox, C.C. 464, and *Thomas Robson Thornton* (1909), 2 Cr. App. R. 285, are authorities the other

way. See also *Nathan Gordon* (1909), 2 Cr. App. R. 52; *John Poolman* (1909), 3 Cr. App. R. 36; and *George Powell*, *ib.* 1, where the Chief Justice at p. 2, said:

"The possession of recently stolen property throws on the possessor the onus of shewing that he got it honestly."

MARTIN, J.A.: There is, in my opinion, no doubt that the conviction of the accused as receivers was justified. The exact point now raised is fully covered by the decision of the Court of Criminal Appeal in *Langmead's Case* (1864), L. & C. 427; 9 Cox, C.C. 464. I refer specially to the former citation because the case is more fully and better reported there. That decision is in accord with a prior ruling of the same Court in 1862 in *Deer's Case*, same volume, p. 240. The case at bar indeed is a much stronger one for conviction than either of those cited because here the accused themselves gave uncontradicted evidence to shew that they did not steal the property in question, though the learned County judge found that it was stolen by some one. Therefore it must be reasonably inferred from the evidence that they were not guilty of the theft, and, since they failed to account satisfactorily for their recent possession, the remarks, in particular, of Mr. Justice Blackburn in *Langmead's Case* apply *a fortiori* to this case. Compare also the instruction to the jury given by Mr. Justice DUFF in *Rex* v. *Theriault* (1904), 11 B.C. 117 at p. 120.

MARTIN, J.A.

Taking this view of the matter, it becomes unnecessary to now discuss the interesting point raised by Mr. *Maclean* on "retaining" as distinguished from "receiving."

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

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellant: *Tupper & Griffin.*

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Jan. 26.

RORISON v. KOLOSOFF.

Foreshore—Right of access of riparian owner to bank of river—Highway—Right of access to, from land abutting on.

RORISON v. KOLOSOFF

The riparian owner of land, bounded by high-water mark of tidal waters, is entitled to access to such waters from all parts of his frontage thereon. The Court will, at his suit, enjoin any obstruction of the foreshore.

The same principle applies to the owner of land abutting on a highway. He is entitled to an injunction to restrain any obstruction of the highway in front of his land.

Harvey v. *B.C. Boat and Engine Co.* (1908), 14 B.C. 121, followed.

Statement

ACTION to determine certain foreshore and highway rights, tried by CLEMENT, J., at Vancouver on the 21st and 22nd of December, 1909.

Craig, for plaintiff.
Brydone-Jack, for defendant.

26th January, 1910.

Judgment

CLEMENT, J.: The British Columbia Land & Investment Agency, being the owners of certain lands fronting on the Fraser river in the Municipality of Richmond, registered in 1903 a plan of sub-division thereof. This plan shews (so far as here material) a 33 foot road paralleling the river bank some little distance therefrom, and, to the south of this road, a number of lots with various road allowances. The strip shewn on the plan between the River road and the river was not sub-divided. The defendant, Mrs. Kolosoff, bought lot 6 which faces upon the River road, and her claim to certain rights appertaining (as is alleged) to this lot 6 has led to this litigation. Her husband has lately died so that she is now the sole defendant. To the west and south of lot 6, as shewn on the plan above mentioned, appears an allowance marked "road," 20 feet in width, running from the River road above mentioned to another road which runs along the easterly boundary of the Agency's lands and

parallel with the line of the Vancouver and Lulu Island railway. No other sales having been made, one Webster bought out the Agency, and on his application the plan above mentioned was cancelled in April, 1907, by order of Mr. Justice MORRISON, "except insofar as it affects lot 6." The plaintiff in his turn bought from Webster, and he now brings this action as owner of the strip of land between the River road and the Fraser river and also of the land to the west and south of Mrs. Kolosoff's lot 6, claiming (1.) that she has trespassed upon the strip and has obstructed plaintiff's access to the Fraser river therefrom and (2.) that she has also trespassed upon the land to the west of her lot. In proof of his title the plaintiff puts in two certificates of indefeasible title, one of title to the strip and the other of title to the remainder of the land; and these are, of course, conclusive, subject only as specified in the Land Registry Act.

I find as a fact that the defendant, Mrs. Kolosoff, has built or maintains (1.) upon the strip or foreshore a scow resting upon piles with a superstructure in the nature of a shed or river warehouse, to which she claims, and has hitherto exercised, the right of access over the strip from the road running in front of her lot, and (2.) certain buildings or parts of buildings and a fence, all of which are upon the land covered by the road allowance as shewn on the plan above mentioned to the west of lot 6.

The defendant contends that the certificates of indefeasible title are not conclusive against her as to either of the parcels as to which dispute has arisen. Firstly, as to the strip of land between the road and the Fraser river: She contends that this is a case coming within class (*i.*) of the reservations set out in section 81 of the Land Registry Act, that is to say, that the certificate is subject to "the right of any person to shew that any portion of the land is by wrong description of boundaries or parcels improperly included in such certificate;" and that there has been such "wrong description of boundaries" in this case. The certificate contains no description in words, the land covered by it being shewn in pink on an annexed plan. But translating into words what appears to the eye, the description is very ambiguous. If measurement by foot-rule is to govern, the defendant's scow-warehouse is clearly within the pink area;

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whereas, if one is to take the black line (with its outer shading of blue) as meaning the bank of the Fraser river, the question at once arises: high-water mark or low-water mark? *Prima facie* it would be the former, and as the evidence shews that the scow-warehouse is really on the foreshore, between the two marks, the defendant contends that in this view the plaintiff has failed to prove title. If, on the other hand, low-water mark is meant, the defendant says that the plaintiff never in fact acquired title from the Crown to the foreshore, and that there is, therefore, in this view, a "wrong description of boundaries." For some time I inclined to think that this question might give trouble to the Court as well as to the plaintiff, but on further consideration I am of opinion that it is a question which the Court need not consider. Assuming that plaintiff owns only to high-water mark, the case of *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662, 46 L.J., Ch. 68, shews that the acts of the defendant in obstructing the foreshore are acts which the Court will restrain at the instance of a riparian owner, such as the plaintiff undoubtedly is. What rights the defendant has as one of the public to navigate or fish in the Fraser river and in connection therewith to utilize the foreshore are indicated in, *e.g.*, *Brinckman* v. *Matley* (1904), 2 Ch. 313, 73 L.J., Ch. 642, but they do not include the right to obstruct the plaintiff's access to the river from all parts of his land or the right to cross the plaintiff's land above high-water mark in order to reach the river. Upon this branch of the case therefore the plaintiff is entitled to succeed and an injunction will go, mandatory and otherwise, to enforce his rights as above indicated.

Judgment

Secondly, as to the road allowance to the west of lot 6: Curiously enough the principle of this same case (*Lyon* v. *Fishmongers' Company*) is also decisive against the defendant upon this branch. In my opinion, the effect of the order made by my brother MORRISON cancelling the old plan is that the road running to the west and south of lot 6 continues to be a road; but the plaintiff as the owner of the land to the west and south of this road has a right to seek the aid of the Court to prevent that road being blocked up. I so held in *Harvey* v. *B. C. Boat and Engine Co.* (1908), 14 B.C. 121, applying there the law as

laid down in the *Fishmongers'* case. There must therefore be an injunction on this branch of the case as well as upon the first.

The interim injunction obtained by the defendant in respect of certain projected work on the strip is dissolved with costs. The plaintiff is also entitled to the costs of the action so far as the river front issue is concerned, but as the relief granted in respect of the road allowance is not that sought by the plaintiff in his statement of claim, I give him no costs upon that issue. To carry out this view in such a way as to avoid a troublesome scrutiny on taxation, I allow the plaintiff two-thirds of the costs of the entire action and all the costs of the defendant's injunction application.

Judgment

Judgment for plaintiff.

REX v. PRASILOSKI.

Criminal law—Evidence—Admissibility—Depositions taken by magistrate—Parol evidence in addition thereto.

Where a deposition has been regularly taken down in writing by a magistrate at a preliminary hearing, and such deposition is available, that deposition is the best evidence of what the witness stated on that occasion, but

Where the deposition is produced and put in evidence, then parol evidence is admissible to prove statements made by the witness on the occasion of the taking of the deposition, and not appearing therein.

CRIMINAL APPEAL by way of case stated, from a conviction had by HOWAY, Co. J., in a speedy trial on a charge of perjury held by him at New Westminster on the 22nd of September, 1909. The prisoner, having lost two cows, laid an information before Magistrate E. W. King accusing three persons of unlawfully taking a dark red cow from his field, and at the preliminary inquiry before said Magistrate King the accused

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were discharged. Subsequently one of the three accused laid an information before Stipendiary Magistrate Pittendrigh, charging the prisoner with perjury alleged to have been committed at the preliminary inquiry before the said Magistrate King. The prisoner was committed for trial and convicted.

The material portion of the case reserved for the opinion of the Court of Appeal, reads as follows:

"At the trial, when the Crown sought to prove, by witnesses who were present at the inquiry before the said Magistrate King, the evidence given by the prisoner containing the alleged perjury, counsel for the accused objected on the ground that the deposition taken down by the magistrate was the best and only evidence of what the prisoner said on oath before him. I overruled the objection. It appeared from the oral testimony of Magistrate King that he had not taken down all the evidence given by the prisoner before him.

"Was I right in allowing parol evidence to be given of what the prisoner said on oath before the said Magistrate King when the prisoner's deposition as taken down by the magistrate incomplete as aforesaid was in evidence?"

The appeal was argued at Victoria on the 4th of January, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Ross, for the accused: The evidence taken by the magistrate is the best and only evidence of the statements made by the prisoner before him: see sections 682 (3), 688, 691, 695, 827 and 871, from which it will be seen that the Code presupposes that in all cases all the statements made by the witness before a magistrate must be taken down in writing by the magistrate.

Section 170 of the Code defines perjury to include all statements, whether material or not. In this respect the Canadian law goes beyond the English law inasmuch as in England the statement containing the alleged perjury must be material. He cited and referred to the following: 7 Geo. IV., Cap. 24, Secs. 2 and 3; 11 & 12 Vict., Cap. 42, Sec. 17; *Rex* v. *Lewis* (1833), 6 Car. & P. 161; *Rex* v. *Wylde* (1834), *ib.* 380; *Rex* v. *Walter*

(1836), 7 Car. & P. 267; *Regina* v. *Morse* (1838), 8 Car. & P. 605; *Regina* v. *Taylor* (1839), *ib.* 726; *Regina* v. *Weller* (1846), 2 Car. & K. 223; *Christopher, Smith and Thornton's Case* (1850), 1 Den. C.C. 536; *Parsons* v. *Brown and others* (1852), 3 Car. & K. 295; *Regina* v. *Taylor* (1874), 13 Cox, C.C. 77. See also Taylor's Evidence, 10th Ed., paragraphs 399, 400, 893; Roscoe's Criminal Evidence, 13th Ed., 58; Phipson, 4th Ed., 502-3; *The King* v. *Doyle* (1906), 12 C.C.C. 69.

The prisoner *bona fide* believed that the accused men had taken his cow and hence laid the information against them. Section 170 of the Code provides that it is essential to the crime of perjury that the accused must know when making the allegedly false statement that it is false in fact and it must be made with an intention to deceive the Court, There was absolutely no evidence before either the magistrate or the trial judge of either of these two essentials.

Maclean, K.C. (D.A.-G.), for the Crown: As to the first point reserved: Parol evidence is admissible to shew that the deponent made other statements than those taken down by the magistrate. The statutory provision that the magistrate must take down in writing in the form of a deposition the evidence of such witness is intended to provide only for the most authentic way of presenting to the Court the statements made, but not at all as intending to exclude all other modes of giving evidence of statements made by the accused in the course of his examination. This view of the statute clearly follows from *Queen* v. *Erdheim* (1896), 2 Q.B. 260. As this decision is recent and was given by the Court of Crown Cases Reserved, it must be regarded as the governing case on this subject.

Argument

If the law were as contended for on behalf of the accused, a man charged with perjury would be precluded from shewing that the magistrate had failed to take down some statement which would be a complete defence to the charge contained in the indictment.

With regard to the second and third questions it is submitted that there was some evidence on which the magistrate

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could properly hold that the accused should be committed for trial and on which the trial judge could properly find a verdict of guilty.

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MACDONALD, C.J.A.: The accused, having lost a cow, laid an information against three men charging them that they did unlawfully take out of the field of the said Prasiloski a dark red cow, being the property of the aforesaid Prasiloski, residing at Peardonville, contrary to the statute in such case made and provided.

A preliminary inquiry was held before Magistrate King, at which Prasiloski gave evidence, and the accused men were discharged. Subsequently, these three men laid an information before a justice of the peace (Pittendrigh), charging said Prasiloski with having, in his evidence before Magistrate King, on such preliminary hearing, committed perjury.

Prasiloski was committed for trial on this charge and afterwards tried before HOWAY, Co. J., and found guilty. The County judge reserved questions for the opinion of this Court, the first, with its accompanying statement of fact, being as follows:

MACDONALD, C.J.A.

"At the trial when the Crown sought to prove by witnesses who were present on the inquiry before the said Magistrate King, the evidence given by the prisoner containing the alleged perjury, counsel for the accused objected on the ground that the deposition taken down by the magistrate was the best and only evidence of what the prisoner said on oath before him. I overruled the objection. It appeared from the oral testimony of Magistrate King that he had not taken down all the evidence given by the prisoner before him. Was I right in allowing parol evidence to be given of what the prisoner said on oath before said Magistrate King when the prisoner's deposition as taken down by the Magistrate, incomplete as aforesaid, was in evidence?"

The deposition of the accused taken by Magistrate King, and the depositions of the witnesses at the preliminary inquiry before Magistrate Pittendrigh, together with the evidence taken at the trial, were made part of the reserved case. No point was made before us that the information in part above recited does not disclose a criminal offence, the argument for the

accused being that as the statute requires the magistrate to take down the evidence in writing, parol evidence was not admissible to prove what took place before the magistrate after the accused was sworn. The deposition of the accused taken by Magistrate King was first put in evidence, and then counsel for the Crown proposed to call witnesses to shew that certain statements were made before Magistrate King by the accused other than those which appeared in the deposition. The question is one of considerable importance both to the Crown and to accused persons, because if a mistake be made, or breach of duty committed by the magistrate in the taking of depositions, and it be held that depositions regular in form are to be taken as conclusive evidence of all that was said by witnesses on that occasion, far-reaching results would follow from such a ruling.

The following authorities have been examined:

Rex v. *Lewis* (1833), 6 Car. & P. 161. The prisoner was examined on oath, and her examination taken down, and in it she referred to a letter produced by her before the examining magistrate. It was proposed at the trial to examine the magistrate touching this letter. Gurney, B.: "That cannot be done as it was referred to in the examination." The Crown then proposed to give evidence of what the prisoner said which was not taken down. Gurney, B., at p. 162:

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"It is very dangerous to admit such evidence, and I think it ought not to be done in this case."

Rex v. *Wylde* (1834), 6 Car. & P. 380. The Crown proposed to call Mr. Flint, who had been attorney for the prosecution at the preliminary hearing, to prove statements made by defendant before the magistrate, but not taken down. Park, J., at p. 381:

"I am of opinion, that that cannot be done."

Rex v. *Walter* (1836), 7 Car. & P. 267. It was proposed by the Crown to give evidence of the confession made by a prisoner when examined before the magistrate. Lord Abinger, C.B.:

"The depositions shew that the prisoner said 'I decline to say anything.' This being so, parol evidence that the prisoner made a confession of guilt on the same occasion cannot be admitted."

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Regina v. *Morse* (1838), 8 Car. & P. 605. The magistrate's clerk in taking down the evidence left blanks for the names of certain persons other than the accused implicated by the witnesses. At the trial it was sought to put in oral testimony of the clerk to supply these blanks. Patteson, J.:

"I ought not to receive the parol evidence. The rule ought not to be extended. In the present case the statement professes to be a complete account of what took place; and I am of opinion that supplementary evidence ought not to be received."

Regina v. *Weller* (1846), 2 Car. & K. 223. Platt, B. declined to hear any evidence of what the prisoner said during the preliminary examination except what appeared in the depositions.

Christopher Smith and Thornton's Case (1850), 1 Den. C.C. 536. In this case it was held that the statement proposed to be proved by parol evidence formed no part of the depositions, but was wholly independent of them, and could therefore be given in evidence by parol. This was a decision of the Court *in banc*, and Alderson, B. referred with approval to the case of *Jeans* v. *Wheedon* (1843), 2 M. & Rob. 486, and in particular to a foot-note to that case at p. 488. In the foot-note is found this statement:

"But even on such criminal trial, evidence is admissible by way of explanation, or to prove that the party made other statements besides those reduced into writing; otherwise the safety of prisoners, and the credit of witnesses, would depend on the honesty and accuracy of the clerks who take the examinations."

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The Queen v. *Coll* (1889), 24 L.R. Ir. 522. In that case the Crown sought to put in a deposition taken before the magistrate, but on objection, was not allowed to do so. A question was then framed presumably based on a statement made by the witness in the rejected deposition, and this question was put, objected to, but allowed. On a reserved case before nine judges of the Irish Court, five of the judges held that it was admissible, basing their reason for this conclusion on the absence of anything before them to shew that the question was really contained in the deposition, and that it might have reference to a different occasion. The other four judges held that the question was not admissible, because it could be fairly assumed

that the occasion was the same as that on which the deposition was taken, and that the question was really taken from the deposition. The case is instructive as shewing the view taken by a number of the learned judges of the extent to which parol evidence can be given of statements made by a witness on a preliminary hearing. O'Brien, J., at p. 556, of the report, says:

"It is certain there was an information of the 14th February. It is certain also that the statement about which the witness was asked was on the 14th February; and I take it to be the effect of the decisions that there is a presumption, until the contrary is shewn, that it was taken down in writing."

Harrison, J., p. 561, said:

"Nor do I think it is open to the prisoner's counsel to contend that in effect the question referred to a written document not produced, and was therefore inadmissible."

Palles, C.B., referred to *Leach* v. *Simpson* (1839), 5 M. & W. 309, and quoted from Lord Abinger, C.B., as follows, p. 569:

"I have always understood the law to be that when testimony has been reduced to writing by a person of competent authority, you must inquire, in the first instance, what the witness said, by the writing; and the rule is the same, whether the evidence is taken down upon interrogatories in Chancery, or by depositions before a magistrate."

And from Lord Wensleydale, as follows:

"The presumption is, until the contrary is shewn, that the magistrate took down all that was material in the testimony of the witness. The written deposition, therefore, is the best evidence of what he said, and must first be produced, before you can inquire by other means as to what passed upon the occasion. If it appears, upon production of the deposition, that any particular statement alleged to have been made is not contained in it, you can add to it by parol evidence of that statement."

Palles, C.B., then continues:

"That is, in a case in which it may thereafter appear that the statement sought to be given in evidence is not contained in the writing, still the writing must be produced. The necessity for the production of the writing is by reason of the general presumption that everything material has been taken down. The production of the writing is a condition precedent to proving by parol any part of the evidence given; and although, as a matter of fact, it may afterwards appear that the statement sought to be proved is not contained in it, still the writing must be produced to shew that it is not."

On behalf of the Crown *The Queen* v. *Erdheim* (1896), 2 Q.B. 260, was relied upon. The evidence sought to be introduced

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by parol related to statements made by a bankrupt during his examination under the Bankruptcy Act, 1883, section 17. That Act does not require that the whole of the evidence of the bankrupt shall be taken in writing, but provides that such notes of the examination as the Court thinks proper shall be taken down in writing. The examination in question was never completed, and it was sought to prove by parol the statements which had been made by the bankrupt in his examination. The Court there held that parol evidence was admissible.

While that case is not strictly in point, I refer to it as shewing the broad view taken by the Court of the admissibility of parol evidence notwithstanding that the same statements had been reduced to writing in a previous proceeding.

The conclusion which I draw from these various authorities, more or less conflicting and difficult to harmonize, is that where a deposition is regularly taken down in writing, and is available, the writing is the best evidence of what it purports to be, *viz.*: the whole evidence of the witness on that occasion. The written deposition must, therefore, be produced, or its non-production properly accounted for. If it be produced and put in evidence, as was done here, then parol evidence is admissible to prove statements of the witness made on that occasion not appearing in the written deposition.

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The earlier cases above referred to, from which it might be inferred that the depositions are conclusive, were decided at *nisi prius* and without much consideration. When, however, the Court *in banc* had to consider the question, as in *Christopher Smith and Thornton's Case, supra,* the inconvenience and the injustice to be apprehended from such a rule was appreciated, and in *The Queen* v. *Coll, supra,* while there was a disagreement amongst the judges, yet that disagreement arose out of the circumstances of that case, and not as to the rule of law itself. It appears to be unquestioned that had the deposition there referred to been admitted, as it ought to have been, then parol evidence of statements not included in it could be given.

After a perusal of the evidence in this case, it is, with a good deal of regret, that I find myself unable to interfere. We have,

however, nothing to do with the weight of evidence, but only with the legal question of its admissibility. I think, therefore, the first question must be answered in the affirmative.

The second question is founded on the following statement:

(a) "That the said indictment was not founded on facts or evidence disclosed on depositions taken according to law before the committing Magistrate Pittendrigh.

(b) That the depositions did not support the indictment."

I think the motion to quash was properly refused. The depositions in question appear to be regular, with the exception that they are not signed by the magistrate. They were taken down in shorthand and are certified to by the stenographer, but the magistrate omitted to sign them, and there is no affidavit by the stenographer as required by section 683 of the Code.

There was no illegality in the manner in which the inquiry was conducted, as in the case of *The Queen* v. *Lepine* (1900), 4 C.C.C. 145 and *The King* v. *Traynor* (1901), *ib.* 410, to which we were referred. The irregularity was merely in omitting to comply with the formalities relating to attestation of the depositions.

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Clause (b) of the second question, in effect, asserts that the depositions disclose no offence. If it be necessary in a case where the accused is being tried only on the charge upon which he was committed to shew that the depositions support the commitment, as to which I do not express an opinion, I think the depositions here were sufficient, *prima facie*, to support it.

IRVING, J.A.: On the point whether on an indictment for perjury alleged to have been committed before a magistrate at a preliminary inquiry under Part XIV. of the Code, evidence of statements made by the prisoner, but not reduced into writing by the magistrate, can be used. I think we are concluded by what is said in *The Queen* v. *Erdheim* (1896), 2 Q.B. 260, at pp. 269 and 270, to the effect that there being no rule saying that the written statement shall be the only evidence, we may act on the general rule there laid down, that the statement of a person in the witness box may be proved by any person.

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But I would draw attention to what is stated at p. 271, that in dealing with such verbal evidence the very greatest care should be taken.

I do not think the judge would have been justified in quashing the indictment or charge under section 871 (2), because it was suggested to him that the accused was a foreigner and did not fully understand the proceedings, or their nature. The case would be governed by the maxim *omnia presuumptur rite acta est*, and therefore evidence was necessary to shew that he in fact did not understand what was being done. The objection in my opinion could not be dealt with by quashing the indictment.

I concur in the reasons of the Chief Justice on the other points.

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MARTIN, J.A.: I concur in the view that the conviction should be sustained. I place great reliance on *Rex* v. *Harris* (1832), 1 M.C.C. 338, not cited to us, wherein the first question before us was, in its essentials, disposed of by all the judges of England, with certain exceptions (p. 341); that decision is binding on us, and conclusive of the point, the Court being "unanimously of opinion that the evidence being precise and distinct was properly received, and that the conviction was right." This view of the matter, indeed, only confirmed the prior decision of Chief Justice Tindal in *Rex* v. *Reed* (1829), M. & M. 403, and, if any corroboration is necessary it will be found in *The Queen* v. *Christopher* and in the report of the Irish case of *The Queen* v. *Coll*, referred to by my learned brother the Chief Justice, wherein nine judges sat. With respect to the *Erdheim* case, with all deference, I do not place so much reliance on it, because it is a decision on a particular section of the Bankruptcy Act, and not one of the many prior decisions directly relating to the case at bar was considered: see Lord Chancellor Halsbury's remarks in *Quinn* v. *Leathem* (1901), A.C. 495 at p. 506.

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On the other points I concur in what the Chief Justice has said.

GALLIHER, J.A.

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

Appeal dismissed.

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Husband and wife—Judicial separation—Petition for by wife on account of cruelty.

In a petition by a wife for a judicial separation on the ground of cruelty, the petition should shew specifically the series of acts of cruelty relied upon.

Remarks on the necessity for careful and strict compliance with the rules of practice in the steps leading up to the hearing of proceedings under the divorce jurisdiction of the Supreme Court.

PETITION by a wife for a judicial separation on the ground of cruelty. Heard by GREGORY, J., at Vancouver on the 16th and 18th of February, 1910. Argument

Brydone-Jack, for petitioner.

Respondent not represented, or present.

3rd March, 1910.

GREGORY, J.: After carefully reading the transcript of evidence, I am unable to come to any other conclusion than that expressed by me at the conclusion of the trial.

This is an undefended action for a judicial separation brought by the petitioner, the wife of the respondent, who claims to be entitled to a judicial separation on the ground of cruelty on the part of her husband, and she attempts to establish her right by proving specific acts, and a course of conduct amounting to cruelty. Judgment

The petitioner's evidence of specific acts occasioning bodily injury is very unsatisfactory, particularly as to the extent of the injury, which, if any, was inflicted in 1899 or 1890, and notwithstanding which the petitioner and respondent continued to live together as man and wife until a few months ago.

Although the parties were married in 1886, and have had six children, the petitioner, while alleging that the respondent has continuously ill-treated her, is only able to give the vaguest kind of evidence of one or two specific acts of alleged ill-treatment,

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and which from her own evidence appear to have arisen out of disputes in which she evidently was not altogether blameless.

After a separation of about two months, the petitioner and respondent on the 26th of April last settled all their differences, and resumed their marital relations, entering into a written agreement as to the manner in which their domestic and household affairs should be conducted in the future. One cannot read this agreement and the evidence without concluding that there was a great lack of harmony in the Timms household, but that alone does not justify a judicial separation, no matter who is the cause of it; there must be some substantial wrong-doing before the law will interfere with the solemn relations of man and wife.

The question of cruelty is one of fact, and is whether the husband has so treated his wife as to inflict bodily injury upon her, or cause reasonable apprehension of suffering to her physically or mentally: *Tomkins* v. *Tomkins* (1858), Sw. & Tr. 168; *Russell* v. *Russell* (1895), P. 315, 64 L.J., P. 105.

The petitioner has no substantial grievance, or at least none which she has not unequivocally condoned. The general tenor of her complaint was that she was not allowed any voice in the expenditure of her children's wages; and, to use her own words, that her husband "did not treat her as a wife at all, never told her any of his secrets, or where he was, or how he spent his time, or anything."

Judgment

Counsel urged that the cruelty of respondent, if condoned, was revived by his beating of the eldest child, and cited a number of cases, all of which are to be found in Browne & Powles on Divorce, 7th Ed., at p. 62. But those cases establish that such beating must be in the presence of the wife and for the purpose of giving her pain; while in the present case she was not present, and it is quite evident that while the respondent did strike the girl upon the arm, she was no longer a child, but was 21 years of age, and was following him against his will; his purpose therefore was not that required by the authorities.

Counsel also relied strongly upon *Wilson* v. *Wilson* (1849), 6 Moore, P.C. 484, but it in no particular resembles the present

case. In that case the wife proved repeated acts of cruelty, specifically set out in the petition. Her subsequent cohabitation was in compliance with an order of the Court for restitution of conjugal rights (made on her application for failure on his part to pay her allowance agreed upon in a deed of separation). The Court held that such cohabitation was not a condonation, but only carrying into effect the sentence of the Court for restitution of conjugal rights, and that in any case she had set out and proved to the satisfaction of the Court specific charges of subsequent cruelty. She left a hiatus of two months only during which there might have been no ill-treatment. Lord Brougham at the beginning of his judgment, p. 487, says:

"It hardly appears from the evidence that there would be sufficient ground for saying that there had been less cruelty upon the renewed cohabitation, if we knew nothing of Mrs. Wilson's experience of her husband's previous character, which was of the worst kind, amounting to gross personal violence and maltreatment."

And at the conclusion he says:

"That her husband's conduct was likely to have been less cruel during those two months than formerly, is not a necessary or even probable inference."

There is no evidence that the respondent has been criminally convicted, and if there was, there is no evidence whatever that the petitioner's health was broken down by reason of the disgrace and shock arising out of such conviction. The attempt, therefore, by reason of the assault upon the daughter, to bring the case within the rule laid down in *Thompson* v. *Thompson* (1901), 85 L.T.N.S. 172; and *Bosworthick* v. *Bosworthick* (1902), 86 L.T.N.S. 121, utterly fails.

Judgment

The final contention that the respondent was guilty of cruelty in September last (and of which there is no evidence of condonation), by his refusal to supply medical attendance when the petitioner was ill, would have been worth serious consideration if it had been specifically set out in the petition, and if it had been proved by medical evidence that she was in need of it, and that she had been deprived. But her own evidence shews that she called in a doctor before consulting her husband; that he made several visits and charged the account to the respondent.

In dismissing the petition, I feel that some observations should

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be made upon the tendency to loose practice in divorce and matrimonial causes, and while I acquit the petitioner's counsel of any attempt to deceive me, there is no question that the order for substituted service of the citation and petition herein, made by myself, was made upon quite insufficient material. Instead of reading the affidavit at the time, I relied upon counsel's statement of its contents, and I am afraid I also assumed that all of the statements made by him on the application, appeared in the affidavit, which does not shew that the slightest effort was made to ascertain the whereabouts of the respondent. The order was made for service "upon an adult person in the office of Mahon, McFarland & Mahon, 456 Seymour St., Vancouver, B. C.," while the affidavit of service shews service upon "Mr. Reeves at the office of Messrs. Mahon, McFarland & Procter (formerly Messrs. Mahon, McFarland & Mahon, 543 Pender St. West," etc., without shewing Mr. Reeves' christian name, or that he was of the full age of 21 years, and the affidavit of service of the petition for alimony shews service upon a "Mr. Greeves," etc., without shewing his full name or that he was of the full age of 21 years.

In matrimonial causes, which affect the solemn relation of husband and wife, the greatest possible care should be taken to see that the proceedings are brought to the notice of the respondent.

Judgment

There never should have been any such vague order for substituted service as was made in this case. The application for the order should have been founded upon affidavit setting out in minute detail the efforts made to effect personal service, and shewing the reasons why service upon a particular individual named would bring the proceedings to the knowledge of the respondent: *Sudlow* v. *Sudlow* (1858), 28 L.J., P. & M. 4; *Cook* v. *Cook*, *ib.* 5; *Chandler* v. *Chandler*, *ib.* 6; and *Lacey* v. *Lacey*, *ib.* 24.

In cases of this kind where the petitioner relies upon conduct amounting to cruelty, the petition should specifically set out a regular series of the acts relied on to establish the cruelty: *Suggate* v. *Suggate* (1858), 28 L.J., P. & M. 7.

Petition refused.

THE CORPORATION OF THE CITY OF VICTORIA v. THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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Statute, construction of—Agreement between municipal corporation and railway company—Conditions in agreement repugnant to statute passed reciting the agreement and confirming the rights of the railway company.

By an agreement dated the 20th of November, 1888, made between certain persons (predecessors of defendant Company) and the plaintiff Corporation, authority was given to establish a system of street railway in the City of Victoria; but clause 25 of said agreement provided that the cars to be used should be exclusively for the carriage of passengers. In 1894 the Legislature passed an Act, Cap. 63, consequent upon a petition reciting the agreement, the incorporation of the persons named therein as a company, and the passage of an Act, Cap. 52 of 1890, giving the Company power to build and operate tramways through the districts adjoining Victoria, and to take, transport and carry passengers and freight thereon. The petition further prayed for an Act consolidating and amending the Acts and franchises of the Company then in force, and declaring, defining and confirming the rights, powers and privileges of the Company. Section 16 of said Cap. 63, provides that "in addition to the powers conferred by the agreement, the said Company are hereby authorized and empowered . . . . to take, transport and carry passengers, freight, express and mail matter upon and over the said lines of railway . . . . . subject to the approval and supervision of the city engineer, or other officer appointed for that purpose by the said Corporation as to location of all poles, tracks and other works of the said Company":—

Held, that, the passage in the agreement being repugnant to the provision in the statute, the latter should prevail.

APPEAL from an order made by MARTIN, J., at Victoria, on the 7th of April, 1909, upon a motion (upon consent turned into a motion for judgment and trial of the action), for an order restraining the defendant Company from laying down a line of track or rails on Gladstone Avenue in the City of Victoria for the conveyance of sand and gravel. The facts and arguments appear in the reasons for judgment.

Statement

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The appeal was argued at Victoria on the 19th of January, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. J. Taylor, K.C., for appellant (plaintiff) Corporation.

A. E. McPhillips, K.C., and *Bodwell, K.C.*, for respondent (defendant) Company.

Cur. adv. vult.

11th February, 1910.

MACDONALD, C.J.A.: The dispute in this action arises under an Act of the Legislature, Cap. 63 of the Acts of 1894, which embodies in a schedule thereto an agreement made between the City and the Railway Company, or its predecessors, in 1888, whereby the Company was given power to construct a system of street railways in the City. The Act, after confirming the agreement, proceeded to make certain other provisions with respect to the rights and obligations of the parties.

The plaintiffs claim a declaration that the defendants are not under said agreement and statute, or otherwise, entitled to tear up a certain street or highway and sidewalk thereon, known as Gladstone Avenue, fronting on section 58, Spring Ridge, nor to construct over such highway and sidewalk into the said section 58 a line of rails for the conveyance of gravel for the Lineham, Scott Sand and Gravel Company along the Company's system to the customers of the said firm, and for an injunction. A motion was then made by the plaintiffs for an injunction founded upon an affidavit by the city engineer which affirms that the defendants were about to proceed with the work, and that no permission had been given. A letter from defendants' manager was exhibited, dated the 30th of October, 1908, stating that it was the wish of the Company to run a spur off Gladstone Avenue track on to the said section 58, and asking that the city engineer should be instructed to give the necessary grade. The letter also contained this paragraph:

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> "Should there be no reason to insist upon the giving of 30 days' notice and you will kindly waive the same, the work can be started without delay."

The affidavit also states that no other notice was given by the Company of its intention to lay down this spur; that the engi-

neer reported upon the Company's request, and defendant was notified that the request would not be granted; that deponent believes that the spur is to be used for the carrying of gravel for the said Sand and Gravel Company, and that the defendants' workmen were then engaged in the grading. A letter from the said Sand and Gravel Company to plaintiffs is also made an exhibit to said affidavit, which reads as follows:

"8th February, 1909.

"That the Lineham, Scott Sand and Gravel Company beg to make application to the Council for permission to construct a spur track from the B. C. Electric Railway Company's line into lot 58 near the terminus of the Spring Ridge car line, to be used by us as a temporary depot for the storage of sand, etc., for city deliveries."

Then follow certain undertakings as to the manner of doing the work, and the last paragraph reads as follows:

"The privilege is revocable by the Council at any time on reasonable notice, and upon the same being revoked we undertake that the rails shall be removed and the roadway and sidewalk be made good within such time as the city engineer may require."

The application was heard by MARTIN, J., and counsel agreeing thereto, the motion was turned into a motion for judgment, and trial of the action. The only evidence before the learned judge was that supplied by the writ, notice of motion, and affidavit above referred to. The learned judge refused the motion and dismissed the action, and from that order the plaintiff has appealed to this Court.

MACDONALD, C.J.A.

It appeared on the argument before us that besides this franchise in the City of Victoria, the Company had acquired franchises outside of Victoria referred to in an Act of the Legislature, passed in 1890.

It was contended on behalf of the City that Clause 25 of the agreement, Schedule A of the Act of 1894, prohibited the use of the defendants' cars for the carriage of freight, and that insofar as section 16 of the Act of 1894 professes to confer the right to carry freight, the right therein contained ought to be held to apply only to that portion of the Company's undertakings outside of the City of Victoria. Hence it was argued that the defendant had no right to build a spur or siding for freight purposes. I cannot accede to this contention. The language of section 16 seems to me to be very clearly applicable

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to the Company's undertaking within the city, and that being so, it is unnecessary for me to consider the statute of 1890, or anything with regard to the Company's outside undertakings.

By clause 25 of the agreement it is provided as follows: "Cars to be used exclusively for the carriage of passengers." That is to say, as I understand it, the Company was confined in its operations to passenger traffic and was not entitled to carry freight over its lines.

Section 16 of the Act of 1894 reads as follows:

"In addition to the powers conferred by the agreement, the said Company are hereby authorized and empowered to erect, construct and maintain all necessary poles, wires, buildings, works, appliances and conveniences connected with and incidental to the construction, maintenance and operation of the said lines of railway, and to take, transport, and carry passengers, freight, express and mail matter, upon and over the said lines of railway by electric or such other motive power as the said Company may deem expedient, subject to the approval and supervision of the City Engineer or other officer appointed for that purpose by the said Corporation, as to location of all poles, tracks, and other works of the said Company."

It is under this that the Company claims that it is relieved from the restriction contained in said clause 25. We have here a clear contradiction between clause 25 and section 16. Neither standing alone is ambiguous. It is to my mind a clear case of repugnancy. The question then is, to which are we to give effect, because effect cannot be given to both. I have already stated that I do not think Mr. *Taylor's* argument that section 16 can have reference only to the Company's lines outside of the City, is a sound one. I think if we look at the circumstances of the case as disclosed in the statute, we find that clause 25 was in existence, and acted upon between the parties, before the Act of 1894 was passed. In dealing with the matter the Legislature would not alter the terms of the agreement itself by striking out clause 25 or any other clause as to which it was intended that a change should be made. It would confirm the agreement as a whole, and modify it by subsequent sections. That I think is the natural and usual way of proceeding in cases of this kind.

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The difficulty arises because of the presence in the same statute of two sections, namely, clause 25 and section 16 in

direct conflict with each other, coupled with the unsatisfactory wording of section 16. This section suggests that the promoters of the Bill artfully succeeded in covering up the provision respecting freight in such a way as that the effect of the words used would not readily challenge attention.

I cannot, however, decide this case on a suspicion of this kind. Besides it is only fair on the other hand to say that it is most likely that this Act, embodying an agreement of such importance between the plaintiffs and the defendants must have been watched in committee of the Legislature by the legal representative of the plaintiffs and must have come to the notice of the City Council. I say this because no suggestion was made in argument that the Act was passed without the knowledge and assent of the City authorities.

In Maxwell on the Interpretation of Statutes, at page 236, the rule is laid down supported by several authorities, that "where a passage in a schedule appended to a statute is repugnant to one in the body of the statute the latter is to prevail."

I think, also that the circumstances of this case, the fact that the agreement was in force long before the statute was passed, entitles me to apply to the case the rules of construction that have been applied by the Courts to conflicts between sections in earlier and later statutes, and to treat section 16 as the later. In *City and South London Railway Co.* v. *London County Council* (1891), 2 Q.B. 513, a conflict very closely resembling the present arose between the provision in the Metropolis Management Amendment Act of 1862, which forbade the erection of buildings beyond the general line of buildings in a street, and sections in the said Railway Company's Act, passed in 1887, which gave general powers to erect stations within the limits of deviation allowed by the Act. The company built a station within such limits but beyond the general line of buildings in a street, and it was held that the later statute must prevail. *La Compagnie pour l'eclairage au gaz de St. Hyacinthe* v. *La Compagnie des Pouvoirs Hydrauliques de St. Hyacinthe* (1895), 25 S.C.R. 168, was relied upon by Mr. *Taylor*, but I think that the case at bar is quite distinguishable from that case. There

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the by-law and agreement between the gas company and the city was not set out in the Act, and it is stated in the judgment that the city was not a party, nor did it assent to the legislation in question; that the attention of the Legislature may not have been directed to the terms of the by-law and agreement. In any case, effect could be given to the section of the Act in question, but not the wide construction contended for by the gas company, which was that a monopoly was created and not a mere non-exclusive right.

On the material before us it is not clear that the Company observed the formalities requisite to entitle it to do what it proposed, but as no point was made of that on the argument, I assume that it was not desired that we should pass upon it.

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I am therefore of opinion that the appeal should be dismissed.

IRVING, J.A.: The question for our consideration is, can the defendant Company operate freight cars in and along the streets of the City of Victoria?

The agreement of 20th November, 1888, between the City of Victoria and the defendants, or their predecessors, purports to authorize the persons named therein to lay down tracks in certain named streets in the City of Victoria, and to run cars over these rails; and to propel and run such cars either by electricity, gas, compressed air or horse power; but such

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cars shall be used exclusively for the carriage of passengers. And the persons named therein covenanted with the City to observe the conditions mentioned.

Now, in 1894 the defendants—or their predecessors—presented a petition to Parliament wherein, after reciting the above agreement, and the incorporation of the persons named therein as a company, and that by another Act, 1890, Cap. 52, the Company had power to build tramways through the districts adjoining the City of Victoria, and (Sec. 2) to operate the same by electricity or other motive power; and to take, transport and carry passengers and freight thereon; and prayed for an Act consolidating and amending the Acts and franchises then in force by an Act declaring, defining and confirming the rights, powers and privileges of the Company. Upon that petition they obtained the

private Act, Cap. 63, 1894, section 16 of which, it is claimed by the defendants, grants to them the right to operate freight cars through the City.

We were urged by counsel for the City to read the statute in the most restricted way possible, and to regard section 16 as a substitute or a re-production for the second section of the Act of 1890, which Act was being repealed *in toto* by the new Act.

The petition indicated that the Act of 1894 was to be in the nature of a consolidating Act. The avowed object was to bring into one Act all the charters or franchises under which the Company was acting, so that the rights and privileges of the Company could be determined by all persons interested, or to become interested in the Company. The idea was to get rid of their two old charters and re-state their rights in one Act. That is of course admitted by both sides, but how are you to construe this new Act?

I think that we should not, unless adequate grounds for so doing are advanced, proceed to destroy the utility of the consolidation, by going back to the Act of 1890, and the agreement of 20th November, 1888, to discover how much of the new Act is taken from the Act of 1890 and how much from the agreement.

I do not think we can regard this consolidating Act as a thing of shreds and patches, and say that as this or that section was lifted from the Act of 1890 it applies only to that part of the Company's work outside of the City limits.

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The best way to find out what was the "intent of them that made the Act," is to examine its language and to read the words (if they are not technical words) in their popular meaning and according to the rules of grammar. To justify a departure from the primary meaning of the words of the Legislature, it must be shewn that the ordinary and grammatical construction of the words would lead to some absurdity, such as the Legislature could never have intended, or that it would be plainly disclosed in the context of the statute: *Vestry of St. John, Hampstead* v. *Cotton* (1886), 12 App. Cas. 1 at p. 8.

Turning then to the Act, we see that by section 1 the agreement with the City was confirmed and the obligations created by

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it were declared to be binding on the defendant Company. If the Act had stopped there, then beyond question the Company would not be allowed to run freight cars as the language of section 1 is as general as possible, making no provision for exceptions to be thereinafter mentioned. But the Act goes on:

Section 12. In addition to the powers conferred by the said agreement the said Company are hereby authorized . . . to construct on any street in Victoria (instead of on the streets named in the agreement), and (*a.*) May adopt for use in the City a different rail from that described in the agreement; and (*b.*) Amends clause 27 of the agreement as to repairing streets in the City.

Section 16 also begins with the words "In addition to the powers conferred by the said agreement" and goes on

"The said Company are hereby authorized and empowered to erect, construct and maintain all necessary poles, wires, buildings, works, appliances and conveniences connected with and incidental to the construction, maintenance and operation of the said lines of railway, and to take, transport, and carry passengers, freight, express and mail matter, upon and over the said lines of railway by electric or such other motive power as the said Company may deem expedient, subject to the approval and supervision of the City Engineer or other officer appointed for that purpose by the said Corporation, as to location of all poles, tracks, and other works of the said Company."

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It seems to me that if we read sections 12 and 16 together, as we ought to do in view of the fact that they both commence with the words "In addition to the powers conferred by the said agreement," we see that Parliament was dealing with the rights of the Company within the City, and said in effect: "We confer on you the following powers, *viz.:* to operate freight cars along any of the streets within the City of Victoria and we amend your charter accordingly."

As it was a stipulation in the agreement that the Company should not have power to run freight cars through the City, I must admit that the words "In addition to the powers conferred by the agreement" are not well selected by the draughtsman of the Act. It would have been better to have said that "notwithstanding anything to the contrary contained in the agreement." These plain words would have prevented any discussion, but in my opinion the fact that the section was prefaced by that

expression (inapt as it is), shews that Parliament had the agreement before it, and that fact makes the maxim *generalia specialibus non derogant* inapplicable.

Mr. *Taylor* invokes that maxim in this way. The Legislature, he argues, having already (namely when dealing with section 1), given its attention to the special clause of the agreement whereby the Company agreed not to run freight cars, it cannot be presumed, now that they are considering the 16th section, that they intend to alter that special provision by a general enactment such as he contends section 16 is.

The answer to that argument is that the Legislature prefixed to sections 12 and 16 a statement which would have no meaning unless it applies to the running of freight cars within the city limits. That preamble plainly shews that they had in the legislative eye, so to speak, the provisions of the agreement of November, 1888, so that taking the whole Act material to the matter in question, *viz.*: sections 1, 12 and 16, we find that the operation of section 1 was meant to be qualified by the amendments made to the agreement by sections 12 and 16.

IRVING, J.A.

The obligation imposed on the Company by article 25 of the agreement to use their cars exclusively for the conveyance of passengers is, it seems to me, absolutely inconsistent with the privileges given by section 16 of 1894. I am therefore driven to the conclusion that although the City granted the franchise on the express promise of the Company not to run freight cars through the City streets, the Legislature intended to repeal that clause by passing the 16th section.

In my opinion, the appeal should be dismissed.

The appeal book quite unnecessarily sets out the schedule to the statute of 1894.

GALLIHER, J.A.

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

Appeal dismissed.

Solicitors for appellant Corporation: *Mason & Mann.*
Solicitors for respondent Company: *Bodwell & Lawson.*

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Contract—Part failure of consideration—Promissory note—Defence to action on note—Price of timber licences—Payment of.

Where a contract is made dependent upon an occurrence beyond the control of either party, such as the issuance by the Government of a special timber licence, and the unexpected happens, the loss must rest where it falls.

Held, on the facts in this case, that the plaintiff was never under a legal obligation to make the refund demanded, and so the consideration for the abortive agreement was illusory.

APPEAL from the judgment of MARTIN, J., in an action tried by him at Victoria on the 17th of February, 1909.

Higgins, for plaintiff.

H. B. Robertson, for defendant.

19th March, 1909.

MARTIN, J.: This is an action upon a promissory note given under a contract for the purchase of certain timber limits. The note is admitted, but in answer to the demand for the payment of the balance due thereon the defendant sets up a new agreement between the parties, which is stated to be "partly in writing and partly verbal" and the effect of the same is alleged to be shortly that the defendant was to receive 14 licences for the price of 12 only, subject to a certain additional payment in the event of a special sale "and if such sale did not take place as aforesaid the defendant was not to receive anything further, and in any event the defendant was to pay to the Government of the Province of British Columbia the licence fees for the said licence." In support of this contention a conflict of evidence arose between the defendant and the plaintiff who gave their respective accounts of what was said at the time of the execution of the later writings, and the defendant put forward one Charles Gass in corroboration of his story, and in his evidence-in-chief Gass testified in a manner which told against the plaintiff, but on cross-examination he broke down

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and gave such an unsatisfactory and uncertain account of the transaction that I cannot accept him as a safe guide to my conclusion; he does not seem to have any reliable recollection of what was said, apart from his lack of frankness about the payment of the commission. It is clear that there never was any agreement by the plaintiff to pay the licence fees, either under the original contract of the 20th of July, 1907, or subsequently. In my opinion the defendant has no meritorious defence, legally or equitably, though he appears to have entertained the genuine belief that the plaintiff was liable to repay him the amount he had paid for the licences under paragraph 4 of said contract. Though in one sense it is not strictly necessary to decide that point, yet in view of the subsequent disagreement between the parties, I think it is not out of place to say that there was under said contract clearly no obligation upon the plaintiff to recoup the defendant for the amount he "advanced" to pay for the licences. It seems unfortunate that the defendant did not apparently take legal advice upon this point before requiring the plaintiff to do something he was not lawfully called upon to do, thereby bringing about this litigation. The only obligation upon the plaintiff under the contract was to sell so much timber land for a specified price and to execute the necessary transfers thereof. I am happy to be able to say that in putting forward this untenable contention I feel satisfied the defendant did not seek to take undue advantage of the plaintiff's anxiety for a settlement, though it had that result.

MARTIN, J.

On the whole evidence I am of the opinion that the defence to the payment of the note has not been established, and therefore judgment must be entered in favour of the plaintiff.

The appeal was argued at Victoria on the 7th of January, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Davis, K.C., and *H. B. Robertson*, for appellant (defendant).
Higgins, for respondent (plaintiff).

Cur. adv. vult.

On the 11th of February, 1910, the judgment of the Court was delivered by

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IRVING, J.A.: The defendant claims that as the consideration for which the note was signed has since the making thereof failed in part, *viz.*: to the extent of two-fourteenths, his liability on that note is reduced *pro tanto*. This right can only be supported where the consideration for which the note is signed consists of (a) a definite sum of money; or (b) of something the value of which is definitely ascertained in money. Examples of cases where the defendant failed to obtain a reduction are to be found in *Walker* v. *Douglas* (1863), 23 U.C.Q.B. 9; *Goldie and McCullough* v. *Harper* (1899), 31 Ont. 284.

The facts of this case are simple. The plaintiff having staked some timber limits entered into agreement with the defendant to sell him fourteen of these at $1 an acre, the defendant to advance the licence fees—the defendant to pay the plaintiff in cash and notes for balance.

After the plaintiff had obtained from the Government twelve of the licences referred to in the contract, a question arose as to the meaning of the contract, the defendant (honestly but wrongly) "entertaining a genuine belief that the plaintiff was liable to repay to him the amount that he had paid the Government for the licences." The parties met on the 27th of November, and made a new agreement, a complete settlement. It was to the effect that the defendant should forego his claim to be repaid the amount he had paid to the Government on the licences, and that the plaintiff would throw in two other claims of 640 acres each (the licences for which had not yet been obtained) for the sum agreed on as the price of twelve claims.

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The 12 issued licences were assigned, and an order for an assignment of the two unissued licences was executed, and defendant gave plaintiff $1,714.30 cash and a note for $1,714.30, and another for $2,751.40: this latter is the note sued on.

It was expected by both parties in November that there would be no trouble in obtaining from the Government the two remaining licences, but the unexpected happened—the Government refused to issue the two additional licences and the defendant on the 21st of July, 1909, wrote:

> "On the settlement of the dispute I gave up my *bona fide* contention and you agreed to give me 14 licences at the price of 12, *viz.*: $7,680. Now you can only get 12 licences. I am entitled to a proportionate reduction."

Our decision must be governed by the construction to be placed on the contract of November 27th.

Having regard to the rule of construction laid down in *Taylor* v. *Caldwell* (1863), 3 B. & S. 826 at p. 833, applied in respect of a contract relating to the Dry Dock at Esquimalt (*McKenna* v. *McNamee* (1888), 15 S.C.R. 311 at p. 318), I think the absolute terms of the settlement of November, 1907, must be construed as subject to the condition that the Government would issue the two necessary licences.

The effect of this was to leave the parties in the position in which they were on the date of refusal, *viz.*: 28th April, 1908. The right which the plaintiff had to have his note paid in full remained to him as it was due in March, 1908. The Coronation cases, as they are called, illustrate this arbitrary rule—see *Chandler* v. *Webster* (1904), 1 K.B. 493, which has been adopted by the Courts because it is impossible for any Court to ascertain exactly what the rights of the parties should be, in order to effect a *restitutio ad integrum*.

For these reasons the plaintiff is entitled to hold his judgment.

Appeal dismissed.

Solicitors for appellant: *Barnard & Robertson.*

Solicitor for respondent: *F. Higgins.*

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ANDREWS v. PACIFIC COAST COAL MINES, LIMITED.

Master and servant—Survey party—Hiring contract—Monthly basis—Notice —Custom in survey work—Evidence taken after close of trial.

Plaintiff was engaged by defendant Company as a surveyor's assistant, but stipulated that his hiring was to be on a "monthly basis." During the progress of the work, and while the survey party was in the field, a dispute arose between the Company and the surveyor in charge, which resulted in the entire party being recalled. Plaintiff was paid his fare home, and was offered his wages up to the date on which he reached Victoria and in the action brought by him to recover in lieu of a month's notice, defendant Company set up a custom among surveyors terminating employment without notice.

Held, on appeal (IRVING, J.A., dissenting), that plaintiff was not entitled to recover.

Observations on the undesirableness of hearing evidence after the close of a trial.

APPEAL from the judgment of LAMPMAN, Co. J., in an action tried by him at Victoria on the 15th of October, 1909. The facts appear in the headnote and reasons for judgment.

Statement

Elliott, K.C., for plaintiff.

Heisterman, for defendant Company.

16th November, 1909.

LAMPMAN, Co. J.: The defendant Company, which is in the unfortunate position of having made a contract through an agent who is now hostile, admits that plaintiff was employed by the month, but it contends that he is not entitled to recover, because it is the custom amongst land surveyors and their field assistants to terminate the employment at any time, without notice, even though the hiring be a monthly one.

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It cannot be contended that such a custom overrides an express contract, and if any effect is given to Napier's evidence there was in fact a conversation between the plaintiff and him on the one side, and Collins (as the representative of the defendants) on the other side, in which Collins said that a month's notice

would be necessary to terminate the employment. Neither Andrews nor Collins gave this version of the conversation, but it does not fit in at all badly with what they said, and it is very much the sort of conversation one would expect did take place when once it is shewn that there was an express agreement that the hiring should be a monthly one, and the letters shew that. While the custom as stated may exist between the surveyors and their assistants, it does not follow that the same custom would prevail in the case of a company engaging surveyors and their assistants.

The plaintiff claims $75, being the amount of wages for one month, and $30, being the amount he had to pay for board for the month following his discharge. From these amounts there should be deducted the amount the Company paid the plaintiff for the four days in September, including the allowance for board and also the $7 earned by the plaintiff in September. For the balance the plaintiff is entitled to judgment with costs. No costs should be allowed the plaintiff in connection with getting the evidence of Napier.

The appeal was argued at Victoria on the 28th of January, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Heisterman, for appellant (defendant) Company: The custom among surveyors is to discharge their workmen without notice, and the employment is accepted by the workmen on that understanding; it makes no difference whether the men are paid by the surveyor himself or by those who employ the surveyor. The reason why "a monthly basis" was arranged upon was so that the men would be paid by the month and not for the days only on which they worked. Argument

Elliott, K.C., for respondent (plaintiff): The hiring was clearly a monthly hiring, and plaintiff was entitled to notice. In the circumstances here, if any custom existed, it could not apply. Besides, plaintiff was not dismissed through any fault of his, and because the Company quarrelled with his chief, was no reason why he should be made to suffer.

Cur. adv. vult.

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11th February, 1910.

MACDONALD, C.J.A.: Plaintiff was engaged by defendant as a surveyor's assistant, the terms of hiring being, as he expresses it, "on a monthly basis." He was discharged without notice and without any cause which would entitle defendant to discharge him without notice, if notice were required to be given. The defendant Company distinctly alleged in its defence a custom among surveyors and engineers, and persons employed by them, that employment may be terminated on either side without notice. The learned County Court judge reserved judgment, and several days afterwards allowed the plaintiff to call another witness who swore that he was present when Collins, defendants' surveyor in charge of the survey party, engaged the plaintiff, and that it was a term of such engagement that a month's notice should be given. We thought this a most irregular and objectionable practice, and particularly in this case, because neither the plaintiff nor Collins, who was plaintiff's witness, made mention in their testimony of any such agreement. Counsel for the plaintiff before us very frankly and properly withdrew this objectionable evidence, so that now it is no factor in this appeal. Even if it had not been withdrawn, I should, under the circumstances, have given no effect to it.

MACDONALD, C.J.A.

The learned County Court judge, however, appears to have made this evidence the basis of his judgment in favour of the plaintiff. He says that it cannot be contended that a custom overrides an express contract, and refers to this belated evidence as proving such a contract. There is no other evidence of an express contract to give a notice.

Assuming that a contract "on a monthly basis" could, in the absence of agreement or custom, be terminated only on reasonable notice, the question we have to decide is: has such a custom in the trade or calling of land surveyors been proved here? The suggestion has been made that such a custom, if it exists, is only as between the surveyor and his assistants, and that the company employing surveyors and their assistants could not claim the benefit of it. If there be such a custom, it is a custom of the trade or calling, and the defendants are entitled to the benefit of it. Such evidence as we have here of

the custom is not contradicted. Gillespie, Gore and Harris, all experienced land surveyors, swear to it. The plaintiff, though challenged in the pleadings and by the evidence of these surveyors, makes no attempt either by himself or his witnesses (and Collins, a man not friendly to the defendants, was one), to deny such a custom, or that he was aware of it. Had he offered even very slight evidence to controvert the evidence of defendants' witnesses on this point, I should have hestitated to accept the custom as proved, as the evidence on this point as it appears in the notes, is not as satisfactory as it might be; but when it is remembered that the question was distinctly raised, and that plaintiff did not even pledge his own oath on the matter, I can only assume that he could not meet that issue.

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It has been suggested that the hiring was for a period to be terminated only on the completion of the work in hand. Collins said: "My view would be that when work completed then employment would cease." It was either a hiring by the month for an indefinite period, or a hiring for a period to be terminated on the happening of a certain event, *viz.:* the completion of the work. The plaintiff has given us his own interpretation of it when by his plaint he claims "one month's wages in lieu of notice."

MACDONALD, C.J.A.

The question is one of fact, *viz.:* custom or no custom. The learned judge has made no finding upon it, and as we can make the finding which ought to have been made by him, I would allow the appeal and dismiss the action.

IRVING, J.A.: Plaintiff, who had been in the employ of the defendant Company at Boat Harbour on a daily wage, was asked by Collins, the defendants' agent, if he would go as a topographer and chainman for the defendants to Suquash. To which the plaintiff said "Yes, if I am paid by the month." Collins assented, and at once put his name down at $75 per month and board. Nothing more was said, but plaintiff admits that he understood his employment would cease when work was done, and that he anticipated that the engagement would last some eight or nine months, as a railway was to be built. Plaintiff left Victoria on the 16th of June for Suquash. At the end of the first month,

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June, he received a cheque for $75, but on the second month's pay being sent up he found that the Company had deducted from his $75 two months' board. The plaintiff declined to receive the cheque and complained to Collins, who was the engineer in charge of the party. Collins wrote to the Company a letter concerning this, and other matters, with the result that the Company re-called Collins and his party, the work then requiring some six weeks or two months to finish. The plaintiff left Suquash on the 28th or 29th of August, and arrived at Victoria on the 4th of September. On the 3rd of September he saw Mr. Reynolds, another agent of the Company, who offered him his pay till that day, and who paid his fare down to Victoria. On the 10th of September, 1909, plaintiff issued his plaint, and delivered the following particulars of his claim of $105:

"On the 16th day of June, 1909, the plaintiff was engaged by the defendants to assist in surveying certain lands at a salary of $75 a month and board. On the third day of September, 1909, the defendants without notice or just cause discharged the plaintiff, although the work upon which he was employed was not completed. The plaintiff in consequence of the defendants' acts has suffered damage and loss, and therefore claims $75, being one month's wages in lieu of notice, and the further sum of $30 being the amount paid by him for his board and room for the said month."

And the dispute note [after denying the particulars and indebtedness] was as follows:

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"(2.) The defendant says that it was one of the terms of the alleged engagement that the defendant should be at liberty to determine the said contract or engagement at any time, without notice. (3.) The defendant says that the plaintiff received notice of the defendant Company's intention to discontinue the said work and also to dispense with his services in the month of August, 1909. (4.) The defendant says that it is the custom of surveyors and civil engineers and persons employed by them, that the engagement or employment shall be subject to termination by either party at any time without notice."

There is no evidence given to support the second paragraph of the statement of defence. As to the third, the proper inference to draw is that the only notice plaintiff received was at Suquash about the 27th or 28th of August.

I shall refer presently to the evidence on the fourth ground.

The learned County Court judge made up the account between them as follows:

" To amount claimed $105
" Less paid by Company for 4 days in September for wages and board.
" Less also amount earned by plaintiff, in endeavouring to keep damages as small as possible . . . . . 7 "

and directed that judgment be entered for balance. Judgment, however, was entered for $98 and costs.

As to the defence resting on the alleged custom, without doubt terms (provided they be not inconsistent with the terms actually expressed), may be added by proving those terms to be an accustomed part of such contracts made between such persons as the Court has then before it. Custom—usage is a better word (see Kay, L.J., in *Dashwood* v. *Magniac* (1891), 3 Ch. 306 at p. 370)—when the word is used in these cases does not necessarily imply antiquity, or universality, or any definite local range. It is merely a usage so general and well understood in fact with reference to the business, place and class of persons, that the parties are presumed to have made their contract with tacit reference to it in the same way, and to the same extent, as other like persons in like cases.

Attempts to establish usages have failed from one of two reasons, (1.) for want of satisfactory proof of the custom; or (2.) even if supported by evidence, the alleged usage is one that could not be sanctioned by the Court. In *Gibbon* v. *Pease* (1905), 1 K.B. 810, the architect refused to deliver up the plans to the owner after the building had been constructed, but the Court of Appeal affirming the judgment of the judge appealed from, said the architect's contention was unreasonable, and that such a usage would not bind the public.

In the present case, I shall not discuss the reasonableness of the alleged custom or usage, because I do not think the proof of its existence is satisfactory. Mr. Gillespie says: "Custom is not to give notice, as you never know exactly when you will get through." The witness must be speaking of giving notice to employees of the termination of employment, not of discharging a man with the work unfinished, and without fault on his part. He then comes near the case in hand: "If you don't like a man, the practice is to send him back and pay him." Yes, but what are you bound to pay him?

I have no doubt many men have been sent back, and of these

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many have been paid on a fair basis, and others have been unjustly treated; but because these unfortunates have not by reason of their poverty, or for reasons of policy, gone to law with their employers, I do not think that the employers can claim that a custom or usage to discharge without notice on paying up to the date of discharge (or even with return to place of employment) is thereby established. The onus of establishing the custom is on the defendants, and if there is any doubt on the point it must be determined against them.

Mr. Gore's evidence is only what is to be expected from a man who recognizes that an unwilling workman is a great detriment. When a man wants to go, we let him go, and pay him to date, is what he says, but he says not a word as to getting rid of a man without notice, where there is no fault on his part.

Mr. Harris "never gives notice or requires notice, as he never makes monthly arrangements." This testimony is of little assistance in determining the question of usage. The learned County Court judge does not seem to have thought the usage proved. I reach the conclusion that no notice was given—except that which they received at Suquash when the party was re-called; in my opinion that is not notice. The disregard of the employer to give reasonable notice makes him liable to an action. In assessing these damages the judge should take into consideration the efforts made by plaintiff to find work and the actual loss sustained; the maximum should not exceed the wages (and board, if board is to be provided) for the period found to be a reasonable length of notice calculated at the agreed rate.

IRVING, J.A.

I think the question to try was: what would be reasonable to allow in lieu of notice under the circumstances, *i.e.*, having regard to the fact that the defendants invited the plaintiff to go out on an expedition of this kind, with a reasonable prospect of the work lasting several months, wages to be $75 on a monthly basis, and defendants to supply board free, and the plaintiff being discharged for no fault on his part.

The circumstances of this case do not shew that a hiring for a year or any definite period was contemplated. The nature of the employment and its situation tend to shew that it was not a daily employment. The fact that payment of wages took place

monthly was a circumstance in favour of the view that the hiring was a monthly hiring.

I think the calculation made by the learned County Court judge shews that he took a very reasonable view of the matter, and I would therefore dismiss the appeal.

I observe that a deduction made by the judge in his calculation was not given effect to when judgment was entered up, but the appeal is not based on that discrepancy.

As we did not hear fully the grounds on which the evidence of Napier was admitted, I make no comment on what was done with reference to the admission of his evidence.

MARTIN, J.A.: After some hesitation, I confess I find myself unable to take a different view of the question of custom from that entertained by my learned brothers, the Chief Justice and Mr. Justice GALLIHER. It follows from this opinion that the judgment of the learned county judge of Victoria cannot be supported on the evidence in the absence of the testimony of Napier. In regard to the objectionable and unprecedented way (as appears from the record), in which the testimony of that witness was taken, I am also in entire accord with the views of my said learned brothers.

Some discussion arose on the language used by Chief Justice HUNTER in *Lamberton* v. *Vancouver Temperance Hotel* (1904), 11 B.C. 67, wherein the learned county judge appealed from fell into the same mistake as the judge below did herein. On the present argument before us it was pointed out at the bar that the learned Chief Justice's language was too broad and could not be supported by authority because it said in effect that no damages could be recovered unless it appeared "that the plaintiff not only endeavoured to get similar employment elsewhere and failed, but that he acted reasonably in that behalf."

MARTIN, J.A.

As a member of the Full Court who concurred in the result in *Lamberton's* case, I think it desirable, in order to avoid future misunderstanding, to say that, while it is true that the language used by the presiding judge there is not an exact definition of the true position of the servant, because he would at least be entitled to some damages consequent upon the breach, neverthe-

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less, in order to recover more than nominal damages, it has for a long time been considered by the Courts in this Province that the plaintiff must be prepared to shew efforts to obtain similar employment instead of voluntarily remaining idle, otherwise his case for substantial damages will fail. I refer to *Hopkins* v. *Gooderham* (1904), 10 B.C. 250 at p. 257, and to *Roberts* v. *Tartar* (1908), 13 B.C. 474, where I pointed out the similar rule that I have given effect to in the Admiralty Court.

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

Appeal allowed, Irving, J.A., dissenting.

Solicitor for appellant Company: *H. G. S. Heisterman.*
Solicitors for respondent: *Elliott & Shandley.*

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REX v. RAHMAT ALI

Court of Appeal—Jurisdiction in habeas corpus proceedings in first instance or on appeal—Court of Appeal Act, 1907, Cap. 10, Sec. 6.

The Court of Appeal has no jurisdiction to hear a motion for a writ of *habeas corpus* in first instance.

MOTION to the Court of Appeal for a writ of *habeas corpus*, heard at Vancouver by MACDONALD, C.J.A., IRVING and MARTIN, JJ.A. The applicant had already applied to two judges of the Supreme Court and had been refused.

Statement

Woods, for the motion, cited *In re Seeley* (1908), 41 S.C.R. 5 and *Cox* v. *Hakes* (1890), 15 App. Cas. 506 at p. 526.

A. M. Whiteside, for the Crown, objected that there was no jurisdiction given by the Court of Appeal Act, 1907, Sec. 6, to this Court to consider this application.

Argument

Woods: It is true that the subject of *habeas corpus* is omitted from the statute and, it is submitted, purposely omitted; but that is intended to apply as to appeals. We can, however, come to this Court as a Court of Record in the first instance.

[IRVING, J.A., referred to *In re Melina Trepanier* (1885), 12 S.C.R. 111.

MARTIN, J.A., referred to *Rex* v. *Tanghe* (1904), 10 B.C. 297.]

Whiteside, was not called upon in reply.

Per curiam: We think the application should be dismissed. Counsel for the motion having admitted that this is not an appeal matter, and this Court having appellate jurisdiction only, the motion should be refused.

Judgment

Motion refused.

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RUSSELL v. DIPLOCK-WRIGHT LUMBER COMPANY.

Practice—Appeal by plaintiff from an order in his favour—Subsequently proceeding on order—Misnomer of parties—Waiver—Amendment—Terms of—Waiver of right of appeal—Statute of Limitations.

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Plaintiff, who was injured in the defendants' sawmill, sued under the Employers' Liability Act and the common law. His action was launched against the Diplock-Wright Lumber Company, Limited, but he subsequently ascertained that the defendants were not an incorporated company, but a registered partnership. He therefore applied to amend accordingly. Defendants did not oppose the application, but asked and obtained, as one of the terms of the amendment, leave to be permitted to plead to the amended claim such defences as could have been pleaded thereto if the action had been commenced on the date of the order allowing the amendment. It transpired that at the latter date the action had become statute barred under the Employers' Liability Act. This fact was not disclosed at the time of the application for the order for amendment.

Held, on appeal, that the application not being one having the effect of adding new parties, but merely to correct a misnomer of parties, the defendants could not properly set up the Statute of Limitations as a bar.

Statement

APPEAL from an order made by CLEMENT, J., at Chambers in Vancouver on the 4th of October, 1909, whereby the plaintiff was permitted to amend the writ of summons and statement of claim by striking out the word "Limited" in the name of the defendants, and alleging that the defendants were a partnership instead of an incorporated company, and whereby as a condition of allowing the amendment, the defendants were permitted to plead to the amended statement of claim such defences as could be pleaded thereto if the action had been commenced on the date of the order allowing the amendment. The action was brought against the Diplock-Wright Lumber Company, Limited, to recover damages for injuries sustained by the plaintiff while in their employment. The plaintiff afterwards learned that his employers were not an incorporated company, but a partnership carrying on business under the name of the "Diplock-Wright Lumber Company." The appeal

was from that part of the order which imposed the above-mentioned terms. The action was one for damages received in the defendants' sawmill and was brought under the common law and also under the Employers' Liability Act. The statement of claim was amended and the defendant then filed an amended statement of defence setting up that the plaintiff's claim, under the Employers' Liability Act was barred, as more than six months had elapsed from the time of the accident in question until the making of the order by CLEMENT, J.

The appeal was argued at Vancouver on the 8th of March, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

McHarg, for appellant (plaintiff): Although this is an appeal from part of an order made by CLEMENT, J., at Chambers, in reality it is not an appeal from anything ordered by him, as we submit that he was not aware at the time he made the order, allowing the defendant to amend his statement of defence, that it would have the effect of allowing him to plead the six months' limitation in the Employers' Liability Act. At the time the application was made by the plaintiff to amend the writ of summons and statement of claim by striking out the word "limited" the defendant did not disclose to the judge that he wanted to amend his statement of defence so that he could plead the limitation; consequently, that part of the order appealed from was never really made. Even if the learned judge had knowingly made that part of the order objected to, it is submitted that it should not have been made in the circumstances, and further that he would be exceeding his jurisdiction if he made such an order. The proper defendants were sued and served, and the amendment asked for by the plaintiff was merely the correction of a name. This case can readily be distinguished from cases where an amendment of the indorsement on the writ practically introduced a new cause of action, such as the case of *Hogaboom* v. *MacCulloch* (1897), 17 Pr. 377, where on the amendment being allowed the defendant was given permission to plead the Statute of Limitations.

Argument

Craig, for respondent (defendant), raised the preliminary objection that the plaintiff had taken the benefit of the order

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by making the amendments, and could not afterwards appeal: *Videan* v. *Westover* (1897), 29 Ont. 1, note at p. 6. The plaintiff has waived the right of appeal by giving notice of trial, passing the record and entering the action for trial and striking a jury panel before giving notice of appeal. The date for which the notice of trial was given, being a date before any sittings of the Court of Appeal would be held, shews that plaintiff never intended to appeal. He cited *International Wrecking Co.* v. *Lobb* (1887), 12 Pr. 207; *Pierce* v. *Palmer*, *ib.* 308; *Boyle* v. *Sacker* (1888), 39 Ch. D. 249; *Pearce* v. *Chaplin* (1846), 9 Q.B. 802.

On the merits the order which was made by consent, was properly made, *Hogaboom* v. *MacCulloch* (1897), 17 Pr. 377; *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7. In any event the discretion of the judge should not be disturbed.

Argument

McHarg, in reply: The order was not made by consent. A consent order must shew on its face that it is "by consent." As to the question of waiver by having taken certain proceedings after the order was taken out: waiver is a question of intention and immediate steps were taken to appeal against the order as soon as it was known what the effect of the defendants' amended statement of defence was.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The appeal should be allowed. I am satisfied from all the circumstances of this case that the learned judge would not have made the order which he made if the facts of the case had been brought to his notice. I am also satisfied that the plaintiff's counsel had not in his mind at the time this rider was added to the order any idea that the defendant intended to raise the defence of the time section under the Employers' Liability Act.

I think the appeal should be allowed with costs.

IRVING, J.A.

IRVING, J.A.: I agree in that conclusion, and also in the reasons given by the Chief Justice.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

Appeal allowed.

Solicitors for appellant: *Abbott & Hart-McHarg.*

Solicitors for respondent: *Martin, Craig, Bourne & Hay.*

SOPER v. PEMBERTON AND GODFREY.

GREGORY, J.

1910

April 27.

SOPER v. PEMBERTON

Practice—Remission of action to County Court—County Courts Act, B. C. Stat. 1905, Cap. 14, Sec. 73.

Defendant Pemberton as first mortgagee exercised his power of sale and realized some $2,950. From this he satisfied certain charges and liens. Plaintiff, a second mortgagee, sued for an account and distribution arising from the mortgage sale. Defendant applied under section 73 of the County Courts Act for an order remitting the action for trial to the County Court, the plaintiff's mortgage claim amounting to only $130.

Held, refusing the application, that if the subject-matter was founded in contract, it was not a contract to which the defendant Pemberton was a party, but that the relief sought against him was on the ground that he was in reality a trustee having in his hands moneys which the plaintiff contended should be applied in satisfaction of her claim.

APPLICATION by the defendant Pemberton to remit the action to the County Court of Victoria for trial. Heard by GREGORY, J., at Victoria on the 26th of April, 1910. Statement

Bradshaw, for plaintiff.

Fowkes, for defendant Pemberton.

27th April, 1910.

GREGORY, J.: The defendant claims that the County Court has jurisdiction to try this action within the terms of sub-section 3 of section 40 of the County Courts Act (Cap. 14, 1905). The plaintiff, however, claims that it falls within sub-section 2. Whether it falls within either of these sections seems to me to be immaterial, as both of these sections make provision only that the action may be originally launched in the County Court. When, however, launched in the Supreme Court, sections 73 and 74 of the Act are the sections which govern its remission to the County Court. Section 73 is applicable only in case of contract, and while the plaintiff in this instance founds his action upon a contract, it is not a contract to which the defendant Pemberton is a party. The relief claimed against him is on the grounds that he is in reality a trustee, and out of the moneys in his Judgment

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hands he must pay the plaintiff's claim. The action, therefore, does not appear to fall within section 75 of the Act.

The only other section dealing with the remission of actions to the County Court is section 74, which applies only to actions in tort, which this is not. The application will therefore be dismissed.

Since the point taken, however, is a new one, and the decision appears to be out of harmony with the usual practice, the costs will be referred to the trial judge, when the matter can be fully argued.

Judgment

Application dismissed.

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SWIFT v. DAVID.

Agreement, construction of—Covenant to pay for shortage—Arbitration clause—Whether covenant to pay and covenant to refer to arbitration separate, or concurrent and collateral provisions—Right of action—Costs thrown away by abortive trial.

Defendant David, who, with his associates, were the owners of practically all the stock in the Fraser River Lumber Company, entered into an agreement with the plaintiff, Swift and his associates, for the sale to the latter of 6,700 shares in the Company, to be paid for as set out in the agreement. Attached to the agreement was a schedule setting out the assets belonging to the Company, and in the agreement there was a provision by which David guaranteed that the timber on the limits owned by the Company should run equal to the number of feet shewn in the schedule. The agreement further provided that if the purchasers failed to find the quantity of timber in the limits, and the parties failed to agree on a settlement of such shortage, a committee composed of three men, one named by each of the parties and a third by those two so named, should make a finding, and their decision should be final.

The action came on for trial before MORRISON, J., but before any evidence was taken the question was argued whether under the agreement the reference to arbitration was a condition precedent to the right of action or whether the covenant to pay for any shortage and the

covenant to refer to arbitration were independent, collateral covenants. The two clauses in question read as follows:

"Third: First party is to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shewn by the statement of the Fraser River Saw Mills, Ltd. Corporation, under their statement of April 30, 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shewn in the attached statement.

"Fourth: Second parties are to have until September 1, 1907, to cruise and verify the figures on the attached statement of April 30, 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing date of April 30, 1907.

"It is further agreed that in event second party fails to find the quantity of timber on said tracts represented by the statement of April 30, 1907, attached hereto and said first party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto, and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage, and whose action and decision in the matter shall be final.

"In event the two parties so named as the arbitration members fail for any reason to agree on or name a third party within thirty days after their appointment on the committee, then and in that event the judge of the District Court of New Westminster, District of British Columbia, shall name the third party, and decision by any two of said Committee above referred to shall be considered and treated as the decision of the whole and accepted as final."

Held, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that as the covenant to pay for shortage, and the covenant to refer to arbitration were independent collateral covenants, the reference to arbitration was not a condition precedent to the bringing of an action.

Per MARTIN, J.A.: That as the clause referring to arbitration contained no operative words, the Court could not supply them.

Per IRVING, J.A. (dissenting): That the contract contemplated that, if there arose any dispute as to the shortage, the reference to arbitration was to be a condition precedent to a cause of action.

Held, also, that the plaintiff should have the costs thrown away by reason of the abortive trial.

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APPEAL from the judgment of MORRISON, J., in an action tried by him at Vancouver on the 3rd of December, 1909. The facts are set out in the headnote and reasons for judgment.

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Davis, K.C., and *Pugh*, for plaintiffs.
Bodwell, K.C., and *Reid, K.C.*, for defendants.

4th December, 1909.

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MORRISON, J.: One of the inducing elements of the agreement of sale as appears by paragraph 3 is the condition that the timber shall at least run equal in quantity to the number of feet shewn in the schedule which is incorporated in the contract. The defendant fixed the quantity and represented it to be correct.

But the plaintiff as a protection against possible or probable misrepresentation—inadvertent, perhaps—or mistake made the usual stipulation in transactions of this kind for an opportunity to check up the accuracy of defendant's estimate and provided for the contingency of a shortage and of a failure of agreement as to a basis of settlement of that shortage. The contingency eventuated. Swift alleges he found a shortage and fixed his estimate thereof at $250,000. He submitted his claim therefor, which was repudiated. Then it was, I think, he should have invoked the provisions in question. But, instead of so doing, he brings his action, not on the contract as a whole, but for the payment of a certain sum ascertained by himself.

MORRISON, J.

The contract is in respect of the purchase price of a certain asset. It is well known that in transactions such as the one under consideration the quantities, areas, locations which include facilities for transportation and contiguity to the mills, being susceptible of controversies, are always subject of adjustment. And what was bargained for was the price of that asset as adjusted. And by whom adjusted? Not by the plaintiff, nor yet the defendant, but as provided in the very inapt, inexact and inartistic terms of paragraph 4. But, being a commercial agreement in which both parties are on an equal footing of responsibility for the terminology, it is not to be subjected to the same method of construction which is applied to the forms of contracts used, for example, by insurance companies, such as

were used in many of the cases cited in argument, and which, the Courts being astute to safeguard the interest of the assured, construe *fortius contra proferentes*.

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I am of opinion that the words of paragraphs 3 and 4 contain, in substance, one term, and, in their true character as intended by the parties, having regard to the whole agreement, sufficiently indicate the existence of a condition precedent, as contended by Mr. *Bodwell*. It is not necessary that a resort to a reference should be expressed in terms to be a condition precedent. *Braunstein* v. *Accidental Death Ins. Co.* (1861), 1 B. & S. 782, 31 L.J., Q.B. 17. I do not think such clauses in order to be recognized need be labelled with the legend "This is a condition precedent." The present clause differs from the cases cited on behalf of the plaintiff, where it was stipulated that the amount of the loss is to be paid and that there is also a collateral provision that the amount shall be ascertained by arbitration. In cases of that kind there is no condition precedent to the maintenance of the action: *Viney* v. *Bignold* (1887), 20 Q.B.D. 172 at p. 174. As was said by Sir Montague E. Smith in *Collins* v. *Locke* (1879), 4 App. Cas. 674 at p. 689:

"The questions to be considered in clauses of this kind must be determined in each case by the construction of the particular contract, and the intention of the parties to be collected from its language."

MORRISON, J.

Here we have a certain sum of money that must be ascertained in a certain way. The ascertainment in that particular manner is a condition precedent to the maintenance of an action respecting that sum of money. The clause was no doubt inserted also for the laudable purpose of preventing the expense and time involved in litigation such as is being now attempted.

The action will therefore be dismissed with costs. There will be judgment for the amount admitted to be due in the counter-claim with costs, without prejudice to a settlement of the first disputed item. All proceedings to be stayed pending an appeal.

The appeal was argued at Victoria on the 10th of January, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, J.J.A.

Davis, K.C., for appellants (plaintiffs): The clause provid- Argument

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ing for a reference does not contain the all-important words, "one arbitrator shall be appointed," etc. A covenant to refer to arbitration is not a cause of action; the arbitration must have taken place before there is a cause of action. There has been no arbitration held here, and consequently no cause of action has arisen, because no amount has been fixed as due. The covenants here are two separate and independent covenants. He referred to *Scott* v. *Avery* (1856), 5 H.L. Cas. 811 at pp. 841 and 848; *Roper* v. *Lendon* (1859), 28 L.J., Q.B. 260; *Dawson* v. *Fitzgerald* (1873), L.R. 9 Ex. 7, (1876), 1 Ex. D. 257. The question is, does the one covenant standing alone give a right of action: see *Braunstein* v. *Accidental Death Ins. Co.* (1861), 31 L.J., Q.B. 17 at pp. 21 and 23; *Viney* v. *Bignold* (1887), 20 Q.B.D. 172 at p. 174; *Collins* v. *Locke* (1879), 4 App. Cas. 674; *Babbage* v. *Coulburn* (1882), 9 Q.B.D. 235; Russell on Arbitration, 9th Ed., 51; Halsbury's Laws of England, Vol. 1, p. 445.

Bodwell, K.C., and *Reid, K.C.*, for the respondents (defendants): We submit that the proper rule of construction to apply here is to look at the whole of the agreement, and ascertain from all its terms the spirit of the parties. The *Roper* v. *Lendon* case referred to is clearly distinguishable from this case, and is on the ordinary clause referring to arbitration. We agreed to pay the value of the shortage, if any, in the amount of timber. When the amount of that shortage is fixed, then the other party has to pay. He agrees that the amount of the shortage is to be fixed by arbitration, and his covenant to pay does not arise until that amount has been fixed. See *Collins* v. *Locke* (1879), 4 App. Cas. 674 at p. 689; *Braunstein* v. *Accidental Death Ins. Co.* (1861), 31 L.J., Q.B. 17 at p. 22; *Edwards* v. *Aberayron Mutual Ship Insurance Society* (1876), 1 Q.B.D. 563 at p. 575. Here the agreement was to pay the amount of shortage and nothing else: *Caledonian Insurance Company* v. *Gilmour* (1893), A.C. 85; *Edwards* v. *Aberayron Mutual Ship Insurance Society, supra; Babbage* v. *Coulburn* (1882), 9 Q.B.D. 235 at p. 236; *Pompe* v. *Fuchs* (1876), 34 L.T.N.S. 300; *President, Etc., Delaware and Hudson Canal Co.* v. *Pennsylvania Coal Co.* (1872), 50 N.Y. 250 at p. 258.

Argument

The parties intended the shortage to be adjusted by arbitration.

Davis, in reply: The intention to be obtained is whether or not the reference was to be a condition precedent; or whether it was in such a state that either party could recede from his position. The two covenants are separate and distinct; the second being only a collateral covenant to refer. We also submit that we are entitled to the costs thrown away by the objection of the defendant, if it should transpire that he was wrong in his contention.

Bodwell: This is not outside of the usual rule; it is not a case of postponement of the trial.

Cur. adv. vult.

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MACDONALD, C.J.A.: concurred with GALLIHER, J.A.

IRVING, J.A.: I think the learned trial judge reached the right conclusion in his construction of the contract that there were not two separate agreements, *viz.*: one to pay, and another to refer to arbitration if the parties agree to adopt that method of ascertaining the amount.

The contract, read as a whole, contemplates the payment of "a just proportion" to be ascertained in the event of a failure to agree on a basis of settlement by arbitration. In short, if there is a dispute, the arbitration is to be a condition precedent to any cause of action.

IRVING, J.A.

I would dismiss the appeal.

As to costs thrown away, I agree that the parties should have raised this as a question of law (rule 286), and the plaintiff being right (as the other judges have found) the trial should have proceeded. It would have gone on, had not the defendant insisted upon this objection. The defendant ought, therefore, to pay forthwith the costs thrown away.

MARTIN, J.A.: Before entering upon the consideration of the construction of the covenants under the alleged agreement to refer to arbitration, the preliminary question raised must be decided, *viz.*: Is there, in reality, any agreement to refer at all? The appellant takes the ground that certain essential words have been omitted by the parties and the Court cannot supply them

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and therefore the agreement fails for uncertainty. This point struck me at the hearing as being a serious one, and the more I have considered it the more I am satisfied that we cannot do so. No case has been cited where the Court has gone to any such length nor can one, I think, be found, and in my opinion, it would be undesirable for us to attempt to do so and thereby establish a dangerous precedent. This is not like a case where two intentions may fairly be open, as in *McGregor* v. *Canadian Consolidated Mines Ltd.* (1907), 12 B. C. 116, 373, 2 M.M.C. 428; wherein, as I remarked, the Court went as far as it dared to go, but a case where no intention at all, either imperative or permissive, is made manifest by the parties.

MARTIN, J.A.

Such being my view, it is wholly unnecessary to discuss other aspects of a contract which has no operative existence as regards this appeal, which, I think, should be allowed.

GALLIHER, J.A.: This is an appeal from the judgment of Mr. Justice MORRISON, rendered on the 4th of December, 1909. The question turned on the interpretation of certain clauses in an agreement entered into between the plaintiffs and defendant on the 15th of July, 1907, for the purchase of certain timber lands, mills, and mill properties, and more particularly as to the interpretation of clause 4 of the agreement.

In opening, Mr. *Davis* pointed out that paragraph 2 of clause 4 was defective, and in order to give it effect we should have to read in operative words after the word "hereto" in the seventh line, and that the Court should not read in such words, and as it stood the clause was void for uncertainty. In the view I take of the case on the other point, I have not considered this objection, and make no finding thereon.

GALLIHER, J.A.

Clause 3 of said agreement provides for a guarantee that the timber on the different tracts of land sold by the defendant to the plaintiffs will at least run equal in quantity to the number of feet shewn in a statement attached, which statement is made a part of the agreement. This statement shews the number of feet guaranteed, and the price to be paid for same to be 50 cents per thousand.

Clause 4 of the agreement is divided into two paragraphs [Already set out].

In their statement of defence the defendants set up in effect that the reference to arbitration provided for in paragraph 2 of the 4th clause was a condition precedent to the plaintiffs' right to bring an action, and upon the case coming up for trial it was agreed by counsel for both parties that this question should be argued before going into the evidence. At the close of the argument the learned trial judge gave judgment maintaining the defendants' contention, and from that judgment the plaintiffs appeal to this Court.

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I think it was practically admitted by counsel for the defendant that if paragraphs 1 and 2 in the 4th clause of the agreement were independent and collateral covenants, he could not succeed in his contention. In any event that is the conclusion I have come to. I adopt the language of the Lord Chancellor in *Scott* v. *Avery* (1856), 5 H.L. Cas. 811 at p. 847, as follows:

"The general policy of the law is that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals."

And further:

"But surely there can be no principle or policy of the law which prevents parties from entering into such a contract as that no breach shall occur until after a reference has been made to arbitration."

That seems to me to be the true principle upon which to proceed in this case. I have been unable to find any authorities in the more recent decisions which question that principle, and in fact in a number of subsequent cases where *Scott* v. *Avery* is referred to, it is quoted with approval.

GALLIHER, J.A.

Mr. *Davis* cited *Roper* v. *Lendon* (1859), 28 L.J., Q.B. 260. This seems to me to be a case in point. There the action was on a policy of insurance, one of the terms of which was that the insured should, within 15 days after loss, deliver particulars of loss to the company; another term being that if any dispute should arise between the insured and the company touching the loss or damage, such dispute should be referred to arbitration. The first term was held to be a condition precedent, but the second was not. The second term appears to me to be on all fours with the second paragraph in clause 4 of the agreement.

In the case of *Dawson* v. *Fitzgerald* (1873), L.R. 9 Ex. 7,

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Lord Bramwell, in a dissenting judgment, held that a collateral agreement to refer is no answer to an action on an independent covenant to pay money, and this finding was upheld on appeal: See (1876), 1 Ex. D. 257.

The case of *Braunstein* v. *Accidental Death Ins. Co.* (1861), 31 L.J., Q.B. 17, is in my opinion distinguishable from the present case. In this case the parties had contracted to pay such sum as should appear just and reasonable and in proportion to the injury received, such sum to be ascertained in case of difference or dispute by arbitration. We find no such provision in the present case.

The same can be said in the case of *Viney* v. *Bignold* (1887), 20 Q.B.D. 172. The words of the contract sued on in that case being express that the insured should not be entitled to commence or maintain any action until the amount of loss should have been referred and determined.

Again, in the case of *Babbage* v. *Coulburn* (1882), 9 Q.B.D. 235, it was held that there was only a covenant to pay what should be ascertained by valuers, and the terms of the contract warranted that finding.

GALLIHER, J.A.

Mr. *Bodwell* contended that the separate paragraphs in clause 4 did not contain separate and independent covenants, but must be read together in order to arrive at the intention of the parties, and so read, the two paragraphs constitute one covenant, and that until paragraph 2 had been complied with by reference to arbitration, no right of action accrued to the plaintiffs. In support of this he cited the case of *Caledonian Insurance Company* v. *Gilmour* (1893), A.C. 85. In that case there was first an agreement to refer to arbitration, and secondly, an express stipulation that the insured should not be entitled to commence an action at law until the amount should have been awarded. The only contract on the part of the company to make any payment is a contract to pay an amount ascertained in a particular manner, and this is within the second principle laid down in *Scott* v. *Avery, supra.* Did these conditions pertain to the present case, I would have no difficulty in arriving at a conclusion, but I will shew later where I think they do not.

Mr. *Bodwell* also cited the case of *Edwards* v. *Aberayron*

Mutual Ship Insurance Society (1876), 1 Q.B.D. 563, but that case is, I think, distinguishable from the present. In that case, by article 39 of the Articles of Association of the Society, it was provided that no member should be allowed to bring any action or suit for any claim except as provided in the articles of association of the Society; and Article 83 provides for the method of adjustment of loss. It was there held that the promise of the Society is to pay an indemnity as settled under Article 83, and not otherwise.

In all these cases cited by Mr. *Bodwell,* it will be seen that there is an element not present in the case at bar, and that none of them are inconsistent with the principles as laid down in *Scott* v. *Avery, supra.*

The case of *Pompe* v. *Fuchs* (1876), 34 L.T.N.S. 800, would seem to be somewhat at variance with the principles laid down in *Scott* v. *Avery* and *Dawson* v. *Fitzgerald, supra,* but as the Court did not refer to those cases and the report seems to be somewhat meagre, I do not think it would be safe to assume that the judgment proceeded upon any dissent from those principles, but rather upon the particular terms of the contract.

I think, however, from all the cases referred to and which I have been able to find upon the subject, I am safe in concluding that the law is that where different clauses in an agreement contain independent and collateral covenants, where a breach of the covenant occurs, the party aggrieved is entitled to bring his action without reference to anything contained in any separate covenant, unless that covenant is made a condition precedent by express terms, or comes within the second of the principles laid down by the Lord Chancellor in *Scott* v. *Avery, supra.*

We have now to determine whether or not the separate paragraphs in clause 4 of the agreement contain independent and collateral covenants. I have already referred to the fact that the quantity of timber was guaranteed, and the price per thousand fixed by the agreement, and I find these words in the first part of clause 4:

"In the event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party [meaning the defendants], is to repay second party [the plaintiffs] in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts."

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Now, supposing the clause ended there, does it contain a covenant for the breach of which the plaintiff would be entitled to bring an action, and which the Courts could deal with fully? I think it does. The amount of timber guaranteed is fixed; the price per thousand is fixed; the time for cruising is fixed; and in the event of the cruise shewing a shortage of the amount guaranteed, the defendant is to repay to the plaintiffs, what? —the just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on the land. The moment the cruise shews the deficiency, and payment has been demanded and refused, there is a breach of the covenant which entitles the plaintiffs to be repaid certain moneys, and these amounts are fixed by the proportion that the shortage bears to the total value of the timber. It seems to me there should be no difficulty in a Court dealing with this matter independently of the second paragraph of clause 4. It may be that arbitration would be the more satisfactory way of ascertaining this amount, but that is not the question.

Mr. *Bodwell* urged that it was necessary to read both paragraphs of this clause together in order that we may get at the intention of the parties. Supposing we do read them together, it goes no further than to say that the intention of the parties was to arbitrate. But can we say that it was the intention of the parties that arbitration should be a condition precedent to the bringing of any action? I think not. If such had been the intention of the parties they could have very easily used express words, either declaring it to be a condition precedent, or declaring that the moneys to be repaid should be such as would be found to be due by arbitrators, or general words that would have brought it within the meaning of the principle laid down in *Scott* v. *Avery, supra.*

GALLIHER, J.A.

I therefore hold that the plaintiffs were entitled to bring their action, and I would allow the appeal with costs, and grant a new trial.

Mr. *Davis* asked us, in the event of the appeal being decided in his favour, to consider the question of costs thrown away in

the Court below. I think the plaintiffs should have the costs thrown away by reason of the abortive trial.

Appeal allowed, Irving, J.A., dissenting.

Solicitors for appellants: *Davis, Marshall & Macneill.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

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

HUNTER, C.J.B.C.
1908
Oct. 12.
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WINTER
v.
B. C. ELECTRIC RY. CO.

Negligence—Highway—Use of by street car company—Collision—Motor car struck by tramcar—Negligence of driver of tramcar.

Plaintiff's motor car proceeding along the highway, got partly between the rails of the defendant Company, but owing to the condition of the road, was unable to get out of the way of an approaching tramcar. On seeing his difficulty, the driver signalled to the motorman of the tramcar to stop, which he endeavoured to do, but was unable to avoid a collision in which the motor car was damaged. The trial judge (HUNTER, C.J.), gave judgment for plaintiff on the ground of negligence on the part of the defendant Company in not having a car of the size which caused the collision equipped with air brakes, which would, he held, have enabled the motorman to have stopped in time to prevent the collision.

Held, on appeal, on the evidence (IRVING, J.A., dissenting), that there was no negligence on the part of the motorman.

Per MARTIN, J.A.: That there was no evidence to support the finding of negligence in the Company's not having the car equipped with an air brake.

APPEAL from a judgment of HUNTER, C.J. B.C., in an action tried by him at Victoria in June and July, 1908. The facts appear in the reasons for judgment on appeal. Statement

Helmcken, K.C., and *Peters, K.C.*, for plaintiff.
A. E. McPhillips, K.C., for defendant Company.

HUNTER, C.J.B.C.

1908

Oct. 12.

COURT OF APPEAL

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12th October, 1908.

HUNTER, C.J. B.C.: I find it unnecessary to come to a conclusion as to when the signal to stop was given by the chauffeur, as assuming the account, given by the defendants' witnesses to be correct, *viz.*: that it was when the tramcar was from 60 to 100 feet distant, I think even in that case the defendants must be held to blame inasmuch as the tramcar was not provided with an efficient air brake, and there can be no doubt that if it had been so provided the collision could have been avoided, as according to the evidence the car could have been brought to a stop in another 10 feet or so without the air brake. The so-called electric brake is not a brake at all; it consists merely in reversing the current and is resorted to only in case of sudden emergency, as to suddenly reverse, the current is almost certain to damage the car, and therefore, as may be imagined, is seldom resorted to. Now I do not by any means intend to lay it down as a hard and fast rule that a tramway company would be negligent in not providing an air brake for all its cars; it may be that such a rule would be unreasonable where the car is light and easy to handle with a hand brake, but I am clearly of opinion that it is negligence to operate a car of 15 tons weight on a much travelled route with fairly stiff gradients, without an efficient air brake, as was done in the present case.

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If necessary the pleadings may be made to conform to the evidence: *Gough* v. *Bench* (1884), 6 Ont. 699; *Stilliway* v. *Corporation of City of Toronto* (1890), 20 Ont. 98; *Piche* v. *City of Quebec* (1885), Coutlee's Sup. Court Digest, 1448.

Judgment for the plaintiff for $400 and costs.

The appeal was argued at Victoria on the 13th, 14th, 17th and 18th of January, 1910, before IRVING, MARTIN and GALLIHER, JJ.A.

A. E. McPhillips, K.C., for appellant (defendant) Company. *Helmcken, K.C.*, and *Peters, K.C.*, for respondent (plaintiff).

Cur. adv. vult.

11th February, 1910.

IRVING, J.A.: The plaintiff claims damages for injuries to

his automobile caused by the negligence of the defendants' servants on the 28th of February, 1908, by carelessly and negligently driving an electric tramcar belonging to the defendants, whereby his automobile was injured.

The questions raised by the pleadings were as follows: Was the defendants' servant negligent? Was the plaintiff's servant, the driver of the automobile, guilty of contributory negligence? Assuming that the defendants were guilty of negligence, could the plaintiff's servant, if he had taken reasonable care, have avoided the consequences of the defendants' negligence?

The second and third of these are easily disposed of. Without going into the facts in detail, I have arrived at the conclusion that the plaintiff's servant was not guilty of negligence in any way, nor did he omit to take reasonable care.

I wish to say, in answer to a contention made in argument, this, that a man driving a trap or motor car, is not bound by law at all times and in all circumstances, to keep to the left-hand side of the road. That rule is designed to prevent collisions, and it is an excellent rule to observe, but merely because a man happens to be on the wrong side of the road, that is not negligence *per se;* he is not to be run down with impunity by any vehicle that is on its proper side of the road.

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Then the question is, Was the defendants' servant guilty of negligence? I think he was, and the evidence seems to me to be very strong against him.

The defendants' car, bound for Esquimalt, left its starting place in Victoria a little bit late. The conductor in charge was Blake, the motorman was Cummings. The time allowed to make the run, something over four miles, is 22½ minutes; the maximum limit within the City is 10 miles on hour. Where the track of the tram line crosses the E. & N. Railway, a stop is usually made, and I think it was made on this occasion. The accident took place 100 yards west of James street, and therefore some distance west of the railway crossing. At the railway crossing Blake left the duties of conductor to be performed by another man, and he himself took in hand the driving of the car, and proceeded towards Esquimalt. He held the position

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till the accident took place, after that, Cummings again took charge.

The plaintiff's automobile was coming from Esquimalt. It was being driven by a young man—Hooper—a man of some experience in driving motor cars. On his left hand, alongside of him, sat a passenger, Cotter by name. In the back seat were two ladies, and between the ladies and back of Cotter sat Hammond. He sat on a chair facing forward, so that Hooper, Cotter and Hammond were all in a position to see what took place. Cotter and Hammond were examined on commission in Winnipeg, and I regard them as disinterested witnesses.

Before the tramcar was in sight, the automobile was running on the road, altogether off the track. After the car came into sight, the automobile was put across the tram line, that is to say, with its right hand wheel inside of the northern rail and the other wheel still on the highway. It was run some yards in that way, when Hooper, thinking it time to get off the track, endeavoured to get off into the highway, but owing to the height of the rails, or the badness of the ground, or perhaps for both reasons, he was unable to do so. He made three attempts, and failed. He then stopped his car, got up from his seat behind the steering wheel, stepped out from under the hood with his foot on the running board, and held up his hand, well out from the car as a signal to the driver of the approaching tramcar

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that he was in difficulties. He then returned to his seat behind the steering wheel and endeavoured to back the car off into the road, but failed, he then closed off his engines, and then he and those in the car sat waiting for the electric car to stop.

Now, in weighing evidence the verbal statements of witnesses are by no manner of means the only thing which should guide a judge, the consistency of their verbal statements with the acts done by them is an excellent test of the *bona fides* of their statements, and the deliberateness with which Hooper seems to have acted in stopping his car and giving the signal, indicates much more strongly than any words can testify the fact that in his opinion he had given warning in plenty of time, and the fact that he and Cotter and Hammond sat there till the car was almost on top of them, shews that they three believed that that

signal had been given in sufficient time to enable the motorneer to bring his car to a stop without running into them. The car, however, continued to come forward. When it was within 10 feet of him, Cotter, seeing the wheels skidding and the car sliding on the rail, jumped into the road. Hooper at once followed him. It is abundantly clear from the evidence of Cotter and Hammond that Hooper did indeed follow him at once. It is contradicted by the witnesses for the defence, but having regard to the evidence of Cotter and Hammond, as well as Hooper, and the natural inclination of a man to save himself, I believe the statement of Hooper on that point, although I do not think very much turns on it.

As soon as the collision had taken place, and the people in the automobile were out on the road, another thing took place which satisfies me of the *bona fides* of the belief that the signal had been made in plenty of time, and this is that those in the motor car immediately charged the driver of the tramcar with negligence, asking him why he had not stopped as soon as he got the signal. These verbal facts I regard as giving weight and force to Hooper's evidence. Here, in effect, we have a declaration from all in the automobile that they were satisfied with the precautions taken by Hooper.

The automobile had been pushed back into the highway and damaged. The defendants suggested the damage was slight because the blow was slight, but on the other hand we know the blow was sufficient to force a three ton car back across a rail which the driver had vainly attempted to cross.

I take it, however, that the contention of Mr. *McPhillips* is correct, that if the tramcar had another 10 feet or so to go the car would have been brought to a stop, and the collision would have been averted. It is just the difference of 10 feet upon which this case turns. The plaintiff's claim throughout was that if the effort to stop had been made 10 feet earlier than it was made, the accident could not have taken place. That was the contention put forward at once on the roadway, immediately after the accident, and that has been the contention throughout. It is to that particular time, *viz.*: when the signal to stop was first given, that one should direct one's attention in ascertaining whether the driver of the tramcar was guilty of

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negligence or not. The crux of this case is not what was done when a collision was inevitable, but did the tram driver take care in slowing his car when the signal was first given? Hooper says he held out his hand "for a minute, at any rate, quite a while." Hammond says: "He kept on signalling." And Cotter: "He waved his hand up and down at the street car."

The trial took place before the Chief Justice, who, instead of dealing with the question of the negligence of the tram driver, Blake, came to the conclusion that assuming the account given by the defendants' witnesses to be correct, namely, that the signal was not given until too late, namely from 60 to 100 feet, that in that case the defendants must be held to blame inasmuch as the tramcar was not provided with an efficient air brake, and he directed the pleadings to be amended accordingly. I agree with the Chief Justice that assuming that that was the distance at which the signal was given the defendants' car was not properly equipped, and if I were on a jury I would probably add as a rider to the verdict that the Company ought to be required to equip their cars with air brakes, but I do not see in this evidence sufficient to say that air brakes are absolutely necessary. The Chief Justice found that the tramcar was inefficiently equipped, and in my opinion that is right, if we accept the story as told by Blake. But that does not seem to me to be the point.

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If the tramcar was being driven at the rate of speed they on board it say it was, and if they got the signal as they say they did at some 70 feet from the place where the automobile was standing, I think the car was defectively equipped.

But I do not accept their story, and I think the proper ground to rest a decision on is that raised by the pleadings.

Now, having seen the deliberate movements made by those on board the automobile, and the confidence with which they awaited the result that they would expect naturally to follow from the giving of the signal to stop, under these circumstances, let us step into the front vestibule of the defendants' car. Driving, whether out of that joyousness of heart which so often precedes a catastrophe, or because it was his duty to do so seems to me immaterial (because he is a qualified driver), we

have Blake. On his right, Cummings, an employee of the defendant Company; to the right of him again, a man named Duncalfe, also in the employ of the Company, but not called as a witness. On the left of Blake, Mr. Bullen and then Mr. Shaw. These two last named are partners in a photographic business, and gave evidence on behalf of the defendants. Mr. Shaw seems to have had his sympathy for Blake aroused by the fact that all the people in the motor car had charged him with neglect of duty. He felt that the man was in the right, and that with all the people in the automobile against him it was only fair for him to assist Blake to keep his job. That is quite right and fair and plainly expressed. It is natural that he should sympathize in that way with Blake, but we must remember that it was sympathy for Blake that made him offer himself as a witness. Later on he took an active part in the preparation of the testimony. Mr. Bullen seems to be made of sterner stuff, and apparently did not take the same interest in the preparation of the defendants' case that Mr. Shaw seems to have taken.

That night, immediately after the accident, Blake prepared a report for the Company which is as follows, so far as material, although some comment was made on the parts that I have omitted:

"As Car No. 70 was running along the Esquimalt road this afternoon, and approaching James street, an automobile was seen coming towards us, and about 200 yards away. The auto moved from the road on to the car track to pass a vehicle. The driver of the auto seemed for some reason unable to drive on to the roadway again. IRVING, J.A.

"The car [that is his own car I take it] was now about three car lengths away and slowed down.

"When I noticed the difficulty of the auto I used every means to stop, but the rails were very slippery, and finding the brakes would not stop the car I reversed the motors but could not avoid a collision, which did considerable damage to the automobile and some to the car fender."

That statement was prepared by Blake that night. Cummings signed it also, but, he explained in the box, more as a matter of form than anything else. The document is the production of Blake written for the information of the Company immediately after the accident, and before he had gone over the ground, and I infer, before he had consulted with Mr. Shaw or other witnesses as to the evidence they were willing to give.

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Now, the length of his car was 42 feet. So his report amounts to this, that he first saw the automobile some 600 feet away or more; it was then on the road, but afterwards came across the tram track; he observed the driver was not able to get it off the track, although trying to do so; that when they were about three lengths away—126 feet apart—having observed that the driver was in difficulties, his car was slowed down, he then put on the brakes and then reversed. He says nothing about any signal being given, but to us who now know that a signal had been given, the fair meaning of what he wrote was that the signal was given when he was three car lengths away.

Now, at the trial a map was used which was prepared outside, that is, on statements made by witnesses, with a legend on it stating "this is where the plaintiff's automobile was when it was first seen by us"; "this is where we were when we received the signal to stop"; "this is where the plaintiff's car was when he gave the signal," and so on. Maps and plans are most useful on a trial, so that you can understand a witness's testimony, but they may be most mischievous things. It does not prove the things to be as thereon represented. In this case it was used as the exposition of the defendants' case. It was not shewn to the plaintiff's witnesses. It shews, in this case, that the witnesses had gone over the ground together and are now united in telling one story. It may be that they would have told that story in the same way if they had not gone over the ground together, but the fact that they have gone over the ground together prevents a judge from forming as good an estimate of the value of their testimony as he would be able to do, if they had come in and told their stories separately and without having prepared the plan together. In this case, so far as I can see, there was no necessity for a plan at all. The place was a straight line for some hundreds of yards. After the preparation of this map there was no great difficulty in Shaw and Blake being able to agree as to distance, but I think what was done when the signal was given is the vital point.

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Now, Blake, when he went into the box, immediately proceeded, with the assistance of this map, to minimize the statements that he had made in his written report. He says that

he first saw the motor car some 500, or possibly 520 feet off; when the automobile came on the track, they were 250 or 263 feet away; that when the automobile was on the track he saw nothing wrong with it. He was very emphatic on that, and I think that that statement on his oath makes his evidence worthless. His written statement was, "The driver seemed, for some reason, unable to drive out of the roadway again." His evidence in chief is as follows:

"Did you observe anything wrong with the . . . .? No, sir.

"Seemed to be proceeding properly? Yes.

"The Court: But Hooper says he made two or three ineffectual attempts to get off the track? Yes. (This I take to be 'Yes, so I understand him to say.')

"If you had been observing it closely you could have seen that he was in trouble before he signalled? He might be running along the rail; I would not know that he was trying to get off.

"*McPhillips:* Did you observe that he was trying to get off? He could not have been trying to get off but running along the rail.

"The Court: Did you observe him trying to get off? I would not observe he was trying to get off the rail or that he was running along all right.

"*McPhillips:* You did not observe? No."

He does not mention in his report anything about a signal, but he says, "When I noticed the difficulty of the auto I used every means to stop." His car was then three car lengths away, *i.e.*, 126 feet.

At the trial he says that the signal was given when he was 70 feet away. IRVING, J.A.

"I was 60 feet away when I saw the car stop, and I then reversed the motors."

"It was when I got the signal that I reversed the motors—70 feet."

Now, that is quite a different story from the story told in the report, and it is told by a man who is untruthful, and the doctrine contained in the maxim *Falsum in uno falsum in omnibus* is a fair one to adopt.

Faith in a witness's testimony cannot be partial or fractional. Where any material fact rests on his testimony, the degree of credit due to him must be ascertained, and according to the result his testimony should be credited or rejected.

In reading the evidence, I have reached the conclusion that none of the other witnesses saw the signal when it was first

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given. As already mentioned, it was a prolonged signal, given by Hooper standing up, or, as Blake says, "[As] he stood up and reached out and [as] he lent over the side and waved." The witnesses for the defence, other than Blake, only saw his hand outstretched after he had resumed his seat.

In that way there was an apparent conflict of testimony as to how he gave the signal. There is in truth no conflict because they, the witnesses for the defence, other than Blake, did not notice his out-stretched hand till he had regained his seat. They are speaking of what they saw—the end of the signal; Blake, Hooper, Hammond and Cotter, of what had been done in the earlier part of the signalling.

It was during this period, namely, when Hooper had his foot outside on the running board that Blake was negligent in not applying his brake. He waited expecting Hooper would be able to get off. He says, "I did not know how long the trouble was going to last."

Blake, being the driver, it was his business to be on the look-out. The others were not attending; they had no reason to attend. The evidence shews that Mr. Shaw had his attention diverted from the car for a considerable distance. He says that he saw the car come on the track when about 263 feet apart.

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"The next thing I observed was that he was quite close to us, 60 or 80 feet, it gave me a start he was so close. I heard the man say throw in the reverse. I was taking no interest in the matter, only the man held out his hand, and then of course I was all interest."

Now, what took place was this, that the man held out his hand for some little time, and Shaw saw the last of the signal, probably just as he was resuming his seat, and it was just the failure of the driver of the electric car to act when he received the first signal that made the difference of ten feet of space required to avert a collision. Mr. Shaw practically says that this is correct because he said: "If the motorneer had any intimation, or anything different—he would have reversed before, because it was so short a distance."

So too with Cummings. He says that he did not see the automobile till when within 60 or 70 feet; it was then stopped; "and I told the motorneer to throw in his reverse." Shewing

that he too felt the shock experienced by Shaw. This was just about the time the signal was given.

Bullen says he saw the car 100 yards away when it was running on the road:

"I saw him attempt to get out from between the tracks, but he was too near the rail and could not do it; the result was that his car skidded; he then held up his hand. It was over 50 feet when he held up his hand. It appeared to me that all he did was to lift up his hand as he sat in the seat."

The motorneer did not reverse till he got the signal. Bullen only saw him try to get off once. Now, we know that he tried to get off three times. I infer from this that Bullen's attention was not concentrated on the automobile the whole time.

On the one hand we have deliberate action, followed by confidence as to the result of the precautions taken, a charge of a particular act of negligence made at once and adhered to throughout.

On the other, we have haste—first one remedy and then another, a deliberate statement in writing placing the distance at 126 feet—admitting the case advanced by the plaintiff;—then a different statement reducing the distance to 70 feet at the trial.

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It is clear to my mind that Hooper did everything that was right and proper and that the motorman did not (a) either see the signal when it was first given; or (b) if he did, he did not act upon it with that degree of promptness that he should have, and that in either case he was guilty of negligence.

MARTIN, J.A.: This is an appeal from the judgment of Chief Justice Hunter, sitting without a jury, in favour of the plaintiff, and the judgment of the learned judge is based upon the fact that he holds the "defendants must be held to blame, inasmuch as the tramcar was not provided with an efficient air brake, and there can be no doubt that if it had been so provided the collision could have been avoided," etc., etc.

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On the argument before us, the respondent did not attempt to uphold the judgment on this ground because there is admittedly no evidence to support the finding and, therefore, the case is not in this respect even within *Warmington* v. *Palmer*

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(1901), 8 B. C. 344, (1902), 32 S.C.R. 126, where evidence was adduced in the attempt to prove that the defendant had not provided machinery of a type which a reasonably prudent man would adopt as safe and efficient.

But the respondent did urge that the Company was not absolved by sub-section (*b.*) of section 12 of Cap. 63 of the Victoria Electric Railway's Act of incorporation, 1894, from its liability to the public to repair after 90 days because of some expressions which were cited to us from *Hartley* v. *Rochdale Corporation* (1908), 2 K.B. 594; 77 L.J., K.B. 884. That case, however, does not assist the plaintiff and has no application to the present, because there was a finding of negligence caused by improper performance of authorized work, but here there is no evidence at all of any negligent acts in that particular on the part of the Company, and therefore it must be assumed that its acts in that respect were originally unobjectionable and continued so to be till after the termination of the statutory period.

It had been my original view, seeing the case failed on these two points, that it should be sent back for a new trial on the ground that the learned judge had misdirected himself, but, on further consideration, I have reached the conclusion that it will not be necessary to do so in this case because, on what I regard as the essential particulars, there is so little real conflict of evidence that the facts are unusually clear, and I feel competent on them to dispose of the matter as it stands before us and thereby save the parties further unnecessary expense. Were the case not so clear, however, I should prefer to adopt the course of sending it back for a new trial.

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Viewing the case on the facts then, I do not think it necessary to depart from my usual practice not to attempt to here fully canvass the lengthy evidence but simply to say briefly that I find it impossible to hold the defendant Company guilty of negligence and that I regard the case as one of inevitable accident.

Judgment, therefore, should be entered for the defendants and the appeal allowed.

GALLIHER, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of Chief Justice HUNTER, sitting without a jury.

The action was brought to recover damages from the defendant Company by reason of their negligence in operating a car on their line of street railway between the City of Victoria and Esquimalt on the 28th of February, 1908, by which the plaintiff's motor car was damaged. The negligence complained of was the improper driving of the electric car by the servants of the defendants, and the failure to stop their car when signalled by the plaintiff's chauffeur in charge. The defendants denied the negligence complained of, and further set up that it was inevitable accident, and in any event the plaintiff was guilty of contributory negligence.

The case was partly tried on the 26th day of June, was adjourned and continued on the 8th and 9th days of July, 1908, and judgment given on the 12th of October, 1908, for the plaintiff for $400 damages, and costs.

The learned Chief Justice made only one finding of fact, *viz.*: that the defendants were negligent in not having their car equipped with an air brake, and if it had been so equipped the accident could have been avoided, with leave, if necessary, for the pleadings to be made to conform to the evidence.

If this finding of fact is not supported by the evidence, or is in law not sufficient to entitle the plaintiff to a verdict, and I think it is not, it is open to us to consider the whole case.

The only expert evidence as to the brakes is that of Mr. Tripp, electrical superintendent of the defendant Company. His evidence at pp. 275-6 of the appeal book is as follows:

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"Now, dealing with the brakes, Mr. Tripp, what brakes are there on this car? Well, for ordinary stopping purposes for passengers and so forth, we have a Sterling geared brake.

"A Sterling gear brake? Yes.

"Who are the makers of that? The Sterling Motor Company of—I have forgotten, some place in the States.

"Is that a modern brake? A modern efficient brake.

"How old is that brake on 70? It was new when the car was built.

"In 1908? Yes, sir.

"And the most modern Sterling brake? Yes; it has a leverage for two brakes on it to make the leverage on the wheel from 1 to 14.

"What other brakes are there on the car? The emergency brake, the electric brake.

"How would you describe that? That brake is operated directly from the controller. Being four motors under the car, the two motors work in

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opposition to the other two motors, which of course brings the car to a stop.

"Two pull against the other two? Yes.

"Independent of the trolley? Independent of the trolley.

"So that if the trolley is off, the electric brake will work? Yes.

"What do you term the emergency? Emergency.

"Or electrical brake? It is the electric brake.

"And if the trolley is even off the rail, it will work? Yes.

"Four motors? Yes.

"The Court: Within what distance will that brake bring the car to a standstill when travelling say eight miles an hour, with the power off? That depends on the rail condition. If it is a greasy rail of course it might slide more.

"Well, within what distance would you say? Well, it is very difficult to say; I should say it would bring the car up forthwith, going 10 miles an hour it would bring the car up within a car length.

"The length of this car is what? Forty-two feet.

"What is its weight? About 15 tons.

"Mr. *McPhillips:* When you say the length of the car, is that with a dry rail on a level? Absolutely dry rail and on a level."

Also at p. 277:

"Mr. *McPhillips:* We will put the facts here: apparently this car struck without a heavy impact, according to the evidence within 70 feet here. What do you say about that as to the use of the electric brake? To stop the car going 10 miles an hour in that time, with a greasy rail I don't think it could.

"The Court: Say eight miles an hour? No, I don't think it would. I think it would take three car lengths to stop with a very greasy rail."

Also at p. 278:

"Mr. *McPhillips:* As between the air brake, the hand brake and the electric brake, which is preferable? In Victoria the electric brake is the best, because it puts the wheels in opposition, and the air brake would stop the wheels.

"And it would skid along them like a toboggan down the hill? Yes.

"And then you claim you have proper brakes on the car? Oh, yes.

"And up to date? And up to date brakes in every respect.

"I suppose you are familiar, Mr. Tripp, with other systems of cars? Yes.

"In the Pacific Coast cities and elsewhere? Yes.

"And in view of all that, you state that the equipment is up to date? We have an up to date equipment in every respect."

Then there is evidence that the electric brake worked as both plaintiff and defendants' witnesses testify that after it was applied the car slowed down materially, and was skidding just before it came in contact with the plaintiff's motor car, and all

the evidence goes to shew that the electric car was almost stopped when the collision occurred. There is nothing in the evidence to indicate to my mind that had the car been equipped with an air brake the accident could have been avoided, and in fact the evidence rather goes to shew that the electric brake with which the car was equipped would be more effectual in bringing the car to a stop than an air brake.

Moreover, had the evidence shewn that the air brake would have been more effective (which it does not) there is in law no obligation on the defendants to equip their cars with the most modern improved appliances; but they must, to use the language adopted by my brother MARTIN, in *Warmington* v. *Palmer* (1901), 8 B. C. 344, furnish such appliances as a reasonable man having taken reasonable precautions might reasonably expect to be capable of acting efficiently and safely.

In my opinion, therefore, the verdict cannot be maintained on the finding of the learned trial judge. There remain, however, for our consideration two questions: (a) Was there negligence in the operating of the car by the defendants' servants? And (b) Was there contributory negligence on the part of the plaintiff's chauffeur? On the latter I have come to the conclusion that there was not contributory negligence.

The learned counsel for the defendants, Mr. *McPhillips,* cited various authorities on what does and does not constitute contributory negligence, but in the view I take of this particular case they are distinguishable.

Mr. *McPhillips* strongly urged that the evidence disclosed that the plaintiff was guilty of contributory negligence by going on the car track when he saw a car approaching (the track and rails being in a muddy and slippery condition) and by running his car on the wrong side of the road. It was not contended that vehicles did not have the right to cross and recross and drive along the car tracks, but that reasonable care must be used by the drivers of same to get off the tracks when meeting or allowing a tramcar to pass. Of course, drivers of vehicles, while they have the right to go on the Company's tracks, cannot run into danger recklessly, and then claim damages if an accident occurs, but what are the facts in this case as disclosed by the evidence?

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It appears that during the drive on the day in question the plaintiff's chauffeur to avoid mud holes in the road (which the evidence shews to have been in bad condition from recent rains) had crossed and recrossed and driven along the defendants' tracks and experienced no difficulty in doing so or in getting on or off the track. This is borne out by the evidence of the chauffeur and the witnesses Cotter and Hammond, who were of the party being driven, and although it might have been wiser for the chauffeur not to pull on the track when he saw a car approaching, I cannot say that he should have had any reasonable apprehension that he would not be able to get off the track without difficulty as he had on previous occasions the same day. Moreover, the evidence shews that he attempted to get off the track at a safe distance, and his own evidence and that of Cotter and Hammond, shews that the power on the motor car had evidently lessened from some cause, probably the muddy nature of the track which allowed the wheels to sink between the ties at the time he attempted to get off, and the rail being high at that point, when the wheel came against it, it would not rise over it. I think the evidence shews that the chauffeur did all he could to get his car off the track, and found himself in a position out of which he could not extricate himself, and which he could not reasonably be supposed to have anticipated, or which was brought about by his negligence within the meaning of the doctrine as laid down in the decided cases.

GALLIHER, J.A.

Now, as to the first question. There is some considerable conflict of evidence as to distances, but I will narrow my consideration of that down to the point where the chauffeur attempted to get off the track. I have already held upon the evidence that that was at a safe distance to avoid collision had not something unforeseen happened. Up to that point it appears to me that the motorman had exercised due care in operating his car.

It is in evidence that close to James street on the Victoria side he shut the power off and that when he came about 100 feet further, he started to put on the hand brake.

The evidence is as follows:

"Where were you on this plan when you shut the power off? About the figure A.

"That is on the east side of James street? Yes.

"You threw the power off there. What else did you do in the way of controlling your car? When I came about 100 feet further along I started to put on the brake because I saw the motor car was on the rail then; started to bring up slowly I had no idea that there would be any trouble, they go off and on the rails so often.

"Before you got to Dalton street you had applied the brake? Yes.

"To what extent? To ease the car down so that it would be under control."

This evidence is corroborated by Shaw and Bullen, who were riding in the front of the car beside the motorman and in a position to see.

As to the distance the electric car was from the motor when it got into trouble, for the defendants, Blake, motorman, says, "About 60 feet"; Shaw, "About 70 feet"; and Bullen, "Over 50 and under 100 feet." And for the plaintiff, Hooper, the chauffeur, says, "About 225 yards"; Hammond, "Possibly a couple of hundred yards"; and Cotter, "I would think about 200 yards."

I can readily understand how under circumstances such as in this case there could be a considerable difference of opinion as to this distance, but taking the plan filed (which is not admitted as correct by the plaintiff and was drawn by Mr. McGregor, a duly licensed surveyor, and based on points indicated to him by Blake, but which as to distance from the rock to point "A" shewn on the plan must, I think, be taken as correct) we find the actual distance from the rock to point "A" to be only 507 feet, so that the evidence of the plaintiff's witnesses must be considerably out.

GALLIHER, J.A.

A point was urged by Mr. *Peters* that the witness Blake had made three statements as to the distance—first, about 70 feet in his examination for discovery; then about 60 feet, and again three car lengths which the evidence shews would be about 105 feet. Assuming that the distance was 105 feet, which seems to me nearer the mark than any, and I think the evidence warrants that conclusion, did the motorman do everything that a reasonable man could do to bring his car to a standstill and avoid the collision? I think I must place more reliance on the evidence of the motorman and those who were standing beside him (not casting any reflection on the evidence of the plaintiff's witnesses,

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who were not in as good a position to know) with regard to what was actually done when he saw the motor was in trouble, and got the signal from the chauffeur.

His evidence is as follows:

"When you got this signal, as you judge about 70 feet away from you, what did you do on the electric car? I reversed the motors, that is by pulling back the reverse lever.

"Previous to that what had you done? Previous to that I had shut the power off.

"And then you say you reversed the power? Reversed the motors.

"And what is that done for? It makes the motors work in the opposite direction.

"Is it the last resource? That is the last resource in case of an accident.

"Had you got any sand in your box there? Yes.

"Did you use any sand? Yes.

"When? When we got near the point of collision.

"Where did you get the sand on, about? Somewhere about 'C' here.

"That is when you were within about 60 feet of the collision, is it? Yes."

From this it would appear that he applied the sand almost immediately after he threw on the reverse. Shaw, Cummings and Bullen corroborate the statement of Blake, as to throwing on the reverse.

GALLIHER, J.A.

Another point arises as to the speed at which the electric car was travelling, and I think we must conclude from the evidence before us that when the car was running free it was travelling at about 10 miles an hour, shortly after applying the hand brake to control the car it slowed to about seven miles an hour, and after the reverse was thrown on and the sand applied, it slowed very considerably, and was almost stopped when it hit the motor.

The evidence also shews, in my opinion, that the motorman was competent, and the evidence of both sides shews that no one anticipated that the car would not stop until it was almost upon the motor. This is borne out by the fact that no one jumped from the motor until the car was within ten feet of it, and that no one jumped off the electric car. In fact the chauffeur and Cotter both say they did not anticipate a collision until they saw the car skidding within ten feet of them, and I

am of the opinion that but for the slippery condition of the rails the accident would have been avoided.

Mr. *Peters* raised the further question of liability on the ground of the failure of the defendant Company to keep its road bed in proper repair, and quoted *Hartley* v. *Rochdale Corporation* (1908), 2 K.B. 594, as an authority, but I think he practically abandoned that contention later, but on perusal of that case it will be found that it is not an authority in point as there the judgment proceeded on the ground of misfeasance.

I am of the opinion that the defendants' car was not running at an excessive rate of speed; that the motorman was competent; and that from the time he received the signal that the motor car was in trouble, he not only did everything that a reasonable man could be expected to do, but everything he possibly could do to avoid the accident, and having already found that there was no defect in the car equipment, I find there was no negligence on the part of the Company. It seems to me a case of inevitable accident.

I would, therefore, allow the appeal with costs.

Appeal allowed, Irving, J.A., dissenting.

Solicitors for appellant: *McPhillips & Heisterman.*
Solicitor for respondent: *H. Dallas Helmcken.*

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Criminal law — "Procedure" — Commissions of assize — Abolition of— Evidence—Circumstantial—Reference to by Crown counsel in opening— Afterwards found inadmissible on objection by defence—Omission of judge to warn jury—Charge not objected to by defence—Non-direction—Misdirection—New trial—Dying declaration—Reply of counsel—Interpreter, competency or unfitness of.

The abolition of commissions of assize is within the competence of the Provincial Legislature, the reading of the commission not being "procedure" within the meaning of section 91, sub-section (27) of the B. N. A. Act.

In a trial for murder, counsel for the Crown in opening the case, directed the attention of the jury to the blood-stained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of the prisoner in question, and she was not examined. The subject was not brought to the attention of the jury in any other way, nor did the trial judge refer to it in his summing up; nor was the charge objected to by either side.

Held (IRVING, J.A., dissenting), that the counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the Court and jury, and that omission by the trial judge to advise the jury to ignore the remarks of counsel was non-direction, causing a substantial wrong within the meaning of section 1,019 of the Code so as to entitle the accused to a new trial.

The injured woman said to another Indian woman "Fellows hurt me and make me die," and to her father she said "I am going to die, hurry up and get the priest"; "Sure, I am going to die, hurry up and get the priest for me."

Held, that this was sufficient indication of apprehension of imminent death and hopelessness of recovery to be admitted in evidence as a dying declaration.

A "reply" of a Crown counsel under section 944 is not restricted to answering matters dealt with by the prisoner's counsel.

Where a witness, who is being examined through an interpreter, voluntarily makes a statement incriminating the accused, but which statement is included in other evidence subsequently admitted, the accused is not necessarily prejudiced thereby.

Held, on the facts (MARTIN, J.A., dissenting), that the objections taken to the interpreter and his competency were not well founded.

Held, on the facts, and taking the judge's charge as a whole, that there had been no misdirection to the jury as regards the question of doubt.

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CRIMINAL APPEAL by way of case stated by MORRISON, J., in an indictment for murder tried by him at the Clinton fall (1909) assizes. The facts, and the case stated appear sufficiently in the arguments and reasons for judgment.

The appeal was argued at Victoria on the 5th, 6th, 7th and 17th of January, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Henderson, for the accused: The assize was irregularly held, in that no commission of assize was issued or read, as required by common law, the Provincial law abolishing the reading of a commission being *ultra vires* as applied to criminal trials. *In re Robert Evan Sproule* (1886), 12 S.C.R. 140, while deciding that no Dominion commission was necessary, yet did not decide that a Provincial commission could be dispensed with. The Dominion, not the Province, should make the change. The result of the Provincial statute of 1899 was to directly affect the procedure of the Court, and the reading of a commission of assize is part of the procedure: *Rex* v. *Carroll* (1909), 14 B.C. 116.

The second ground of objection is that the Attorney-General, in opening the case to the jury pointed to the blood-stained clothing of the prisoner Chinley, and called the attention of the jury to the fact that such clothing was there. He afterwards led no evidence on the point, and it is submitted that it was his duty to do so, and his failure or omission in that respect had the effect of prejudicing the minds of the jury against the prisoners. He was bound to lead evidence on the point: *Darby* v. *Ouseley* (1856), 1 H. & N. 1; *Stevens v. Webb* (1835), 7 Car. & P. 60; *Rex* v. *Davis* (1837), *ib.* 785.

Argument

Further, the interpreter called by the Crown was objectionable on account of his having been before the Court several times on criminal charges, and all the telling evidence in the case came through this interpreter.

There is not sufficient evidence to shew that, when the deceased woman made her alleged dying statement, she knew or felt she was dying.

The Attorney-General in his reply, did not confine himself to

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the points discussed by counsel for the prisoners, but treated the case as if he had addressed the jury first.

Maclean, K.C. (D.A.-G.), for the Crown: Section 1,019 of the Criminal Code must be considered on these criminal appeals, and in this case it is submitted that no substantial wrong or miscarriage has been occasioned. As to the abolition of commissions, the Legislature had the undoubted right to do so, and while dispensing with commissions may have incidentally interfered with the procedure, still that does not render the legislation nugatory.

In opening to the jury, counsel for the prosecution has the right to indicate his line of evidence, but circumstances may transpire which render impossible the production of certain evidence, or make it inadmissible, as here, where there was nothing to shew at the time that the woman by whom the fact in question was proposed to be proved, was the wife of one of the accused. In any event, she or her evidence was not connected with the opening remarks of the Attorney-General, and the incident, if it was ever noticed, evidently was entirely forgotten by the jury and everyone else until after the trial. This is where the effect of section 1,019 of the Code must be considered. As to the admission of the witness Augustine's evidence objected to, there was no admission; the witness blurted out a remark as she left the witness box, and the Attorney-General said he did not want that information. In any event there was no harm done to the cause of the prisoners.

Argument

On the question of the dying declaration, all the essential elements are present here: see *Rex* v. *Perry* (1909), 2 K.B. 697. The woman was in expectation of imminent death; all the surrounding circumstances shew that she had no hope of recovery.

As to the order of addressing the jury in criminal cases, the counsel for the Crown always has the right of reply, but supposing after the evidence for the Crown is closed and no evidence is put in for the prisoner, and counsel for the prisoner sums up, then counsel for the Crown has the closing, or address in reply; but there are not two addresses by Crown counsel in such circumstances, one on the close of the evidence and one following that of counsel for the defence. The reply mentioned

here means the address of counsel for the Crown on the whole case. This right is not confined to the Attorney-General when acting in person, but also extends to any counsel instructed by him: see *The King* v. *Martin* (1905), 9 C.C.C. 371 at p. 384; *The King* v. *Charles King*, *ib.* 426. In attacking the charge of the learned judge, consideration must be given to the whole charge, and its effect; not isolated portions of the charge. If the judge has made the matter clear on the whole, no harm has been done the prisoner.

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Henderson, in reply, cited *Gott* v. *Ferris* (1865), 15 U.C.C.P. 295; *Sornberger* v. *Canadian Pacific R. W. Co.* (1897), 24 A.R. 263; *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537; *The Queen* v. *Theriault* (1894), 2 C.C.C. 444; *The King* v. *William Long* (1902), 5 C.C.C. 493; *Rex* v. *Bridgwater* (1905), 1 K.B. 135; *The King* v. *Blythe* (1909), 15 C.C.C. 225.

Argument

Cur. adv. vult.

26th January, 1910.

MACDONALD, C.J.A.: The reserved case consists of statements of facts divided into paragraphs, but no questions are propounded based on those facts, and the Court is therefore left to infer the question of law under each paragraph of the reserved case from the facts stated in the paragraph. This is not as it should be. In this case owing to the fact that the condemned men have been sentenced to death, it is desirable that we should dispose of the case without delay, otherwise we should have sent the reserved case back to be properly stated.

MACDONALD, C.J.A.

The first question reserved relates to procedure. It was urged on behalf of the prisoners that as a commission of assize was not read at the opening of the Assize Court at which these men were tried and convicted, the trial was therefore irregular and illegal. It was not disputed that the Act of the Legislature of this Province dispensing with the issue of commissions of assize was *intra vires*, being an Act affecting the constitution of the Court, and not practice and procedure; but it was contended that the reading of a commission at the opening of the Court was, at common law, a necessary formality, and that this practice was in existence in British Columbia at the time of the

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Union and was a matter of practice and procedure and, therefore, since the Union, of Federal jurisdiction only; that Provincial legislation, although *intra vires*, which has the effect of interfering with practice and procedure in criminal cases must be held to be ineffectual. In other words, that when the Province dispensed with the necessity of a commission of assize and discontinued the practice of issuing such commissions, it did so at the peril of rendering the holding of Assize Courts illegal by reason of the impossibility of conforming to the practice above mentioned, that is to say, the practice of reading a commission of assize at the opening of the Court.

I cannot give effect to this contention. It is more reasonable to hold that the practice and procedure in our Courts must adjust themselves to the conditions which are brought about by the lawful exercise of its authority by the Legislature, and therefore that when no commission of assize is necessary, the practice of reading a commission at the opening of an assize must fall by the wayside. The question implied in the first paragraph of the reserved case should be answered against the contention of counsel for the condemned men.

The second question we are asked to pass upon arises under paragraph 2 of the case. I gather that the question is this: The Attorney-General, having made the statements and indicated the blood-stained clothes as set forth in this paragraph, and having afterwards failed to prove them, was it non-direction or other error in law on the part of the learned trial judge to omit to direct the jury that the matters above referred to were not in evidence and ought to be wholly disregarded in deciding the guilt or innocence of the accused.

MACDONALD, C.J.A.

I had some doubt as to whether the omission to direct the jury on the above mentioned occurrence is a question of law within the meaning of section 1,014 of the Code, but as this point was not raised by the Deputy Attorney-General, who argued the case before us, and who is a gentleman of very great experience in Crown cases, I have not considered the point further than to refer to the cases of *Rex* v. *Wong On and Wong Gow* (1904), 10 B.C. 555 and *The Queen* v. *Sonyer* (1898), 2 C.C.C. 501, both decisions of the Full Court. In the former it

was held that non-direction on a point of law was ground for a new trial; and in the latter the circumstances were analogous to those under consideration. Evidence in that case had been admitted and afterwards withdrawn, and although the jury was explicitly directed to pay no attention whatever to the evidence in question, it was nevertheless held that the jury should have been discharged and a new jury impanelled; and this not having been done, a new trial was ordered.

In this case, evidence of the most damaging character against the accused was outlined to the jury by the Attorney-General. There is no suggestion that he did not in good faith intend to follow up these statements by the evidence itself, but he failed because of the objection that the witness Mrs. Chinley was the wife of one of the accused, and therefore an incompetent witness against her husband.

These statements, opened to the jury, appear to have not been afterwards referred to by anybody. That it was the duty of the learned trial judge to explicitly tell the jury that the statements complained of were not in evidence; that they must endeavour to entirely free their minds from them, and from the effect which the production of the blood-stained clothes had created, cannot be doubted.

I dissent entirely from the contention of the learned Deputy Attorney-General that the statements and circumstances complained of were trivial, and not calculated to affect the minds of intelligent jurymen. On the contrary, I think that the production in Court of these clothes, coupled with the declaration that the stains on them were stains of human blood, was calculated to have a most profound effect upon the jury.

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But it was argued that we should not be giving due effect to section 1,019 of the Code were we to order a new trial in this case as "no substantial wrong or miscarriage was thereby occasioned on the trial."

If I am right in my belief that the statements and circumstances recited above, standing unexplained and uncommented upon by either the learned trial judge or by counsel for the Crown, and without the slightest warning to the jury that they must not be considered, might, and probably would turn the

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scale against the accused, then substantial wrong was done in not withdrawing them and clearly and explicitly warning the jury against being influenced by them.

It is true that this is not a case of wrongful admission of evidence in the strict sense of that term. If it were, I apprehend that there could be no doubt that its admission would be fatal to the conviction, but while it was not given the legal status of evidence in the strict sense, yet coming as it did from the mouth of counsel for the Crown, backed up by ocular demonstration by the production of the blood-stained clothes, and remaining uneliminated, and without explanation, direction or warning, as appears from the reserved case, can it be treated as much less calculated to do substantial wrong to the accused than would be done by the actual admission of those statements in evidence? I think not. The principles enunciated in *The Queen* v. *Gibson* (1887), 18 Q.B.D. 537, and numerous other cases lead me to the conclusion that the conviction should be quashed and a new trial ordered.

The question involved in paragraph 3 of the case is one relating to the appointment of the interpreter and manner in which he performed his duties. Objection was taken to this interpreter by counsel for the accused on the ground that he was a person of criminal instincts and had several times been committed to prison on serious charges, though it does not appear that he was ever convicted. Had the matter stopped there, I do not think the question would have presented much difficulty: but it goes further. The statement is made in paragraph 3 that the interpreter was "objectionable." It was, however, contended by the Deputy Attorney-General that the language of this paragraph was framed by counsel for the accused, and that the learned trial judge probably meant no more by the word "objectionable" than that objection had been taken by the prisoners' counsel as appears on pages 6 and 7 of the transcript of the evidence, to which we were referred. With the consent of counsel on both sides, though such consent was not necessary to enable us to do so, we referred this paragraph back to the trial judge for further explanation, which he gives us as follows:

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"I certainly did consider the interpreter unsatisfactory. I think any

interpreted evidence is unsatisfactory and to that extent objectionable. I was, however, satisfied that this was the least objectionable or unsatisfactory one available. I took Mr. *Henderson's* use of the word objectionable as being synonymous with being unsatisfactory and to a certain degree unreliable. The interpreter certainly seemed to lack ordinary intelligence and facility of expression. The evidence took a long time in recital. I made no comment to the jury about the manner of giving or the degree of reliability of this evidence, not desiring to interpose my own views thereof after they had heard the preliminary discussion about him and after hearing him and seeing his demeanour."

I take this to mean that the learned judge during the course of the trial became dissatisfied with the manner in which this man performed his duties, that he found him inapt; but there is nothing to indicate that the interpreter had dishonestly performed his duties, or had been guilty of misinterpretation of the evidence.

What should the learned trial judge have done under the circumstances? It seems to me if he felt that the evidence was not being truly interpreted he should, and I feel certain that he would have at once stopped the trial until a proper interpreter could be procured, and if one could not be procured in time to proceed at that Court, have discharged the jury and postponed the trial, and the fact that he did not do so, and that no objection was taken by counsel for the accused after the interpreter was sworn shews to my mind that no substantial wrong or miscarriage was occasioned by continuing the trial with this interpreter.

MACDONALD, C.J.A.

I desire, however, to say that in my opinion it is the duty of Crown officers to take greater care than seems to have been exercised in this case to secure an interpreter whose character and capabilities fit him for the very grave responsibilities of such an office. It may be that the man chosen in this case was the best or only one at hand. But that is not enough. No reasonable trouble or expense should be spared, especially in a capital case, to procure a safe and competent medium through which the evidence shall reach the jury.

With regard to paragraph 4 of the case, it appears that the witness Augustine, when about to leave the box, and after counsel had finished with her for the time being, was noticed by the learned trial judge to be muttering. He asked the interpreter what she was saying. This brought out a statement from the

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witness respecting something said by the deceased woman, Agnes, to the witness, tending to incriminate the prisoners, and which at that stage of the trial was not admissible. As the *ante-mortem* statement of the deceased made to Augustine, which included the matter of evidence referred to in this paragraph, was afterwards admitted, I do not consider it necessary to say more with regard to this paragraph than that it shews no ground for relief, and is disposed of by my finding upon the next paragraph of the case.

With regard to the fifth paragraph of the case, that relating to the admission of the evidence of the witness Augustine of the *ante-mortem* statements of the deceased woman, Agnes, I have no doubt that that evidence was properly admitted, and that a new trial should not be granted on this ground.

The sixth paragraph of the case was withdrawn by counsel.

With regard to the seventh paragraph of the case, it was doubted by the Chancellor of Ontario in *The Queen* v. *Connolly and McGreevy* (1894), 1 C.C.C. 468 at p. 489, that the order of addresses of counsel was a question which could be reserved for the opinion of the appellate Court. In my view of the facts of this case it is not necessary that I should decide that point. I find that no substantial wrong was done to the accused even if it be assumed that the Attorney-General ought to have been confined to what is strictly understood by the term "reply." As to whether or not "reply" is to be interpreted strictly, or is to be given a broader meaning covering matter which might have been dealt with by counsel in summing up, I need not discuss in view of the conclusion to which I have come. In this connection I want to point out that while it is now well-established that in a proper case the Court will not refuse to grant a new trial in a case of felony because counsel for the defence did not take his objection at the trial, yet deliberate withholding of objection to something which might be remedied at the trial if objection had then been taken ought to be discountenanced, and where the objection is one having reference to practice and procedure I think that failure to take it ought, except under very exceptional circumstances, to be an answer to a motion of this kind.

MACDONALD, C.J.A.

In paragraph 8 of the case we are asked to say whether or not

several expressions used by the learned trial judge in his charge to the jury were misdirections. Looking at those expressions in the light of the whole charge I do not think they were.

On my answer to the question involved in paragraph 2, and on that alone, I would quash the conviction and order a new trial.

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IRVING, J.A.

IRVING, J. A.: Mr. Justice MORRISON, before whom the prisoners were tried, and found guilty, reserved under section 1,014 of the Code, the question whether or not a new trial ought to be granted or the prisoners discharged from custody for the reasons set out by him in eight paragraphs.

Some doubts having arisen as to the exact meaning to be attributed to the language used in some of the eight paragraphs, a letter was written to the learned judge and his reply was treated as part of the reserved case.

The assize was held at Clinton without any commission, and the trial occupied two days. The Crown was represented by the Attorney-General, the prisoners were defended by Mr. *Henderson*.

The charge was that the two prisoners had murdered one Agnes, an Indian woman. The evidence consisted of the medical testimony, a great deal of Indian evidence as to the collateral circumstances, and a dying declaration in the Indian language in which declaration the deceased identified the accused as the persons who had made the assault on her. The Indian language throughout the trial was interpreted into English by one Louis Tsan. What took place on his being called by the Crown to be sworn as interpreter is thus set out in the case:

"Louis Tsan called as interpreter by the Crown:

"Mr. *Henderson:* I will not have him for an interpreter.

"Mr. *Bowser:* Who is the interpreter?

"Mr. *Henderson:* He has been in gaol several times, and been tried in this Court House. This man has been in gaol for burglary.

"Court: I do not suppose that affects his facility of speech.

"Mr. *Henderson:* We have to have a man that we can depend on.

"Court: Well, the constable informs me that the only other interpreter he can get is a relative of Chinley. That is the only outside man that can interpret. Who is she? (referring to witness called).

"Mr. *Bowser:* She is the one that found the body.

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"Court: For that matter, you could raise a suspicion about any interpreter. Very often, he is a man of their own set and quality. You can really cast that doubt upon interpreters of any of these people. Take a Chinaman, for instance. Every time, they are objected to—that they are cousins, or something. You could not get the evidence without calling these people and it is taken for what it is worth. Of course, we never know how it gets to these witnesses anyway.

"Mr. *Bowser:* Well, his client can check him up.

"Mr. *Henderson:* As long as it is known what the man is, I do not care. The man was defended for murder, and was committed for trial at Barkerville.

"Court: He is not in the penitentiary, and he has not been hanged.

"Mr. *Henderson:* He had a good lawyer. But he has been repeatedly in gaol, and committed various offences.

"Court: Well, perhaps, that is a matter that should have been threshed out beforehand.

"Mr. *Henderson:* How did I know? I did not know this interpreter was here. He is the last man in the world that should act.

"By Court (addressing interpreter): Louis, where do you live? Up at Quesnel.

"Just at this place where this woman was found? Did you know this woman that was found dead? Yes; I seen her sometimes.

"Did you know her? Yes.

"Was she related to you in any way? No.

"Did she belong to the same tribe? No.

"You know the men—which is which? Walker is the white man?

"Mr. *Bowser:* Yes.

"Do you know Walker? Yes.

"Do you know Chinley—he is the Indian? Yes.

"Do you know them long? How long have you known them? Oh, I have known them for a long time.

IRVING, J.A.

"Friends of yours? Are they your friends? Friends.

"Chums? No.

"Tillicums? No.

"Court: Well, I think, Mr. *Bowser*, it will be all right."

The first question raised is as to the regularity of the assize "as no commission of assize was issued or read as required by common law," the argument being that the Provincial Act, B.C. Stat. 1899, Cap. 20, Sec. 10, abolishing commissions of assize being ineffective as to criminal cases.

It is conceded by prisoners' counsel that the statute of 1899 is *intra vires* of the Provincial Legislature as falling within the words "constitution and organization of Provincial Courts," but that as the reading of the commission is part of the procedure of the Court, at least joint legislation dispensing with the reading

of the commission was required. In the first place, I do not think the reading of the commission at the opening of the assize is "procedure" within the meaning of section 91 (27).

It is a mere formality, convenient and becoming when the Court is held by virtue of a commission, but altogether impossible when the Court is organized or constituted by statute.

The invariable practice in this Province between Confederation and 1879 was that commissions should be issued by the Provincial Government but returnable at Ottawa. That practice was broken in on in 1879, and an assize was held at New Westminster without any commission. At that assize four men were sentenced to be hanged for murder. To test the regularity of that trial an argument took place, curiously enough, not on the return to a writ of error, but on the return to a writ of *habeas corpus*, and the trial was declared invalid. A report of the argument and judgment in the case—*Reg.* v. *McLean and Hare*—was published by the late Sir Henry CREASE, then Mr. Justice CREASE.

Then for a long period commissions were again issued: for form used see *Sproule* v. *Regina* (1886), 1 B.C. (Pt. 2), 219 at p. 225, but in 1899 the use of them was wholly discontinued.

In *In re Robert Evan Sproule* (1886), 12 S.C.R. 140 at p. 188, Ritchie, C.J., expresses the opinion that by reason of Provincial legislation no commission was necessary, and that if there had been no commission the trial would have been regular; and that opinion was shared in by the other judges, Strong, J., see p. 206; and Taschereau, J., at p. 249.

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The next point turns on the fact that the Attorney-General in opening the case for the Crown referred to certain facts which he expected to prove by a witness, but when the witness was called it was found that her evidence was inadmissible.

The case as reserved stated the point in the following terms:

"The learned Attorney-General on opening the case to the jury immediately after the panelling thereof dealt with evidence as to the finding of blood on the clothes of the accused, that it was human blood, and the clothes were in Court and the Attorney-General turned around from facing the jury and indicated the clothes which were situated near his seat. No evidence of this was introduced at the trial although it was introduced at the preliminary hearing, but was excluded at the trial on a point of law."

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The letter of inquiry, which so far as this matter is concerned, is as follows:

"I am directed by this Court to request your Lordship's attention to the following questions in the reserved case.

"First: (2.) The learned Attorney-General on opening the case to the jury immediately after the panelling thereof, dealt with the evidence as to the finding of blood on the clothes of the accused, that it was human blood, and the clothes were in Court, and the Attorney-General turned around from facing the jury and indicated the clothes which were situated near his seat. No evidence of this was introduced at the trial although it was introduced at the preliminary hearing, but was excluded at the trial on a point of law.

"A question has arisen as to whether or not these statements were made by the Attorney-General, particularly that as to the blood being human blood, and not having been put in evidence afterwards, whether they were withdrawn from the jury. Counsel for the prisoners alleged that they were not afterwards referred to by your Lordship; then when Mrs. Chinley was called by the Crown, objection was taken by the defence to her competency as a witness; but that there was no discussion at that time as to the nature of the evidence which it was proposed to get from her. The Court would also be pleased to know how the Attorney-General dealt in his opening with the blood-stained clothes, and in particular whether he stated by what witness he proposed to prove the clothes and their condition."

The reply of the learned judge states the matter in this way:

"I did not make any note of the learned Attorney-General's opening address which was delivered as I recall in a casual conversational manner. He did refer to the prisoner Chinley arriving at his home in the morning following the occasion of the injuries to the deceased with his clothing stained with blood and that he required his wife to wash them. The clothes were in Court, but when they were brought in I did not observe, as constables and other persons were constantly passing to and fro as is usual in places of trial such as Clinton. The clothes when I saw them were on the floor between the counsels' table and the Bench, the stenographer being seated between where I saw them and the jury. The Attorney-General was addressing the jury on his own side of the counsel table and next the jury and away from the bundle at the time I saw it and ordered it to be removed. I made no reference whatever to the clothes. I do not recall the Attorney-General associating any name with the proposed evidence as to the blood-stained clothes except as above stated. Mrs. Chinley was in due course called. The exact sequence in which she appeared is shewn by the transcript. Upon objection taken to her giving evidence, she being the wife of Chinley, she did not proceed with any testimony. The transcript recites what then took place."

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It will be seen that the Attorney-General in dealing with the case stated that the circumstantial evidence upon which he proposed to rely would be established by the wife of one of the prisoners—whether he mentioned her name or not is not stated. In the transcript of the stenographer's notes the following appears:

"The wife of William Chinley, the accused, was called by the Crown, but objection taken by Mr. *S. Henderson*, counsel for the accused; objection was sustained by Court."

No further or other reference appears to have been made by counsel or judge to the matter, unless the following expressions made use of by the judge "as to keeping you to the evidence as given"—"the evidence as you have heard it" are to be regarded as touching this point. The question (assuming it to be a question of law within the meaning of section 1,014) I think should be considered with reference to the course pursued at the trial. What did the judge at the trial do? What did the prisoners' counsel do?

This is an unfounded allegation made by counsel in his opening, of what he intends to prove; there are several cases reported where the jury have been permitted to hear from witnesses under oath, or from interpreters professing to give the sworn testimony of witnesses. In most of those cases it has been held sufficient for the judge to tell the jury to disregard the objectionable statements, and to proceed with the hearing of the case.

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In *The Queen* v. *Sonyer* (1898), 2 C. C.C. 501, we have an instance where a new trial was ordered because the judge refused to discharge the jury although requested by counsel for the prisoner so to do.

In the case of *The Queen* v. *Finkle* (1865), 15 U.C.C.P. 453 certain statements made before the coroner were given in evidence against the prisoner at the trial. These statements it was made to appear later had been improperly obtained. When this appeared the judge directed the jury to exclude from their consideration the confession and directed them to acquit the prisoner unless the other evidence satisfied them beyond reasonable doubt that the prisoner was guilty.

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Richards, C.J., in delivering the judgment of the Court (Adam Wilson and John Wilson being the other two judges), at p. 459, said:

"*Garner's Case* (1848), 1 Den. C C. 329; is also authority to shew that the correct course to be taken by the judge, when evidence has been received which is afterwards shewn not to be properly receivable, is to treat it as if it had been inadmissible in the first instance; and the effectual way of doing so is, to tell the jury not to consider the confessions, and to dispose of the case on the other evidence, which was the course pursued by the judge on this trial.

"Many of the cases shew that the objectionable evidence is taken down before it is discovered that it is not admissible, and it is afterwards rejected; and if no other sufficient evidence to sustain the case is offered, the jury are directed to acquit for want of evidence: *Regina* v. *Warringham*, in note to *The Queen* v. *Baldry* (1852), 2 Den. C.C. 430 at p. 447).

"A similar principle is acted on when the names of other prisoners are mentioned in the confession. It has been suggested that the names ought not to be mentioned in reading the confession; but the proper course seems to be to read the names in full, the judge directing the jury not to pay any attention to them: *Rex* v. *Jones* (1830), 4 Car. & P. 217; *Maudsley's and Another's Case* (1 Lewin, C.C. 73); Roscoe's Crim. Law, 4th Ed., 53, and cases there collected."

In *The Queen* v. *Whitehead* (1866), L.R. 1 C.C. 33, before the Court of Crown Cases Reserved, a deaf and dumb witness was called and an interpreter sworn. After the examination of the witness had proceeded some way, the interpreter informed the Court that he was satisfied that the witness did not understand him, the case proceeded and the following is the opinion expressed by the Court (p. 39):

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"The judge, when he found her incompetent, did what he had a perfect right to do—he withdrew her evidence, and directed the attention of the jury merely to the testimony of the other witnesses."

In *Regina* v. *Rose* (1898), 67 L.J., Q.B. 289 at p. 291, 14 T.L.R. 213, the Queen's Bench Division dealing with a question what course the presiding magistrate ought to take when a statement by a witness of a confession improperly got before the jury, said:

"It is easier to say what he ought not to have done than to define what he should have done. It is clear that he ought not to have allowed the whole of the confession to go to the jury; but as to whether he ought to have struck out that part of it which was not voluntary and directed the jury to disregard it, or whether he ought not to have discharged the jury and impanelled a fresh one, the Court is not now called upon to determine upon the materials before it."

These cases illustrate the rule that it is a matter for the judge to see that inadmissible evidence is withdrawn from the jury, and that it is for him also to determine whether statements made in the hearing of the jury have produced or are likely to produce on the minds of the jurors an impression so as to prejudice the fair trial of the case, and to determine whether he should dismiss the jury or permit the trial to proceed. In considering what course he should adopt, it is recommended by Mr. Greaves, Q.C., the editor of several editions of Russell on Crimes, that he should ask the prisoner whether he wishes the jury to be discharged on that ground.

Now, in this case the judge decided to allow the case to proceed. I am not prepared to say that he was wrong. I do not believe there was any substantial wrong or miscarriage occasioned to the prisoner, because (1) the Attorney-General indicated or described the person by whose evidence he proposed to sheet home to the accused the inculpatory fact, and the jurors were present when that person was called and declared an incompetent witness, and no further or other withdrawal was necessary or advisable; and (2) because no complaint was made by the prisoners' counsel distinguishing this case from *The Queen* v. *Sonyer, supra.*

The argument that the jurors may possibly have been misled is to assume that the jurors do not know the difference between statements by counsel and evidence by a witness. I do not think one should assume that. Channel, J. said in *Max Cohen and Leonard Wilson Bateman* (1909), 2 Cr. App. R. 197 at p. 208-9:

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> "One must give credit to the jury for intelligence, and for the knowledge that they are not bound by the expressions of the judge upon questions of fact."

In *Rex* v. *Osborne* (1905), 1 K.B. 551, evidence admissible as corroborative of the complainant's credibility, but not as evidence of the fact complained of, went before the jury. The chairman did not refer in the summing up to the matter (p. 553). The conviction was nevertheless upheld by the Court of Crown Cases Reserved, although the jury was not cautioned (as they ought to have been) that the evidence was admissible for a particular purpose only.

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In the case of *The Queen* v. *Sonyer* referred to, I wish to point out that there the prisoner's counsel objected to proceeding before the jury who had heard four (out of a total of seven) inadmissible confessions. That seems to have been the proper attitude for him to take: see the remarks of Boyd, C. in *Sornberger* v. *Canadian Pacific R. W. Co.* (1897), 24 A.R. 263 at p. 272.

In the second volume of Criminal Appeal Reports we find several judgments bearing on the duty of counsel: *Frederick Charles Davis and Frank Ridley* (1909), 133, Darling, J., says, pp. 139-40:

"It is stated that in opening the case counsel for the prosecution stated matters which were not evidence against the appellant Davis on his trial, but we have been unable to find the admission of any evidence that could be objected to; but if it were so, if counsel on the other side do not object, it is not obligatory on the judge to do so. When a prisoner is defended by counsel, and he chooses, for reasons of his own, to allow such evidence to be let in without objection, he cannot come here and ask to have the verdict revised on that ground."

That seems to me to be very close to this case.

Then again, *Joseph Stoddart, ib.* 217 at pp. 245-6, the Lord Chief Justice said:

"We cannot part from this case without making some observations which may, we trust, be of service with reference to the practice of this Court. As appears from the judgment which has just been delivered, the case for the appellant was conducted by making a minute and critical examination, not only of every part of the summing-up, but of the whole conduct of the trial. Objections were raised, which, if sound, ought to have been taken at the trial. Probably no summing-up, and certainly none that attempts to deal with the incidents as to which the evidence has extended over a period of twenty days, would fail to be open to some objection. To quote Lord Esher's words in *Abrath* v. *The North-Eastern Railway Co.* (1883), 11 Q.B.D. 440 at p. 452: 'It is no misdirection not to tell the jury everything which might have been told them. Again, there is no misdirection unless the judge has told them something wrong or unless what he has told them would make wrong that which he has left them to understand. Non-direction merely is not misdirection, and those who allege misdirection must shew that something wrong was said or that something was said which would make wrong that which was left to be understood.' Every summing-up must be regarded in the light of the conduct of the trial and the questions which have been raised by the counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that

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might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed, or whether other topics which might have been dealt with on other occasions should be introduced. This Court sits here to administer justice and to deal with valid objections to matters which may have led to a miscarriage of justice. Its work would become well-nigh impossible if it is to be supposed that, regardless of their real merits or of their effect upon the result, objections are to be raised and argued at length which were never suggested at the trial and which are only the result of criticism directed to discover some possible ground for argument."

Again, in *William Rose, ib.* 265-6:

"The witness went on to say that the articles in question had been identified by prosecutor as stolen from him—a matter on which prosecutor's evidence would have been the best. It was true that counsel representing appellant at the trial said that he did not object, but the identification of the articles, supposed to be wrongfully in appellant's possession, was only hearsay, and appellant ought not to be prevented from raising the point on appeal.

"[The Lord Chief Justice: It is impossible to allow points to be raised by counsel who were not present at the trial, which were not taken by appellant's counsel in the Court below. Very often a statement is admitted in the interest of the defendant.]"

And again in *Charles Baker, ib.* 249; and in *Rex* v. *Spinelli* before the Court of Appeal in Ontario (1909), 1 O.W.N. 246.

I do not mean to say that there may not arise a case in which the ends of justice may imperatively require that we should not fetter ourselves by too strictly adhering to the rule that these objections should be taken in the Court below, but counsel are not at liberty to stand by at the trial and then come to this Court with a complaint that there has been a miscarriage of justice. IRVING, J.A.

It is regrettable that an incident of this kind should occur in a trial; and on appeal, or on application for a new trial, one must feel the responsibility of determining the question whether or not there has been substantial wrong or miscarriage occasioned on the trial.

The reasons why I think wrong was not done to the prisoners are these: The trial took place before an experienced judge, who did not think proper in a very careful summing up to caution the jury. From that I infer that he was satisfied from what had occurred in Court that no specific direction was necessary.

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The prisoner was defended by counsel upon whose objection the circumstantial evidence was shut out, and who was satisfied with the charge. I think the proper inference to draw from his silence was that he thought that no wrong was being done to his client.

It is not enough for a prisoner to shew that improper proceedings might have occasioned some substantial wrong, but he must shew that it did occasion such substantial wrong. And how can we say that there was a miscarriage or a wrong done when those most interested said by their conduct: This is right; this is sufficient. I would say that the proper inference for us to draw is that the jury understood that the statement of the Attorney-General had been made under a misapprehension, and that the fact mentioned to them had been wholly withdrawn from their consideration; and that being so, I can see no reason why the jurors could not weigh and consider the other facts of the case deposed to by witnesses, without reference to the fact referred to in the Attorney-General's opening.

The third ground raises a matter of very general importance connected with the conduct of criminal trials in this Province.

If anyone had asked me the question: is it not an inherent right in every person that the proceedings taken in our Courts against a prisoner should be made wholly intelligible to him? I should have thought there was only one answer to that question, but it seems there are some who would hold a different view: see *Rex* v. *Maceklette* (1909), 18 O.L.R. 408.

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The manner in which witnesses ought to be examined lies chiefly in the discretion of the judge before whom the action is tried, and in this Province I think the standard which the judges in exercising that discretion have recognized as the correct standard is that laid down by Kelly, C.B. in *The Queen* v. *Berry* (1876), 1 Q.B.D. 447 at p. 451, *viz.*: that the prisoner should understand every word of the proceedings, and of course that the judge and jurors should also understand what is being said—although this is not always easy to manage satisfactorily, as DRAKE, J., pointed out in *Rex* v. *Louie* (1903), 10 B.C. 1 at p. 8:

"In dealing with Indians and Chinese in our Province who have to have all their evidence filtered through an interpreter, who is seldom acquainted

with the niceties of the language into which he interprets the native tongue, one has to take what is the actual purport of the statement without criticizing the terms in which it is couched."

The question originally submitted was: Ought a new trial to be granted or the accused discharged from custody for the following reason:

"(3) The interpreter called by the Crown dealing with Indian evidence was of such a character as to be objectionable, especially as the telling evidence in the case was all given through this interpreter."

The letter of inquiry and the reply to this part are as follows:

"It was contended before this Court by counsel for the Crown that the expression 'objectionable' meant only that objection had been taken as shewn on the pages referred to, not that your Lordship had found that during the interpretation of the evidence the interpreter had proved unsatisfactory."

"I certainly did consider the interpreter unsatisfactory. I think any interpreted evidence is unsatisfactory and to that extent objectionable. I was, however, satisfied that this was the least objectionable or unsatisfactory one available. I took Mr. *Henderson's* use of the word objectionable as being synonymous with being unsatisfactory and to a certain degree unreliable. The interpreter certainly seemed to lack ordinary intelligence and facility of expression. The evidence took a long time in recital. I made no comment to the jury about the manner of giving or the degree of reliability of this evidence, not desiring to interpose my own views thereof after they had heard the preliminary discussion about him and after hearing him and seeing his demeanour."

What the learned judge has said might be said of almost every case in which Chinese or Indian interpreters are necessary. I think it would be a most mischievous practice for this Court to countenance the view that a matter of this kind can be the subject of examination by this Court on a case reserved in the way this case has been left to us. The judge in his discretion accepted the interpreter, and permitted the case to proceed to judgment. In my opinion that is the end of the matter so far as any Court of law is concerned.

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In Nova Scotia the Supreme Court of that Province on a case reserved by Mr. Justice Graham, *The King* v. *Barnes* (1907), 13 C.C.C. 301, held by a majority of the judges that the Court had no jurisdiction, they could not decide the question reserved without deciding a question of fact. Compare also *The Queen* v. *Martin* (1872), L.R. 1 C.C. 378 at p. 379, where the facts were not found by the Court below.

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Here, if we are to go beyond the judge's decision to permit the case to proceed, we must go into facts. I think this shews conclusively that the question is not one that can be reserved.

Before leaving this objection I would point out that there was no question of the ability of Louis Tsan to interpret raised by the prisoners' counsel at any time, indeed there is what almost amounts to an acknowledgment by Mr. *Henderson* of his ability to interpret contained in the words "As long as it is known what the man is, I do not care."

The learned judge, although dissatisfied, took a very reasonable view of the matter. The jurors, who by reason of their being residents of the same district in which the accused and these witnesses live, are supposed to be peculiarly well qualified to deal with questions of this kind. We all know that it is very usual (and proper) for counsel for the prisoner to point out to a jury the danger there is in convicting on evidence filtered through an interpreter.

It is to be remembered that there are some things that cannot be corrected by a court of law. For example, suppose after verdict and judgment it is found that a jury or an interpreter was corrupt? That miscarriage is one which could not be set right by the Courts: see article 301 of Stephen's Digest of the Criminal Law.

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The fourth point arises from the fact that a witness, Augustine, volunteered certain evidence, not then admissible.

In dealing with the second point, I have already stated that where there is improper evidence stated in the presence of the jury, it is not necessary that the jury should be, in every case, discharged (see on this point *The King* v. *Grobb* (1906), 13 C.C.C. 92, in which case *The Queen* v. *Sonyer, supra*, was cited but not acted upon). It is sufficient in many cases if the jury are given to understand that they are not to pay attention to the inadmissible evidence. That disclaimer in my opinion was sufficiently evidenced by what took place when the witness was bundled out of Court.

The fifth point, was the *ante-mortem* statement properly admitted? I think it was. From time immemorial Courts

have settled for themselves a great many questions of fact during the course of a trial; incidental questions that spring up during the trial, but it was not until 1790 that the practice was fully recognized as to dying declarations. If these decisions are questioned, the same rule should be applied as would be applied in considering the verdict of a jury; for as Lord Loreburn, L.C., said in *Lodge Holes Colliery Company, Limited* v. *Wednesbury Corporation* (1908), A.C. 323 at p. 326, the decision of a judge, as to facts, is in its weight hardly distinguishable from the verdict of a jury.

I think there was evidence upon which the learned trial judge might reach the conclusion he did, and therefore his decision cannot be interfered with. In *Rex* v. *Louis, supra*, where I received a dying declaration and refused to reserve a case, will be found a case in many respects like the present.

The seventh point raises a mere question of practice and is not in my opinion a ground for allowing a new trial, or interfering with the trial that has taken place. In *Rex* v. *Warren* (1909), 25 T.L.R. 633, one of the grounds of appeal was that the chairman had not told the prisoner that he had a right to give evidence on his own behalf. The Court of Criminal Appeal did not consider that a sufficient ground for quashing the conviction.

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Here there was no application to the judge; counsel arranged the matter between themselves as to the order of speaking, and prisoners' counsel did not ask the judge to permit him to again address the jury. The Attorney-General seems to have done what is a very common practice and I cannot say that what was done caused any miscarriage.

Lastly, exception is now taken to what was said by the learned judge in his address to the jury.

The part complained of is in the following words:

"Such uncertainty or doubt, you must, if you can, fight against. Do not let it influence."

It is not fair criticism of a judge's charge to wrench one sentence from its setting and read it by itself. If the whole paragraph is read the sentence in question is unobjectionable. See remarks on summing up in *Joseph Stoddart* (1909), 2 Cr.

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App. R. 217 at pp. 245-6, and also the judgment of the Judicial Committee in *Blue & Deschamps* v. *Red Mountain Railway* (1909), A.C. 361 at pp. 367-8.

Eighth (g). The suggestion is that the jurors were improperly influenced by the remarks of the trial judge who stated that "the deceased had been under the influence of the Church for a number of years." But the learned judge immediately informed the jury that those words were his words, and as they were the judges of fact they might adopt them or not as they thought fit.

On this point I could again refer to the judgments last above cited. The judgment of the Court of Criminal Appeal in *James Donoghue* (1909), 3 Cr. App. R. 187 at p. 189, is very much in point.

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Eighth (h). The learned judge dealing with the evidence of a witness called Tommy, and the criticism thereon by the prisoners' counsel, asked the jury whether the conclusion which the counsel wished the jurors to draw was not founded on an hypothesis worked out in argument by the counsel himself, rather than on what Tommy had said. It was perfectly proper for the judge to draw the attention of the jury to the matter in the way he did. There is less ground for complaint because the learned judge said in leaving the subject, "Well, gentlemen, you have heard the evidence and know how it was elicited."

I would answer the question reserved in the negative.

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MARTIN, J.A.: At the outset I desire to say that I am in accord with the remarks of the learned Chief Justice regarding the unsatisfactory way in which this case has been reserved for our consideration, which necessitated its being referred back, under section 1,017, to the learned trial judge for restatement, as mentioned in the letter of the registrar of this Court dated the 11th of January, 1910, *viz.*: "the case is herewith remitted to you for the purpose of having it restated" on the points therein mentioned. Even now, after its return, it is in such a condition that it is far from satisfactory, and it is only because of the long delay in the hearing of the appeal (owing to the constitution of this new Court) and the near approach of the time for the carrying out of the sentence, that I reluctantly

consent to consider the matter in its present irregular state. In future it must be understood that these cases are to be properly stated so as to assist this Court to deal with them to the best of its ability. If any difficulty arises in the settlement of the case it is a proper course for the judge to give both counsel an opportunity to see it, as was done in *The Queen* v. *Coll* (1889), 24 L.R. Ir. 522 at p. 535.

With respect to the first question it is sufficient to say that since it is admitted that the Court was held pursuant to statute at the time and place appointed by competent authority, as proclaimed in the official Gazette, then the point is covered by the decision of the majority of the judges of the Supreme Court of Canada in *Sproule's* case, *supra,* for, as Mr. Justice Strong puts it (p. 206), "if no regular commission was issued there was jurisdiction to hold the courts of oyer and terminer and general [gaol] delivery without commission."

Then as to the second question. Manifestly nothing like so much weight is to be attached to statements of counsel as to testimony of witnesses, quite apart from the fact that a counsel is not permitted even so much as to state his belief on matters of fact, and therefore the effect and consequences of a statement by counsel are far from necessarily being the same as they were in, *e.g., The Queen* v. *Sonyer, supra;* the proper course for the judge to adopt depends upon the circumstances: *Regina* v. *Rose, supra.* Doubtless in the great majority of instances such statements, though they were at the time, or afterwards proved to be irrelevant, would be innocuous, yet on the other hand the special circumstances might be such that they were fraught with great moment, and if not corrected or explained would unquestionably prejudice that fair trial which the prisoner is entitled to. The question is really one of degree, not easy to determine, and depending upon the special circumstances of each case. After, I confess, some hesitation I have reached the conclusion that the case at bar is one which falls within the latter category, because it is an extreme case and the statements made were of such grave import and were accompanied by such dramatic incidents that they could not fail to have produced an effect upon the jury which would be damaging to the prisoners,

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and since, unfortunately, no steps were taken to nullify that effect there must, I think, in fairness to the accused be a new trial. It is much to be regretted that the prisoners' counsel did not draw the attention of the Court to the oversight, but *The Queen* v. *Gibson, supra,* and *The Queen* v. *Coll, supra,* shew that in a criminal case objections of such a nature are not to be taken as waived, though, as will be seen later, objections to procedure may be, and, also, failure to take objections may otherwise weaken the position on appeal: *vide post* under question 7.

The third question relates to the interpreter at the trial, and I have no doubt that it should be answered in favour of the prisoners; moreover, it is their strongest point, in my opinion. As soon as the interpreter was put forward by the Crown to act in that capacity he was objected to by the prisoners' counsel as an unfit person, saying, "We have to have a man that we can depend on," and stating as a reason that he had been in gaol several times. It is true that after some discussion the counsel said, "As long as it is known what the man is I don't care," but after further discussion and as his final word the counsel said, in reply to the suggestion from the Court that the objection "should have been threshed out beforehand," (though, with every respect, I cannot see how it could have been)—"How did I know? I did not know this interpreter was here. He is the last man in the world that should act." Then the Court and

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the Crown counsel asked the interpreter certain questions respecting his relationship to the deceased, and if the accused were friends or "tillicums" (which means "friends" in the Chinook jargon) of his, and being informed that they were not, though he had known them for a long time, and that the deceased was no relation, nor of the same tribe, the Court said, "Well, I think, Mr. *Bowser* (the Attorney-General) it will be all right," whereupon the interpreter was sworn and proceeded to discharge the duties of his office. The only question before us is, how did he discharge them? The prisoners' counsel contends that though the learned trial judge has stated plainly in the original reserved case, and in the restated case that the interpreter was "objectionable," and that "I certainly did consider the interpreter unsatisfactory," and that he considered "the word 'objectionable'

as being synonymous with being unsatisfactory and to a certain degree unreliable," and that "the interpreter certainly seemed to lack ordinary intelligence and facility of expression," yet notwithstanding all these defects, the learned judge permitted the interpreter to continue to attempt to discharge duties which he had shewn himself incompetent to perform. The learned judge also states that he was satisfied that the interpreter was "the least objectionable or unsatisfactory one available." That, with all due deference, is clearly no ground for accepting his services, because the test is not one of availability but of competency. It is, of course, for the judge to determine at the outset the question of competency and, if he is satisfied on that point, to permit the proffered interpreter to be sworn as such, and I have only referred to the weighty objections raised at the outset by the prisoners' counsel to shew that in this respect he fully discharged his duty to the Court by drawing its attention to the bad character and criminal record of the interpreter, which was a material element in determining the question of his fitness. But though a judge might feel justified in accepting the services of an interpreter at the beginning of a trial, yet as it proceeded the judge might, on any good ground which might arise and become evident from, *e.g.*, the demeanour of the interpreter, his drunkenness, partiality, or lack of understanding, decide that he was no longer to be deemed a fit and proper person to act as an officer of the Court, and in such case it would at once become the duty of the judge of his own motion to discharge the interpreter and, if necessary, adjourn the trial so that a competent person could be procured. It is, to me, clear on the face of it that no fair trial can possibly be had where the interpreter is not reasonably competent. This question of competence is not one for the jury, as seems to have been considered below, but for the presiding judge. We have not been asked to pass upon the facts going to the question of competency, but we are properly asked to say that where the trial judge has himself declared that the interpreter is incompetent, and yet despite that incompetency has allowed the trial to proceed and the accused have been found guilty, then, according to section 1,019, "something not according to law was done at the trial" which has occasioned a

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substantial wrong or miscarriage of justice to the accused, and therefore they are entitled to a new trial.

I think it well to add that the Court is not restricted to the services of one interpreter, but may allow each party to swear his own, as was done on the trial of Queen Caroline, where the witnesses for Her Majesty were examined through an interpreter offered by her counsel, and where leave was given to interpose in case of apparent error in interpreting: report of the trial of Queen Caroline, 2 vols., London, 1821; Vol. 1, pp. 157-8, 495, 842.

As regards the 4th, 5th and 8th questions I do not wish to add anything to what has been said by my learned brothers, except in regard to the fourth, which relates to certain voluntary statements blurted out through the interpreter, by the Indian woman Augustine, and not in response to any question. The course adopted by the trial judge, after her statement was repudiated by the Attorney-General, in stopping her at once and ordering her to be removed from the witness box was tantamount to, if indeed not much more strikingly effective than ordering her evidence to be struck out in so many words, which was held in Queen Caroline's trial, *supra*, Vol. 1, p. 270, to be the proper course to adopt in similar circumstances, the Lord Chancellor observing:

"The constitutional mode is, if an answer is not evidence to strike it out."

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The 7th question invites consideration of the meaning of the word "reply" of the Crown counsel, in sub-section 3 of section 944 of the Code. It was not, nor can it be disputed, that the right to reply existed: *The King* v. *Martin* (1905), 9 C.C.C. 371; *The King* v. *Charles King, ib.* 426; yet it was contended that because the defence called no witnesses, therefore the Crown counsel was restricted to "replying" to those matters which had been dealt with by the prisoners' counsel; and that in any event "reply" means something much less than addressing the jury at large upon the whole case.

The only authority cited that supports the contention of the prisoners' counsel is *The Queen* v. *Le Blanc* (1893), 6 C.C.C. 348, a decision of the Chief Justice (Taylor) of Manitoba, who held that the practice on the trial of a civil action where no

defence is offered for the defendant should be followed, and counsel for the prosecution should therefore address the jury first, and that counsel for the defence had the right to reply.

No authority is cited in support of this view, and with every respect for the learned judge's ruling I feel unable to give effect to his view of the matter as it is now presented for determination the first time to us in this Court of Appeal. In the circumstances, and out of respect for the learned judge, I have been at some pains to find an authority in support of my view, and have been fortunate enough to do so in the report of the trial of Queen Caroline above cited, one of the most famous in criminal annals, in which, as might be expected from the exalted position of the accused, the many distinguished counsel employed, and the number of judges assembled to assist in the trial, the greatest precautions were observed to see that no course of procedure was adopted which could not be justified by precedent. At p. 570 in Vol. 2 under the heading "Reply to the Defence" there will be found at considerable length the reply of the Attorney-General, Sir Robert Gifford, in the course of which he dealt with the whole case, as is perhaps best shewn by the following extract at p. 638:

"The learned gentleman then apologized to their Lordships for trespassing so long upon their indulgence when he was aware that their attention was exhausted by their previous continued application to the same subject. His duty had been an anxious one. It had been to bring before their Lordships the whole evidence of the case . . . . ."

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This exact precedent in my opinion settles the question, and shews that the reply is one at large.

I am, however, entirely in accord with the remarks of Mr. Justice Maclaren in *The King* v. *Martin, supra,* at p. 389, upon the propriety of claiming the right, *viz.*:

"In the meantime I think it should be claimed only when there are special reasons for doing so, and that it would be more in consonance with modern enlightened ideas as to the relative rights of the Crown and the subject if it were entirely abrogated."

I likewise agree with what the learned Chief Justice of this Court said regarding the taking of objections in criminal trials generally, and the waiving of this particular objection by the prisoners' counsel, and I desire to add also that it may very well be that in a case where the effect upon the jury of something

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said or done during the course of the trial is in doubt, the fact that the prisoners' counsel raised no objection would turn the scale and justify a Court of Appeal in taking the view that an objection raised first before it was in truth by no means so serious at the trial as it was sought to be made upon the appeal. The result of this appeal is that there should be a new trial.

GALLIHER, J.A.: The accused were tried before Mr. Justice MORRISON at the assizes at Clinton on the 5th, 6th and 7th of October, 1909, on the charge of murdering an Indian woman named Agnes, were convicted and sentenced to be hanged on Monday the 20th of December, 1909, but were respited until 20th February, 1910, counsel for the accused (Mr. *Henderson*) having applied for and been granted a reserved case for consideration by this Court; that a new trial ought to be granted, or the accused discharged from custody, for the following reasons:

[Already set out in reasons for judgment of IRVING, J.A.]

I will reserve the consideration of grounds 2 and 3 until the last, and proceed upon the others in the order in which they appear.

On the first ground: By section 10 of Cap. 20, B.C. Stat. 1899, the Legislature abolished the issuance of commissions for the holding of sittings of the Supreme Court as a Court of Assize, Nisi Prius, Oyer and Terminer and General Gaol Delivery, and counsel for the accused contended that this Act was *ultra vires* of the Legislature insofar as it affected a question of procedure, that being within the jurisdiction of the Federal Parliament; that the enactment doing away with the issuing of commissions practically resulted in an interference with the practice and procedure in force in this Province, which could only be altered by a Federal enactment.

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I do not agree with this contention. The Legislature had power to do away with the issuing of commissions and that is all they legislated upon, and that legislation so far as procedure is concerned had the effect only of rendering unnecessary the reading of the commission (in fact there was no commission to read) and did not, nor did it in any way purport to deal with a question of procedure.

On the fourth ground I can only say that I can find no reason for holding that the evidence of the witness Augustine was improperly admitted.

On the fifth ground I hold that the *ante-mortem* statement of the deceased was properly admitted in evidence by the learned trial judge.

The evidence of the doctor who saw the deceased on the Monday morning, the day of her death, says her condition was such that it was impossible for her to live, and although it does not appear in evidence that this fact was communicated by him to the deceased, still it is evidence of her actual condition at the time.

Now, as to her belief whether she was in imminent danger of death, and that she had no hope of recovery at the time she made the statements admitted in evidence, her statement to an Indian woman—Augustine—on the Monday morning was "Fellows hurt me and make me die"; and on the same morning to her father, Sundayman, "I am going to die, hurry up and get the priest," and again on the same morning, "Sure, I am going to die, hurry up and get the priest for me." It appears to me that this last statement particularly, expressed in her own way, shews very strongly her belief that she could not recover.

The sixth ground was abandoned by the learned counsel for the accused.

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On the seventh ground it does not in any way appear upon the record, but was stated before us, that some discussion took place as to who should address the jury first, but without the point being argued, counsel for the accused proceeded first and was followed by the Attorney-General. I do not think there is anything in the point taken, and if there was it was waived by counsel for the accused not insisting on his right to address the jury last.

On the eighth ground . . . . . having regard to the language used by the learned trial judge, and the whole context of his summing up, I am unable to say that there was any misdirection or that any substantial wrong was done to the accused.

Now, as to grounds 2 and 3. When the case came before us

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there was some discussion as to how the Attorney-General dealt with the question of blood-stained clothing in opening, and this was referred back to the learned trial judge for further information, as was also question 3. Below is the reply of the learned trial judge:

"As to the first question: I did not make any note of the learned Attorney-General's opening address which was delivered as I recall in a casual conversational manner. He did refer to the prisoner Chinley at his home in the morning following the occasion of the injuries to the deceased with his clothing stained with blood and that he required his wife to wash them. The clothes were in Court, but when they were brought in I did not observe, as constables and other persons were constantly passing to and fro as is usual in places of trial such as Clinton. The clothes when I saw them were on the floor between the counsels' table and the Bench, the stenographer being seated between where I saw them and the jury. The Attorney-General was addressing the jury on his own side of the counsel table and next the jury and away from the bundle at the time I saw it and ordered it to be removed. I made no reference whatever to the clothes. I do not recall the Attorney-General associating any name with the proposed evidence as to the blood-stained clothes except as above stated. Mrs. Chinley was in due course called. The exact sequence in which she appeared is shewn by the transcript. Upon objection taken to her giving evidence, she being the wife of Chinley, she did not proceed with any testimony. The transcript recites what then took place.

"As to the second point: I certainly did consider the interpreter unsatisfactory. I think any interpreted evidence is unsatisfactory and to that extent objectionable. I was however satisfied that this was the least objectionable or unsatisfactory one available. I took Mr. *Henderson's* use of the word objectionable as being synonymous with being unsatisfactory and to a certain degree unreliable. The interpreter certainly seemed to lack ordinary intelligence and facility of expression. The evidence took a long time in recital. I made no comment to the jury about the manner of giving or the degree of reliability of this evidence not desiring to interpose my own views thereof after they had heard the preliminary discussion about him and after hearing him and seeing his demeanour."

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Realizing that it is highly inadvisable to throw open the door too wide in the granting of new trials in cases of this kind, unless it is apparent that some substantial wrong or miscarriage was occasioned by anything that took place at the trial, I have given the two points last referred to by me my best consideration.

Taking up ground 3 as to the interpreter. I do not think the Crown fully discharges its duty by putting forward an interpreter who may be the best procurable at the moment, but that it is

incumbent on the Crown to satisfy itself by inquiry before trial that the interpreter proposed to be used is competent and reliable in every respect. This is even more essential in capital cases where the lives of the accused are at stake.

When the interpreter was called, Mr. *Henderson* for the accused, objected strongly on the ground that he was not a person of good character, and had himself been tried on more than one criminal charge.

Of course it does not always follow that a man who has been convicted say of stealing might not be truthful and interpret faithfully and truthfully; but to say the least, he starts off with a serious handicap, and would be in my opinion an undesirable interpreter. However, we must go further and look at the evidence, take the questions propounded and the answers given through the interpreter, to ascertain as well as possible if his duties were properly performed.

Now, while at times there seems to have been some difficulty in getting the interpreter to understand the exact nature of the question to be put to the witness, and the narrative seems somewhat disconnected in places, this is to a certain extent to be expected except in the case of skilled interpreters; and comparing the answers given through the interpreter with the questions put by learned counsel, it would indicate to my mind that there has been no failure of justice in this connection, and I so find. Moreover, the learned trial judge before whom the case was tried, and who heard and saw everything, did not see fit to stop the case and obtain a new interpreter, something he would be in duty bound to do if he had the least suspicion that any wrong or injustice was likely to be done.

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The second ground, however, presents, in my opinion, a more serious aspect. Section 1,019 of the Code is as follows:

"No conviction shall be set aside nor any new trial directed, although it appears that some evidence was improperly admitted or rejected, or that something not according to law was done at the trial or some misdirection given, unless, in the opinion of the Court of Appeal, some substantial wrong or miscarriage was thereby occasioned on the trial."

Now, what constitutes a substantial wrong within the meaning of the words of the Code to entitle the accused to a new trial?

Does the failure of the trial judge to instruct the jury that

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certain statements made by the Crown in opening (but not afterwards adduced in evidence or referred to) must be disregarded by them constitute a wrong, when such statements had they been adduced in evidence would have told strongly against the accused?

In this connection two things were urged upon the Court by the learned Deputy Attorney-General. First: That counsel for the accused could not stand by at the trial and make no reference to these statements, or ask for any direction thereon, taking his chance of acquittal, and now be heard to complain of non-direction.

Secondly: That the Court must assume that juries are capable of distinguishing between what is a statement made by counsel and what is evidence, and therefore it must be presumed in the case before us that in arriving at their verdict the jury were not influenced by anything that was not matter of evidence.

On the first I am of opinion that counsel for the accused is not estopped from raising the point before us now, even though he made no reference to it or requested any direction thereon at the trial. The rule is not so strictly applied in criminal as in civil cases.

With regard to the second, I do not know that I would go so far as the learned counsel for the Crown, but in the view I take of the main question it is not necessary for me to decide this.

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I do not think we should speculate on whether the jury did or did not take these statements into consideration. The wrong, if wrong there was, lies in the fact that these statements were left with the jury as they were made without any direction to disregard them.

Let us examine the nature of these statements. "That blood was found on the clothes of the accused." "That it was human blood."

Or take the language as the learned trial judge expresses it in his letter of explanation above set out: "He (the Attorney-General) did refer to the prisoner Chinley arriving at his home in the morning following the occasion of the injuries to the deceased with his clothing stained with blood, and that he

required his wife to wash them." And with either of these statements couple the fact that the clothes were in Court within the view of the jury and that they were pointed out to them at the time.

I can conceive of nothing more calculated to impress itself on the minds of the jury then and there.

Had these statements been matter of evidence, there can be no doubt as to how strongly they would have weighed with the jury against the accused, and that brings me back to my original proposition, *viz.*: Was the failure to direct the jury that these damaging statements must not be considered by them such a wrong as would entitle the accused to a new trial?

I think it was. I think that wrong can be occasioned by non-direction in a case such as this equally as by misdirection.

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My opinion is that it should have been placed beyond peradventure (insofar as it was in the power of the learned trial judge so to do) that the jury should disregard these statements. This was not done.

I would therefore quash the conviction and grant a new trial.

New trial ordered, Irving, J.A., dissenting.

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Certiorari—Conviction under section 14, Game Protection Act, 1898, as re-enacted by B.C. Stat. 1909, Cap. 20, Sec. 8—"Hunt," meaning of—Summary Convictions Act, R.S.B.C. 1897, Cap. 176, Sec. 103, as enacted by B.C. Stat. 1899, Cap. 69, Sec. 4.

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A conviction under section 14 of the Game Protection Act, 1898, as re-enacted by Cap. 20, Sec. 8 of 1909, for hunting any animal must be supported by evidence shewing the species of animal hunted.

MOTION to make absolute a rule *nisi* for a writ of *certiorari* to quash a conviction made by Mr. W. H. Whimster, a justice of the peace in and for the Electoral District of Fernie, who, on the 15th of November, 1909, summarily convicted the defendant under section 14 of the Game Protection Act as amended by section 8, Cap. 20, of the statutes of 1909, "for that he did at or near Elcho in the Electoral District of Fernie aforesaid on or about the 11th day of November, 1909, hunt without a licence," etc. Heard by GREGORY, J., at Vancouver on the 5th of March, 1910. The first formal conviction drawn up was admittedly bad, but as soon as these proceedings were commenced, the magistrate returned another as set out above. The information charged that the defendant "did on or about the 11th day of November, 1909, hunt for game without a licence," without shewing what game was hunted for or the district within which it was hunted.

Statement

The matter was heard on the 13th and 15th of November, 1909, when *Eckstein*, for the defendant, admitted that the latter had no licence and did not come within the exempted clauses of the Act. *S. Herchmer*, for the Crown admitted that there was no evidence that the defendant hunted in the sense that he pursued any animal. The depositions shewed that defendant before going out tendered the proper officer the sum of $25, which would have entitled him to a licence to hunt deer, bear and goats for one month. It was clear from the evidence given before the magistrate that the defendant's original expedition wholly failed, and he abandoned it, returning on the third or fourth day to Elcho.

Craig, in support of the motion.
A. D. Taylor, contra.

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GREGORY, J. [after stating the facts above set out]: It is difficult if not impossible to tell from the information or Crown witnesses what animals the defendant is charged with having hunted, but if one is justified in drawing an inference it must be inferred that it was sheep, and that the hunting took place in "the Wigwam country," but in reality the evidence only shews that preparations were made for a hunting expedition, the rest is all inference.

The defendant voluntarily went into the witness box and gave the only evidence which was given of any hunting (in whatever sense the word is used), I quote in full from his evidence on this point:

"I did not hunt sheep. I did not hunt at all. I was without a licence. I was not hunting. We made our camp in a meadow, and then went to another place and put out camp and stayed there 48 hours before I went back. I left the camp with the Indian and went hunting. I went out again the second day with my rifle. I wanted to get a deer if I could. My guide told me he had seen some. There was no possibility for me to get to the place where the sheep were supposed to be."

The minute of adjudication is as follows:

"Nov. 15, 3 o'clock p.m. I find the charge proved. Fine $150 and costs $6—$156. Or one month hard labour."

As the statute only authorizes the infliction of a penalty of $50 in addition to the amount due for a licence and the fee for a general licence is $100, it is clear that the magistrate intended to convict the defendant of having hunted some animals other than deer, bear or goats, for which the licence fee was only $25. Judgment

It has been objected to the conviction that the word "hunt" in the statute means to hunt in the sense of pursuing, etc., some particular animal, and that unless there is evidence to support that, no offence has been proved, and the conviction should be quashed.

The statute, by section 14, makes it unlawful "to at any time hunt, take or kill any animal," etc. Can it be said that anyone is guilty of an infraction of this provision without being able to name the particular animal referred to? I think not.

The verb "hunt" in this section is used transitively and must

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have the same object as the other verbs "take" and "kill"; and clearly as one cannot take or kill without having a particular animal taken or killed, that particular animal must of necessity be the same animal referred to by the word "hunt." The grammatical object of all the verbs is of course "any animal." But a charge, for example, of having "killed an animal," would at least have to be supported by proving the existence of one, and reasoning by analogy from the following cases, the conviction would have to shew the kind of animal killed, and it would have to be supported by evidence.

Reg. v. *Spain* (1889), 18 Ont. 385, where the defendant was charged in the exact words of the statute, R.S.C. 1886, Cap. 168, Sec. 59 with malicious injury to property, Armour, C.J., delivering the judgment of the Court at p. 386, says: "This is not sufficient without its being alleged what the particular act was which was done by the defendant which constituted such damage," etc., and he refers to Paley on Convictions, 6th Ed., 184 and 208; also *In re Donelly* (1869), 20 U.C.C.P. 165, where a conviction of having used blasphemous language on the public highway was quashed because there was no statement of the words used This case was followed by *Regina* v. *Somers* (1893), 24 Ont. 244, where the Court consisting of Armour, C.J., and Falconbridge and Street, JJ., held that a conviction under the Lord's Day Act, R.S.O. Cap. 203, against the cab-driver for unlawfully exercising his ordinary call was bad, because it did not specify the act or acts which constituted the offence against the statute, and both the above cases were referred to and followed in *Regina* v. *Coulson* (1893), *ib.* 246, where defendant was charged with practising medicine under R.S.O. Cap. 148, Sec. 45, but no wrongful act was specified in the conviction.

Judgment

In *Regina* v. *Levecque* (1870), 30 U.C.Q.B. 509, the Court says, at p. 514:

"Describing the offence in the very words of the statute is not, in many cases, a sufficient statement to sustain a criminal charge."

Here, apart altogether from the Crown's admission, there is not a tittle of evidence that the defendant even hunted or looked for any animal other than a deer.

The Crown counsel contends that the word "hunt" means

hunting in the sense of going out with the intention of pursuing whether there is an actual pursuit of or killing animals or not. According to that contention it would be immaterial whether there were any animals in existence or not; the verb would be intransitive and the offence would be complete the very moment one left his door-step, but the Act aims not at guilty intentions, but guilty acts, as is made perfectly clear by the remainder of the sentence.

The Crown counsel argues that the use of the word "pursue" in section 10 "shews that the word 'hunt' need not imply actual pursuit;" but I am unable to follow his reasoning. Section 10 refers to the protection of all game during the close season, and the object of section 14 is to further protect it at all times against certain non-residents—the general object of both sections being to protect. The language in section 10 is to "catch, kill, destroy or pursue," while that of section 14 is to "hunt, take or kill," but both sections appear to me to mean the same thing, the word "catch" in one being equivalent to "take" in the other; the word "kill" is common to both; "destroy" adds nothing, as an animal cannot be destroyed without being killed; and the word "hunt" in its natural sense means to pursue, to shoot at, or at least do something more than look for.

A reference to dictionaries is not a great help in this case, as both meanings will be found there, but it is worthy of remark that the first meaning given to the word "hunt" in the Cyc. Dictionary is "to chase, as wild animals for the purpose of catching or killing them."

Judgment

To adopt the Crown's contention would be to strain the word "hunt" into "hunt for," while the other construction gives full force to the object of the section and gives each word its ordinary and natural meaning.

Whenever a statute or document is to be construed, it must be construed according to the ordinary meaning of the word as applied to the subject-matter with regard to which they are used, unless there is something which renders it necessary to read them in a sense which is not the ordinary sense in the English language as so applied: Maxwell on Statutes, 4th Ed., 78.

Where two or more words susceptible of analogous meaning

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are coupled together, they are understood to be used in their cognate sense, express the same relation and give colour and expression to each other: *Davies* v. *Sovereign Bank* (1906), 12 O.L.R. 557 at p. 559; Maxwell on Statutes, 4th Ed., 491; Bacon's Abridgment, Vol. 4, p. 26.

A number of other objections have been raised, the chief of which may be shortly stated as follows:

"(1.) The penalty of $150 is unlawful, because the $100 can only be added to the fine of $50 in the case of hunting certain animals, and there is no evidence to shew that any such animals were hunted.

"(2.) There is no adjudication of forfeiture of the $100.

"(3.) The adjudication is uncertain and is in the alternative.

"(4.) The conviction does not follow the adjudication in a number of respects."

I do not propose to consider these objections for it is quite possible, as argued by the Crown, that they may be cured under the provisions of the amendment to the Summary Convictions Act, B.C. Stat. 1899, Cap. 69, Sec. 4.

In the case referred to by the defendant's counsel there was really no reference to any statute such as our amendment to the Summary Convictions Act; or it appeared as in the case of *The Queen* v. *Gavin* (1897), 1 C.C.C. 59, that the case did not come within the statute: see Criminal Code, 1892, Secs. 883, 889; 1906, Secs. 754, 1,124; Canada Temperance Act, 1878, Secs. 117, 118.

Judgment

For a general discussion on these sections, see *The King* v. *McKenzie* (1907), 12 C.C.C. 425; *Regina* v. *Elliott* (1886), 12 Ont. 524.

But there is another objection, *viz.:* the absence of any evidence to shew that the magistrate had jurisdiction, and unless this appears the conviction must be quashed. That the right to *certiorari* always exists on the ground of want of jurisdiction of the magistrate, even in cases where it is apparently expressly taken away by statute, is too well established to be questioned: see Seager's Magistrate's Manual, 2nd Ed., under the title Certiorari, and particularly at p. 38.

Our statute explicitly covers the case of the exercise by the magistrate of excess of jurisdiction, but it goes no further than that.

The magistrate's jurisdiction covered "the Electoral District of Fernie," but there is not one single word in the depositions to shew that the defendant hunted or even looked for animals in that district, unless the magistrate is justified with his local knowledge in drawing that inference from the statements that "he (the defendant) outfitted for the Wigwam country." "The Wigwam empties into the Elk river about four miles south of Elcho." "He (the defendant) was out in the hills," and the fact that the defendant was only absent from Elcho three or four days.

In *Regina* v. *Young* (1884), 5 Ont. 184*a*, a conviction was quashed as the only evidence to shew jurisdiction was that the offence took place "in the beer cellar under Duncan's saloon," notwithstanding the fact that the magistrate knew where that was.

In *The King* v. *Chandler* (1811), 14 East, 267, the defendant was charged with having in his possession a private still. The still was found in a garden attached to the defendant's house which was shewn to be in the county for which the magistrates had jurisdiction. But Lord Ellenborough and the entire Court held that was not sufficient, it should be shewn that the garden was also within the county.

While the Courts will take judicial notice of the territorial and geographical divisions, they will not so notice the precise limits of the various counties and divisions; nor whether particular places are, or are not situated therein: Phipson on Evidence, 4th Ed., pp. 13, 14 and cases there collated.

Judgment

But in the present case it would be necessary in order to sustain the conviction to judicially notice that the "Wigwam country" means the country tributary to the Wigwam river; but even that would be insufficient, for an examination of the map shews that a portion of the Wigwam river lies beyond the limits of the electoral district of Fernie.

Section 103 of the Summary Convictions Act as amended by the statute of 1899, directs me to dispose of the matter on the merits, and further directs that if the merits have been tried below and the conviction is good under that section or otherwise—and there is evidence to support it—then it shall be affirmed and not quashed and may be amended if necessary.

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I am clearly of opinion that there is no evidence to support the conviction here, and even adopting the Crown's construction of the statute, I must quash the conviction unless I am prepared to close my eyes to the merits on the defendant's side and find him guilty of having hunted deer; amend the minute of adjudication by reducing the addition to the penalty from $100 to $25; change the imprisonment from one month to 30 days and strike out the addition of hard labour and then draw up a new conviction to agree with such adjudication. To do that would seem to me to be something more than to affirm and amend the conviction, and would amount to the Crown trying the defendant *de novo*, and in his absence and for an entirely different offence from that of which he has been convicted.

Judgment

The rule will be made absolute, and the conviction quashed with costs, but there will be the usual order for protection.

Conviction quashed.

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Vendor and purchaser—Timber limits—Option for sale of—Contract—Specific performance—Acceptance—Reasonable time—Time of the essence.

Defendant on the 4th of September, 1908, agreed, under seal, to give to plaintiff the exclusive right to purchase certain timber limits at $1.50 per acre, plaintiff to examine and cruise the limits within 30 days from the date of the agreement, when if accepted, plaintiff was to pay $2,000 and the balance in equal portions as stipulated. The cruising, which was effected within 30 days, was satisfactory.

Held (MARTIN, J.A., dissenting): That the option never became a contract; that the examination and cruising, although the result was satisfactory to the plaintiff, and so intimated by him, did not constitute an acceptance of the option; that the option should have been accepted within 30 days, or within a reasonable time thereafter, and a tender made on the 23rd of October, 1908, was not in the circumstances, a reasonable time, and that the plaintiff could not obtain specific performance.

APPEAL from the judgment of IRVING, J., in an action tried by him at Victoria on the 1st of June, 1909, to enforce specific performance of a contract for the sale of certain timber limits, under circumstances set out in the reasons for judgment of the learned trial judge. Statement

Elliott, K.C., for plaintiff.
Fell, for defendant.

IRVING, J.: I think the application must be refused. On the 4th of September, Cunningham, knowing all about Alexander's option and the cancellation of it, by a letter which he himself posted, chose to enter into the agreement mentioned in the third paragraph of the statement of claim. That agreement provided that the examination and cruising of the limits should be done within 30 days from the date thereof. The examining and cruising in my opinion does not mean an acceptance. That was another stage provided for by the agreement. But no time is specified in which that acceptance should be notified, therefore I take it that that meant within a reasonable time after the 30 IRVING, J.

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days from that date, I should think the 5th would be a reasonable time. But I do not think, having regard to the nature of timber dealings, that the 23rd would be a reasonable time unless there was something that intervened to prevent the time running. Now, if anything intervened to prevent this time running, it was the agreement that was made between Hillis and Stockham in the presence of Cunningham. It seems to me to be a strong feature in the defendant's favour that the plaintiff has omitted to call Hillis here.

Elliott: He is in New York, my Lord.

IRVING, J.: It is immaterial to me, where he is; he should have been here if the plaintiff wanted to succeed. And it should have been shewn by Hillis that he, Hillis, was ready and willing to buy, and that there was that agreement entered into between them that he said was entered into between them.

The first interview took place on a Saturday, and I find as a fact that when they went out the defendant said to Cunningham "there is nothing sure about this thing going through; there is no money in sight"; and that Cunningham then said he would see what he could do. And the same evening he called at Stockham's house and told him there that he thought Hillis would put up the money, but that he was not sure about it. That same evening, or the next day, at any rate before the interview on Monday, Stockham received the threatening letter from Alexander's solicitors. I do not regard that letter as raising any question of title at all so as to bring this case within the class of cases cited by Mr. *Elliott*. Because Cunningham, the party to the contract, and the plaintiff in this action, knew all about the claim of that, and its cancellation, at the time that he chose to enter into the contract. At that meeting I think Mr. Lawson acted on behalf of Hillis, and I think, after hearing all the evidence, that Mr. Stockham took very little part except to answer such questions as were put to him by Mr. Lawson. I have some difficulty in deciding whether the subject of chickamun or money was mentioned. Mr. Lawson says it was not mentioned, Mr. Cunningham says it was not mentioned, Mr. Stockham says that he did mention it; there is positive evidence there,

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and without reflecting in any way upon Mr. Lawson's veracity —for I do not wish to do that, it is possible Mr. Stockham might have mentioned that and Mr. Lawson might not have heard it, or might not have remembered it; he was more concerned in the legal part of it than in the money part of it, which had a peculiar interest to Mr. Stockham. And I am inclined to adopt Mr. Stockham's contention that he did say it, because the same subject came up in the same way when he left Mr. Hillis's office. So that on the whole I think I must determine that point in Mr. Stockham's favour. Now, on that occasion Mr. Hillis was the buyer. And the application to Stockham for an extension was made for and on behalf of Hillis, and not for and on behalf of Cunningham. That, I think is abundantly clear, when we look at the whole of the evidence, and read Mr. Cunningham's examination for discovery. The defendant went out of the office; he was accompanied to his solicitor's office by the plaintiff, and he had done nothing in my opinion that shewed he was going to be bound. He was present, he was asked to put his hand to the agreement which they thought had been made, and which Mr. Hillis hoped would be made. He said no, I won't do that; I won't do anything until I see my solicitor. Now then, Cunningham saw this defendant almost every day after that at his house and he talked to him; and did nothing further. I think, by the time the 23rd of October had been reached, and the $2,000 tendered, that a reasonable time had passed, and I think it was open to the defendant if he saw fit to refuse to accept that tender.

I find as a fact that no notice was given by the defendant requiring the plaintiff to complete. In my opinion the case depends upon the plaintiff being able to shew that Hillis had made an agreement with the defendant under which the defendant was to waive the payment of the $2,000 and accept in lieu thereof $500, and I am not satisfied that the agreement was entered into. It is unfortunate that Mr. Hillis is not here.

From the facts of the case I draw the inference that the plaintiff himself had not the money, that he expected that Hillis would make the purchase; and it was not until the 23rd of October, the day upon which he made the tender, that he was in

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a position to handle the proposition. I find as a fact that he said they were waiting for the money to come from New York, on the Saturday.

The action will be dismissed.

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The appeal was argued at Victoria on the 24th and 25th of January, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., and *Elliott, K.C.*, for appellant (plaintiff): We contend that when accepted the agreement became binding on the vendor and he was bound to convey the limits, which would have to be within a reasonable time. No time being fixed in the contract, time could only be made of the essence by the vendor fixing some specific date. The option only requires that the timber shall be examined and cruised within 30 days; but even if the option was accepted, Stockham would not have been in a position to demand payment until he had cleared his title by disposing of the Alexander option. Stockham should not have allowed Hillis to have the impression that he (Stockham) was going to see his solicitor and that the option might be extended. He should have demanded his money, and not having done so, he has created an equity. Stockham did not refuse to sign the extension of the option, but left Hillis with the impression that he was simply going to see his solicitor. There was a duty on Stockham to fix a time for acceptance, and not having done so, the matter was thrown back into the open agreement.

Argument

Fell, for the respondent (defendant): We have nothing to do with Hillis; our option was with Cunningham, who knew of and took subject to the Alexander option. We contend that the cruising was to be within 30 days and then the acceptance and payment within a reasonable time, but the acceptance and payment were to be simultaneous.

Bodwell, in reply.

11th February, 1910.

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

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MARTIN, J.A.: I regret that I am unable to take the same view of this matter as my learned brothers. I think the option was duly accepted and so far as payment is concerned it became only a question of reasonable time and there could be no cancellation without reasonable notice.

GALLIHER, J.A.: This is an appeal from the judgment of Mr. Justice IRVING, dismissing the plaintiff's action for specific performance of an agreement, which is as follows:

"Agreement made this 4th day of September, 1908, between R. A. Cunningham of the City of Victoria, B.C., and Thomas Stockham, of the same place, in consideration of the sum of $1 now paid by R. A. Cunningham to Thomas Stockham and hereby acknowledged, he the said Thomas Stockham agrees to give R. A. Cunningham the exclusive right to purchase certain timber limits situated on or about Kennedy Lake, Clayoquot District, held under timber licenses numbers 12,801, 12,802, 27,354-5-6-7, 15,508, 15,509, 29,123-4-5-6-7-8, fourteen in all, and at and for the price of $1.50 per acre, under the following terms: Examination of and cruising of limits to be made by R. A. Cunningham or agents, within 30 days from the date hereof, and if accepted R. A. Cunningham shall pay Thomas Stockham the sum of $2,000 dollars and balance of purchase money in equal portions in 2-4-6 months from date of first payment with provision for postponement of payment on the two latter payments for 60 days and to bear interest at rate of six (6%) per cent. on each postponed payment. Signed, sealed and delivered in the presence of.

"Witness: "Thomas Stockham."

"Angus M. Stockham."

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The cruising was done within the 30 days mentioned in the agreement, and the evidence shews that the timber cruised satisfactorily.

The first question to be considered is: Was there an acceptance of the option by Cunningham, and when? And secondly, Was that acceptance within a reasonable time?

I agree with the learned trial judge that examination and cruising of the limits, and even the statement that they cruised satisfactorily, does not constitute acceptance. The agreement is unilateral, in fact, an option, and something more than that must be done to change it into an agreement binding on both parties. No time is fixed for acceptance in the agreement unless it must be inferred from the agreement itself and the understanding of the parties that it is to be within the 30 days, and if not, then it must be within a reasonable time. Up to the 5th of October

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could any one say that Cunningham had placed himself in a position where he had accepted or was bound to accept and pay for the timber?

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Let us examine the evidence on that point. The substance of Cunningham's evidence is that the timber was approved of by Hillis (a party who had become interested with Cunningham) and himself; and

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"And you accepted it on the 3rd of October in Mr. Hillis's office? Yes. "Did you accept the timber or simply say it was satisfactory? Satisfactory.

"Did you say that the option was accepted? No, I did not say that."

Cunningham also says he told Mr. Stockham on the 3rd that he intended to accept the option.

If this evidence stood by itself, I would have grave doubts as to whether Cunningham had expressed an intention to accept.

As opposed to that we have the evidence of Stockham:

"Hillis said the timber cruised good but he did not have the money to make the payment. It had to come from New York.

"I spoke to Cunningham outside (of Hillis's office) and said nothing sure about this deal going through, there is no money in sight, and he said he would see what he could do."

Up to this time I hold there was no acceptance.

Now, let us see what took place on the 5th of October. The parties went up to the office of Mr. Lawson, a solicitor who was acting for Hillis, and the situation was discussed and from the evidence apparently the parties concerned considered the option expired that day, and it seems to have still been treated as an option, for we find Mr. Lawson indorsing on the agreement for signature by Stockham, the following memorandum:

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"In consideration of the sum of one dollar I hereby extend the within option for a period of fourteen days from the date hereof.

"Dated October 5th, 1908. Seal."

and presenting it to Stockham for signature, but Stockham refused to sign without his solicitor's advice, and went away, and further negotiations dropped.

There was a discussion in Mr. Lawson's office that day about a letter written to Stockham by a firm of solicitors acting for one Alexander, to whom an option had been given on this timber prior to Cunningham's option claiming the timber, and Mr. Lawson in his evidence says that the extension of time asked for

in the memorandum before referred to was to see what happened to the Alexander option in the meantime.

If there is anything in that, the answer is simple.

Cunningham, with whom the defendant was dealing all through knew of the Alexander option, and knowing of it, had been urging Stockham to give him an option; had represented to Stockham that he had taken legal advice and that the Alexander option was not worth the paper it was written on, and had in fact posted the letter from Stockham to Alexander cancelling the option.

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I see nothing in what occurred on the 5th of October to alter the position of the parties as to acceptance.

Cunningham attempted to set up a verbal agreement between himself and Stockham on the 3rd of October, by which Stockham in consideration of being paid $500 was to extend the time of payment for five days from the 5th of October.

This is denied by Stockham and in any event nothing came of it, and no money was paid over or tendered and the extended time they wanted Stockham to sign for in Lawson's office was 14 days, as appears in the memorandum (but the evidence would seem to indicate 10 days), and not five days as Cunningham asserts the verbal agreement was.

Nothing further occurred of moment till the 23rd of October, when it is in evidence that $2 000 was tendered Stockham.

GALLIHER, J.A.

My view is (and it seems from the evidence to have been the understanding of the parties themselves), that acceptance should have been within the 30 days, but if I am wrong in that view, I have then to consider was the tendering of the $2,000 on the 23rd of October (which appears to me to be the first direct intimation of acceptance), within a reasonable time?

Having regard to the nature of the transaction, and the fluctuating character of the subject-matter, I am of opinion it was not.

The case seems to me to be one where Cunningham took the option in the hope of being able to dispose of the timber to a third party at a profit during the life of the option, and never intended to become bound until he saw that the money to pay

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for the timber was available, and that the alleged verbal agreement and the efforts to obtain an extension of time were for the purpose of delay until the money could come from New York.

I would therefore dismiss the appeal with costs.

Appeal dismissed, Martin, J.A., dissenting.

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Solicitors for appellant: *Elliott & Shandley.*
Solicitors for respondent: *Fell & Gregory.*

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McLEAN *ET AL.* v. NORTH PACIFIC LUMBER CO.

MCLEAN
v.
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Statute, construction of—Water Clauses Consolidation Act, 1897, R.S.B.C. Cap. 190—Water Act, 1909, Cap. 48, Secs. 329, 330, 332 and 333—Saving of rights acquired under former Act—Pending applications thereunder—"Continued to completion."

Section 329 of the Water Act, 1909, enacts that any applications under any former Act not completed at the time of the passing of the said Act may be continued to completion under such former Act, or under the Water Act, 1909, as the applicant may elect. Section 333 repeals the Water Clauses Consolidation Act, 1897, saving, *inter alia*, the right to complete any pending application thereunder.

Held, that the appellants here having acquired a right under the Water Clauses Consolidation Act, 1897, but that right not having been determined before the repeal of the Act by the Water Act, 1909, and they having elected, under the provisions of the new Act to continue their application to completion under the old Act, they were entitled to do so.

Statement

IN July, 1908, two applications were made, under the Water Clauses Consolidation Act, 1897, one by the appellants and one by the respondents, for water on the same creek, at about the same point, and for the same amount, namely, five inches. The commissioners granted the appellants a record of five inches and refused the respondents' application. The respondents appealed to the County Court judge under section

36, and the appeal was set down for hearing, but owing to adjournments, did not finally come up for hearing until the 16th of April, 1909, before which time the new Water Act, Cap. 48, 1909, had come into force.

The appellants objected on the hearing that the jurisdiction of the County judge had been taken away by the repealing clause of the Water Act, Sec. 333, but the learned judge, after argument, decided that he had a right to hear the appeal, and in his reasons for judgment granted the respondents one inch of water in priority to the appellants to whom he granted five inches. HOWAY, Co. J., in his reasons for judgment, said "This is an appeal under the provisions of the Water Clauses Consolidation Act, 1897, Cap. 190. At the hearing I held on preliminary objection that the right to proceed and prosecute this appeal was a right acquired under the old Act, Cap. 190, R.S.B.C. 1897, and consequently preserved by section 333 of the Water Act, 1909.

"This is a hearing *de novo*: *Ross* v. *Thompson* (1903), 10 B.C. 177.

"The stream in question is said to contain one and a half inches at its lowest stage. E. W. McLean and Hope Graveley & Co. in one interest, and the North Pacific Lumber Company Limited, applied for a record of it, at the same time. The water commissioner granted a record of five inches to the former. The North Pacific Company appeals against the grant to their opponents, and also against the refusal of their application.

Statement

"The Nicholas Chemical Company, successors to E. W. McLean and Hope Graveley & Company desire the water for the manufacture of acid—a commercial purpose—an unnatural use of the water. The North Pacific Lumber Company desire it for the domestic use of their employees—a natural and ordinary use. Between these two conflicting claims I have no hesitation in holding that those who wish the water for the purpose of maintaining life and for bodily cleanliness—who are using it for its manifest and natural purposes—have the better claim. But of course such claim must be limited to the reasonable requirements for the purpose in question.

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"The evidence satisfies me that one inch of water will supply the domestic requirements of all the North Pacific Lumber Company's employees who can use the stream.

"The record granted to E. W. McLean and Hope Graveley Company by the water commissioner on 16th of September, 1908, will, therefore, be set aside and the same is hereby set aside and cancelled. In its place, a record will issue in favour of the North Pacific Lumber Company for one inch for domestic purposes; and subject thereto a record to E. W. McLean and Hope Graveley & Co., Ltd., or their successors in title for five inches. As the success is divided, there will be no costs."

The appellants then applied for a writ of prohibition, and an order *nisi* was granted which was subsequently discharged.

22nd September, 1909.

CLEMENT, J. [on discharge of the rule]: This order *nisi* must, I think, be discharged. Section 333 of the Water Act, 1909, repeals the Water Clauses Consolidation Act, 1897, and the various amending Acts, but expressly saves and preserves any rights or privileges acquired thereunder. Before the coming into force of the Water Act, 1909, Mr. Wilson's clients had acquired the right of appeal given by section 36 of the earlier statute and had indeed actually exercised it by the filing of a petition within the time limited by the section. Such a right is a matter of substance and not of procedure: *Canadian and Yukon P. & M. Co.* v. *Casey* (1900), 7 B.C. 373; *Courtnay* v. *Canadian Development Co., ib.* 377, and cases there cited, and involves not merely the suitor's right but the jurisdiction of the tribunal to which the appeal is given. To save and preserve the suitor's right as section 333 clearly does, involves the continuance of jurisdiction in the named tribunal.

CLEMENT, J.

I may add that it seems impossible to construe the new Act so as to transfer to the chief commissioner any jurisdiction to hear these appeals. His jurisdiction under section 72 is to hear appeals from a water commissioner, an entirely new functionary, and in respect of decisions by such water commissioner under the new Act only.

From this judgment the appellants appealed to the Court of Appeal.

The appeal was argued at Vancouver on the 11th and 14th of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Sir C. H. Tupper K.C., for appellants: Whatever the respondents' rights are, they can be dealt with under the new statute, the jurisdiction of the County Court having been swept away by it and a new tribunal established for the settlement of all pending matters. Here no right is being taken away, but we say that the language of the Legislature is express, and they say that they have referred all these pending matters to their own tribunal, and laid down that they alone shall deal with them.

Bloomfield, for respondents: The appellants have gone too far in their proceedings under the old Act to elect under the new one. We had a right to the water a year ago, and our right to continue our application to completion under the old statute is preserved by the new one in the clearest language: sections 329 and 332. The intention of section 330 is that the applicant who was making an application, or had a pending application at the time chapter 48 came into force, and completed his application under the old Act must not be in any better position after he had obtained his record than any other old record holder. After he has obtained his record, that is "continued his application" to completion, he must then under Part III., apply to the tribunal established under section 9, and obtain a licence in exchange for his record. To grant the writ in this instance would be not to prevent a wrong being done, or to direct a right to enure, but on the other hand to perpetuate the erroneous record of the appellants and to deprive the respondents of a right, that is the right to the record of water to which they were entitled on September 16th, 1908. If the County Court jurisdiction is determined by section 333, then the commissioner's powers are also at an end, and it follows no application could be "continued" to completion under the old Act—which is contrary to the very apparent intention and express provision of section 329.

Argument

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MACDONALD, C.J.A.: I think the appeal should be dismissed. I think that section 332 of the Water Act gives Mr. *Bloomfield's* clients the right to elect to continue their application under the old Act, and that they did so elect.

IRVING, J.A.

IRVING, J.A.: I have reached the conclusion that the appeal should be dismissed, although at one time during the argument I thought otherwise. I have come to the conclusion that Part III. was never intended to take the place of an appeal to the County Court judge. The appeal to him may still be regarded as part of a pending application.

Part III. deals with the records and claims at the time of the pasing of the Act, or of its coming into force. The idea of that Part was that it should correct and deal with the uses of water whether held by record or otherwise.

The provision in section 330 means that in any event the applicant shall go to the Board established under Part III. That would not be necessary if this were to be regarded as an existing claim. The appeal from an original application under the new Act is not to the Board, but to the Chief Commissioner under section 72. The Board under Part III. has nothing to do with the preliminary question as to who is entitled to the water, but to the correction of grants or claims to water that have been dealt with by the water tribunal.

MARTIN, J.A.

MARTIN, J.A.: I think that the respondents having elected under section 329 to have the rights reserved to them under section 333 decided by the tribunal established under the old Act, are entitled to have that application, which is still pending, continued, which means continued to completion under the old Act and to use its machinery, and once having obtained a record in that matter, then apply for a licence under the new Act. The "right" here is not the right to appeal to the County judge but the right to a record. This view of the matter obviates any difficulty regarding the powers of the Board of Investigation under sections 9, 27, 29, *et seq.* and effectually harmonizes the working of the new system which is a construction which we ought to aim at if fairly open to us: *McGregor* v. *Canadian Consolidated Mines* (1906), 12 B.C. 116. In

this aspect of the matter it is not necessary to discuss the sections of the Act.

GALLIHER, J.A.: I agree that the appeal should be dismissed for the reasons just stated.

Appeal dismissed.

Solicitors for appellants: *Tupper & Griffin.*
Solicitors for respondents: *Wilson, Senkler & Bloomfield.*

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VASILATOS v. THE CORPORATION OF THE CITY OF VICTORIA.

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Municipal law—Periodical licence—By-law imposing fee for six months—Conditions in by-law eliminating Sundays from said period—Municipal Clauses Act, B.C. Stats. 1906, Cap. 32, Sec. 175, Sub-Sec. 11; 1908, Cap. 36, Sec. 21.

Where a municipal corporation is empowered to collect a licence fee "from any retail trader, not exceeding twenty dollars, for every six months," the licence to be granted "so as to terminate on the 15th day of July or the 15th day of January" the corporation may not stipulate that the applicant shall confine his trading to week days only of the period of the licence, and may not withhold the licence if he refuses to subscribe to such a condition.

APPEAL from a decision of IRVING, J., on an application to him at Victoria on the 14th of July, 1909, for a writ of *mandamus* directing the issue to the plaintiff of a retail trader's licence for six months from the 15th of July, 1909, to the 15th of January, 1910, inclusive. The plaintiff had applied for such a licence but, as a condition of its being granted him he was requested to sign an application in the following form: Statement

"I apply for a licence in the above business for Mondays, Tuesdays, Wednesdays, Thursdays, Fridays and Saturdays only."

and that he also sign the following agreement:

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"Agreed that this licence is good only for the following days: Mondays, Tuesdays, Wednesdays, Thursdays, Fridays and Saturdays, and the same is so accepted."

These conditions were embodied in a by-law purported to have been passed in pursuance of section 175, sub-section 11 of the Municipal Clauses Act, as enacted by section 21 of chapter 36 of 1908, which empowers the municipality to collect from any retail trader a licence fee, not exceeding $20, for every six months. IRVING, J., directed that a licence issue for a period of six months, from the 15th of July, 1909, to the 15th of January, 1910, and that such licence be free from the conditions prescribed in the said by-law. The Corporation appealed.

The appeal was argued at Victoria on the 25th and 26th of January, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

W. J. Taylor, K.C., for appellant Corporation: No wrong has been suffered by the respondent in being asked to agree not to do something which is already forbidden. Why should the Corporation not be able to issue a trading licence for the whole period mentioned, excepting Sunday, when there is the Dominion statute which prohibits Sunday trading? If a person were prosecuted by the Attorney-General under the Lord's Day Act, what answer would it be to such prosecution that the person offending had a municipal licence? He referred to Lord's Day Act, R.S.C. 1906, Cap. 153, Secs. 5 and 16.

Argument

Higgins, for respondent (plaintiff): Section 16 of the Lord's Day Act refers only to any Act respecting Sunday observance in force in any Province in Canada when the Lord's Day Act came into force. The by-law passed by the municipality was not in force at that time, so that section 16 does not apply.

[MACDONALD, C.J.A.: A trades licence issued in the ordinary way does not authorize a person to carry on business contrary to law.]

Precisely; that is my answer. See section 177 of the Municipal Clauses Act. There is no authority in the Corporation to compel an applicant for a licence to enter into an agreement not to trade on Sunday. Under this by-law a person cannot obtain a licence for six months. The statute makes all licences expire on

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the 15th of January. We submit that the licence must be for six months running continuously. The by-law is partial and unequal in its operation.

Taylor, in reply: The licence is a periodical licence; not one for six months; it must expire on the 15th of January.

Cur. adv. vult.

5th April, 1910.

MACDONALD, C.J.A.: Under section 175 of the Municipal Clauses Act, 1906, and amendments thereto

"Every municipality shall, in addition to the powers of taxation by law conferred thereon, have the power to issue licences for the purposes following, and to levy and collect, by means of such licences, the amounts following:

"(11.) From any retail trader, not exceeding twenty dollars for every six months."

By section 177, the trader is required to take out a periodical licence paying in advance such periodical sum as may be imposed, and by section 178:

"The licences to be granted as aforesaid may be in the Form B in Schedule One of this Act, and the same are to be granted so as to terminate on the 15th day of July or the 15th day of January."

Form B is as follows:

"(A.B.) has paid the sum of $..... in respect of a licence to ..... and is entitled to carry on the business of ..... at ..... from ..... to ..... $..... Signature ..... Collector ....." MACDONALD, C.J.A.

Purporting to act under the provisions of said section 175, the Council of the City of Victoria passed a by-law, No. 620, enacting as follows:

"8. Every retail trader obliged to take a licence under section 6 hereof, carrying on business in the City of Victoria shall, on the 14th day January and on the 14th day of July in each year, or in any one of the seven days preceding such dates, apply personally at the City Hall to the City Treasurer for a licence pursuant to this by-law, and if commencing business within the dates named, then shall so apply on the day of commencing business or within the seven days before that date. At the time of making the application, the applicant shall pay the $4.50 tax and shall sign an application form which shall contain besides the necessary wording applicable in each case, the following words:

"'I apply for a licence in the above business for Mondays, Tuesdays, Wednesdays, Thursdays, Fridays and Saturdays only.'

"9. Before the licence shall be issued out to the applicant therefor he

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shall, in the presence of some official of the corporation, sign a memorandum to be endorsed on such licence as follows:

"'Agreed that this licence is good only for the following days: Mondays, Tuesdays, Wednesdays, Thursdays, Fridays and Saturdays, and same is so accepted.'

"11. Any person carrying on any retail business described or included in section 6 hereof having neglected or refused to comply with the regulations contained in sections 8 and 9 of this by-law shall be deemed to have committed an offence, and upon conviction be liable to a penalty not exceeding $50, but this provision shall not supersede or in any way interfere with the liability for penalties imposed by section 179 of the Municipal Clauses Act."

On the 8th of July, 1909, the plaintiff applied to the collector for a retail trader's licence, and tendered the proper fee therefor. The collector refused to issue a licence unless the plaintiff complied with sections 8 and 9 of the by-law, which the plaintiff declined to do (other than to pay the fee) and the collector refused to issue to him a licence. The plaintiff on the following day issued the writ in this action for a *mandamus* to compel the issue to him of a licence for six months from the 15th day of July, 1909, to the 15th of January, 1910. On the 21st of July, IRVING, J., in Chambers, made the order asked for and from that order the defendants appealed to this Court.

Mr. *Taylor,* for defendants, urged that to order the defendants to issue a licence in the form provided by Schedule B would be to compel them to license the plaintiff to commit breaches of the Lord's Day Act; that the use of Form B was not mandatory; that as the Corporation had the right under section 50 (105) of the Municipal Clauses Act, 1906, to pass by-laws for the observance of the Lord's Day, it could do indirectly in manner proposed by the by-law in question what it had power to do directly under said sub-section 105.

MACDONALD, C.J.A.

Section 175 was, in my opinion, meant to confer upon a municipal corporation merely the power to impose a tax for revenue purposes. The trader has a right to carry on his lawful business subject only to the liability to pay the tax. I do not agree with the proposition that what the Corporation had power to do directly it could do indirectly. If that were so, the Corporation could refuse to permit a trader to carry on business by refusing a licence, unless he signed an agreement to pay his land taxes or

to refrain from committing a nuisance on his premises. Indeed, if the argument were sound, there would be no end to the impediments which the Corporation, under cover of a by-law of this sort, could throw in the way of legitimate trading.

The contention that a licence in Form B would amount to an authority from the Corporation to the trader to commit breaches of the Lord's Day Act, or any other law, is to my mind quite fallacious.

As to whether the use of Form B is mandatory or not, I am inclined to think that it is, but I do not decide that. What I do decide, however, is that the licence must be either in that form or to that effect, and can not be withheld until conditions such as are imposed by the by-law in question, are complied with by the trader.

MACDONALD, C.J.A.

I think the appeal should be dismissed.

MARTIN, J.A.: I concur with the result arrived at by my learned brother, the Chief Justice, although not entirely on the same ground. I am inclined to think that a great deal can be said in favour of a corporate act being exercised in this way, *viz.*: to regulate Sunday observance.

MARTIN, J.A.

But seeing that in one particular the agreement which they require this man to sign is unauthorized in any event by the statute—that is to say, in regard to the sale of milk, which is a non-intoxicant beverage, the sale of which is specially authorized by one sub-section of section 50, *viz.*, (183), though sought to be prohibited by section 6 of the by-law—therefore the by-law in its present shape, at least, cannot be supported.

I think it is better to put my judgment on that ground, that they have required a condition which, in any event, is unauthorized. Therefore the appeal cannot stand.

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

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellant Corporation: *Mason & Mann.*
Solicitor for respondent: *F. Higgins.*

CLEMENT, J.

1910

March 3.

KILPATRICK v. STONE

KILPATRICK v. STONE *ET AL.*

Fixtures—Machinery attached by bolts and screws—Mortgage of "land and premises," "buildings, fixtures," etc.—Seizure of mill plant and machinery for debt—Claim by mortgagee to as part of freehold.

By two separate instruments at different dates, plaintiff obtained mortgages on certain "land and premises, including all buildings, fixtures," etc., such land and premises, comprising a sawmill built on mud sills, spiked to piles. The mill having been seized for debt, the plaintiff claimed the plant and machinery under his mortgage as part of the freehold. The plant was in general affixed to the structure by heavy bolts going through the beams or sills, and apparently could have been removed by unscrewing without injury to the building.

Held, that the method of attachment of the machinery adopted shewed that it was the intention that the machinery was to be, and in fact did become a part of the mill building, which was itself part of the land; and further, that the form of the mortgages shewed that it was the intention that the mortgagee should take under them certain rights in the fixed plant in addition to his rights as grantee of the land.

Statement

INTERPLEADER issue tried at Vancouver, by CLEMENT, J., on the 25th of January, 1910. By a mortgage, dated the 5th of October, 1907, J. W. Bryden granted and mortgaged to the plaintiff, Kilpatrick, an undivided three-quarters of the "land and premises" on which a certain sawmill at Cumberland, B.C., was situate. By a second mortgage of the 16th of December, 1908, Bryden granted and conveyed by way of mortgage to the said Kilpatrick, an undivided one-quarter of the same "land and premises," together with "all buildings, fixtures, commons, ways, profits, privileges, rights, easements and appurtenances to the said hereditaments belonging, or with the same or any part thereof held and enjoyed or appurtenant thereto, and all the estate, right, title, interest, property, claim and demand of him the said mortgagor, to or upon the same premises." The mill, a substantial building with shingle roof, was built on mud sills, and on sills laid on piles and spiked to the piles. The mill, which contained considerable plant and machinery, was seized.

The plaintiff claimed the plant and machinery above mentioned, under his mortgages as part of the freehold. The defendants, however, instructed the sheriff to persist in possession. LAMPMAN, Co. J., ordered an interpleader issue. When it came to trial the defendants relied on section 4 of the Bills of Sale Act, defining trade machinery, and disclaimed a water turbine wheel, double friction feed works and the shafting. The other machinery was generally affixed to the main structure of the mill by heavy bolts in most cases going through beams or mud sills of the mill. These bolts were mainly to steady the machinery and keep it in place, and the machinery could have been removed by unscrewing the bolts and without damage to the other parts of the freehold.

Statement

Sir C. H. Tupper, K.C., for defendants: The machinery (excepting what we have disclaimed) was capable of seizure because the mortgages were not registered under the Bills of Sale Act. He cited *Warner* v. *Don* (1896), 26 S.C.R. 388; *Topham* v. *Greenside Glazed Fire-brick Company* (1887), 37 Ch.D. 281; *In re Burdett* (1888), 20 Q.B.D. 310; *Small* v. *National Provincial Bank of England* (1894), 1 Ch. 686 to 690; and *Johns* v. *Ware* (1899), 1 Ch. 359. We also contend that neither the mill building, nor any of the machinery, can be called fixtures.

Woodworth, for the plaintiff: Section 4 of the Bills of Sale Act, does not apply except where the trade machinery is separately assigned or charged apart from the freehold. He cited *In re Yates, Batcheldor* v. *Yates* (1888), 38 Ch.D. 112 at pp. 120 to 123; *Brooke* v. *Brooke* (1894), 2 Ch. 600 at p. 612; *Sheffield and South Yorkshire Permanent Benefit Building Society* v. *Harrison* (1884), 15 Q.B.D. 358 at p. 362. He contended that both the machinery and the mill, as between mortgagor and mortgagee, were fixtures, and cited *Reynolds* v. *Ashby & Son* (1903), 1 K.B. 87, (1904), A.C. 466; *Hobson* v. *Gorringe* (1896), 66 L.J., Ch. 114; *Longbottom* v. *Berry* (1869), L.R. 5 Q.B. 123; *Holland* v. *Hodgson* (1872), L.R. 7 C.P. 328; *The Goldie & McCulloch Co.* v. *Hewson* (1901), 35 N.B. 349; *Stack* v. *Eaton* (1902), 4 O.L.R. 335. He also referred to all the cases cited in 12 Camp. R. C. at p.

Argument

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221; and also, *Ellis* v. *Glover & Hobson, Limited* (1908), 1 K.B. 388; *In re Whaley* (1908), 1 Ch. 615; *Monti* v. *Barnes* (1901), 1 K.B. 205; *Howie* v. *McClay,* 5 F. 214; *Haggert* v. *The Town of Brampton* (1897), 28 S.C.R. 174; and *Canadian Bank of Commerce* v. *Lewis* (1907), 12 B.C. 398.

March. 3rd, 1910.

CLEMENT, J.: On the authority of *Reynolds* v. *Ashby & Son* (1904), A.C. 466, 73 L.J., K.B. 946, and the cases there cited, I hold that the machinery in question was land covered by the plaintiff's mortgages at common law; except the loose piece of belting and one circular saw not actually attached at the date of the seizure by the sheriff. I need not describe the method of attachment as detailed at length by the witness Cessford; suffice it to say that the method adopted shews that the machinery was to be, and in fact became, part and parcel of the mill building, which was itself part of the land.

I am further of opinion that the plaintiff's mortgages were not assurances of personal chattels so as to require registration under the Bills of Sale Act (B.C. Stat. 1905, Cap. 8). *In re Yates, Batcheldor* v. *Yates* (1888), 38 Ch.D. 112, 57 L.J., Ch. 697, is, I think, decisive. In the language of Lindley, L.J.: "The trade machinery passes as a portion of the land, not as personal chattels; and if you look at this conveyance"—in this case, these mortgages—"you cannot find from first to last, anything about personal chattels." *Small* v. *National Provincial Bank of England* (1894), 63 L.J., Ch. 270, is, I think, clearly distinguishable. There—to quote the headnote—"the form of the mortgage shewed that it was the intention that the mortgagees should take under it certain rights in the fixed plant in addition to their rights as grantees of the land." There is nothing of that sort here. These are land mortgages pure and simple.

Judgment

Judgment for plaintiff.

STAR MINING AND MILLING COMPANY, LIMITED v. BYRON N. WHITE COMPANY (FOREIGN) (No. 2).

COURT OF APPEAL

1910

April 7.

STAR v. WHITE

Practice—Costs—Taxation—Interest on costs—When to be computed from—Interest Act, R.S.C. 1906, Cap. 120, Secs. 12-15.

An appeal from the judgment of CLEMENT, J., reported *ante*, p. 11, was allowed, GALLIHER, J.A., dissenting.

APPEAL from the judgment of CLEMENT, J., reported *ante*, p. 11. The appeal was argued at Vancouver on the 7th of April, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A. Statement

S. S. Taylor, K.C., for appellant (plaintiff) Company: Judgment was originally obtained on the 23rd of November, 1907; the costs were taxed on the 19th of July, 1909, and an addition of some $326.25 made on the 21st of October, 1909. The question is whether we are entitled to interest on costs from the date of judgment or from the allocatur. They say that we should have had interest from the 19th of July, 1909; we say that we should have had interest from the 23rd of November, 1907, being the date of the judgment on the whole amount. See the Interest Act, R.S.C. 1906, Cap. 120, Secs. 12 to 15. A judgment debt shall bear interest, and a judgment for costs is a judgment debt. He cited and referred to *Schroder* v. *Clough* (1877), 35 L.T.N.S. 850; *Boswell* v. *Coaks* (1887), 36 W.R. 65, 57 L.J., Ch. 101; *Taylor* v. *Roe* (1894), 1 Ch. 413; *In re London Wharfage and Warehousing Co.* (1885), 33 W.R. 836, 53 L.T.N.S. 112. Argument

Bodwell, K.C., for respondent (defendant) Company: The Court by the terms of its order has postponed the payment. The judgment contains a number of declarations; the only money demand which is recovered are the costs, and the practical terms of the judgment are that the costs are to be paid after they are taxed. Until that taxation takes place, no judgment for

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money has been rendered. The debt has to be ascertained, and is to be paid when ascertained. Consequently this is a case in which the Court has "otherwise ordered." The judgment is that on a certain day defendant Company are to pay a certain sum to be ascertained. There is no principal sum recovered here, therefore there is no judgment debt. The Court itself has postponed the date of payment.

Taylor, was not called upon in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal ought to be allowed. The judgment is in the form very commonly used for 20 years to my own knowledge, and all that it means is that the costs were given subject to taxation. This form of order does not imply that the interest, which is given by statute, shall not commence to run until the date of taxation.

IRVING, J.A.

IRVING, J.A.: I agree. The formula is a clumsy one. As there is no special mention that interest shall not run, I think the words "forthwith after taxation" may be rejected as surplusage. It is quite evident that in framing the order no person was considering the question of interest.

MARTIN, J.A.

MARTIN, J.A.: I concur. I prefer to put my judgment on the ground that the direction as to the payment of the costs forthwith after taxation may be regarded as mere surplusage having regard to the fact that no costs can be paid without taxation. Since I settled the order under consideration, I think it desirable to add that I now note that it contains the expression "costs of and incidental to this action," and I wish to say that if I had noticed the words "and incidental to" I should have struck them out, as in this case at least—as in most cases—they are as unnecessary as they are uncertain, if not, indeed, misleading.

GALLIHER, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I agree with the learned judge below who found that the plaintiffs were entitled to exercise certain rights. Costs followed as an incident—having settled or given power to the plaintiff to exercise those rights, he proceeds to settle the question of costs solely, and he fixes a specified time for the respondents to pay the

costs. The parties are now dealing with something by itself—they are dealing with the costs, not with the judgment which has gone before.

Appeal allowed, Galliher, J.A., dissenting.

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Solicitors for appellant: *Taylor & Harvey.*
Solicitors for respondent: *Bodwell & Lawson.*

IN RE LEE HIM.

GREGORY, J.
1910
April 15.
IN RE LEE HIM

Statute, construction of—Chinese Immigration Act, R.S.C. 1906, Cap. 95, Sec. 7—Exemption from entry tax—Onus on applicant—Appeal from decision of controller of customs—Habeas corpus—Mandamus.

The Chinese Immigration Act, by section 7, imposes an entry tax upon all immigrants of Chinese origin coming into Canada, but by sub-section (*c.*) exempts merchants and certain other persons, who are required to substantiate their status to the satisfaction of the controller of customs, subject to the approval of the minister of customs.

Held, that an applicant dissatisfied with the controller's decision, should proceed by way of appeal to the minister of customs, and that if it should ultimately become necessary to apply to the Court for assistance, the proceeding should be by *mandamus* and not by *habeas corpus*.

APPLICATION for a writ of *habeas corpus* heard by GREGORY J., at Vancouver on the 11th of April, 1910. The applicant, Lee Him, left Canada and went to China in February, 1908. On his return in March, 1910, he claimed exemption from payment of the entry tax as a Chinese merchant pursuant to section 7 of the Chinese Immigration Act. The controller of customs did not allow the claim, and the applicant took these proceedings.

Statement

J. W. de B. Farris, for the application.
Senkler, K.C., contra.

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IN RE LEE HIM

15th April, 1910.

GREGORY, J.: I am not at all clear that this is a proper case to move against the controller for *habeas corpus* for, by section 5 of the Act, Cap. 95, R.S.C. 1906, Lee Him is still deemed to be on board the vessel by which he arrived and the controller only interferes with his liberty to the extent of saying that he shall not land without complying with the provisions of the Act. In all other respects, he is, so far as the controller is concerned, absolutely free. I am inclined to think that, if the controller is acting improperly, the proper way to proceed against him is by *mandamus*. But the order *nisi* has been granted and a return made that he is detained because he is a Chinaman and has not paid the $500 entry tax, claiming to be exempt therefrom on the ground that he is a merchant, but that he has not substantiated that fact to the satisfaction of the controller. While admitting that the question is not free from doubt, it seems to me that, Parliament having designated the controller as the person who shall decide whether the applicant for admission is a merchant, with an appeal to the minister, it must be presumed that Parliament did not intend that the controller's action should be also reviewed by the Courts. In fact, if *habeas corpus* lies at all, it would be equally available after the minister had signified his approval. If the statute had been silent upon the point as to who was to pass upon the status of the applicant, the customs officers would undoubtedly have done it in the first instance. Their action would have been subject to the approval of their superiors, *viz.*: the controller and the minister, but, in addition, the Courts would have an undoubted right to finally determine the question. To allow the same procedure—which is practically what Lee Him asks for in this case—is to give no effect to the words of the statute designating the controller as the person to decide that question and the words may be rejected as surplusage, which will not be done if it is possible to give an effect to them which is in accord with the scope and object of the statute as a whole. That, it seems to me, can be done here by holding that the controller, subject to the approval of the minister, shall decide the question. It is his opinion which is

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to govern. As stated by Lord Bramwell in *Allcroft* v. *Lord Bishop of London* (1891), A.C. 666 at p. 678, where the House of Lords refused to interfere by *mandamus* with the opinion of the bishop: "If a man is to form an opinion, and his opinion is to govern, he must form it himself." And their Lordships absolutely refused to form or express any view as to the correctness of the bishop's opinion.

This conclusion does not in any way conflict with the decision of the Full Court in *Ikezoya* v. *C.P.R.* (1907), 12 B.C. 454, and is in accord with the suggested dictum of CLEMENT, J., at p. 459.

Judgment

See also *Nishimura Ekiu* v. *United States* (1892), 142 U.S. 651, which is very similar to the present case, but where the statute was somewhat more explicit in its terms, though the right to apply to the Courts was not expressly taken away.

The order *nisi* will be discharged on the usual terms.

Application refused.

REX v. KLEIN.

IRVING, J.
1909
June 19.
REX
v.
KLEIN

Criminal law—Conviction by magistrate—Reading depositions to witnesses before accused enters on his defence—Criminal Code, Secs. 682, 711, 721, 796, 797, 798.

Section 798 of the Code relieves the magistrate from the duty of reading the depositions to the witnesses before the accused enters on his defence.

MOTION, on the return of a rule *nisi*, to quash a conviction by a magistrate, acting under the summary jurisdiction provisions of the Code, heard by IRVING, J., at Victoria on the 19th of June, 1909.

Statement

Morphy, in support of the motion.

Maclean, K.C., (D. A.-G.), contra.

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19th June, 1909.

IRVING, J.: Mr. *Morphy's* contention is that a magistrate in dealing with a case under Part XVI. is, by virtue of section 711, bound to take depositions in the manner prescribed by section 682. At first I thought that this contention was correct. It seems so reasonable a construction of the Act, and so desirable a practice for magistrates to observe, that one is disposed at first sight to accept it as sound; but section 798 places the point in a different light.

Section 798 provides that, except as specially provided for in sections 796 and 797 (which two sections have nothing whatever to do with the manner of taking the evidence) neither the provisions of the Act relating to preliminary inquiries before justices, nor of Part XV. shall apply to proceedings under Part XVI. Part XV. relates to summary convictions. Section 788 (4) therefore, must be read as authorizing the magistrate to proceed "to dispose of the case summarily" without regard to the provisions of the following sections, *viz.*: 682, 711, 721.

The result is that section 798 relieves the magistrate from the duty of reading the depositions over to the witness, before the prisoner enters on his defence.

Judgment

Although the conviction cannot be questioned because the magistrate did not read over to the witnesses their depositions, I think that magistrates, when they are proceeding under Part XVI. would be adopting a good practice if they took the depositions in the manner prescribed by section 682, reading them to the witnesses in the presence of the accused, and dispensing with the signature only when necessary.

The other points raised on the prisoner's behalf I disposed of on the argument.

The conviction, therefore, stands.

Motion dismissed.

HOVELL v. THE LAW SOCIETY OF BRITISH COLUMBIA.

MORRISON, J.
1909
May 6.
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1910
April 5.
HOVELL v. LAW SOCIETY

Statute, construction of—Law Society—Powers of—Legal Professions Act, R.S.B.C. 1897, Cap. 24, Sec. 41—Power to make rules—Call to the bar—What proceedings constitute—Fee upon call—When payable.

Under section 37 (*g.*) of the Legal Professions Act, the benchers of the Law Society, having been empowered to make rules governing "the fees to be paid to the Society upon call to the bar . . . . ," passed a rule, 103, directing that " the following fees shall be paid to the Society . . . . on examination for call to the bar, $100. In the event of an unsuccessful examination $75 will be returned"; and, Rule 60, "the prescribed fees must accompany the notice." Plaintiff was entitled to apply for call under section 41 of the statute, "upon passing such examination . . . . and upon payment of the prescribed fees." He gave notice and presented a petition for call, but declined to pay at that time the fee prescribed.

Held (IRVING, J.A., dissenting), that "call to the bar includes all the preliminary proceedings and steps connected therewith, such as payment of the fee, the examination and compliance with other proper requirements of the Act and Rules; that when the Society imposed by Rule 103 a fee of $100 upon call to the bar, they intended to impose the fee authorized by section 37, and were entitled to insist upon payment of that fee before entering upon the expense to be incurred by calling the applicant to the bar.

The rider to Rule 103, providing for the return of $75 to an unsuccessful applicant is separable from the part prescribing the fee.

Decision of MORRISON, J., reversed.

APPEAL from the decision of MORRISON, J., on an application for a writ of *mandamus* to compel the benchers of the Law Society of British Columbia to examine the plaintiff as to his fitness to be called to the bar without first paying the fee prescribed by the rules of the Society made pursuant to the Legal Professions Act. Statement

Abbott, in support of the application.

Bass, contra.

6th May, 1909.

MORRISON, J.: The claim of Robert DeBerdt Hovell, the plaintiff herein, is for a *mandamus* commanding the benchers MORRISON, J.

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of the Law Society of British Columbia to examine his fitness to become a barrister of this Court, pursuant to the provisions of the Legal Professions Act, and without the payment first being made of the sum of $100 required by the defendants as a fee upon such examination. And the present application is for a rule *nisi* calling upon the defendants to shew cause.

The notice for call, as appears from the exhibit filed, is dated March 28th, 1900, but I presume that date is intended to be 28th March, 1909. The petition also is so dated. In support of this petition is filed an affidavit of the plaintiff. I confess I find it difficult to gather from this material what is the plaintiff's particular grievance. The notice intimates the intention to present himself to the benchers in July for the purpose of being called to the bar. The petition sets forth the fact that the plaintiff is a duly qualified solicitor in good standing and active practice, and expresses a desire to be "called to the degree of barrister-at-law," and prays, "that his qualifications being first examined and found sufficient according to the rules of the Society and standing orders of the benchers in that behalf, he may be called to the said degree accordingly; and he doth hereby undertake and promise that he will faithfully and truly submit and conform himself to and obey, observe, perform, fulfil and keep all the rules, resolutions, orders and regulations of the said Society during such time as he shall continue on the books of the said Society as a member thereof."

MORRISON, J.

The affidavit sets out the fact that the notice above referred to was given and that he presented himself to the benchers praying that his qualifications may be examined and paragraph 4 is as follows:

> "The benchers of the defendant Society claim payment by me of a fee of $100 on their filing the said notice and petition; I decline to pay such fee, believing that the benchers of the defendant Society are not authorized to levy the same."

This material is certainly not in good shape and barely sufficient to justify serious consideration. However, counsel for the defendant did not object to it and I shall therefore deal with the merits.

The point involved seems to be whether the benchers may

exact the payment of the fee in question from an applicant for his final examination as a condition precedent to his taking such examination.

The powers of the benchers are set out in section 37 of the Legal Professions Act. Sub-section (*g.*) thereof gives them power to make rules respecting the fees to be paid to the Society upon call to the bar or admission as a solicitor.

Section 41 enacts that

"Any solicitor of this Province who has been in actual practice for one year immediately preceding his application for call to the bar may (subject to the rules of the Society) and upon payment of the prescribed fees be called to the bar upon passing an examination to the satisfaction of the benchers touching his fitness to become a barrister," etc.

These are the only sections touching the point herein.

Pursuant to the provisions of this Act the benchers passed certain rules to which are appended a schedule of fees payable to the Society, amongst them being the objectionable one, *viz.*:

"On examination for call to the bar $100. In the event of an unsuccessful examination $75 will be returned."

It is this fee which the defendants require to be paid now and which the plaintiff declines to pay. The power to exact such a fee does not seem to me to have been given by the Act. In order to impose a burden, an enactment must be reasonably clear and explicit and very little, if anything, should be left to intendment: *Simpson* v. *Teignmouth and Shaldon Bridge Company* (1903), 1 K.B. 405; *Horan* v. *Hayhoe* (1904), 1 K.B. 288.

MORRISON, J.

There are several of those rules which do not appear to have the sanction of the Act. Rule 57, for instance, requires that candidates for all final examinations must pay the prescribed fee before taking the examination. Mr. *Bass* invokes sub-section (*g.*) of section 37, *supra,* in support of this, but I do not think a power to pass rules respecting fees to be paid upon call can be exercised to enable the benchers to impose a fee for a final examination. Sub-section (*h.*) of section 37 of the Act gives the power as regards intermediate examinations. If sub-section (*g.*) can bear the construction sought to be put upon it on behalf of the defendants, then it would seem that sub-section (*h.*) is superfluous.

The English Solicitors' Act to which I am referred contains

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an explicit enactment empowering fees to be imposed in respect of the various examinations. See section 8.

The application is granted, but without costs.

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The appeal was argued at Vancouver on the 1st of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant Society: The term "call" does not mean only the appearance of the applicant before the benchers, but extends to the whole of the proceedings connected with the application of the person seeking call and the final acceptance, of such application by the benchers in the appearance of the applicant before them. The details of working out the statute are left with the benchers by the Legislature, and one of these details would be the fixing of the time when call shall take place, and the necessary steps in connection therewith, just as any ordinary corporation shall settle on its mode of doing business. It would not be either desirable or convenient to have a person's application coming in piecemeal. The rule, we submit, is both reasonable and within the powers of the Society: *Slattery* v. *Naylor* (1888), 13 App. Cas. 446.

Argument

Abbott, for respondent: This statute, giving a private corporation power to impose fees, must be construed strictly against the corporation. We admit that they have a right to impose a fee for call, but not for examination, and that is what they have done in this case. "Call" in this statute is a broader expression than as used in England. We say that "call" and "examination" are entirely different matters.

McPhillips, in reply: The only question is, whether the language of Rule 103 is sufficient; whether we have properly carried out the authority given to us. The rule merely specifies a date on which the fee is payable. On a perusal of the whole of the rules we say it was reasonable for the draftsman to fix the time of payment of the fees.

Cur. adv. vult.

5th April, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The respondent is a solicitor entitled to take advantage of the provisions contained in section 41 of the

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Legal Professions Act, reading as follows: [already set out].

On the 28th of March, 1909, the respondent gave notice and presented a petition as provided for by Rule 60 of the rules of the appellant, but declined to send with them the prescribed fees.

The appellant is authorized by the said Act, Sec. 37, to make rules respecting "(*g.*) The fees to be paid to the Society upon call to the bar or admission as solicitors." Purporting to act under such authority the appellant made the following rule:

"103. The following fees shall be paid to the Society in respect of the matters hereinafter set forth:

"On examination for call to the bar, $100.

"In the event of an unsuccessful examination $75 will be returned."

The issue between the parties is defined in the following paragraph of the respondent's affidavit:

"(4.) The benchers of the defendant Society claim payment of the fee of $100 on their filing the said notice and petition. I decline to pay such fee, believing that the benchers of the defendant Society are not authorized to levy the same."

It seems to me that the respondent was ill-advised in refusing to deposit the $100 fee. This fee is clearly payable before call, and I think that appellant kept within the Act when it provided in its Rule 60 that the fee should accompany the notice and petition.

MACDONALD, C.J.A.

But respondent contends that the fee is by Rule 103 a fee on examination for call, and, in answer to the suggestion that this was nothing more than an inartistic way of describing the fee for call, he points to the rider which, in effect, allocates $25 of the fee to the examination itself where call does not follow. Here, it seems to me, we find the only difficulty in the case. Neither the Act nor the rules, apart from whatever may be the proper interpretation of Rule 103, in terms authorize or impose a fee for the examination *qua* examination; and it may be that a plucked candidate could recover back the sum which the appellant assumes to deduct from the fee apparently to cover the costs of the examination. But the respondent has not arrived at that point yet. The rider to Rule 103 may be bad, but it is separable from that which prescribes the fee "on exami-

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nation for call," and, while perhaps the fee is not very aptly prescribed, I am of opinion that that part of Rule 103 which prescribed the fee ought not to be given the narrow interpretation which was contended for by the respondent, namely, that it was not a fee for call to the bar within the authority granted by said section 37 of the Act.

I think the fair interpretation of the Act and rules requires us to hold for the purposes of this appeal that call to the bar includes all the preliminary things immediately connected therewith, such as the payment of the fee, the examination and compliance with other proper requirements of the law, and that, when the appellant prescribed a fee of $100 in the words used in Rule 103, it intended to impose the fee authorized by section 37, and is entitled to insist upon payment of that fee before entering upon the expense entailed upon it in calling an applicant to the bar.

MACDONALD, C.J.A.

I would allow the appeal.

IRVING, J.A.: The section under which the plaintiff claims a right requires him to pay the "prescribed fee." Turning to the rules, I am unable to find any fee prescribed for payment on call. But there is a fee payable "on examination for call," but the Act does not authorize the Law Society to levy a fee for examination, nor is the plaintiff required to pay any fee unless it has been prescribed.

IRVING, J.A.

I do not regard this as a tax Act, but I think when the Legislature has committed to a rule-making body the power to prescribe fees, that body should state the fees payable with precision. In my opinion the plaintiff's contention is well-founded and the appeal should be dismissed.

MARTIN, J.A.: Martin, J.A., concurred with MACDONALD, C.J.A., in allowing the appeal.

MARTIN, J.A.

GALLIHER, J.A.: This is an appeal from the judgment of MORRISON, J., pronounced on the 6th of May, 1909.

GALLIHER, J.A.

The facts are, shortly, these:

The plaintiff, a practising solicitor in Vancouver, applied to the benchers of the Law Society for call to the bar, and

deposited the necessary papers required by the rules of the Society, but did not with such application deposit the fees as required by Rule 60.

The Society refused to enter the plaintiff on its books as an applicant for call as the prescribed fee had not been paid, whereupon the plaintiff moved for a writ of *mandamus* to compel the Society to enter him as such applicant.

The matter came on for hearing before MORRISON, J., who granted the rule *nisi*, and against this ruling the defendants appeal.

Section 37 of the Legal Professions Act, R.S.B.C. 1897, Cap. 24, defines the powers of the benchers and provides, among other things, that they may make rules respecting "(*g.*) the fees to be paid to the Society upon call to the bar or admission as solicitors."

This carries with it the right to say when these fees shall be payable, and Rule 57 is as follows:

"Candidates for all final examinations must pay the prescribed fee before taking the examination,"

and the fee prescribed for examination for call (Rule 103) is $100; then rule 60 provides that every candidate for call to the bar must deliver a written notice in a certain form, and also his petition for call, and the prescribed fees must accompany the notice, and Rule 67 provides for compliance with Rule 60.

GALLIHER, J.A.

Section 41 of the Act provides for call in cases such as the present, and one of the requisites is payment of the prescribed fees.

It is contended on behalf of the respondent that the fee fixed by the Society is a fee for examination for call and not a fee for call, and that the Society have no power to fix such a fee, or in any event it is a fee partly for call and partly for examination.

The words used are:

"On examination for call to the bar, $100.

"In the event of an unsuccessful examination $75 will be returned."

In considering the powers granted to the Society and the rules framed thereunder, I cannot give it that interpretation. I regard the $100 as the fee for call pure and simple, the words "on examination," if they have any bearing, being referable only to the time as prescribed by the rules, and in accordance with

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them, when the fee shall be paid, and I do not regard the words which follow, and which I have quoted above, as in any way fixing a separate fee for call and for examination.

I take them to mean nothing more than a notice to the applicant that in case he fails in his examination, $25 will be deducted from the fees paid in to cover expenses of examination, and that the intention of the Society was to prevent applicants presenting themselves unprepared and putting the Society to unnecessary expense.

Whether the Society can legally deduct such sum is not before us, and we are not called upon to decide that point.

I would allow the appeal.

Appeal allowed, Irving, J.A., dissenting.

Solicitor for appellant: *Oscar C. Bass.*
Solicitor for respondent: *Abbott & Hart-McHarg.*

REX v. RHAMAT ALI (No. 2).

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REX
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RHAMAT ALI

Criminal law — Conviction by police magistrate — Jurisdiction — Criminal Code, Sec. 777—Application of to British Columbia—City of Vancouver—Population—Dominion census—Judicial notice.

Section 777 of the Criminal Code, as amended by Chapter 9 (Dominion), 1909, is applicable to the Province of British Columbia.

Judicial notice will be taken of a Dominion census.

Where, therefore, the Code, by said amendment, gives jurisdiction in certain cases to a police magistrate for cities having a population of over 25,000:—

Held, that the census returns for the City of Vancouver, having been published by authority of a Dominion Act, the Court will take cognizance of such a notorious fact without requiring formal proof.

EX PARTE application for writ of *habeas corpus* to discharge a prisoner confined in the common gaol under a conviction of the police magistrate for the City of Vancouver. The grounds relied upon were, firstly, that section 777 of the Criminal Code, as amended by Chapter 9, statutes of Canada, 1909, does not apply to the Province of British Columbia, and, secondly, that, if it does, there was no evidence before the magistrate and there is nothing in the conviction to shew that the City of Vancouver has a population of 25,000. Heard by GREGORY, J., at Vancouver on the 5th of April, 1910. Statement

Woods, in support of the application.

6th April, 1910.

GREGORY, J.: As to the first contention, it seems to me it is untenable. Sub-section 2 of section 777, Criminal Code (1906), in express language makes the previous sub-section (1) (referring to the Province of Ontario) apply to every other city and incorporated town in Canada having police and stipendiary magistrates. The statute of 1909 extends this provision to district magistrates and judges of sessions in the Province of Quebec and to judges of the Territorial Court and police magistrates in the Yukon Territory (where I believe there are no Judgment

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cities or incorporated towns) but it limits the jurisdiction of these magistrates to cities having a population of not less than 2,500. A perusal of the Acts will shew that the identical language used in the 1906 Act is followed in the 1909 amendment so far as it is possible to do so, and at the same time provide for other changes. I cannot think that Parliament had any intention of limiting the provisions of section 777 to the Provinces of Ontario, Quebec and the Yukon Territory; and section 9 of the Interpretation Act, Cap. 1, R.S.C. 1906, provides that every Act shall apply to the whole of Canada unless the contrary appears.

As to the second contention, it seems to me that it also is untenable. The provision relating to cities of 25,000 population refers to trials by magistrates without the prisoner's consent, but the magistrate has jurisdiction to try a prisoner, with his consent, in cities, etc., having a population of 2,500, and that consent appears by the conviction to have been given in this case. The Court will take judicial notice of such a notorious fact as that the population of the City of Vancouver was at the last Dominion census greater than 2,500, particularly since the census was taken under the authority of the Dominion Parliament, Revised Statutes, 1886, and the census return was reported to the House under the authority of the same Act and published by its authority.

Judgment

It is true that no English or Canadian cases have been cited, nor can I find any where the Court has taken judicial notice of census returns, but I have no hesitation in following the American authorities where the express point has been raised. See Cyc. Vol. 16, p. 870.

It is not to be forgotten that the doctrine of judicial notice extends to all departments of the law, and is not confined to that of evidence.

Application refused.

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Contract—Building, erection of—Baker's oven included in contract—Acceptance—Undertaking to make good any defect—Collapse of oven—Fire caused thereby—Destruction of building—Damages—Measure of—Finding of fact—Reversed on appeal.

Defendant, having contracted to erect a building, including a baker's oven, sub-let the work of constructing the oven. Plaintiff complained to defendant, after the oven was built, that the arch was defective and liable to collapse. Defendant and the sub-contractor who built the oven, were of opinion that the oven was properly built. On the other hand, an expert called in by the plaintiff was of a contrary opinion. On being called upon to fulfil his contract by giving a mortgage on the building as security for the contract price, plaintiff complained that the oven was not properly constructed, but later agreed to pay the contract price, but insisting in his contention that the oven was unsafe. Defendant, in reply, wrote: "If what you dread happens, why it will be put right." Plaintiff proceeded to use the oven, when a fire broke out in the bake house, where the oven was, and injured that and the main building adjoining it.

Held, on appeal, that the fire was caused by the collapse of the oven, and that the plaintiff was entitled to damages, but

Held (IRVING, J.A., dissenting), that he should be confined to such damages as the parties had in contemplation, that is, damages to the oven itself.

Per IRVING, J.A. That plaintiff was entitled to damages for the loss of the use of the building and the estimated cost of rebuilding, but not for loss of profits.

Judgment of MARTIN, J., on the facts reversed.

APPEAL from the judgment of MARTIN, J., in an action for damages tried by him at Victoria on the 31st of March, 1909.

Statement

The appeal was argued at Victoria on the 20th, 21st and 24th of January, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

Aikman, for appellant (plaintiff): There was no conflict of evidence as to the cause of the fire. The facts raising a presumption that the only cause of the fire was the falling of the

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oven, thus permitting sparks to escape to the roof above, hence the fire. Although the learned trial judge found as a fact that the defendants were entitled to judgment, it was contended by plaintiff that there were no facts proved that warranted such a finding.

Higgins, for respondent (defendant): There was a conflict of evidence at the trial and the learned trial judge found all the facts in favour of the respondent, and his judgment should not be disturbed.

The appellant's case is wholly founded on conjecture and there is no evidence to warrant the Court in presuming that the fire started from the oven: see *Laidlaw* v. *Crow's Nest Southern Railway Co.* (1909), 14 B.C. 169, and *The William Hamilton Manufacturing Co.* v. *The Victoria Lumber and Manufacturing Company* (1896), 26 S.C.R. 96 at pp. 108-9. There is no evidence shewing whether the oven collapsed before or after the fire. The appellant admitted that he knew that the oven was defective and that it would probably cause a fire and he therefore voluntarily assumed all risk of the oven collapsing. He cannot recover because of the doctrine of *volenti non fit injuria.* In any event appellant cannot recover for damage done to the building as such damages are too remote: *Membery* v. *Great Western Railway Co.* (1889), 14 App. Cas. 179 at p. 186, Mayne on Damages, 8th Ed., 88.

Argument

Aikman, in reply.

Cur. adv. vult.

11th February, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Defendant contracted with the plaintiff to erect a building including a bake oven, for a stated price. The defendant sub-let the erection of the oven to one Martin, who was represented to be a competent person, and one accustomed to building ovens of that sort. There were no plans and specifications of the oven, but it was to be of a type well known to the parties. After the completion of the oven, plaintiff complained of its construction. It seemed to him that the arch was so constructed as to be in danger of falling. It is not disputed that the plaintiff complained to the defendant about the construction of the oven, and that the defendant went

to see it, and that Martin, the builder, went to see it on one or more occasions. As one would expect in such a case, both the defendant and Martin assumed to consider the oven to be properly constructed. The plaintiff, however, was so dissatisfied that he called in an expert in such matters, and had him examine it. The expert condemned the oven, and reported that it was in danger of collapsing. The defendant having called upon the plaintiff to fulfil his part of the contract by giving a mortgage as security for the contract price, plaintiff demurred that the oven was not properly constructed, and was liable to fall down. But in March, 1908, plaintiff finally agreed to pay the defendant the contract price in manner set out in a letter, dated the 26th of March, but still insisted upon his claim that the oven was improperly built, as appears by a postscript at the end of the letter in which he requested that Martin, the sub-contractor, should guarantee the oven in good order for 12 months. In August, 1908, defendant wrote to the plaintiff a letter in which he stated as follows:

"It is not my fault, I might say, if what you dread happens, why it will be put right."

This admittedly had reference to plaintiff's dread that the oven would fall down. On the 8th of September, 1908, defendant secured from the said Martin the following letter:

"This is to certify that I, the undersigned, will replace the arch of Mr. Baker's oven on Ladysmith street if it falls inside of one year from completion of work through any fault of mine."

After this the plaintiff went on using the oven until the 6th of December, 1908, a period of about six months from the completion of the oven, when a fire occurred in his bake house in which this oven was, causing damage to the bake house and to the principal building to which the bake house was a lean-to. In his evidence, the plaintiff said that about 12 o'clock on this day, being Sunday, he had made a fire in the oven for the purpose of keeping it warm for use on Monday morning. This fire was allowed to burn for about an hour and a half when the oven was dampered in order to keep the heat in. The plaintiff remained in the bake house until about 6 o'clock in the evening. At that hour everything about the oven and bake house appeared to be right and in safe condition. There was no other

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fire in that part of the premises and no lights except one electric lamp, which the plaintiff, or his wife, turned out at about 6 o'clock when they both left the premises to visit friends in the city.

The fire occurred about 9 o'clock in the evening. One of the plaintiff's witnesses passed the premises shortly before the fire occurred, and saw no sign of fire in the premises at that time. When the fire was first noticed it was breaking out through the roof of the lean-to, just above this oven.

I think the evidence excludes any other hypothesis than that the fire originated by the collapse of this oven. I have no hesitation, on the evidence, in coming to the conclusion that the oven was defectively constructed and likely to collapse at any time; and I conclude from the evidence that the oven did collapse on the evening in question, and that the fire originated from that, and from that alone. I think this is the proper inference to draw from the evidence. It is true that the learned trial judge came to a contrary conclusion. The conclusion, however, is one which does not depend much upon the credibility of witnesses. At all events, there is no serious conflict of evidence. The conclusion that the fire originated in the way I have just stated is an inference to be drawn from the evidence which this Court can draw without violating the rule that where the evidence is conflicting, the finding of the trial judge will not be lightly interfered with.

MACDONALD, C.J.A.

The question that has given me most difficulty is that as to the measure of damages. The plaintiff was fully aware of the defective condition of the oven, and used, and continued to use it with that knowledge. He complained of its construction about the time of its completion, and insisted that the arch was not properly constructed; he refused to accept the assurances of the defendant that the oven was all right, and called in an expert of his own who examined it, and reported that it was defectively constructed and might fall down at any time. When the plaintiff was called upon by the defendant to give a mortgage on his property for the contract price in accordance with their agreement in that behalf, he still demurred, and insisted that the oven was likely to fall, and gave the mortgage

only after he received a letter from the defendant saying that if what he, the plaintiff, dreaded should happen, the defendant would put it right.

Under these circumstances what is the liability of the defendant with respect to the damage resulting from the fire in question? The oven seems to have been practically destroyed. With respect to the loss of the oven I have no difficulty. I think the plaintiff is entitled in respect of that.

With respect to consequential damages, namely, the loss of the building, two questions arise. First, can the plaintiff recover beyond the damages sustained by him in respect to the oven itself; and, second, are these damages too remote? We have been referred to a number of authorities on this point, but there is one element in this case which does not appear in any of them. If the plaintiff had not been aware of the defects in the oven, and aware of the danger of it falling down, this case would be pretty well covered by authority. But the plaintiff used the oven with full knowledge of the danger, and now seeks to charge the defendant, not alone with the value of the oven, but with the damages which resulted to other property of the plaintiff by reason of the fire in question. I think the maxim *volenti non fit injuria* is applicable here.

MACDONALD, C.J.A.

It was argued by Mr. *Aikman* that because the defendant insisted that the oven was properly constructed and in no danger of falling, the plaintiff was entitled to accept and rely upon that assurance, and that in any case there was a warranty, express or implied, or both. But as against that, it must be borne in mind that the plaintiff refused to be convinced of the soundness of the oven, and besides had the opinion of his own expert to the contrary, and declined to settle for the contract price until he had received assurances that if the arch fell it would be made right; and I think that the plaintiff is confined in this action to such damages as the parties evidently had in contemplation at that time, namely, the damages to the oven itself.

Having come to this conclusion, it may not be necessary to deal with the question as to whether or not, had the plaintiff

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been unaware of the defect and danger, the damages to his building would be too remote. I would say only in this connection that I do not think the destruction of his building by fire would be a necessary consequence of the collapse of the oven. It did not even appear to the parties themselves to be a probable consequence, because it appears that they discussed the very thing which afterwards happened, namely, the collapse of the oven, and practically agreed upon the measure of damages should that collapse occur.

MACDONALD, C.J.A.

I am therefore of opinion that this appeal should be allowed, and that judgment should be entered for the plaintiff in the action for the value of the oven, and that if the parties cannot agree upon such value, it be referred to the registrar of this Court to ascertain the amount. The plaintiff is entitled to the costs of the action, to the costs of this appeal and of the reference, if any.

IRVING, J.A.

IRVING, J.A.: The defendant, who is a contractor, on the 15th of May, 1908, agreed with the plaintiff, who is by trade a baker, to erect a "building" on the plaintiff's lot. The building was to be a store, and in a lean-to adjoining a baker's oven was to be erected. The oven was not mentioned in the written agreement, but both parties agreed that the sum mentioned in the contract, $1,125, was to include the construction of the oven. It was a lump sum contract for the building, with the oven. An entire contract so that no consideration was to pass from the plaintiff until the whole of the obligations of the defendant had been completed. The price was to be secured by a mortgage on the lot on which the building was erected. The defendant proceeded with the erection of the building, and having no practical knowledge of oven building, employed one Martin to erect the oven. It (the oven) was completed about the beginning of July, and the plaintiff was permitted by the defendant to make use of the oven in his business before the rest of the building was completed. The plaintiff was dissatisfied with the way the oven was built, and as the first batch of bread was spoiled, Martin was called in, and by him some bricks were removed. The plaintiff still complained, and Martin came over and endeavoured to make

the oven work satisfactorily. The plaintiff saw Atkins and told him he was afraid the arch of the oven would fall in. Atkins told him, however, not to bother if the arch did fall in, it would be replaced.

On the 6th of December, the building caught fire and was badly burnt. The judgment just read so fully sets out the evidence as to the cause of the fire that it is unnecessary for me to say anything further on that point.

The action was brought for the delivery up and cancellation of the mortgage, or for damages caused by the fire. The defence was, that the plaintiff agreed to look to Martin and not to the defendant for any damages that might occur through any defect in the oven; that plaintiff by accepting the letter of 8th September, 1908, which can be called for convenience "the defect clause," released the defendant; that the plaintiff accepted and used the oven and thereby obtained knowledge of its defects, and that as he executed the mortgage for the payment he thereby waived any claims for damages.

The trial took place before MARTIN, J., without a jury, who dismissed the action. We are not able to view the evidence in the same way that the learned judge did, and I have arrived at the conclusion, speaking for myself, that the oven was defectively built, and that the fire was occasioned in consequence of the faulty construction of the oven.

IRVING, J.A.

As to the rights of the Court of Appeal to review the finding of a judge on fact see *Beal* v. *Michigan Central R. R. Co.* (1909), 19 O.L.R. 506. In my opinion there was an implied condition on the part of the defendant that the whole work, that is, the building including the oven, should be done in a good and workmanlike manner, and that the oven should be fit for its purpose, *e.g.*, to hold fire without setting fire to the adjoining woodwork, so far as the exercise of reasonable care and skill could make it so. This condition would not extend to any unseen or unknown defect which could not be discovered, or which might be said to be undiscoverable.

On the 20th of August, the defendant wrote to the plaintiff the following letter:

"In the matter *re* the bakery, for which payment of interest and

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prin. is now due. And after it was left entirely in your hands to have what you wanted, and haven't got it. It's not my fault I might say if what you dread happens why it will be put right and having my money invested there you must either live up to your agreement or vacate it as I intend to have returns for money invested or I shall take other proceedings. So please in order to stop further trouble you will attend to this at your earliest and oblige."

And the plaintiff wrote thereon the following memorandum:

"August 25th. Yours of yesterday at hand. As I said on Monday night, the matter will be settled on completion of contract."

The defendant came over to the plaintiff's place on the 29th, when the plaintiff executed exhibit 7, as follows:

"I the undersigned do hereby agree to pay to Jas. Atkins contractor the contract price of the Home Bakery Ladysmith St. cor. St. Lawrence St. Vic. B.C. first payment to be made 6 month after July 1, 08. Payment of $100.00, interest 6% per cent per annum to be paid at the above date the contract price $1125.00. W. T. Baker.

"I the undersigned do hereby request Mr. Martin, contractor to guarantee to me the oven built by him in a good going order for 12 months after date. W. T. Baker."

The defendant had previously obtained from Martin the writing, exhibit 5, which is as follows:

"This is to certify that I the undersigned will replace the arch of Mr. Baker's oven on Ladysmith street if it falls inside of one year from completion of work through any fault of mine,"

and handed it to the plaintiff.

IRVING, J.A.

On the 13th of October, the plaintiff executed the mortgage. After this some defects revealed themselves, and Martin came and endeavoured to correct them. The plaintiff then seems to have moved in, and the building was regarded as substantially completed, but in November Martin was on several occasions working at the oven.

Now, let us deal with the rights and duties of the plaintiff, owner and contractor defendant, irrespective of the transactions in August and September, which have been set out. The contract was for a lump sum, and therefore when the whole work was completed in accordance with the contract, and not before, the contractor was entitled to payment. The contractor to get payment had to shew he had performed his work properly. To quote an old authority, *Basten* v. *Butter* (1806), 7 East, 479 at p. 484:

"If a man contracted with another to build him a house for a certain sum, it surely would not be sufficient for the plaintiff to shew that he had put together such a quantity of brick and timber in the shape of a house, if it could be shewn that it fell down the next day; but he ought to be prepared to shew that he had done the stipulated work according to his contract. And it is open to the defendant to prove that it was executed in such a manner as to be of no value at all to him, or not to be of the value claimed."

If defects appeared, the owner was to be at liberty to resist the payment at the time, in that case, if sued, he might set up the defects then visible, or he might pay, and bring his action for damages for breach of contract later on.

Davis v. *Hedges* (1871), L.R. 6 Q.B. 687, shews that actual payment of the contract price will not preclude an owner from bringing an action for damages for defective workmanship. The reason of the thing is simple. The right to payment arises as soon as the work is completed, but as the defects have not shewn themselves, the damages have not yet been ascertained, and the owner may delay his action until the defects have developed and the damages have been ascertained. If the plaintiff elected to do so, he was at liberty to say, "Your oven is not satisfactory. You can have your money, but you must put that right. I will allow you time to put it right." He could have said that, and not lost his right to recover damages.

Now then, did anything occur in connection with these writings so as to deprive the plaintiff of his right? In my opinion the facts do not establish a waiver, or a *novatio,* or a substituted contract, or an accord and satisfaction, or an acceptance by the plaintiff of the oven, subject to all risks. The document of the 8th of September is not a contract between the plaintiff and Atkins and Martin, or evidence of any contract. It gives no right to the plaintiff to sue, nor is it shewn anywhere that the plaintiff was releasing his rights in respect of the whole contract in consideration of the defendant handing him this piece of paper. The true effect of what took place was that the plaintiff agreed to pay at once, without litigating the question of whether the oven was or was not defectively built. It was a case of giving time to the plaintiff, and not of alteration of the contract, or release from its obligations. The intention to discharge the first contract must be

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made clear, and although I have no doubt the contractor, in obtaining the writing of the 29th August, was endeavouring to obtain something that might operate as a release or discharge of his original contract, the intention on the part of the plaintiff to consent to a discharge or release is not at all clear. What the defendant did obtain was forbearance—an accord not followed by satisfaction. In my opinion, the defences set up in paragraphs 3, 8, 8a, 8b, 8c, and 8d, are not proved. He sets up that if there were defects in the oven, that fact was well known to the plaintiff, and that plaintiff cannot recover damages as he continued to use the oven. The plaintiff undoubtedly did believe that the oven was defective, but the sub-contractor, Martin, assured him that it was safe.

I cannot say that the plaintiff acted unreasonably in permitting the oven to remain. Had the defendant at any time admitted that the oven was defective, then different considerations would arise, but the defendant's whole conduct was a representation that it would be safe to use, and that in the end the oven would be completed as contracted for. The rule that the use and occupation of that which has been constructed on your land, does not necessarily imply acceptance of the work or waiver of any defects, nor does it preclude you from contending that the work has been properly done is well illustrated in *Whitaker* v. *Dunn* (1887), 3 T.L.R. 602.

IRVING, J.A.

The measure of damages where the work is not only worthless, but also causes damages, has been considered by the Court of Appeal in *Mowbray* v. *Merryweather* (1895), 2 Q.B. 640, where a stevedore's chain broke and a workman was injured. The contractor was held liable to repay the owner the amount he had to pay the workman, because the damages were the natural consequences of the defendant's contract to supply a proper chain. It was a consequence which might reasonably be supposed to have been within the contemplation of the parties when they made the contract. In that case the Lords Justices approve of the opinion of Martin, B. in *Burrows* v. *March Gas Co.* (1870), L.R. 5 Ex. 67, (1872), L.R. 7 Ex. 96, where damages for injury to plaintiff's premises were allowed.

I would allow the following heads of damage: Loss of use of

building: *Cory* v. *Thames Ironworks Company* (1868), L.R. 3 Q.B. 181; and estimated cost of re-building: *Smith* v. *Johnson* (1890), 15 T.L.R. 179; but not loss of profits: see *Fitzgerald* v. *Leonard* (1893), L.R. Ir. 32 C.L. 657, an Irish case cited with approval by the Court of Appeal in *Bostock & Co., Limited* v. *Nicholson & Sons, Limited* (1904), 1 K.B. 725 at p. 742.

The judgment should be set aside, and a reference to assess the damages should be ordered.

GALLIHER, J.A.

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

Solicitor for appellant: *J. A. Aikman.*
Solicitor for respondent: *F. Higgins.*

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

Negligence—Contributory negligence—Street Railway Company—Excessive speed—Duty of driver to have his car under control.

Where plaintiff alighted from one of the defendant's cars at night time, at a point where the street was torn up for purposes of repair, and the bell on a car immediately behind that from which he alighted, was clanging; and going between the two cars, and looking up and down a parallel track before crossing, but seeing no car approaching, was nevertheless struck and injured by an approaching car, running at an excessive speed on such parallel track:—

Held, that he was entitled to recover, as it was the duty of the driver to have his car under control.

Statement

APPEAL from the judgment of MORRISON, J., and the verdict of a jury, in an action tried at Vancouver on the 6th, 7th and 8th of January, 1910.

COURT OF APPEAL
1910
April 21.

MORTON v. B. C. ELECTRIC RY CO.

Statement

The plaintiff an infant, sued by his next friend, Eliza Florence Morton, for damages against the defendant Company, for negligence, he having been run over by a street-car operated by the defendant Company. The accident took place about 11.30 at night. The plaintiff had alighted from a car which was running in a southerly direction, and went behind it to cross to the westerly side. When he got between the tracks of the south-going line his attention was attracted by the gong being rung on a car which was following his car on the same line, had come up within 10 or 12 feet and was moving at the time when the plaintiff noticed it. Plaintiff looked ahead in a westerly direction and as far southerly as he could see, stating that he could see about two car lengths to the south; then proceeded to cross the street in a westerly direction to the sidewalk. As he was crossing the most westerly track he was run down by a car travelling down-grade in a northerly direction and had both feet so badly mangled that amputation was necessary. It appeared that there were three tracks of railway at that place, an easterly track which was the permanent up-going track for cars travelling in a southerly direction, a centre track, and a westerly track which were temporary tracks. On the night in question the cars travelling in a northerly direction travelled on the most westerly track, the track on which the plaintiff was injured, and owing to the street being paved, cars travelling in a southerly direction were running on the centre track. At the scene of the accident the devil's strip, between the centre track and the most westerly track, measured from the inside rails eight feet four inches, and the distance between the two rails of each track was four feet eight inches, being standard gauge.

The case for the plaintiff shewed that the car which caused the accident was travelling at an excessive rate of speed, in the neighbourhood of 20 miles an hour, and that no gong was sounded. The plaintiff stated that when between the two cars on the centre track, he could see nothing for about two car lengths and heard nothing, and concluding that no down-car was approaching he hurried across as fast as he could; he had to pick his way across the devil's strip which was badly torn up

owing to the paving operations of the street. The plaintiff admitted he had not looked again when on the devil's strip, and it appeared clear from the evidence that had he looked he could have seen in a southerly direction for several blocks and would undoubtedly have seen the car approaching. Plaintiff, however, looked when between the two cars and having been able to see in a southerly direction for a couple of car lengths, concluded no car was approaching and crossed the devil's strip onto the most westerly track, which on account of being a temporary track, was elevated about a foot and a half above the ground. He succeeded in getting almost clear of the westerly track when he was struck by the westerly portion of the fender and was dragged for about a distance of a third of a block, the car itself not coming to a full stop until about 300 feet from the point of collision.

The defendants contended that the plaintiff was the author of his own injury, and was guilty of contributory negligence in failing to look a second time when on the devil's strip before crossing the westerly track, when it was clear that he could have seen the approaching car if he had looked.

Statement

The jury returned the following verdict:

"1. Did the defendant Company do anything which a person of ordinary care and skill under the circumstances would not have done? No.

"2. Have they omitted to do anything which a person of ordinary care and skill under the circumstances would have done? Yes.

"3. Did they by such act of commission or omission cause the injury to the plaintiff? Yes.

"4. Did the plaintiff Morton do anything which a person of ordinary care and skill would not have done under the circumstances? No.

"5. Did he omit to do anything which a person of ordinary care and skill would have done under the circumstances and thereby contribute to the accident? No.

"6. Amount of damages: $8,000."

The appeal was argued at Vancouver on the 20th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

L. G. McPhillips, K.C., for appellant (defendant) Company: There was contributory negligence on the part of plaintiff, who should not have passed between the two cars. From his own evidence, the accident occurred through the joint negligence of himself and defendant Company, and his being the last act of

Argument

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negligence, he cannot recover. Further, there is no evidence that we could have avoided his negligence. We did the best we could, which was to reverse the car about the time it struck the plaintiff. We refer to *Davey* v. *London and South Western Railway Co.* (1883), 12 Q.B.D. 70; *The Bernina* (1887), 12 P.D. 58; *G. T. Ry. Co.* v. *Hainer* (1905), 36 S.C.R. 180; *Brenner* v. *Toronto Ry. Co.* (1908), 40 S.C.R. 540.

Argument

McCrossan, and *Harper,* for the respondents, cited *Tuff* v. *Warman* (1858), 5 C.B.N.S. 573, 27 L.J., C.P. 322; *Radley* v. *London and North Western Railway Co.* (1876), 1 App. Cas. 754; *Metropolitan Railway Co.* v. *Jackson* (1877), 3 App. Cas. 193; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), *ib.* 1155; *Toronto Railway* v. *King* (1908), A.C. 260, 77 L.J., P.C. 77.

He was stopped.

McPhillips did not reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal must be dismissed. There was evidence of defendants' negligence to go to the jury, and there was no evidence of contributory negligence on the part of the plaintiff. In the circumstances of this case, with the street torn up as it was, it was incumbent upon the defendants to take particular care. The accident occurred at night, and while there is some evidence that a light was placed there, yet it is well known that a light, while it sheds a brightness for a certain distance around it, makes the locality beyond appear darker. The conditions at this spot were not only dangerous but confusing. The credibility of the plaintiff's evidence was a matter for the jury, and they have decided that he was telling the truth. The car which caused the accident was going at an unusual rate of speed. It was the duty of the driver to have the car under control, and he had not.

IRVING, J.A.

IRVING, J.A.: Dealing with the question whether the judge should have taken the case away from the jury: The failure of the plaintiff when clear of the central rails to look to the south was not, in view of all the circumstances, such clear evidence of negligence on his part as to entitle the judge to take the case away from the jury. The plaintiff passed behind the car from

which he had just descended. In the middle of the central track, he says, then having a view of two car lengths, say 80 or 90 feet, to the south, he looked in that direction to see if it would be safe for him to proceed. From there, *i.e.*, from where he looked to the south, the distance between him and the extreme western rail was some 14 or 15 feet. He came to the conclusion that it would be safe to make the crossing of 14 or 15 feet and therefore went on, hastening on account of the clanging of the Robson car bell, and picking his way with care on account of the bad condition of the street, but listening for any tram on the western tracks. He heard nothing, knew nothing until the north bound car struck him as he reached the most westerly rail. It is true that he did not take a second look when he got clear of the central rails and was in a position to see the car track for several hundred feet to the south. Whether or not that omission was the negligence which caused the injury was a question for the jury. As to the objection that the verdict was against the weight of evidence, in my opinion the evidence will bear out the verdict that there was an omission on the part of the defence to proceed at a reasonable pace and take proper precautions.

IRVING, J.A.

MARTIN, J.A. (after a consideration of *Toronto Street Railway* v. *King* (1908), A.C. 260, 77 L.J., P.C. 77, and the other cases): I agree that there was sufficient evidence to support the findings of the jury.

MARTIN, J.A.

Appeal dismissed.

Solicitors for appellant: *McPhillips & Tiffin.*
Solicitors for respondent: *McCrossan & Harper.*

BROWN, CO. J. 1910 March 26.

CERVIO v. GRANBY CONSOLIDATED MINING, SMELTING AND POWER COMPANY.

CERVIO v. GRANBY CONSOLIDATED M.S. & P.Co.

Workmen's Compensation Act, 1902—Injury to servant in the course of his employment—Disobedience to orders—Serious and wilful misconduct or neglect.

A chuteman and his helper, employed in the defendant Company's mine entered the chute before being told by the "mucker boss," according to orders, that it was safe to do so. There was some evidence that the chuteman told his helper that the "mucker boss" had given orders to proceed. The helper was injured by a fall of rock, the cause of which was unknown.

Held, that the injury arose out of and in the course of his employment, and that in accepting the statement of the chuteman, in a sense a person of authority over him, he was not guilty of wilful disobedience.

Statement

ARBITRATION under the Workmen's Compensation Act, 1902, held by BROWN, Co. J., at Grand Forks, on the 2nd of March, 1910.

Eckstein, for the applicant.

D. Whiteside, for the respondent Company.

26th March, 1910.

Judgment

BROWN, Co. J.: Antonio Cervio, the applicant herein, on the 26th of March, 1909, while in chute number 72 of the Granby mine at Phoenix, B. C., owned by the respondents, had his right foot crushed by a rock rolling upon it, the foot being so badly injured that it had to be amputated. He seeks compensation under the provisions of the Workmen's Compensation Act, 1902.

The applicant was a chuteman's helper, and had been working as such for the respondents for about four months previous to the time that he was injured, and his average weekly earnings were $18 per week.

The chutemen and chutemen's helpers are generally under the orders of the "mucker boss," although they sometimes receive orders from the "shift boss," who is above the "mucker

boss." The chuteman's helper is to some extent, at least, under the direction of the chuteman, as, under the heading "Instructions to Employees," posted in various places in the mine, rule 4 reads as follows: "Chutemen helpers will follow instructions received from chutemen, but will not be permitted to handle powder for any purpose under any circumstances." The duties of the chuteman's helper were to stand on the level on the side of the chute-gate on which the lever was, to open and shut the chute-gate as required in loading cars, and to pick up or shovel any ore or muck that fell on the level from the chute or car. In addition to this, he assisted the chuteman to get the muck through the chute-gate, and, under the directions of the shift boss or mucker boss, usually the latter, went into the stope and barred down or shovelled down the muck to the chute-gate. J. Frank McDougall was shift boss, Edmond E. Campbell was mucker boss, and Nick Milich was chuteman over the applicant, Cervio. In the usual course of events in the mine, after rock is blasted, the bar-men bar it down and report to the mucker boss or shift boss that stope is barred down and safe, and one of these, usually the mucker boss, then tells the chuteman what the barmen have reported.

On the morning of the accident to Cervio, the chuteman and his helper—Cervio—did not wait until they were told by the mucker boss that the stope or chute was safe. Cervio swore he went into the chute to bar down some fine muck which was about 12 or 14 feet away from the chute-gate in No. 72 chute, because he was told by Milich, the chuteman, that McDougall, the shift boss, had said they were to do it. Milich swore that he was given this order by McDougall. McDougall emphatically denies it. I believe McDougall, but I believe Cervio acted in good faith, that is, he believed Milich was ordered by McDougall as set out above. Milich and Cervio, on the morning of the accident, entered No. 72 chute by the chute-gate, which was against the provisions of rule 3 of instructions to employees posted in the mine, part of which is as follows: "Chutemen are cautioned not to enter chutes through gate, but to use manways constructed for that purpose." McDougall, the shift boss, stated on oath that the day before the accident

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occurred, he told Milich and Cervio not to go through the gates of those chutes, and that some time previously he had said to them, "Don't go into those chutes until stopes are barred down and barmen report to mucker boss that it is safe." Campbell, the mucker boss, whose evidence was taken at Montreal under commission, states that he warned Cervio not to go into stopes at all. I do not, however, attach much importance to the latter's evidence, as it seems to me he was reckless in many of his statements. There is no evidence as to what caused the fall of rock which injured Cervio. There were no barmen in No. 72 stope on the morning of the accident, and no blasting had been done there the night before. Campbell, the mucker boss, said that apparently the miners were setting up their machines and loosened a piece of rock; but Charles Swanson, one of the miners who was setting up a machine in the stope above, said he did not know how the accident happened.

The respondents resist payment of any compensation on a number of grounds, as appears by the answers to particulars of claim, but at the hearing there were really only two grounds insisted upon, namely: (1) that the injury to the applicant did not arise out of and in the course of his employment; (2) that the injury he sustained is attributable solely to the serious and wilful misconduct or serious neglect of the applicant.

Judgment

At the time that the accident happened to Cervio, he was engaged in his employers' work. The case of *Whitehead* v. *Reader* (1901), 3 W.C.C. 40, particularly judgment of Collins, L.J., at p. 43, shews that disobedience to orders does not take the workman's action out of the course of his employment unless the order is one limiting the scope of the employment. Here there was a written rule not to enter chutes through the chute-gates, and Cervio was also told not to go into chutes until barmen had barred down loose rock, and chute or stope was reported safe. Even admitting that Cervio broke both the written rule and verbal order, it is yet a fact that under certain conditions it was quite proper for him to be in the stope and get the muck down to the chute-gate, and he had frequently

done it. He cannot then be said to have been acting outside the scope of his employment: see *Forster* v. *Pierson* (1906), 8 W.C.C. 21.

If it is proved that the injury to a workman is attributable solely to the serious and wilful misconduct or serious neglect of that workman, any compensation claimed in respect of that injury shall be disallowed; see section 2 (*c.*) of the Workmen's Compensation Act, 1902. Under this section the onus of proof is on the employer. And the serious and wilful misconduct must be the cause of the accident, otherwise it is not an answer: Dawbarn's Employers' Liability, 3rd Ed., 211. In this case, as before stated, Cervio broke a written rule of the mine by going into chute No. 72 by the gate instead of by man-way No. 74. The rule was printed in English, and Cervio swears he cannot read English, but he was also told about the rule. But going through the gate was not the cause of the accident at all, as he had been working in the chute at least five minutes, and perhaps ten minutes, before the rock fell and injured him.

Then was he guilty of serious and wilful misconduct because he went into the chute without waiting for the report of the mucker boss? I do not think he was, for two reasons:

(1.) He was told by Milich, the chuteman, that McDougall, the shift boss, said they—Milich and Cervio—were to go into chute No. 72 and shovel down the muck. I have no doubt at all but what Cervio believed this order was given, although as a matter of fact McDougall never gave it. It was usually the mucker boss who gave orders to the chutemen. They were under him. It would seem, however, that sometimes the shift boss gave the chutemen orders even about their work. John A. Swanson, the general foreman of the respondents at Phoenix, was asked: "On the morning of the accident, finding No. 72 chute empty, what was the duty of these two men, the chuteman and his helper, Cervio?" He answered: "Well, it was their duty to stay there and wait till the shift boss came along or the mucker boss, and he would give them orders to go somewhere else." Again he said, in answer to a question as to what conditions prevail in the mine before the chutemen or other men are allowed in the stopes: "Well, when we know

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that everything is all right, why the shift boss or the mucker boss generally comes around and says, 'we will go up now and start the muck down.'" So it was not at all unreasonable for Cervio to believe that the shift boss had given orders as Milich said. In order for a person to be guilty of wilful misconduct, he must have known and appreciated that to do or refrain from doing some act was wrong, and yet intentionally did it: see *Forder* v. *Great Western Railway* (1905), 2 K.B. 532, 78 L.J., K.B. 87. Apart from going into the chute-gate, which was not the cause of the accident, Cervio believed he was obeying orders, so the disobedience could not be wilful.

(2.) I do not think Cervio was guilty of serious and wilful misconduct, even if Milich had not told him that the shift boss said they were to go into the chute and shovel down the muck. There had been no blasting the night before the accident, there were no barmen there, and there is no evidence to shew where the rock came from that struck Cervio. Edmond E. Campbell said in his evidence that apparently it was loosened by the men setting up their machines. This is only a surmise. Charles Swanson, one of the miners who was setting up a machine, said he did not know how the accident happened. He also said there were no miners working near him the morning of the accident. The ground had been barred down. Milich and Cervio shouted to warn or give notice to any one who might be in the stope that they—Milich and Cervio—were there. Although Swanson said he did not hear any shout, he admitted that there might have been shouts which he did not hear. Under these circumstances, it seems to me, the possibility of a rock rolling down the stope and injuring either—Milich or Cervio—was so unlikely that the misconduct, even if wilful, would not be serious: *Johnson* v. *Marshall, Sons & Co., Limited* (1906), A.C. 409.

Judgment

It remains to consider the words "or serious neglect" contained in the British Columbia Act, but not in the English Act. In *Hill* v. *Granby Consolidated Mines* (1906), 12 B.C. 118, DUFF, J., at p. 123, said:

> "That any neglect is 'serious neglect,' within the meaning of the Act, which, in the view of reasonable persons in a position to judge, exposes anybody (including the person guilty of it) to the risk of serious injury."

In this case Cervio went through the gate of the chute against

orders, but going through the gate was not the cause of the accident. He believed he was ordered to go into the chute. There had been, as he stated, no blasting done in this stope the night before. He shouted to give notice to any one who might be in the stope or chute where he—Cervio—was. He also carried a light so that he could see and be seen for quite a distance, probably 50 feet. Under these circumstances, would a reasonably prudent man consider that Cervio was likely to suffer serious injury by being in the chute at the time that he was injured? I do not think so, particularly as it was not shewn in evidence where the rock came from which injured him, and scarcely any evidence to shew the likelihood of rocks falling from miners setting up their machines. The danger that was emphasized was rocks being knocked down or loosened by the barmen, and this danger was absent on this morning, as there were no barmen in the stope.

Judgment

Commencing with the 10th of April, 1909, the applicant is entitled to $9 per week. There is, therefore, now due him the sum of $450, which the respondents are to pay forthwith. After the sum of $450 is paid, the respondents are to pay to the applicant weekly the sum of $9 until (including the before mentioned sum of $450) the sum of $1,500 is paid, subject, however, to the provisions of sections 8, 9 and 10 of the first schedule of the Workmen's Compensation Act, 1902.

Costs on the Supreme Court scale.

COURT OF APPEAL

1910

June 1.

GRANICK v. B. C. SUGAR REFINERY CO.

GRANICK v. BRITISH COLUMBIA SUGAR REFINERY COMPANY.

Master and servant—Injury to and resulting death of servant—Workmen's Compensation Act, 1902—Elevator—Warning by foreman or fellow servant not to use same—Disobedience—Serious and wilful misconduct—Accident arising out of and in course of employment.

Practice—Counsel opening expressing doubt as to sufficiency of his evidence to support action in one line.

Deceased, a foreigner, but able to speak and understand, though not to read or write, English, entered the employment of defendants and was put at work in which he had had no previous experience. Before commencing work on the morning of his entering the employment, a fellow labourer was cautioned by the foreman, in presence of the deceased, not to allow the latter to use a freight lift until he was acquainted with it. He nevertheless attempted to use it and was cautioned not to do so. He was later in the day, found dead jammed between the side of the lift and the floor. There was no evidence that in the few hours between his hiring and his death, he had not been instructed in the use of the lift, or that he had not had an opportunity of becoming acquainted with the use, or way of using it.

Held, reversing the finding of MORRISON, J. (reported (1909), 14 B.C. 251), IRVING, J.A., dissenting, that the defendant Company had not discharged the onus resting upon them to shew that the deceased had been guilty of serious and wilful misconduct.

Where plaintiff's counsel, on the opening, in an action launched under the Employers' Liability Act and the Workmen's Compensation Act, expressed a doubt that his evidence was not strong enough to support a claim under the former, but that he hoped to succeed under the latter Act, the trial judge was right in proceeding to hear the evidence.

The learned trial judge in the above circumstances having heard the plaintiff's evidence, dismissed the action under the Employers' Liability Act, and came to the conclusion that no compensation was payable under the Workmen's Compensation Act.

Held, that an appeal lay from him in the action as a judge.

Statement

APPEAL from the judgment of MORRISON, J., reported (1909), 14 B.C. 251.

The appeal was argued at Vancouver on the 11th and 12th of

April, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

COURT OF APPEAL

1910

June 1.

GRANICK v. B. C. SUGAR REFINERY CO.

Burns, for appellant (plaintiff), referred to *Johnson* v. *Marshall, Sons & Co., Limited* (1906), A.C. 409, 75 L.J., K.B. 868; *George* v. *Glasgow Coal Company, Limited* (1909), A.C. 123, 78 L.J., P.C. 47; *Robertson* v. *Allan Brothers & Co., Lim.* (1908), 77 L.J., K.B. 1,072; *Bist* v. *London and South Western Railway* (1907), A.C. 209.

L. G. McPhillips, K.C., for respondent (defendant) Company: This is not an ordinary appeal where all the facts are open to the Court. The only question here is one of law: was there evidence justifying the trial judge in coming to the conclusion that there was negligence on the part of the deceased, and that the accident was due to his negligence? There is nothing to shew that there was no evidence of wilful misconduct before the trial judge.

[MACDONALD, C.J.A.: There is no evidence that the man was using the elevator.]

He was found on it. *Bist* v. *London and South Western Railway, supra,* is distinguishable here. This man knew nothing about the elevator, and never used it; but even if he did use it he was, in the circumstances, guilty of wilful misconduct. Further, we submit, on the facts here, that there is no appeal. It is only when the judge finds that there is no action under the common law that the plaintiff is entitled to have the damages assessed under the Workmen's Compensation Act. Here the plaintiff's counsel admitted that he had no action under the common law, but was entitled only to a reference under the Workmen's Compensation Act. He should, on that admission, have had the action dismissed and applied for the appointment of an arbitrator. It is not the intention of the Act, on finding that there is no action at common law, to ask the judge to assess damages under the Workmen's Compensation Act. In serving a notice under the latter Act, plaintiff claims damages; a claim for damages is a commencement of an action, and, having claimed damages under the Workmen's Compensation Act, he cannot recede; he has elected for compensation under the Workmen's Compensation Act, therefore he has no action at law.

Argument

COURT OF APPEAL

1910

June 1.

GRANICK v. B. C. SUGAR REFINERY CO.

[MACDONALD, C.J.A.: If this is an appeal from the judge as an arbitrator, then we cannot treat it as a case stated; if on the other hand, it is an appeal from a judge at *nisi prius*, does not an appeal lie?]

The learned judge actually proceeded as an arbitrator; there was no adjudication before the judge commenced to assess the damages. He referred to *Perry* v. *Clements* (1901), 17 T.L.R. 525; *Powell* v. *Main Colliery Company* (1900), A.C. 366. Plaintiff has no rights in this Court, and had no right to have damages assessed until an arbitrator had been appointed; there has been no submission, and plaintiff cannot get here until there has been: *In re Durham County Permanent Benefit Building Society* (1871), 7 Chy. App. 45; *Bustros* v. *White* (1876,) 1 Q.B.D. 423; *Excelsior Life* v. *Employers' Liability Corpn.* (1903), 5 O.L. R. 609.

It is only after the evidence under the common law is in that the judge comes to the decision to dismiss the action, and then plaintiff elects, but here it was admitted on the opening that he had no action. See also Dawbarn on Employers' Liability and Workmen's Compensation, 3rd Ed., 326. In short we have here no action dismissed, therefore the judge had no jurisdiction. Assuming that the judge below did dismiss the action on the admission of plaintiff's counsel, he held the arbitration before he decided to dismiss the action. The judge was wrong in proceeding to assess compensation when the plaintiff on the opening said he did not think he could recover under the common law, but thought he could under the Workmen's Compensation Act. That course of proceeding forced on us the necessity of taking the onus of proving a negative.

Argument

[MARTIN, J.A.: You say the action could not be kept alive for any purpose under the common law or the Employers' Liability Act while the judge adjudicates under the Workmen's Compensation Act?

IRVING, J.A.: Must he non-suit the plaintiff under the common law or the Employers' Liability Act before he proceeds under the Workmen's Compensation Act?]

I should think so; plaintiff must take the onus.

[IRVING, J.A.: Is not that really what was done in this case? Mr. *Burns* stated that he felt his evidence was not strong enough to sustain a case under the common law. When does the determination take place? It is not reached until the judge says the action is dismissed. Now, he did not determine the case until after he had heard what Mr. *Burns's* witnesses had to say.]

If that is so, it could happen in every action, and we submit it is a wrong procedure.

[IRVING, J.A.: The judge does not seem to have gone on the statement of counsel; he allowed the evidence to go in, and then it was for him to determine whether it fell within the Workmen's Compensation Act.]

We say that there was a mistrial, because it forced on us the onus of proving a negative. This was an agreement, in effect, to take the opinion of MORRISON, J., and there is no appeal from that.

Argument

Burns, in reply: The judge sat as a judge and not as an arbitrator. As to the question of onus, it was simply a matter of bringing out the evidence. The learned judge did not at once dismiss the action; had he done so we would have been in a different position, but we preserved our action throughout. The action was not and could not be dismissed until the judge had done what he was asked to do.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.: The plaintiff is the widow and administratrix of one John Granick, who was killed in defendants' freight elevator on the 30th of July, 1908.

The deceased commenced his employment on that morning, about 7 or half past 7. He was put to work by Foreman Woodworth, along with another man named Morgan, and Woodworth says that he told Morgan in the presence of Granick not to allow Granick to use the elevator until he was acquainted with it. The men then went to work and the accident happened at 2 o'clock in the afternoon. No witness is able to tell how the accident happened. Granick was found caught in the elevator between the floor of the elevator and the ceiling or archway above, between No. 1 and No. 2 floors. The action was

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brought at common law, and under the Employers' Liability Act, but there being no evidence of negligence on the part of the employer, plaintiff's counsel, after the evidence was in, asked the judge for a finding that plaintiff was entitled to succeed under the Workmen's Compensation Act, and to assess the compensation in pursuance of section 2 (4) of that Act. The learned judge came to the conclusion that the case was within the Workmen's Compensation Act, but that the accident happened to deceased solely by reason of his own serious and wilful misconduct, and so dismissed the action.

The only evidence in this case from which serious and wilful misconduct on the part of the deceased can be inferred, is that of two employees of the defendant, namely, Woodworth and Morgan. One can readily understand that these men might feel that responsibility and blame for the accident might be imputed to them. Their evidence must, therefore, be scanned with care, not only on this account, but also because the only person who could give evidence which might be in opposition to theirs is dead. His account of what occurred between the hours of 7.30 a.m. and 2 p.m. on that day was not available to the plaintiff. Unless, therefore, we are driven to the conclusion on the evidence before us that the accident could only have occurred from the wilful and serious misconduct of the deceased, we ought not in my opinion to deprive the plaintiff of the relief which the Workmen's Compensation Act intended to provide for her. That Act has always been construed liberally in favour of the injured or his dependants, and the employer has always been required to fully satisfy the onus which is placed upon him of shewing that the workman was guilty of misconduct, disentitling him or his dependants to obtain the compensation provided by the Act. I think it is incumbent on the defendant to practically exclude by evidence every other hypothesis than wilful and serious misconduct before it can succeed in such an issue.

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Does the evidence do this, or go anywhere near doing this in the present case? I think not. In the first place, we can eliminate the evidence that employees were not to use the elevator except for freight. If there was such a rule, it is quite

clear that deceased had no notice of it. His sole instructions were not to use the elevator until he knew how, or as put in another place, until he was acquainted with it. Where then is the evidence that he transgressed these vague instructions? Where is the evidence to shew what he and Morgan were doing from 7.30 in the morning until 2 o'clock in the afternoon? They were working all over the place as Morgan says. There is a suggestion in the evidence that deceased was told to open and close certain trap doors, and we are left to assume that he was engaged solely at that work during the several hours of his employment. But where is the evidence to support any assumption of that kind? Morgan says they were working all over the place, on several different floors. They appear even to have been in No. 1 shed, and to have used the elevator there, as well as the one in question. The only evidence with respect to the opening and closing of trap doors is, that shortly before the accident, 300 sacks of sugar were sent down a chute and that deceased went down from floor to floor to open and shut the trap doors when these sacks were sent down. How long that would take is not stated. It may have taken ten minutes, or it may have taken an hour. In the absence of any assistance from the witnesses on the point, I may use my own judgment, and I can only say that I do not think it would take very long to send 300 sacks of sugar down a steep inclined chute. Then, if they were working all over the place, what were they doing for the several hours preceding the accident? How often had the deceased, either alone, or in company with Morgan, or with some other employee, gone up or down upon this elevator, or in the elevator in No. 1 shed? The evidence is silent. Did Morgan or any other employee explain to the deceased how to run the elevator, or, in other words make him acquainted with it? Upon this point the evidence is silent. It is suggested that Morgan stopped him from using the elevator in No. 1 shed. But when did that occur? It was in the forenoon, but was it five minutes after the deceased started to work, or two hours after? Upon this point the evidence is silent. Did Morgan after stopping him from using the elevator without instructions at No. 1 shed shew him how to use it as they were going up

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or down? Again the evidence is silent. Why should we assume that this man had not been made acquainted with the elevator or shewn how to operate it, or that he had not been up and down often enough to make himself acquainted with its operation; or, at all events, to give reasonable grounds for believing that he knew how to run it? All this ground could have been covered by the evidence of the employees of the defendant, but no attempt was made to cover the ground, and we are asked to believe that, because the accident happened to the deceased, it must have happened by reason of his own disobedience to alleged orders, vague and insufficient in themselves.

Now, what is the inference to be drawn from the statement "Do not let Granick use the elevator until he is acquainted with it"? Is it not that he was expected to learn how to use it, and this notwithstanding that it appears in evidence that he was a temporary man who might not be employed for more than a day or two? Yet the foreman contemplated that Granick should use the elevator when he became acquainted with it. How long does it take to become acquainted with that elevator in the sense in which these words were used? We are told that it was a very simple affair—very simple of operation—no difficulty about it at all. The employees indiscriminately seem to have had authority to use it. It is said that they were only to use it for freight, but of this the deceased knew nothing. Is there any reason to suppose that an ordinarily intelligent man who had been employed in electrical works in Winnipeg for two years, and as a blacksmith's helper by the Canadian Pacific Railway, could not learn to run that elevator in an hour, or in less than an hour, for that matter? Or in any event during the several hours that he was there? If there was any danger in his using the elevator owing to ignorance or inexperience then the instructions which were given to him not to use it until he became acquainted with it were insufficient, and the employer was guilty of negligence in not giving him sufficient instructions and warning him against the danger. I do not hold that there was such negligence in this case, but if the employers' contention be true, there was such negligence. I

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think this elevator, being a very simple one, and one easily operated, and used by employees indiscriminately in the course of their employment, it was considered that any employee could pick up the use of it by either being shewn, or being about it for a few hours. I am not at all satisfied that this man was not shewn and was not allowed to run that elevator later on in the day. If he had not been shewn, and had not become acquainted with it, I can hardly conceive that the defendants would have failed to make that apparent at the trial, and I think that we are fully justified in believing that he was acquainted with the elevator at the time of the accident, or had reasonable ground for believing that he was, and that he was not disobeying instructions. I therefore think that the defendant has not by any means satisfied the onus which rests upon it to prove that the accident occurred solely from the serious and wilful misconduct of the deceased, and as in other respects the case is within the Workmen's Compensation Act, as held by the learned trial judge, it ought to have been so declared, and the learned judge should have proceeded to fix the compensation as contemplated by the said section.

It was suggested by counsel for the respondent (the employer) that the plaintiff having served notice of the accident upon the employer making a claim under the Workmen's Compensation Act, she had elected to proceed under that Act, and therefore could not bring the action. I think there is nothing in this contention, even assuming, which I do not decide, that a claim under the Workmen's Compensation Act sufficient to be considered the first step in the proceedings under the Act, would be an election. That is not this case, because the notice in question making the claim, claimed not only under the Workmen's Compensation Act, but also under the Employers' Liability Act. It was equivocal, and there could not be said to be any election to take one remedy any more than the other.

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Then again it was contended that there was no appeal from the learned trial judge's decision. This contention I think also fails. The appeal is from the judge's decision in the action. It is in the action that the judge decides whether or not it is a case in which the employer would be liable under the Workmen's

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Compensation Act. He must decide that first before proceeding under the above-mentioned section to fix the compensation. He decided that, as I think with great respect, wrongly, and there is an appeal from that decision.

I think, therefore, the appeal should be allowed, the action re-instated, and that it should be referred back to the learned trial judge to fix the compensation as provided by the said section.

IRVING, J.A.: Sub-section 4 of section 2 of the Workmen's Compensation Act, 1902, Cap. 74, contemplates two things occurring—(1) an action for damages brought independently of the Act; and (2) its failure. When these two things occur the provisions of the fourth sub-section relating to the assessment by the Court come into play.

It was framed to prevent what would be a hardship to a plaintiff, who, under a mistake as to his rights, had brought an action for damages when he should have applied for compensation under the Act. It is a remedial section designed to prevent a person injured from losing the benefit of the Act.

The language of the statute is plain. The trial proceeds in the ordinary way, but when it is determined, *i.e.*, by the judge that the action cannot be maintained, it is the duty of the Court to assess the compensation instead of referring that branch to arbitration.

IRVING, J.A.

The learned judge who heard this case came to the conclusion that the action must fail on the ground that the injury was such that the employer was not liable in the action, he refused to allow compensation, because in his opinion the injury was attributable solely to the serious and wilful misconduct of the deceased.

Mr. *Burns* asked for a review of the case, but Mr. *McPhillips* contends there is only an appeal on some question of law. He claims that no compensation can be fixed under this sub-section because of what took place at the trial. What took place was this: Counsel for the plaintiff in his opening intimated that he was now (*i.e.*, since examination for discovery) aware that his case was an extremely doubtful one. Perhaps he stated it

more strongly, but that did not amount to an abandonment. Nothing was said about abandonment, and no determination of the case was then made by the judge. He would not have been justified in dismissing the action on the counsel's opening without the consent of counsel. He very properly in my opinion held his hand and allowed the plaintiff to adduce her evidence. When it was all in, he determined the case by dismissing the action, and at the same time declared it was not a proper case for compensation.

There were then given two decisions, and in my opinion an appeal lies from each of them. The right of appeal from the judgment dismissing the action is not questioned, but the right to appeal from the refusal to allow compensation is denied.

Sub-section 4 requires "the Court" to make the assessment, and the Court of Appeal Act, 1907, gives an appeal from every judgment made by the Supreme Court. It seems to me this enquiry is a judicial proceeding, and from any decision on it an appeal to this Court lies—such an appeal is not limited to a question of law, as prescribed by section 4 of the second schedule. The second schedule relates to matters to be settled by arbitration, and has nothing to do with the matter now under discussion.

IRVING, J.A.

I would therefore hold that the question whether or not the injury was solely attributable to the serious and wilful misconduct of the workman is reviewable by this Court.

But on the main question, in my opinion the defendants have satisfied the onus placed upon them, and the decision of the judge that the injury was solely attributable to the serious and wilful misconduct of the deceased, was correct. On this ground I would dismiss the appeal.

MARTIN, J.A., concurred in the reasons for judgment of MACDONALD, C.J.A.

MARTIN, J.A.

GALLIHER, J.A.: I have had the advantage of reading the judgment of the learned Chief Justice with whom I agree on the questions of law raised upon appeal.

GALLIHER, J.A.

On the question of fact I am not altogether free from doubt, but considering that the onus rests upon the defendants to shew

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that there was wilful and serious misconduct on the part of the deceased, they have not as fully as they might at the trial satisfied that onus. For instance, they might have shewn that the persons with whom he was working that day had not instructed him in the use of the elevator. This they failed to do, and relied seemingly on the shortness of time he was working as indicative of the fact that he could not have known how to operate it. That indeed might be a fair presumption, but I think the defendants were called upon to go further.

I would therefore allow the appeal, and refer the case back to the learned trial judge to assess the damages.

Appeal allowed, Irving, J.A., dissenting on the main question.

Solicitors for appellants: *Burns & Walkem.*

Solicitors for respondents: *McPhillips, Tiffin & Laursen.*

ARBUTHNOT *ET AL.* v. THE CORPORATION OF THE CITY OF VICTORIA.

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Municipal law—Local improvement — By-law consented to by property owners—Duty of council to perform work specified in the by-law—Right of owners to object to class of work being done—Action—Premature—New trial.

The Corporation having, with the consent of the property owners interested, passed a by-law for the improvement of a thoroughfare by certain specified methods, departed from those methods and proceeded to construct the thoroughfare in another manner. The property owners to be assessed objected that this was not the class of work to which they had given their consent, and further, that it would not be as beneficial or permanent as the work originally proposed, and brought action to compel the Corporation to carry on the work in accordance with the by-law, or in the alternative to be relieved from the payment of any special rates which might be levied in respect of the work. IRVING, J., at the trial dismissed the action on the ground that the pleadings shewed no cause of action.

Held, on appeal (MARTIN, J. A., dissenting) that, the Corporation having passed a by-law for the construction of a certain class of road, they were contravening the provisions of that by-law by constructing a different kind of road, that the property owners to be assessed had a right to object, and that their objection should be adjudicated upon.

New trial ordered.

APPEAL from the judgment of IRVING, J., dismissing the plaintiffs' action on the ground that the pleadings shewed no cause of action. The plaintiffs' claim was for a declaration that the defendant Corporation were not carrying out certain improvements on Rockland avenue, a municipal thoroughfare, in accordance with the petition and conditions under which they consented to the imposition of a rate or assessment under the local improvement plan; for a mandatory injunction directing the defendant Corporation to construct, grade and macadamize in a proper and workmanlike manner a roadbed on said thoroughfare 26 feet wide; or in the alternative, to be relieved from the payment of any special rates which might be levied

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under the terms of the local improvement by-law passed authorizing said work. It appeared that there were two by-laws passed in respect of this work, the first having been objected to on account of the expense of tar surfacing the road, when the Council passed another by-law to improve the street by widening it "to an approximate width of 40 feet, grading same, macadamizing the roadbed to a width of 26 feet," etc. The plaintiffs' contention was that the road being constructed was not a macadamized road properly so called, and defendant Corporation submitted that plaintiffs had no status to interfere in a matter wholly within the jurisdiction of the Council as a governing body, and that even if plaintiffs had any right of action, their proceeding at this stage was premature.

The appeal was argued at Victoria on the 27th of January, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellants (plaintiffs):

W. J. Taylor, K.C., for respondent (defendant) Corporation, submitted as a preliminary objection, that the first by-law having been petitioned against, the Council on their own account passed another by-law and carried it out. The Council had power to do that as a governing body. Plaintiffs here have no right to complain of a matter of assessment until an assessment has been made. No assessment has yet been made in respect of this work.

Argument

Bodwell: With the consent of the owners a by-law was passed on the local improvement plan for the improvement of the roadway in question. The work is being proceeded with, but not according to the by-law; now the question is, whether the city having passed a by-law for one kind of work, can proceed to carry out another and different kind of work? They passed a by-law for a macadamized road, but are not building a macadamized road. The Corporation in these matters are merely the agents of the property owners. These local improvements partake of the nature of a contract, and the Corporation must carry out the work for which they have the assent of the

ratepayers, and no other work. They could not have done this particular work except as a local improvement and the only thing they have delayed is the act of assessment; therefore, that the assessment is contemplated and must be made is certain. If we take no objection now, but let the work go on the Court would be entitled to say that we stood by. He referred to *In re Gillespie and the City of Toronto* (1892), 19 A.R. 713; *Smith* v. *The Township of Raleigh* (1882), 3 Ont. 405; *Cleary* v. *Corporation of Windsor* (1905), 10 O.L.R. 333; *Dillon* v. *Township of Raleigh* (1886), 13 A.R. 53; *Re Misener* v. *Township of Wainfleet* (1882), 46 U.C.Q.B. 457; *City of Waco* v. *Chamberlain* (1898), 45 S.W. 191; *Illinois Cent. R. Co.* v. *City of Effingham* (1898), 50 N.E. 103; *Piedmont Pav. Co.* v. *Allman* (1902), 68 Pac. 493.

Taylor: The plaintiffs have no right to interfere at the present stage, as they are not assessed yet for this work, and there is nothing to prevent the Council from paying for it out of the general revenue. That alone would be a good ground of defence.

[MARTIN, J.A.: On the pleadings it appears that this was all done on the initiative of the property owners.] Argument

No; it was on the initiative of the Council. It is true there was a meeting between the property owners and the Council, but we submit that any promises or undertakings antecedent to the by-law cannot be taken into account, as the by-law speaks for itself and is the only document we have to go by. Until the property is affected by assessment there is no status to object.

Bodwell, in reply: The assessment for this work is merely postponed. The Council having made arrangements to borrow the money, if they paid for the work out of the general revenue they could be restrained.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: This is an appeal from an order dismissing the action on a point of law, namely, that the statement of claim discloses no cause of action.

The City Council proposed to make a macadam roadway on Rockland avenue by the local improvement plan. Such

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proposal could only be carried out if it were approved by the property owners in this sense, that if a certain number of property owners petitioned against it, then the work should not be undertaken. The proposal was apparently satisfactory, as the owners did not petition against it, and the by-law was passed and the work commenced and was proceeding at the date of the commencement of this action.

The plaintiff, who brings this action as well on his own behalf as on behalf of other ratepayers affected, alleges in the 14th paragraph of the statement of claim that the "defendants are not building a macadam roadway on said street, but are laying down said roadway in a defective and unworkmanlike manner, and the same will, if constructed according to present plan, not have the life and efficiency of a macadam road."

For the purposes of this appeal we must accept that statement as true. The allegation, while perhaps capable of the construction that the defendants are building a macadam roadway in an unworkmanlike manner, is also capable of the other construction that they are not constructing a macadam roadway at all, but are laying down some sort of a roadway in a defective and unworkmanlike manner. If therefore we accept the latter construction, which I think on the whole is the fair one, we have it that while the property owners in effect consented to be specially taxed for a macadam roadway, and consented that a macadam roadway should be laid on Rockland avenue, the defendants in breach of the terms of the by-law, and in breach of good faith toward the said property owners, were at the commencement of this action building a roadway which was not a macadam roadway.

MACDONALD, C.J.A.

It was contended, *inter alia,* by counsel for the City that there is nothing to shew that this work is being done under the by-law as a local improvement, and that until the plaintiff is called upon to pay rates on account of it he is not entitled to object. The statement of claim effectually disposes of the first part of this contention. There is no doubt at all in my mind that the work done on Rockland avenue was done in pretended conformity with the by-law, that is to say, as a local improvement. If then, as we are bound to assume on a motion of this

kind, the defendants were putting down a roadway which was not the one authorized by the by-law, then they were committing a breach of the statutory injunction which declares that no such work shall be undertaken if a majority of those to be charged petition against it; which means that there must be a by-law against which the property holders have had an opportunity to petition. There was a by-law here it is true, but it was a by-law authorizing one thing, while the defendants were doing quite another. On the authorities cited before us, if the property owners' moneys were in the defendants' hands, and were being applied for a purpose other than that for which they were collected, there could be no doubt about the matter. This case is, however, different, and I prefer to base my conclusion on the ground that the defendants were doing something which was directly contrary to statute.

MACDONALD, C.J.A.

The remedy asked for is a mandatory injunction, and while I have some doubt as to whether this is the relief applicable to the case, yet I would let the action go to trial before which, if so advised, the plaintiff may amend. It must not be understood that I assent to the proposition that a ratepayer can, as it were, oversee the work and interfere whenever the quality does not suit him.

I would allow the appeal.

MARTIN, J.A.

MARTIN, J.A.: My opinion is, to put it concisely, that though the statement of claim must be regarded as an allegation that an unauthorized roadway was being laid down, yet the plaintiffs' action is premature because this work of local improvement was undertaken by the Corporation on its own initiative under section 256 of the Municipal Clauses Act. Had the work been done upon the request of the owners under section 50, sub-section 148 (*a.*) I should have been of a contrary opinion: that, I think, is the result of the authorities. The case most in the plaintiffs' favour is *Smith* v. *The Township of Raleigh* (1882), 3 Ont. 405; but action was therein taken upon the petition of the owners. Unless this course is adopted the element of trust or agency on the part of the Corporation is wanting.

The appeal, should, therefore, be dismissed.

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GALLIHER, J.A.

GALLIHER, J.A.: This case comes before us by way of appeal from the judgment of Mr. Justice IRVING, dismissing the plaintiffs' action with costs.

There was no trial of the issues, but the question of law was argued as to whether the plaintiffs' pleadings disclosed any cause of action, and the learned trial judge having found in the negative, the plaintiffs appealed.

In deciding this question we must assume the truth of the allegations contained in the plaintiffs' pleadings and ask ourselves the question—assuming these to be true, do they disclose any cause of action?

The pleadings allege that the defendant Corporation passed a by-law under the powers given them by section 256 of the Municipal Clauses Act as a local improvement by-law for the macadamizing and otherwise improving of that part of Rockland avenue in the City of Victoria lying between Moss street and Oak Bay avenue. That plans, specifications and a report as to cost and rates to be assessed against the respective owners of property to be benefited by the improvements were prepared and filed. That notice in accordance with the provisions of the statute was given. That no protest was filed by the ratepayers interested. That the by-law provided for the borrowing of the moneys to pay the cost of construction from a bank, and its repayment to the bank out of special tax to be levied on the property of ratepayers owners of property to be benefited. That it also provided that no assessment under the by-law should be levied until the work was completed and that the work set out in the report should be proceeded with forthwith.

The work was proceeded with, but the defendants are not building a macadam road nor performing the work in accordance with the report referred to in the by-law, and are doing the work in a defective and unworkmanlike manner.

The plaintiffs sue on behalf of themselves and other ratepayers subject to the payment of special rates to be levied under the by-law.

Mr. *Bodwell,* for the plaintiffs, contends that, so soon as the defendants were proceeding wrongly and improperly in the

construction of the work, and not in accordance with the report, and were constructing a different kind of road to what plaintiffs had consented to be assessed for, a right of action accrued and they accordingly brought their action, and cites numerous authorities in support of his contention to which I will refer. On the other hand, Mr. *Taylor* for the defendant Corporation, takes the position that the City can proceed with the work as they see fit; that they can not be dictated to as to how they carry on a public work, citing Dillon on Municipal Corporations, 4th Ed., par. 94, p. 151. And secondly, that in any event no right of action could accrue to the plaintiffs (even if a different kind of work was being done) until an assessment under by-law had been levied.

I think Mr. *Taylor's* first contention is too broadly stated. Surely if the Corporation is proceeding to execute works entirely different from what the ratepayers agreed to be assessed for, they have the right to have the matter adjudicated upon. As to when that right accrues will be dealt with under the second head.

Dealing with the second contention. Have the plaintiffs (under the circumstances disclosed in their pleadings) any right to bring this action, or did their right accrue only when an assessment would be levied? And in this connection I will consider the cases cited.

In *Smith* v. *The Township of Raleigh* (1882), 3 Ont. 405, a portion of the moneys assessed under the by-law for a specific drain had been diverted to the clearing out of another drain which was no part of the work provided for in the by-law, and the plaintiffs brought their action for a *mandamus* and an injunction. The Court (Ferguson, J.) ordered a refund of the money diverted and enjoined the defendants from diverting further sums. No question was raised that the action was premature, and there is nothing to indicate that if the action had been brought before assessment levied, it could have been supported.

In re Gillespie and the City of Toronto (1892), 19 A.R. 713, was a motion to quash a by-law and is of no assistance to us as to the time when the right of action accrued in the present case.

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This applies also to *Re Misener* v. *Township of Wainfleet* (1882), 46 U.C.Q.B. 457. Action was brought after assessment made.

I may say, however, that the trend of all these cases seems to be that corporations are bound to carry out works authorized by special by-laws in accordance with the terms of those by-laws, and by which terms the ratepayers have consented to be bound.

The case of *Cleary* v. *Corporation of Windsor* (1905), 10 O.L.R. 333, appears to me to be more nearly in point. In that case, the corporation were proceeding to construct sidewalks not in accordance with the by-law voted upon by the ratepayers, but of a width less than was authorized by the by-law, and an injunction was granted restraining them from so doing.

Mr. Justice Anglin in his judgment at p. 335, says:

"The raising and the expenditure of this money is authorized by the vote of the ratepayers for a particular purpose. The municipal council has no power to vary or depart from that purpose. It is a trustee of the funds so raised, its trust being to expend them for the very purpose to which the ratepayers have devoted them."

GALLIHER, J.A.

Assuming the truth of the plaintiffs' allegations in the case at bar, the defendants have proceeded with the construction not in accordance with the report of the committee and of the city engineer and assessor nor in accordance with the by-law based thereon to which the ratepayers gave assent.

This I think brings it within the principle laid down by Mr. Justice Anglin, and the plaintiffs were within their rights in bringing this action.

I would allow the appeal.

Appeal allowed, Martin, J.A., dissenting.

Solicitors for appellants: *Bodwell & Lawson.*
Solicitors for respondents: *Mason & Mann.*

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RE DALGLEISH

Statute, construction of—Land Registry Act—B. C. Stat. 1906, Cap. 23, Secs. 15, 83, 91—Refusal by registrar to register—Conveyance without covenants for title—Appeal from registrar's refusal—"Good, safeholding and marketable title"—Order declaring good title.

The absence of the usual covenants for title in a conveyance of land does not, *per se*, justify a registrar of titles refusing to register such conveyance on the ground that the applicant has not a good, safeholding, marketable title, as required by section 15 of the Land Registry Act.

Decision of a registrar, refusing to register, reviewed pursuant to sections 83 to 91.

APPEAL from the decision of the registrar of titles at Kamloops, refusing to register a conveyance to the applicant on the ground that he was not shewn to have a good safeholding and marketable title in that the conveyance did not contain the usual covenants for title. Heard by GREGORY, J., at Kamloops on the 14th of May, 1910. Statement

Fulton, K.C., for the appellant.
Cornwall, for the registrar.

3rd June, 1910.

GREGORY, J.: This is an appeal by way of petition from the decision of the district registrar at Kamloops, who refused to register the petitioner's title to certain lands in the register of indefeasible fees on the sole ground that the conveyance to him did not contain the usual covenants for title; he was therefore not satisfied that the petitioner "had a good safeholding and marketable title in fee simple" as required by section 15 of the Act, B. C. Stat. 1906, Cap. 23. Judgment

Sections 83 to 91 provide ample powers for reviewing such decision. The effect of the registrar's conclusion, if sustained, would be to declare unsafe and unmarketable any title taken through a trustee who had not entered into the same covenants which a grantor usually enters into when dealing with property of which he is the legal and beneficial owner.

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RE DALGLEISH

Judgment

Dart on Vendors and Purchasers, 7th Ed., p. 92, says, subject to express stipulations, fiduciary vendors must shew a marketable title—that is, a title which at all times and under all circumstances may be forced on an unwilling purchaser, and are in all respects liable to a purchaser as if they were absolute and beneficial owners, except that they ordinarily enter into no convenants for title beside the covenant against encumbrances implied by their conveying as trustees; and at page 59 he includes under the term "fiduciary vendors" mortgagees with powers of sale, and at page 787 he says there is no authority for holding that a purchaser who can obtain the legal estate can make the absence of a good string of covenants for title a valid ground for objecting to the title: see Lindley, L.J., in *Scott* v. *Alvarez* (1895), 1 Ch. 596 at p. 606.

In this case there is no suggestion that the mortgagor did not possess the legal estate, and that it has been passed on to the petitioner, who therefore has a good safeholding and marketable title which should be registered.

As there can be no order for costs against the Government, and the registrar does not appear to have been actuated by any improper motives, there will be no order for costs to either party.

Appeal allowed.

PACIFIC LAND COMPANY v. JAMIESON.

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PACIFIC LAND CO. v. JAMIESON

Partnership—Married woman sole remaining partner—Action in name of partnership—County Court rules, Order III., r. 17; Order V., r. 3—Principal and agent—Commission.

L. who had been a member of a firm doing business under the firm name of the Pacific Land Company, retired from the firm after the registration of the same under the Partnership Act, leaving R., a married woman, sole member. Subsequently to his retirement the transaction in question in this action arose.

Held, that R. was entitled to sue in the County Court under Order III., r. 17, and that, although she was a married woman, Order V., r. 3 did not apply in the circumstances.

Held, further, on the facts, that R. was entitled to the commission sued for.

APPEAL from the judgment of McINNES, Co. J., in an action tried by him at Vancouver on the 16th, 20th and 23rd of October, 1909. The facts on which the decision turned are set out shortly in the headnote. Statement

The appeal was argued at Vancouver on the 14th of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Sir C. H. Tupper, K.C., for appellant: We submit that under Order III., r. 17 of the County Court rules, the action could not be maintained in the partnership name. The Court must read the Partnership Act and the rule together. As to the claim in the action, we say it was a several bargain for a joint performance.

Kappele, for respondent: The Partnership Act does not apply to us as we are not traders; but as a matter of fact we did register. Plaintiff is not, moreover, suing as a married woman but as the Pacific Land Company, and she has a perfect right to do so. The trial judge found as a fact that there had been a contract to pay $100 and we have earned it. Argument

Tupper, in reply: Section 69 of the Partnership Act. There had been a change in the partnership, and that change should

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have been registered. We further submit that this is a plaint by Mrs. Rice.

Cur. adv. vult.

5th April, 1910.

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MACDONALD, C.J.A. (oral): I think the appeal should be dismissed.

IRVING, J.A.: Two points were raised as to the right of the plaintiff to maintain the action. I think they must be disposed of in plaintiff's favour.

The action was originally launched with the name of D. H. Rice as plaintiff. Now, D. H. Rice was merely manager of a business being carried on in the name of the Pacific Land Company, a partnership registered under the Partnership Act. One of the registered members—Laslett—of the firm has, since the registration and prior to the action, resigned, and it is therefore said that this action fails. I do not think so. It may be that Laslett is still liable for the debts of the firm, but I do not think there is anything to prevent the firm name being still used.

The second point was that the only surviving member of the firm, Mrs. Rice, was a married woman and that the plaint had not complied with the requirements of Order V., r. 11, which requires her to state the name and address of her husband. On the other hand, the firm being a distinct identity, it appears to me the action is properly brought under the firm name—Order III., r. 17.

IRVING, J.A.

On the facts I think that the judgment must be sustained. The action is for $50, the balance of $100 commission to be payable by the defendant to the plaintiff in respect of the purchase of lots 9 and 11. The contract out of which this action arose was a contract of employment by Jamieson, the manager of the plaintiff Company, to be a medium of communication to bring about contractual relations between a Chinaman for whom Jamieson was acting and the owner of the said lots. By the arrangement, Jamieson agreed with Rice, the manager of the Pacific Land Company, and one Wallace to pay each of them a commission if they brought him, or rather the Chinaman for

whom he was acting, into communication with the owner of the said lots.

They being employed by Jamieson, the purchaser's agent, it was their duty to get the best terms possible. After it had been decided that they should get the property listed with them, there was a discussion as to how the commission, which was to be payable out of the purchase money, was to be divided. The plaintiff says that he was to receive $100 and Wallace was to receive $100. The defendant says "No, that is not so. The two of you were to receive between $110 or $100." The contractual relationship of vendor and purchaser was established between the owner and the Chinaman by means of the combined efforts of the two men. *Sir Hibbert Tupper* says that the plaintiff did nothing to entitle him to a commission, but I think that there was a promise on the part of Jamieson to pay in consideration of their doing what they did, *viz.:* finding out the list price and then one of them withdrawing and the other carrying out the sale, so I say it was by their combined efforts they effected the contractual relationship—by their combined efforts they brought about the relationship and so earned their commission.

IRVING, J.A.

In my opinion, the only question we have now to determine is whether the County Court judge was right in saying whether the plaintiff and Wallace were to get between them $200 or $100. The County Court judge, who had the witnesses before him, acting on the evidence of Somers, decided that point in favour of the plaintiff. I would have done the same, having regard to the evidence of Somers and the unsatisfactory statement of the defendant with reference to the sum of $10.

MARTIN, J.A.: I agree that the appeal should be dismissed. As to the legal points raised, they present no real difficulty, and should be decided in favour of the respondent. Order V., rule 11, clearly, in my opinion, does not apply to the position of the plaintiff, the sole representative of a registered partnership.

MARTIN, J.A.

Then, though section 69 of the Partnership Act requires changes in the membership, or firm name, etc., to be recorded, yet I cannot see that the failure to do so prevents the use of the

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existing name; the penalty section, 76, is silent on this point, as is also section 71 continuing the liability of former partners *de facto*. On the facts I think the trial judge took a correct view.

PACIFIC LAND CO. v. JAMIESON

GALLIHER, J.A.: The defendant appeals from the judgment of MCINNES, Co. J. The action was for balance due on commission and was originally brought by D. H. Rice, carrying on business as the Pacific Land Company, but later the style of cause was amended as at present. The evidence shews that at the time the transaction between the plaintiff and defendant was entered into, Olive C. Rice, wife of D. H. Rice, was the sole member of the Pacific Land Company, and her husband D. H. Rice was her manager. On the facts the whole question in dispute was as to whether there was an agreement between the plaintiff, as represented by D. H. Rice, manager, and the defendant, by which the defendant was to pay the plaintiff $100 as commission for procuring a piece of property for a client of the defendant. Both plaintiff and defendant are dealers in real estate in the City of Vancouver. The learned trial judge found the facts in favour of the plaintiff, and with that finding I fully agree.

The third and fourth grounds are disposed of by the finding of the learned trial judge.

GALLIHER, J.A.

With regard to the first objection. If a married woman sues as such in her own name, then by Rule 11 of Order V. of the County Court rules she has to state the name, and so far as she can the address and description of her husband, but by Rule 17 of Order III. of said rules, any person carrying on business in a name or style other than their own may sue in such name or style as if it were a firm name. Olive C. Rice was carrying on business as the Pacific Land Company and was registered as such, and under the last mentioned rule can sue in that name, and in such a case in my opinion the provisions of Rule 11 of Order V. do not apply.

I cannot give effect to the second objection. The words of sections 66 and 74 of the Partnership Act are "for trading, manufacturing or mining purposes." I doubt if the business carried on by the plaintiff comes within the definition. If it

does, a declaration of partnership was filed in September, 1906, and although that appears not to have been within the three months prescribed by section 66, and no further declaration was filed when Olive C. Rice became the sole member of the partnership as provided by section 69, and while that neglect might render the partnership liable to the penalty provided by the Act, I take it that it would not be an illegal use of the name or deprive Olive C. Rice from suing in the partnership name.

I would therefore dismiss the appeal.

The matter seems to me a very trivial one, the sum of $50 only being involved, and I think such appeals should be discouraged.

Appeal dismissed.

Solicitors for appellant: *Tupper & Griffin.*
Solicitors for respondent: *Kappele & Dockerill.*

CROSSLEY *ET AL.* v. SCANLAN *ET AL.*

Mining law—Location—Survey post used as No. 1 post—Mineral Act Amendment Act, 1898, Cap. 33, Sec. 16, Sub-Secs. (f.) and (g.)—Omission of surveyor's signature on plan—Leave to add signature.

The location of a mineral claim is not invalid merely because an old survey post is used by the locator as the No. 1 post of his mineral claim, if the facts bring the locator within the benefit of sub-section (g.) of section 16 of the Mineral Act as amended in 1898.

Leave was given to amend a plan by attaching the signature of the surveyor.

TRIAL before HUNTER, C.J. B.C. in an action of adverse claim at Nelson in May, 1910. The plaintiffs were the owners of the Vista, Golden Horseshoe and Perrier mineral claims. The defendants located over portions of the same ground, the St. Elmo, St. Anthony and Golden Quartz mineral claims and applied for a certificate of improvements. The plaintiffs adversed and claimed a declaration that their claims were valid

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as against the defendants, and alleged trespass. The plaintiffs proved: (1.) Senority of location and record; (2.) certificate of work; (3.) that they were free miners from the date of location; (4.) extent of encroachment by survey; (5.) adverse claim filed.

S. S. Taylor, K.C., for the defendants, applied for a non-suit on the following grounds: (1.) That the plan attached to the affidavit of adverse claim was not signed by a Provincial land surveyor; (2.) That the Vista was an invalid location because the No. 1 post had formerly been a survey post of a prior claim.

Lennie (*Wragge,* with him), for plaintiffs: The affidavit of adverse claim is not now a condition precedent to the action as it was filed after the writ was issued. The object of filing it is fully set forth by the Supreme Court of Canada in *Paulson* v. *Beaman* (1902), 32 S.C.R. 655. But,

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if necessary, we ask for leave to amend the plan by adding the surveyor's signature to accord with the one filed on his examination *de bene esse.* In any event, the absence of the surveyor's signature does not preclude us from proceeding to establish our title under section 11 of the Act of 1898. As to the use of the survey post as the No. 1 of the Vista, we rely upon *Docksteader* v. *Clark* (1904), 11 B.C. 37 at p. 41, affirmed by the Supreme Court of Canada (1905), 36 S.C.R. 622, and the fact that there is a total absence of evidence that the defendants were misled in consequence.

HUNTER, C.J.: Leave should be granted to amend the plan by attaching the surveyor's signature. In the absence of

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evidence that others desiring to locate in the vicinity were misled by the use of the survey post, there should not be a non-suit as explained in *Docksteader* v. *Clark.*

Order accordingly.

THE PATERSON TIMBER COMPANY v. THE CANADIAN PACIFIC LUMBER COMPANY.

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Contract—Assignability—Contract made with firm subsequently turned into incorporated company—Assignment of contract by firm to incorporated company—Rights of contracting company and assignee—Novation—Repudiation—Breach—Damages.

By contract made between the defendants and the plaintiff firm carrying on business under the name of the Paterson Timber Company, the plaintiff firm agreed to sell and the defendants agreed to purchase the entire output for one year of certain lumber camps operated by the plaintiff firm. The contract was expressed to be binding upon the parties, their executors, administrators and successors respectively. Logs were to be paid for in cash upon delivery. Shortly after the contract was entered into, the plaintiff firm caused a company to be incorporated under the name of The Paterson Timber Company, Limited, to which company the firm assigned all its assets, including the timber limits concerned in the contract with defendants, and including also the contract itself. The incorporated company agreed to perform all the contracts of the firm. The company continued to deliver logs under the contract for some months until the defendants, claiming that a breach of the contract had been made, notified the firm that further deliveries of logs would not be accepted. It was not clear from the evidence that the fact of the plaintiff firm having turned its business over to the company had ever been clearly brought to the attention of the defendants, although the latter in correspondence and in their minute book used the name of the incorporated company, and referred to the contract as being made with the incorporated company:

Held, on the evidence (IRVING, J.A., dissenting), that the alleged breach was assented to by the defendants' manager, and therefore they were not entitled to repudiate the contract.

Held, also (IRVING, J.A., dissenting), that the contract was not of such a personal nature that it could not be assigned, or at any rate it did not require to be performed by the plaintiff firm personally, but could be performed by the company, and therefore the plaintiffs were entitled to recover damages for the wrongful repudiation of the contract.

Tolhurst v. *Associated Portland Cement Manufacturers*, 1900 (1903), A.C. 414; *British Waggon Co.* v. *Lea* (1880), 5 Q.B.D. 149, referred to.

Held, further, that the facts did not establish a novation.

Held, further, that in estimating the damages to which the plaintiffs were entitled, the amount of the two booms sold to other parties with the

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consent of the defendants was not to be deducted from the amount of logs which the defendants were obliged to accept, but that the damages were to be estimated without any reference to the fact of said booms having been sold to other parties.

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APPEAL from a judgment of CLEMENT, J., in a trial before him at Vancouver in October, 1908 and March, 1909. The facts appear in the reasons for judgment at the trial and on appeal.

PATERSON TIMBER CO. v. CANADIAN PACIFIC LUMBER CO.

Martin, K.C., and *Craig,* for plaintiff Company.
Davis, K.C., and *Griffin,* for defendant Company.

4th March, 1909.

CLEMENT, J.: The trial of this action has lasted now for nearly four days. During the intervals of adjournment I have had an opportunity to look into the authorities, and I think perhaps it will be better if I expedite this case on its way to the upper Courts, as I have come to a clear conclusion in my own mind, both as to the facts, and as to the law.

It would perhaps be better for me to deal with the facts first. With regard to the allegation that sale of the two booms was wrongfully made by the plaintiffs (I will not differentiate between the firm and the Company): I have to say that a very determined effort has been made to discredit Mr. T. F. Paterson's testimony, and I think in justice to Mr. Paterson I should say that that attempt has to my mind entirely failed. It seems to me that when, in October, he was accused of having broken his contract by making sales to other people, which he at once denied, alleging he had done so with the consent and at the request of the Company's manager, that would fix the matter in his mind, and I think from that time on it has been present to his mind, and it is for that reason he is in a position to say positively there was such an arrangement made with McCormick. The interviews, on the other hand, in Sir Hibbert Tupper's office, came to nothing and Paterson would easily forget the details. I do not think it necessary to go into a minute, microscopic examination of the evidence as to the exact date on which the conversation with McCormick took place. I feel quite convinced in my own mind that the conversation did take place and that it was at the request

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of the defendant Company's manager that the sale of the other two booms was made to other people. I do not think however, it was necessary to determine that point so far as the determination of this case is concerned, but I think the parties are entitled to my finding on this question of fact in case this case should be carried to a higher Court.

I do not think under all the circumstances that even if these booms had been sold without the consent of the defendant Company it would have been such a breach of contract as would entitle the defendant Company to repudiate. I think the case of *Mersey Steel and Iron Co.* v. *Naylor* (1884), 53 L.J., Q.B. 497, makes that fairly clear. That was a contract made between a limited company and the defendants by which the defendants agreed to purchase a quantity of steel which the company were to deliver by monthly instalments. One instalment was delivered, and the term of the contract that the money should be paid upon delivery was broken. There was no payment made. The reason why no payment was made was that a petition had been presented for the winding up of the company and the defendants were somewhat uncertain as to whether they had the right to pay the company. The result was, however, that they did not pay, and it was ruled there that the failure of the defendants to make that payment to the company did not entitle the plaintiffs to repudiate the contract. The whole question as to what breaches of contract are sufficient to entitle either party to repudiate is discussed in that case. The Lord Chancellor at p. 499, says:

"I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208, 43 L.J., C.P. 91, which is, in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a recission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at the conduct of the parties, and see whether anything of that kind has taken place here."

Then he goes on to discuss whether payment for one delivery

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is a condition precedent to the right to ask for further deliveries and after answering in the negative, says this:

"It appears to me, according to the authorities and according to sound reason and principle, that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to release himself from a future performance of the contract. The question is, whether the facts here justify that conclusion? Now, the facts which are relied upon without reading all the evidence, are these: The company, at the time when the money was about to become payable for the steel actually delivered, fell into difficulties, and a petition was presented against them. There was a section in the Companies Act, 1862 (section 153), which appeared to the advisers of the purchasers to admit of the construction that, until, in those circumstances the petition was disposed of by an order for the company to be wound up, or otherwise, there would be no one who could receive and could give a good discharge for the payment of the amount due. There is not, upon the letters and documents, the slightest ground for supposing either that the purchasers could not pay, or that they were unwilling to pay, the amount due; but they acted as they did evidently *bona fide*, because they doubted, on the advice of their solicitor, whether that section of the Act, as long as the petition was pending, did not make it impossible for them to obtain that discharge to which they had an unquestionable right."

Now, here there was not the slightest ground for supposing that the Patersons were unwilling to turn these particular booms over to the Company. There was not the slightest ground to suppose that they had any desire to break the contract or in any way avoid their responsibility under it, but quite the contrary.

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Then Lord Blackburn, at p. 502, lays down the rule:

"I think that the rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage* v. *Cole* (1607), 1 Wms. Saun. Ed. 1871, 548), if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say, 'I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for the performance is defeated by your misconduct.'"

Now, it seems impossible to bring the defendant Company in this case within that definition.

Lord Watson says, at p. 502, and I quote his language because one part seems to fit this case very neatly:

"I am quite of the same opinion. I think it would be impossible for

your Lordships to sustain the appeal unless your Lordships are prepared to hold that any departure from any terms in the contract by one of the parties is to be sufficient to entitle the other to set it aside. I think the correspondence shews that the delay in making payment of that part of the contract price which ought to have been made on the 5th of February was due to these two causes: in the first place, a very natural desire on the part of the purchasers to see that they were safe against being called upon to make a second payment of the price, and in the second place, an obvious desire on the part of the sellers to get rid of the contract altogether. There was no controversy as to the terms of the contract. There was no unwillingness on the part of the respondents to pay the price due under the contract, except for the circumstances that there had been a change in the constitution of the company, because they had gone into liquidation on the 2nd of February, and the respondents' firm were advised by their law agent that they were not in safety in paying until the liquidator was appointed."

There was here absolutely no controversy as to the terms of the contract. There was obviously a desire on the part of the Company to get relief from the extreme burden of the contract, as the situation was at that time. So that on that branch of the case I feel quite clear in my own mind on the authority of that case that even if there had been a breach, it was not such a breach as would entitle the defendant Company to repudiate. If indeed the conduct of the plaintiffs had been such as to shew that the intention of the Patersons was (to use a common expression), to "get out of their contract," then the situation would have been different, but the whole circumstances of the case point to the very opposite conclusion. As Mr. *Davis* said, the point was really a technical one, perhaps not so in strictness of law, but certainly one without merit, for it is a curious commentary on the situation that the very breach of which the defendant Company complains was one that meant money in their own pockets. It certainly would not have meant any money, but the reverse, so far as the pockets of the Patersons were concerned. I do not wish to be understood as saying that the motives of the Patersons were purely altruistic. It did suit their card to dispose of the two booms as they did, particularly if the defendant Company took the same quantity later. But the whole transaction was of advantage chiefly to the defendant Company.

I may also refer to Anson on Contracts, 11th Ed., 325. I

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suppose on this side of the water we may refer to the books of living English authors. The proposition laid down there is in accordance with my reading of the authorities:

> "The question to be answered in all these cases is one of fact. (Speaking of the question of alleged breach, as a matter of fact), the answer must depend on the circumstances of each case. The question assumes one of two forms—does the failure of performance amount to a renunciation on his part who makes default? or does it go so far to the root of the contract as to entitle the other to say, 'I have lost all that I cared to obtain under this contract; further performance cannot make good past default'"?

Clearly the defendant Company does not bring itself within the law as there laid down.

In regard to the other point, namely, that the action could not be maintained by the Company, as distinguished from the firm, and inversely, I suppose, also the contention that the Paterson firm could not recover because they had suffered no damage. I am not prepared to say whether there was an actual novation; I am inclined the other way. But I think on the authority of *Tolhurst* v. *Associated Portland Cement Manufacturers,* 1900 (1903), A.C. 414, that this was an assignable contract. I had not noticed until Mr. *Davis* mentioned it, the use of the word "successors" in the contract itself. That goes very far, in my mind, to shew that this was not a personal contract within the meaning of the authorities, but, as in the *Tolhurst* case, a contract between the "limits" on the one hand and the "mill" on the other hand.

CLEMENT, J.

By the way: There was another clause which was not referred to in the argument (clause 6) which I think speaks of it as being of the essence of the agreement that the camp should be efficiently worked and operated and the entire output delivered. The effect to be given to that word "essence" is discussed in a recent case: *In re Coleman's Depositories, Lim.* (1907), 2 K.B. 798, 76 L.J., K.B. 865. I do not think that the delivery of the entire output of the camp was of the "essence" of the contract in the sense that a breach of it in respect to these two booms went to the root of the contract. The loss of a boom in a storm would, on that construction, put an end to the contract if the defendant Company so insisted. In pointing that out, I am, of course, going back to the first ground of argument.

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To resume on the second point, the *Tolhurst* case seems to me almost on all fours with this case. I do not think the personal element had much to do with this case; in other words, it seems to be as I said before, a contract between the "limits" on the one hand and the "mill" on the other.

In regard to the position under that assignment, it has struck me that, taking these limits as the Paterson Company did with notice that the contract had been made, this defendant Company would always have been able to hold them to the contract, perhaps not by bringing an action upon the contract itself, but by an appeal to the equitable side of the Court. The benefit of that contract having been assigned to the Paterson Company, that Company would have to accept its burdens, or would have to allow the firm to carry it out.

As to the form judgment should take, whether in favour of the Company or of the Paterson firm with a declaration supplementing it that the benefit of the judgment should really accrue to the Company—I think the difference is that between tweedle-dum and tweedle-dee. I think there must be judgment in favour of the plaintiffs.

CLEMENT, J.

The counter-claim has scarcely been attempted to be substantiated except in one particular, and that, if the deliveries had continued, would have been matter of set-off. I think the counter-claim should be dismissed with costs.

As to the damages they must be computed as set out in the statement of claim down to the last two items. I have not added them up—counsel may do so.

I think the plaintiff is entitled to damages down to the $1,084.74. As to the last two items the amount will be as in the statement made up and submitted.

The appeal was argued at Vancouver from the 15th to the 24th of February, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A. The points argued are dealt with in the reasons for judgment.

Sir C. H. Tupper, K.C., and *Griffin*, for appellants.

Craig, and *Hay*, for respondents.

Cur. adv. vult.

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29th June, 1910.

MACDONALD, C.J.A.: Appellants allege that the contract in question in this action was broken by the respondents when they disposed of a boom of logs from one of the logging camps in question to the Terminal City Lumber Company on the 29th of August, 1907, and again another boom of logs to the Vancouver Lumber Company on the 13th of October of the same year. The respondents admit that they disposed of these logs which came from the camp or camps, the output of which the appellants were entitled to receive, but say that these booms were disposed of at the request of the appellants' late managing director, McCormick. McCormick died before the dispute out of which this action springs occurred, and his version of the affair is not available. T. F. Paterson, one of the plaintiffs, who was apparently the man of business of the plaintiff firm, and afterwards of the plaintiff Company, testified to the alleged request of McCormick, and says that he acted on it when he diverted the two booms.

The trial judge made a special finding of fact in favour of respondents on this point, and declared that he believed the testimony of T. F. Paterson. Appellants now ask this Court to reverse that finding of fact, and to declare that the evidence of T. F. Paterson ought not to be believed. Paterson was very fully examined for discovery, and was subjected to a very searching cross-examination at the trial, which developed, as one would expect, some discrepancies in his statements, more or less open to comment.

MACDONALD, C.J.A.

The appellants' main ground of attack, upon the credibility of T. F. Paterson, is based upon two letters written by him to his foreman, Fraser, dated respectively the 15th and 26th of August, 1907, and his silence regarding the McCormick arrangement at a meeting which he attended of the appellants' board on September 2nd of the same year.

I do not feel it necessary to deal exhaustively with the analysis of the evidence made by counsel, or the arraignment of T. F. Paterson's veracity developed by such analysis; I will only say that these things do not convince me that T. F. Paterson was giving false evidence when he testified to his

conversations with McCormick regarding the disposal of the two booms in question.

I am bound to say after reading the correspondence, that I think the respondents acted towards the appellants in a manner indicative of fair dealing and good faith, and not of duplicity. They were entitled to insist upon the appellants taking without delay, and paying for in cash, all the logs which they had cut for appellants under the contract. They did not insist upon this, but on the contrary, as the correspondence shews, were endeavouring to assist the appellant Company which found itself embarrassed by reason of car shortage, a dormant market, and want of room. The correspondence prepares one for just such a request as that which T. F. Paterson states was made by McCormick. The minutes also of the appellants' board of directors, of the meeting of the 28th of September, 1907, shew that at this time only a month later, the board was exceedingly anxious to be relieved of respondents' liability to take immediately the full quantity of logs contracted for. Having regard to the then existing depressed condition of the market, it is difficult to discern a motive for a breach by respondents of a contract so advantageous to them, or for any surreptitious disposal of the logs, and this I think is a circumstance not to be lost sight of in judging the credence to be given Paterson's story. I think the findings of fact of the learned trial judge ought not to be disturbed. The contract is made by the parties "for themselves, their executors and administrators and successors respectively," and it was contended for appellants that neither by its terms nor by its nature was this contract assignable. Shortly after it was made, the parties of the first part, W. I. Paterson and T. F. Paterson, trading as the Paterson Timber Company, organized a joint stock company, the incorporated plaintiffs (respondents) and commencing in April, 1907, we find that the letters passing between the parties are sometimes signed "Paterson Timber Co. Ltd.," and sometimes "Paterson Timber Co.," usually the former; while at least one letter of the appellants was addressed to the "Paterson Timber Co. Ltd.," and on the 28th of September, 1907, and again on the 12th of October, 1907,

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the appellants in the minutes of its board of directors refers to the "Paterson Timber Co. Ltd's contract."

It was conceded by counsel for the appellants that the absence of the word "assigns" in the contract did not necessarily make it non-assignable, but it was contended that the nature of the contract, coupled with such absence, shews an intention that it should be performed by the parties of the first part only, namely, the Paterson Timber Co., and not by another.

We were referred to a number of authorities in support of the rule that contracts in their nature involving personal trust and confidence are not assignable. As to whether a contract is to be deemed such or not depends upon intention, and this intention is in most cases to be inferred from the nature of the contract, and the surrounding circumstances. Here the contract is for the sale and delivery of logs. Lumbering is one of the principal industries in this Province, and logging contracts are very common. I think we ought not to be astute to discover an element of personal trust and confidence in such common commercial transactions. That this contract was regarded as a not strictly personal one appears on the face of it. Assuming that the word "successors" is applicable only to the appellant, we still have the words "executors and administrators" applicable to the Patersons. The personal skill and care of the Paterson firm was therefore not in any event stipulated for. It was argued that their financial ability to carry out the contract was relied upon, but I am unable to see how the performance of the contract through another would relieve the Paterson Timber Company from their responsibility to the appellants. It was contended also that as the contract contained few or no safeguards against the supply of inferior logs, the appellants must have relied upon the honour of the Paterson Timber Company in this regard. That argument is not without force, but I am inclined to think that the parties relied more upon their knowledge of the limits from which these logs were taken, and the class of logs produced and delivered from these limits in the past than upon the honour of this firm.

In arriving at the intention of the parties at the time the

contract was made, I think we may look at their subsequent conduct. Now, as early as April the Paterson Timber Company, Ltd., were writing letters to appellants which were an intimation that some change had taken place. The appellants' board of directors passed resolutions referring to the incorporated plaintiffs; on that board and present at one or more of those meetings was the solicitor for appellants. As it did not occur to the minds of the members of the board and the appellants' solicitor, that it was contrary to the intention of the parties when they made the contract that the incorporated plaintiffs should carry it out, we ought not to attribute to the parties an intention which they themselves at a later date were unable to perceive.

A further ground of appeal was argued before us, namely, that the learned trial judge erroneously included in the sum allowed for damages the loss on the two booms of logs which were diverted as aforesaid. I do not see any reason for interfering with his conclusion on this point. The contract while providing for the entire output of the camps, fixed a limit to the quantity of logs which the appellants need accept, and after July they agreed upon 18,750,000 feet as the total quantity to be delivered. That quantity the respondents were entitled to deliver, and I see no reason for holding that they could and would not have delivered that quantity had the contract not been repudiated by the appellants in October.

There was a cross-appeal by the respondents who claimed an increase in the sum allowed for damages on the ground that they were entitled to deliver a greater quantity than 18,750,000 feet, but I think that that contention is not tenable, having regard to the correspondence between the parties which I think resulted in the respondents assenting to the above quantity.

I would therefore dismiss the appeal, and the cross-appeal.

IRVING, J.A.: The question of fact raised by the appeal is: Did Mr. Frank Paterson and the late Mr. McCormick arrange on the 28th or 29th of August, 1907, that the contract in question should be so varied as to allow the plaintiffs to sell or use some of the booms they had agreed to deliver to the defend-

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ants, but without prejudice to the right of the plaintiffs to make delivery of a like amount after the day fixed for the termination of the contract.

The duty of the Court of Appeal in considering appeals on questions of fact from a finding of a judge, as laid down in *Coghlan* v. *Cumberland* (1898), 1 Ch. 704, and *Montgomerie & Co., Limited* v. *Wallace-James* (1904), A.C. 73, is to rehear the case, reconsidering the materials before the judge, with such other materials (if any) as it may decide to admit. The Court appealed to must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it, if on full consideration the Court comes to the conclusion that the judgment is wrong.

There seems to be some difference of opinion as to what this Court should do on hearing an appeal from a judge without a jury. The two cases I have cited in the opinion of the Judicial Committee must be regarded as exhaustively laying down the rule with reference to appeals on questions of fact from a judge: see *Greville* v. *Parker* (1910), 26 T.L.R. 375 at p. 376. It has been suggested that the rule laid down in *Weller* v. *McDonald McMillan Co.* (1910), 43 S.C.R. 87, for the Supreme Court of Canada is applicable in some way or other to this Court. That is impossible, because this Court never has before it the findings of two Courts on a question of fact. It is by reason only of the fact the Provincial Court of Appeal has done its duty by re-trying the case that the Supreme Court of Canada can lay down such a rule for themselves.

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The finding of the learned judge was that the conversation in which the agreement was reached did take place, and that it was at the request of the defendant company's manager that the sale of the other two booms was made to other people. The finding of the trial judge is, in view of what he says later, a strong point in favour of the plaintiffs; but there are circumstances in this case which satisfy me that he has reached a wrong conclusion on this question of fact. It is proper to observe here that a great mass of correspondence was put in at the trial, and that there was held, not in the presence of the

judge, two examinations for discovery—one of which takes up some 100 pages of the appeal book. It is also proper to observe that at the alleged conversation in August, 1907, there were only two men present. *viz.:* Mr. Frank Paterson and Mr. McCormick, the latter of whom died on the 13th of October, 1907 (the dates are important), and that there is no corroboration of Mr. Paterson's story, such as one would naturally look for—see *per* Hannen, J. in *Beckett* v. *Ramsdale* (1885), 31 Ch. D. 177 at p. 183; and that the agreement then entered into seeks to vary a written agreement: see observations of the Lord Chancellor (Lord Chelmsford) in *Earl of Darnley* v. *Proprietors, &c. of London, Chatham and Dover Railway* (1867), L.R. 2 H.L. 43 at p. 60.

If it is believed, his story, though uncorroborated should be accepted, because it is conceded that it would be in the scope of Mr. McCormick's duties to sell the logs but not to make such an agreement for the extension of time for completion. How then are we to determine whether we should accept his story or not? Of course if any story by a witness is improbable, or absurd, or inconsistent with admitted or incontrovertible facts, it will not be accepted. It carries with it its own condemnation. And if a story is rejected on these grounds it brings in its trail a re-action. These improbabilities, absurdities and inconsistencies, if shewn to be such, become weapons of attack in the hands of the side contesting the truth of the story. His story, as ultimately told, is this: that on the afternoon of the 28th of August, 1907 (or on the morning of the 29th), McCormick came to him in great distress, and begged him not to make delivery of so large a quantity of logs (some $20,000 worth) as he (Paterson) was then prepared to deliver; that it was impossible for McCormick's company to handle that amount or to find the cash to pay for it. He, Paterson, then agreed that if the time for the final delivery was extended beyond the 1st of February, 1908, so that Paterson could deliver two booms then, he, Paterson, would instead of then making delivery to the Company of two booms then specified, find some other means of disposing of them. For this McCormick was grateful, and he agreed to it,

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and he confirmed it, over the telephone, after seeing his directors. The two booms not to be delivered were an 8 swifter from Foul Bay, and a 10 swifter from Rock Point. Let us get a clear grasp of what this agreement was. It was that the plaintiffs should find some one to take over an 8 swifter from Foul Bay, and a 10 swifter from Rock Point. In this way the defendants were to be relieved from finding some $10,000 cash; but on the other hand, as it was only fair that the plaintiffs should not lose their profit, they were to be at liberty to deliver a similar amount of lumber after the 1st of February, 1908. On its face a very fair and reasonable arrangement. But of the three matters dealt with the last was the most important to Mr. Paterson. It was for his protection. It was the term he insisted upon. Unless that was agreed to, he would not accommodate the defendants by withholding delivery.

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I now state the reasons why I think the trial judge should have rejected his story. In the first place, there is an omission on the part of Mr. Paterson to confirm this interview by letter. Mr. Paterson's correspondence shews how unlikely it is that he would have omitted this ordinary business precaution. That reason by itself is not of great weight, but the fact that he did omit to put in writing the result of this interview becomes of great importance when we consider the interview which he held with Sir Hibbert Tupper on the 18th of October, just after McCormick's death, and the letters he and his solicitors wrote on the 25th of October, 1907. These different pieces of evidence must all be taken together, they form a much stronger case than the sum of the cases which each separately would make. The interview of the 18th of October was held to discuss some changes in the contracts. It was spoken of on Paterson's second discovery examination; by Paterson in chief, on cross-examination, and by Tupper. We have no finding from the judge as to what was said by Paterson on that occasion. The conclusions I reach are that at that meeting Paterson told Tupper that he had sold one boom in October, but he did not mention that he had sold or used the other. He did not tell Tupper that there was an agreement between him and McCormick for an extension of time. His

statement as to this departure from the terms of the contract seems to have startled Tupper, for (judging from the way Paterson tells the story) he grasped at the opportunity and said something to the effect that it looks as if that contract was off, to which Paterson said: "I did it at the request of McCormick." Paterson excused what he had done by saying: "It was at McCormick's request." He did not set up that he had a right to sell part of the output by virtue of a change in the contract. He then, seeing Tupper was "crusty" left the office, wondering, he says, what it was that had upset him, as he adds he thought that Tupper knew all about the agreement between him and McCormick. Now, one would have expected that after the unpleasant termination to this interview, Paterson would have said to himself: "Why, all the other directors know about this, even if Tupper doesn't," and that he would have appealed to them to confirm the agreement. No, not to confirm the agreement, but to testify that they knew from McCormick that the agreement had been made. Within the next ten days he received a notice from the Company that he had broken his contract. As was to be expected he at once sat down and in a business-like way put before them his position. He begins his letter by expressing the opinion that he does not think the Company will repudiate the contract when they have the whole matter properly put before them. He then proceeds to put the matter properly before them, and goes through the points in dispute one by one, and in time reaches this particular matter:

"*Re* the letter of your solicitors to the effect that we had broken the contract we of course are prepared to state that it is not so. If we sold any logs from these camps it was at the earnest solicitation of your then managing director, the late McCormick, and he assured us that he had full power to act in the matter. Indeed we are prepared to say that such action on our part was a great help to your company at the time as Mr. McCormick assured us that your company was so heavily stocked with lumber and logs that it was impossible for them to pay for these logs at that time."

He then proceeds with the other matters, and expresses a hope that legal complications may be avoided. Now, if ever there was an occasion which called upon Paterson to put for-

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ward his contention that there was a permission for him to sell two booms, and an agreement that he should have an extension of time, that was the occasion. He knew by this time that he was the only living person who was present at that alleged interview, and he knew he had not confirmed it in writing. He was in consultation with his solicitors, Messrs. Harris & Bull; see their letter of the same date in which they do not take up any position except that taken up by Paterson in his interview, *viz.:* that it was done at McCormick's solicitation. That same excuse was advanced on 2nd November, 1907, and the position remained the same until October, 1908, when the parties went to trial and an adjournment had to be taken in order that the plaintiffs might amend their pleadings to set up this agreement. The story of the permission to sell two booms was set up for the first time, just one year after McCormick's death, in the particulars furnished on the 7th of October, 1908.

A safe rule to observe in cases like the present, where any question of fact depends upon the testimony of a single witness, and any inconsistency is apparent between such testimony and the previous conduct of the witness, is that which was frequently laid down by Page Wood, V.C., *viz.:* that the Court should look rather to the acts done by him at the time, than to his statements when called as a witness.

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In my opinion what I have written is sufficient to justify the rejection of Mr. Paterson's evidence. But there are other reasons why his story should not be accepted. It is inconsistent with itself. The date of the alleged interview was the 28th or 29th of August. Before that day, we find that Mr. Paterson on the 14th of August sent up for this boom specially "as we want it for our mill," and again, on the 26th of August, 1907, he writes: "We are using the Rock Point logs at our mill now." Again, if Paterson on the 28th of August had obtained from McCormick this agreement, could he have written to the Company on the 13th of September this enquiry:

"If at any time we can sell some of these logs before the term of the contract expires, we would be quite willing to do so, with the understanding that your company is to take the 18,750,000 even if some of it is not delivered before the time expires.'

It is impossible to believe that he would have written in that way in September—in McCormick's lifetime—if the impeached agreement had been made as to two booms, and for one of which he was still seeking a purchaser. One notices in this letter how Mr. Paterson asks to have this sought-for extension put in the contract, but not a word about including the agreement made in August. The story is improbable. It is not improbable that the sale to others should be made, so as to relieve the defendants, but it is improbable that McCormick would alter a contract without leave, and afterwards pretend to Mr. Paterson that he had seen his directors and that they had approved of his action. It is highly improbable that an agreement should have been reached by Paterson and McCormick on the 28th or 29th of August to relieve the defendants from the responsibility of providing $10,000 and that Mr. Paterson and Mr. McCormick should on the 2nd of September attend a meeting of the directors of the defendant Company and not say anything about it when the payment for these very booms was being discussed.

Mr. Paterson's evidence was so full of contradictions that it ought not to have been accepted. It is only fair to the learned judge who tried the case to point out that we in this Court have, in this respect, an advantage over him in that we have more time to compare Mr. Paterson's discovery examination with his evidence at the trial than the learned judge had. I refer to some of the discrepancies that are of importance: (1.) He said he had not sent for this boom specially. His letter of the 14th of August shews that he had; (2.) He swore that he had told Sir Hibbert Tupper about two booms. His letter of the 25th of October, 1907, where he is putting the matter before the Company in order to avoid a law-suit, mentions only one boom. For some reason or other he did not mention the 10 swifter he had used in his own mill; (3.) When the date of his shipment of this 10 swifter was in point he was asked on his second discovery examination in October, 1908, for the tug's receipt. He said "it was there, *i.e.*, among the exhibits, although it had fallen in the water." Again, he was asked to produce it, as defendants' solicitors could not find

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it, and he replied. "It is there." An undertaking was given that it would be produced. On the 28th of October, 1908, defendants applied for it, and the reply of Mr. Paterson through his solicitors was that he "believes there was such a receipt, but that he cannot now find it." Again, on the trial of the 1st of March, 1908, he was asked about it, and remembered seeing it among the papers, but attention was directed to something else, and so it was not turned up. Finally, it was produced on his cross-examination on the 3rd of March, but no comment was then made on its condition nor was explanation offered.

Mr. *Craig* says we ought not to draw any inference from its appearance, as Mr. Paterson was not challenged to explain its appearance. To appreciate this suggestion one should examine the mutilated exhibit. As defendants' counsel had already, on the 1st of March intimated to Paterson that their position was that as he had disposed of these logs before the time of the alleged conversation with McCormick had taken place, it was not incumbent on them to specially invite any explanation from him. They had put forward their charge, and it was for him to explain everything. From the condition of the exhibit, I think the maxim *contra spoliatorem* is applicable. If, however, others should think that under the circumstances no inference of dishonesty can be drawn from its condition—then this surely can be done—everyone must recognize that the unfortunate condition of this much-inquired after receipt would impress itself on Paterson's mind, and that he would remember all about it, and the boom to which it applied; therefore I say that there is no room for the excuse that Paterson might have forgotten when he said he did not send specially for this boom for their own use on the 12th or 13th of August, or that it might have been brought down without special orders.

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On these points we have as good an opportunity of judging the value of Mr. Paterson's evidence as the learned trial judge had. Without going further into the details, I am of opinion that the learned trial judge was wrong in reaching the conclusion that these two booms were sold in consequence of an arrangement between Mr. Paterson and the late Mr. McCor-

mick. Mr. Paterson's evidence stands wholly without corroboration. The evidence of Ford as to something said to him by McCormick was rejected by the learned judge and properly so, in my opinion: *Fairlie* v. *Hastings* (1804), 10 Ves. 123; *G. W. Railway Co.* v. *Willis* (1865), 18 C.B.N.S. 748; followed in *Young* v. *Canadian Pacific Railway Co.* (1884), 1 Man. L.R. 205; *Blackstone* v. *Wilson* (1857), 26 L.J., Ex. 229, where it is laid down that when the admission of an agent is receivable, it can only operate to bind the principal as to the transaction in respect of which it was made.

The learned trial judge thought that even if these booms had been sold without the consent of the defendant Company it would not have been such a breach of the contract as would entitle the defendant Company to repudiate, and he based his decision on *Mersey Steel and Iron Company* v. *Naylor* (1884), 9 Q.B.D. 648; 9 App. Cas. 434. That case decided that the breach of one stipulation in a contract does not of itself amount to an entire repudiation of the contract, nor does the breach of one stipulation necessarily carry with it even an implication of an intention to repudiate the whole contract. It may do so, if the circumstances lead to such an inference. The correct doctrine of emancipating oneself from the terms of contract, on account of the failure of the other party to perform his part, is set out in the judgment of Lord Coleridge in *Freeth* v. *Burr* (1874), L.R. 9 C.P. 208; the two dissenting judgments of Brett, L.J. in *Reuter* v. *Sala* (1879), 4 C.P.D. 239; and *Honck* v. *Muller* (1881), 7 Q.B.D. 92; the *Mersey Steel* case in the Court of Appeal and again in the House of Lords. From those authorities we learn that there is no absoute rule which can be laid down in express terms as to whether a breach of contract on the one side has exonerated the other from the performance of his part of the contract. It is in each case a question of fact, rather than law. You must consider the contract, the nature of the breach, then see what the result of it is. If the conduct of one party is inconsistent with an intention to be bound by the contract, the other party may decline to go on. The application of the principle to the facts in different cases is illustrated by Bowen, L.J., at p. 670, in 9 Q.B.D.:

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"Now in cases where the Court has to determine whether that principle of law applies, the facts may approach nearer to the line, or may be at a greater distance from it; and the difficulty is that the judges have to draw inferences from the particular facts in order to determine whether the principle applies. Non-delivery of a single parcel would not be necessarily, of course, sufficient to intimate that the person who does not deliver intends no longer to be bound, but I am far from saying that non-delivery of a single parcel might not in particular contracts, and under particular circumstances, be sufficient. So as to non-payment. Non-payment of itself is certainly not necessarily evidence of an intention no longer to be bound by the contract, but I do not say there might not be circumstances under which the Court would be entitled to draw that inference from it."

Lord Shelborne, L.C., says, 9 App. Cas., pp. 438-9:

"You must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

Again, after coming to the conclusion that payment for the previous delivery was not a condition precedent to the delivery of the rest of the steel, he goes on:

"But, quite consistently with that view, it appears to me, according to the authorities and according to sound reason and principle that the parties might have so conducted themselves as to release each other from the contract, and that one party might have so conducted himself as to leave it at the option of the other party to relieve himself from a future performance of the contract. The question is, whether the facts here justify that conclusion?"

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But what was the contract entered into between the Patersons and the defendants? It was for the output of four camps—the "entire" output of each camp—and this being a mercantile contract, full effect must be given to these words. To speak of it as a contract relating to the sale of logs merely, or for a delivery by instalments, is to miss the point. The parties chose for reasons of their own to contract for the delivery of the "entire output of each camp"—just as one might buy the crop of apples in an orchard, or the "run of a mill," instead of saying so many bushels of apples, or so many feet of board; or to take a familiar instance, instead of buying so many bushels of potatoes the agreement was as to the patch of potatoes, as in the

case of *Howell* v. *Coupland* (1874), L.R. 9 Q.B. 462. This method of contracting may be more advantageous to one party than another—as in the case of fire—but as they have elected to deal in that way, their rights must be determined with regard to the basis on which the agreement was made.

The main object that these parties had in entering into this contract in February, 1907, was that they might look forward with a feeling of security to the future. The fundamental law of contract is intended to ensure that what a man has been led to expect shall come to pass. The usual consequence of a breach of contract is a right of action for damages, but under some circumstances the person whose rights have been infringed upon may be exonerated from such performance as may be still due from him, he may, "emancipate" himself from the contract.

In considering whether the defendants had a right to refuse to go on, the whole conduct of the plaintiffs must be taken into consideration; their secret breaches of the contract, their false excuse; their refusal to give the plaintiffs any information as to what they had done until the time for the completion of the contract had expired. The plaintiffs' conduct in my opinion justified the defendants in taking the stand they did, although many of these matters were not wholly known to them till afterwards.

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In this case the Patersons contracted to supply the entire output and instead of doing so, they secretly used at their own mill at least one boom of 529,174 feet; and they supplied another of 390,030 feet to the Vancouver Lumber Company in breach of their contract with the defendants. They thereby made it impossible to perform their contract. Selling to a competitor in October, or using it themselves in August were, in the circumstances of this case, in my opinion, breaches that went to the root of the contract. Their action justified the inference that they did not mean to be bound by the clause requiring them to give their entire output to the defendants. As to the rest of the contract—the terms advantageous to them—I agree that there was no intention of abandoning them.

Plaintiffs cross-appeal on the ground that they have not been

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allowed damages on the basis of 28,000,000 feet—the minimum amount named in the contract of the 31st of January, 1907. The contract, as I read it, was for the purchase and sale of the output of four camps, and the stipulation that the output of the four camps should be approximately twenty to twenty-five million feet was not intended to be anything more than a warranty on the part of the plaintiffs that there would be that much coming to the defendants if they should require that much.

Furthermore, the stipulation relates to four camps, and therefore as the defendants had and did exercise the right to close down two of the camps, the capacity of four camps would be no guide to the damages that the defendants should pay for refusing to go on with two camps. It was never intended between the parties when they entered into the agreement to close two camps that the plaintiffs should be at liberty to transfer the plant from the two camps closed down to the two going camps, and so increase the output of the latter; such a piece of work would defeat the very object the parties had in view.

The consideration of this cross-appeal confirms the view I entertained at the close of the argument, *viz.*: that this contract was not assignable. There is an element of personal confidence shewn in this respect. That confidence in the integrity of the Paterson brothers is shewn again by the omission of any classification of the lumber to be supplied and the minimum quantity of cedar to be in each boom. On the whole I think the nature of the contract is such as to shew that the word "assigns" was left out deliberately.

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Tolhurst v. *Associated Portland Cement Manufacturers,* 1900 (1903), A.C. 414, is distinguishable. The contract in the present case was for a short period—provision was made for the continued existence of the contract by succession, but not by substitution. There was no buying of land or erecting of works on land bought from the plaintiffs.

The question of novation was also discussed before us, but I am not prepared to say that there was any agreement by the defendants to accept the incorporated company and to release

the old. The *animus novandi,* as it is called, is not proved. No notice was given to the defendants of the change (I do not consider the alteration of letter heads any notice—an examination of the letter head will be the best test), and therefore there is nothing by which the onus can be shifted. It is the consent to the change which constitutes the essential difference between assignment and *novatio.* That consent is not to be inferred as a rule unless there is given to the person fair notice of the change. It is a question of fact in each case, and as the onus is on the plaintiffs I think I must hold that there was no novation, but I do so with some doubt, on account of the frequent use by the defendants of the title of the incorporated Company.

On the main ground I would allow the appeal, and hold that the defendants are entitled to an inquiry as to damages, in that they can recover their boom chains, or their value.

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With regard to the defendants' appeal in respect of $746.17, in my view of the case the defendants are entitled to it, as there could be no damages against which it could be set off. In any event as it was the subject of a cross action, and as the defendants were compelled to prove it, they were entitled to the costs of so doing.

The cross-appeal should be dismissed.

MARTIN, J.A., concurred in the reasons for judgment of MACDONALD, C.J.A.

MARTIN, J.A.

GALLIHER, J.A.: The plaintiffs, William Innes Paterson and Thomas Frank Paterson, carrying on business under the firm name of the Paterson Timber Company, entered into an agreement with the defendants to supply certain logs from certain timber limits at a specified price, and of specified dimensions, the logs to be fir, cedar and hemlock, but nothing was said as to the quality of the timber. The term of the agreement was to be for one year from February 15th, 1907, and the quantity to be supplied from 20 to 25 million feet. On June 8th, 1907, the plaintiffs, the Paterson Timber Company, sold and assigned all their goods and chattels, effects and property in connection with their lumbering business, includ-

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ing all contracts and orders with the full benefit thereof, to the plaintiffs, the Paterson Timber Company, Limited, taking in payment therefor fully paid-up and non-assessable shares of the Company. It was a term of this agreement that the purchasers should assume and carry out all the contracts entered into by the vendors in connection with the business sold and indemnify and save harmless the vendors from all losses or damages on account of such contracts. Under the contract with the defendants the Paterson Company were to operate four logging camps and give the entire output of these camps to the defendants, but by a provision in the contract if for certain reasons specified the defendants were unable to take the entire output of the four camps, they should have the right of discontinuing the taking from two of the camps and this right they exercised. Some dispute arose as to the amount of logs the defendants would be obliged to take under the contract when two of the camps were discontinued, but I think the evidence shews that the total amount to be received by the defendants under such circumstances was 18,750,000 feet. The plaintiffs kept delivering logs to the defendants, who accepted and paid for same until some time in October, when they refused to accept or pay for any more logs, claiming: First, that the contract was one which could not be assigned, and that there had not been a *novatio;* and, secondly, that if it was an assignable contract, then the plaintiffs had committed breaches thereof which entitled the defendants to repudiate. The plaintiffs then sold the balance of the logs they had agreed to deliver under their contract, and brought action for the difference between the selling price and the price they would have been entitled to receive from the defendants. The learned trial judge gave judgment in favour of the plaintiffs, and from this judgment the defendants appeal.

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There are three things for us to consider: First, was the contract assignable? Second, was there a *novatio?* Third, was there a breach that would entitle the defendants to repudiate?

In the view I take of the evidence novation has not been proved. It does not appear to me at any time that the defendants agreed to accept the limited company and release the

Paterson brothers. There are two or three instances where letters were addressed by the defendants to the limited company and I think on two occasions the limited company are referred to in the minute book of the defendants, but beyond that, and a slight change in the letter heads which might or might not be noticed, there is nothing to indicate that the defendants considered they were dealing with other than the Paterson brothers, original contractors; and on the whole it appears to me that matters went along as if no assignment had been made, logs were being delivered and their dealings were with T. Frank Paterson, who was manager of the limited company.

To enable the plaintiffs to succeed, we must find that the contract was assignable, and that no such breach was committed by them as was alleged by defendants.

First, as to assignability: The clause of the contract to which I wish more particularly to refer at the present is as follows:

"Witnesseth that the parties hereto for themselves, their executors and administrators and successors respectively mutually covenant and agree as follows."

I interpret that clause to mean that William Innes Paterson and Thomas Frank Paterson covenant for themselves, their executors and administrators only, and that the Canadian Pacific Lumber Company covenant for themselves and their successors, in other words, that the word "successors" applies only to the Company.

This, of course, would not of itself, nor would the failure to use the word "assigns" render the contract one which could not be assigned.

I will now proceed to a consideration of the cases bearing upon the subject: In *Kemp* v. *Baerselman* (1906), 2 K.B. 604, the Court of Appeal held that a contract to supply all the eggs a purchaser should require for one year, the purchaser agreeing not to buy from any other than the vendor, was a personal contract and not assignable. The Court dwelt particularly on the clause agreeing not to buy from any other as being one that could not be assigned. We have no such clause before us in the present case.

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The other clause "all that the purchaser might require" was commented upon in this wise—that the party to whom the contract was assigned might require a much larger quantity than the original party to the contract—while in the present case the amount to be supplied is fixed. I think the case is distinguishable.

The case of *Robson* v. *Drummond* (1831), 2 B. & Ad. 303, where it was also held that the contract was not assignable, is referred to in *British Waggon Co.* v. *Lea* (1880), 5 Q.B.D. 149, and is distinguished from the latter. Cockburn, C.J., who delivered the judgment of the Court, at p. 153 says:

"We entirely concur with the principle on which the decision in *Robson* v. *Drummond* rests, namely, that where a person contracts with another to do work or perform service, and it can be inferred that the person employed has been selected with reference to his individual skill, competency, or other personal qualification, the inability or unwillingness of the party so employed to execute the work or perform the service is a sufficient answer to any demand by a stranger to the original contract of the performance of it by the other party, and entitles the latter to treat the contract as at an end, notwithstanding that the person tendered to take the place of the contracting party may be equally well qualified to do the service. Personal performance is in such a case of the essence of the contract."

But those elements did not enter into the *Waggon Company* case, and the same learned judge further expressed the opinion that, while he agreed with the principle above enunciated, the Court in the *Drummond* case went to the utmost limit in applying it.

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Ross v. Fox (1867), 13 Gr. 683 at p. 690, was cited as an authority in defendants' favour, but that was a mining case in which personal skill entered largely into the consideration.

In *Arkansas Smelting Co.* v. *Belden Co.* (1888), 127 U.S. 379, the judgment of Mr. Justice Gray proceeded mainly upon the fact that when the ore was delivered to the smelter it at once became the property of the smelter, but payment was deferred until a certain amount was delivered and assays made, and that during the time that must elapse between delivery and payment the defendants had no security for their money except in the character and solvency of the original parties, and they should not be obliged to accept a stranger for this—and in referring to the *British Waggon Company* case, says:

"That was a case where the party assigning was to do certain work and the question was whether the work was of such a nature that it was intended to be performed by the original contractor only";

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evidently distinguishing the case he was considering from that case without either agreeing with or dissenting from the decision.

The two cases which seem to me more nearly in point are *Tolhurst* v. *Associated Portland Cement Manufacturers,* 1900 (1903), A.C. 414, and *British Waggon Co.* v. *Lea, supra,* and on the authority of these two cases I hold that the contract was assignable.

The latter case particularly seems applicable. There, as here, was the assignment of the contract. There the assignment of the repairing stations for the wagons, here the assignment of the limits from which the timber was to be supplied. There, as here, a covenant by the assignee to carry out and complete the contract; there, as here, a readiness, willingness and ability to do so. Moreover, the contract here could have been performed by the executors or administrators of the Paterson brothers, thus eliminating to a great extent at least, if not altogether, the personal feature in the contract sought to be established.

There remains only for consideration the question as to whether the plaintiffs committed such a breach of the contract as would entitle the defendants to repudiate. Although I have carefully read and considered the evidence, and more particularly as to the diversion of the two booms of logs, one on the 29th of August, and the other some weeks later, and the letters of the Paterson Timber Company to A. Fraser, 15th of August, 1907, and 26th of August, 1907, and the letter to the defendants, 28th of August, and to Tupper & Griffin, 13th of September, I do not propose to enter into it in detail.

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The learned trial judge has made an explicit finding of fact that there was an agreement between T. Frank Paterson and McCormick, that the two booms in question should be diverted—that was leave and licence only, which McCormick would as manager of the defendant Company have authority to give.

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Unless I am prepared to disbelieve the sworn testimony of Paterson, and to base my disbelief upon the letters above referred to, and the fact that at the meeting of the defendant Company held shortly after the alleged agreement between Paterson and McCormick, and at which both were present, no reference was made by either to the agreement, and to disregard the finding of the judge at the trial who saw Paterson give his evidence, I must hold that there has been no such breach as would entitle the defendants to repudiate the contract.

The letter to Fraser of the 15th of August, is not very satisfactorily explained by Paterson in his evidence, in fact he seems when first confronted with it not to be able to explain it at all, but we must look at the whole of the evidence and not place too much reliance on one particular occurrence. Paterson swears that for some time previous to the writing of the above letter McCormick had requested him to get rid of some of the logs to help them out, and even supposing he had in his mind when he wrote that letter, an intention to use that boom at his own mill, that intention was not carried out, at all events, up to the time he wrote the letter to the Company of August 28th, in which he requested them to provide for payment of four booms, one of which was the boom in question; upon receipt of which letter Paterson says McCormick came in and was very urgent in requesting him to dispose of this particular boom in some way, to which he consented; and this boom he invoiced to his own mill on August 29th. Paterson also says that at that time he, at McCormick's request, consented to dispose of another boom, which he afterwards, sometime about the beginning of October, sold to the Vancouver Lumber Company.

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Then referring to the letter of the 26th of August, we find Paterson, in writing to his foreman, using these words: "We are using the Rock Point logs at our own mill now," and giving his foreman instructions as to the lengths the logs should be cut. Considerable stress was laid by defendants' counsel upon this letter as indicating that Paterson was using logs at his own mill which he was bound under the contract to deliver to them; but I think that letter is explainable by reason of the

fact that the defendants had exercised their option to drop the output of the Rock Point camp on the 31st of July, and as this letter was written on the 26th of August, nearly a month later, it is quite reasonable that Paterson should express himself in that way to his foreman.

Counsel for the defence also pointed out that Paterson in his letter of the 13th of September uses these words:

"If at any time we can sell some of these logs before the term of the contract expires we would be quite willing to do so with the understanding that your company is to take the 18,750,000 feet even if some of it is not delivered before that time";

the inference being that if he had McCormick's permission to dispose of the second boom, why should he make that suggestion to the defendants? I think the answer to that is two-fold. I take it the suggestion means more than the disposing of one particular boom of logs, in fact is a suggestion that if he could help them out in any way by selling a portion of the logs to be supplied, to others, he was agreeable to do so; and secondly because there was a still unsettled point as to his being at liberty to supply an amount equal to what might be diverted in that way after the expiration of the contract.

There can be no case of mistake or misunderstanding; either Paterson's evidence is true as to his arrangements with McCormick, or it is a fabrication pure and simple, and to reverse the finding of the trial judge on that issue of fact I would have to hold that Paterson deliberately committed perjury. This I feel upon a careful perusal of the evidence, I would not be justified in doing.

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There was some evidence as to other breaches sought to be adduced, but even if I were to hold that evidence sufficient, the breaches complained of were not of such a nature as under the authorities would entitle the defendants to repudiate.

Respecting the cross-appeal of plaintiffs, I find the parties fixed the amount to be delivered at 18,750,000 feet.

I would therefore dismiss the appeal and cross-appeal.

Appeal dismissed, Irving, J.A. dissenting.

Solicitors for appellants: *Tupper & Griffin.*

Solicitors for respondents: *Martin, Craig, Bourne & Hay.*

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BUTCHART v. MACLEAN

BUTCHART v. MACLEAN *ET AL.*

Vendor and purchaser—Agreement for sale—Forfeiture clause—Default by purchaser—Right of vendor on default—Specific performance—Supreme Court Act, Sec. 20, Sub-Sec. 7.

No matter how stringently the clause in an agreement for sale of land providing for retention of instalment payments may be drawn, it is against equity for a vendor who has resold the land at a profit under his power of sale, to retain the instalments. This does not apply to the initial deposit, which may be regarded as earnest money.

ACTION tried by HUNTER, C.J. B.C. at Vancouver, on the 15th and 16th of June, 1910. The plaintiff purchased from the defendant Maclean on the 24th of January, 1907, lots 56, 57, 58, 143 and 148, group 1, New Westminster district. The agreement was the ordinary form and contained a clause reading:

"And it is expressly agreed that time is to be considered (of) the essence of this agreement and unless the payments above mentioned are punctually made at the times and in the manner above mentioned and as often as any default shall happen in making such payments the vendor may give the purchaser 30 days' notice in writing demanding payment thereof and in case any default shall continue these payments shall at the expiration of any such notice be null and void and of no effect, and the said vendor shall have the right to re-enter upon and take possession of the said lands and premises, and in such event any amount paid on account of the price thereof shall be retained by the vendor as liquidated damages for the non-fulfilment of this agreement to purchase the said lands and pay the price thereof and interest, and on such default as aforesaid the said vendor shall have the right to sell and convey the said lands and premises to any purchaser thereof."

Statement

There was also a clause to the effect that any notice required under this agreement should be sufficiently given if mailed at Vancouver under registered cover addressed to the purchaser at Edmonton. The price was $58,950, payable $1,000 cash on the execution of the agreement of January 24th, 1907; $14,000 on February 15th, 1907, and the balance in three equal payments on October 1st, 1907, 1908 and 1909. The

purchaser paid the $1,000 upon the execution of the agreement and the $14,000 in February, but made no other payment. His agreement was never registered. Immediately after the purchaser's default in October, 1907, the vendor gave him 30 days' written notice, properly addressed, as called for by the agreement and thereafter treated the agreement as cancelled. Maclean subsequently sold the property for something like double the price at which he had sold to Butchart. The party to whom he sold and subsequent purchasers and mortgagees were joined as defendants in this action. As to the defendants other than Maclean plaintiff failed to prove any knowledge of the transaction and consequently the action was dismissed as against them with costs.

Statement

The plaintiff's claim as against his vendor Maclean was for specific performance of the agreement for sale, or in the alternative for the return of the moneys paid by the plaintiff and for damages. . The plaintiff before action wrote defendant Maclean offering to pay the full amount of the purchase money and requesting execution of a conveyance, which Maclean refused. He also refused to return the purchase money paid.

W. A. Macdonald, K.C., and *Campbell,* for the plaintiff: We ask for specific performance and in the alternative contend that the clause quoted is a penalty clause against which the Court will relieve. We cite *In re The Dagenham Thames Dock Co.* (1873), 8 Chy. App. 1,022, 43 L.J., Ch. 261; *Cornwall* v. *Henson* (1900), 2 Ch. 298, 69 L.J., Ch. 581; *Great West Lumber Co.* v. *Wilkins* (1907), 7 W.L.R. 166; *Moodie* v. *Young* (1908), 8 W.L.R. 310; *Canadian Pacific R. W. Co.* v. *Meadows, ib.* 806; *Whitla* v. *Riverview Realty Co.* (1909), 11 W.L.R. 350.

Argument

Pugh, for the defendant Maclean cited *In re Dixon* (1900), 2 Ch. 561; *Labelle v. O'Connor* (1908), 15 O.L.R. 519.

Hay, for the defendant Trustees of the Town Estate.

Abbott, for the defendant The Vancouver Financial Corporation.

HUNTER, C.J. B.C.: The purchaser having delayed two years in bringing his action I cannot decree specific performance, the

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land having been sold in the meantime. With regard, however, to the alternative relief claimed, *viz.*: the refund of the moneys paid, the result of the English decisions is that the Court should not order the repayment of the deposit as that is regarded as earnest money but should order the repayment of the instalment. No matter how stringently the clause providing for retention of an instalment may be drawn it is regarded as against equity for a vendor who has resold the land at a profit under his power of sale to attempt to retain the instalments as well and the power of this Court to relieve against forfeiture extends to every kind of forfeiture by section 20, sub-section 7 of the Supreme Court Act. There will be a decree for the refund of the $14,000 without interest, less the taxes up to the time of the forfeiture. No costs.

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McKENZIE v. CORPORATION OF CHILLIWHACK.

Municipal law—Negligence—Duties of constable or caretaker—Death of prisoner in lock-up—Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, Sec. 232.

Appeal Court—Jurisdiction—Leave to appeal to Privy Council—Privy Council rules.

A municipal corporation appointing a person to act as constable pursuant to the provisions of section 232 of the Municipal Clauses Act, is not responsible for the negligent acts of such person in his capacity of constable. Such person discharges public duties imposed by the Legislature, and from which the corporation derives no benefit in its corporate capacity.

Where, therefore, a municipal constable and gaoler having arrested a person, and after searching him and taking matches and other articles from him and another prisoner, locked him up, and he was suffocated from a fire which broke out in the cell during the temporary absence of the constable-gaoler:—

Held, that the trial judge was right in dismissing the action for damages brought by the deceased's widow, and setting aside the verdict of the jury in her favour.

The Court of Appeal, until power is given by the Privy Council through an amendment of the rules, has no power to grant leave to appeal to the Privy Council.

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MORRISON, J.

APPEAL from the judgment of MORRISON, J., in an action tried by him with a jury at Vancouver on the 27th of May, 1907, and the 17th of February, 1909. The facts are set out in the reasons for judgment.

Martin, K.C., for plaintiffs.
Reid, K.C., for defendant Corporation.

22nd February, 1909.

MORRISON, J.: This is an action against the municipality of Chilliwhack, and is a case of constructive negligence by the acts of an alleged servant, brought by Minnie Ann McKenzie, whose husband, arrested for being drunk and disorderly, was placed by the municipal constable in the lock-up and whilst there set fire to his cell and was burned to death. The trial came on before a common jury who found for the plaintiff for $7,000. The question of law now raised is as to the liability of the defendant Corporation for the negligent acts of the constable in locking the prisoner in his cell and leaving him otherwise unguarded whilst he went about the performance of his duties as constable. The lock-up was in charge of the constable, there being no separate gaoler. It was conceded by plaintiff's counsel that the defendants are not liable if the acts of negligence complained of were the acts of the constable *qua* constable, but otherwise if he were acting as gaoler.

Section 232 of the Municipal Clauses Act, 1897, enacts, "It is hereby declared to be the duty of all municipalities to maintain or provide for a sufficient permanent or special police force and to bear the expense of policing the municipality and enforcing not only the municipal by-laws but also the criminal law and the general laws of the province, and of generally maintaining within the limits of the municipality law and order, and of administering justice therein, including the prosecution of offenders triable summarily and also of offenders triable upon indictment up to committal for trial and delivery of the accused to the common gaol of the country. In order to carry out such duty each city municipality shall provide a lock-up, and rural municipalities shall either singly provide a

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lock-up or two or more may unite to build and maintain a common lock-up and enter into all necessary agreements for sharing the cost of building and maintaining the same, or make arrangements for obtaining the use of a lock-up when required," etc.

Here is a distinct obligation or duty cast upon the corporation of policing the municipality and also of providing lock-ups. It seems to me quite clear that the officer in question who was appointed pursuant to this provision was acting in the discharge of the public duties imposed upon him by the Legislature, duties in which the defendants had no private interest, and from which they in no way derived any benefit in their corporate capacity.

There is no nexus of master and servant established, nor was it the intention of the Legislature to create such relations between a constable acting in the performance of his duties and the Corporation. On the contrary, the Legislature intended that a municipality should enjoy immunity from being sued under circumstances such as these. The case of *Nettleton* v. *Corporation of Prescott* (1908), 16 O.L.R. 538, 10 O.W.R. 944, 11 O.W.R. 539, is directly in point and all the authorities are there assembled. Mr. *Martin* emphasized the dissenting judgment of Mr. Justice Mabee and invoked it in his favour. But the learned judge, at p. 555 of the report, makes use of an expression which puts the defendants' case here exactly, when he says:

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> "If the defendants had placed and left the lock-up in charge of the chief of police, and had not otherwise interfered in its management by the appointment of a servant of their own to attend to it, the position might have been different."

I therefore think the plaintiff's action should be dismissed, but without costs.

The appeal was argued at Vancouver on the 24th and 25th of February, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Craig, for appellant (plaintiff): We contend that the deceased met his death by the direct negligence of the defendant

Corporation; or in the alternative, that the Corporation are responsible for the negligence of their constable. The numerous calls on the constable's time in connection with his various duties made it impossible for him to give proper attention to his duties as gaoler and caretaker. The Corporation should have appointed a sufficient number of constables to perform the work.

Reid, K.C., for respondent Corporation: The man was appointed constable and nothing else. Besides, there is no evidence shewing that one man was not sufficient to perform the work necessary. He was instructed by the reeve to employ assistance whenever required, and if the constable required assistance on the occasion in question and did not procure it, then he was negligent. But then, the evidence goes to shew that the constable exercised due care. He searched the men and took their matches from them before locking them in the cell. The building is owned by the Provincial Government, who control it. True, the municipal council holds its meetings there. He cited *Nettleton* v. *Corporation of Prescott* (1908), 16 O.L.R. 538; *McCleave* v. *City of Moncton* (1902), 32 S.C.R. 106; *Pease* v. *Town of Moosomin and Sarvis* (1901), 5 Terr. L.R. 207; *Tremblay* v. *City of Quebec* (1903), 7 C. C.C. 343; *Dunbar* v. *Guardians, Ardee Union* (1897), 2 I.R. 76; *Enever* v. *The King* (1906), 3 Commonwealth Aust. Dig. 909; *Wishart* v. *City of Brandon* (1887), 4 Man. L.R. 453; *Tozeland* v. *West Ham Union* (1907), 1 K.B. 920. There is no evidence that the constable was appointed by the council to perform other duties than those of constable.

Argument

[MACDONALD, C.J.A.: Had the reeve power from the council to authorize him to employ assistance when necessary, and, further, had he authority to delegate that power in turn to the constable?]

There is no evidence that the reeve was not given that power.

Craig, in reply.

Cur. adv. vult.

5th April, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: In this case the appellants, the widow and children of the late Samuel McKenzie, sued the Corpora-

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tion of the township of Chilliwhack for damages for negligence causing the death of the said Samuel McKenzie. At the close of the evidence a motion was made on behalf of the defendant for a non-suit. The learned trial judge, however, reserved his decision on this question and submitted the case to the jury, who found a verdict of $7,000 damages in favour of the plaintiffs. On the motion being renewed after the verdict, the learned trial judge dismissed the action, and from that order the plaintiffs appeal to this Court.

The question which we have to decide is whether or not there is any evidence upon which the jury could properly found their verdict for the plaintiffs. I am of opinion that there is not. The main contention of the appellants was that the defendant was guilty of negligence in not having a person in charge of the lock-up at the time of the fire therein which caused the death of the husband and father of the plaintiffs, the late Samuel McKenzie. It appears that the constable who placed the deceased in the lock-up was also required by the Corporation to attend to several other duties, such as patrolling the village, lighting the street lamps, and the enforcement of certain sanitary and other by-laws. It appears that the constable placed the deceased in the lock-up after searching him and taking away any matches which were about his person, and

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left the lock-up to light the street lamps in accordance with his duty in that behalf. While he was absent a fire occurred in the cell in which the deceased was confined which resulted in his death. The origin of the fire is not known. It is suggested that it was caused by the deceased himself, or by his companion in the cell.

I do not think it would be reasonable to hold that in a rural district such as this was, it was the duty of the Corporation to have a constable or keeper constantly at the lock-up. The evidence here discloses no negligence at all, unless it was negligent to leave the lock-up for a short time without a keeper in charge.

I fail to find any evidence of negligence on the part of either of the Corporation or of the constable, and I therefore think this appeal should be dismissed.

IRVING, J.A.: This is an appeal from MORRISON, J., who, on a motion for non-suit, came to the conclusion that there was no case to go to the jury.

I am of the opinion that the conclusion reached is correct. A judge should not leave a case to the jury unless there is in his opinion evidence from which they may infer that there was negligence on the part of the defendants.

In the circumstances of this case I think there was no such evidence, for this reason: they had obtained the use of the building as a gaol, which building they had placed in charge of the gaoler, who, by whatever name he is called, is a peace officer. The detention of a prisoner in gaol is as much the duty of a guardian of the peace as the arresting of him in the street. To that officer instructions had been given that he was to employ assistance whenever assistance was required; the matter was left to him how and when the duties that he had to perform should be divided up between him and his assistants. In my opinion it is not necessary that this authority to employ assistance should have been given by a formal document. It would be sufficient if the reeve or the chief of police (if there is such a body) or any member of that committee had instructed him to employ assistance. Furthermore, it was not shewn that the officer was engaged on any other business of the defendants. The evidence is not at all satisfactory as to what the constable was doing.

There are other grounds for saying that this action cannot be maintained. Section 235 of the Municipal Clauses Act does not give the person injured a right of action.

Again, having regard to the statute under which this gaol was being maintained, it would appear that the duties thrust upon the defendants were a branch of the public administration for purposes of general utility and security which affect the whole Province. The Corporation appointing the officers are not responsible for his acts of negligence (if any there were): see *Stanbury* v. *Exeter Corporation* (1905), 2 K.B. 838; see also *McCleave* v. *City of Moncton* (1902), 32 S.C.R. 106.

No authority can be produced for maintaining the action. The case of *Nettleton* v. *Corporation of Prescott* (1908), 16

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O.L.R. 538, is quite different. There, the Town of Prescott voluntarily established the lock-up—*vide per* Boyd, C. at p. 550, and *per* Maybee, J., at pp. 552 and 556. Here the duty was imposed upon them by statute.

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I would dismiss the appeal.

MARTIN, J.A.: I agree that the appeal should be dismissed.

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GALLIHER, J.A.: This action is brought by the widow and children of Daniel McKenzie, deceased. The case was tried before Mr. Justice MORRISON with a jury on the 27th of May, 1907, and at the close of the plaintiffs' case counsel for defendants moved for a non-suit, but the learned trial judge reserved the motion for argument and the case went to the jury, who found for the plaintiffs in the sum of $3,000 for the widow, and $2,000 each for the two children, and upon the motion for non-suit coming up for argument on the 17th of February, 1909, the plaintiffs' action was dismissed. Against this finding the plaintiffs appeal to this Court on the following grounds:

"1. The jury having found that the defendants were guilty of negligence causing the death of the deceased Daniel McKenzie, the learned trial judge should have entered judgment in favour of the plaintiffs for the damages assessed by the jury.

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"2. The learned trial judge erred in holding that the defendants were not responsible for the negligence of the policeman and gaoler, George Calbeck.

"3. That the defendants were guilty of negligence in imposing such duties on the said George Calbeck that it was impossible for him to remain at the lock-up while the said Daniel McKenzie was confined therein.

"4. That the defendants were negligent in not providing a gaoler to remain at the lock-up while the said Daniel McKenzie or other prisoners were confined therein."

The facts are in brief as follows: The deceased was arrested for drunkenness by the police constable of the defendant Corporation, and placed in the lock-up about 6 o'clock on the 27th of October, 1906, and about an hour later another prisoner was placed in the same cell. It appears from the evidence that both prisoners were searched, and matches taken from them and placed beyond their reach, nevertheless a fire started in

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the cell in which the prisoners were confined, and before they could be reached both were suffocated. There was no stove or other article in the cell from which a fire could start, and the origin of the fire is unexplained, the only suggestion offered being that some one from the outside passed matches in to the prisoners during the absence of the constable, and they in some way set fire to the bedding in the cell. This could be done through a window in the cell which was on a level with the street. It appears that the constable who had charge of the prisoners in the cell had other duties assigned him by the defendants, such as patrolling the street and lighting lamps. The constable's evidence is that he visited the prisoners in the cell on the night in question at 7 o'clock, again at 7.30, again at 8.30, and again shortly afterwards, and found everything all right; that he then went up town to look around and see that everything was in order, as was his duty before coming back to retire for the night in a room which he occupied close to the cell when he had prisoners. The fire occurred about 20 minutes after 9, and he opened the cell as soon as possible after the occurrence.

Section 235 of the Municipal Clauses Act, R.S.B.C. 1897, Cap. 144, provides for the policing of the municipality, and the maintaining of law and order within its limits, and providing and maintaining a lock-up. The officer appointed pursuant to this provision was acting in the discharge of public duties—duties which had been imposed by the Legislature, and from which the defendants derived no benefit in their corporate capacity.

GALLIHER, J.A.

I think the case of *Nettleton* v. *Corporation of Prescott* (1908), 16 O.L.R. 538, and cases therein cited, clearly lays down the principles of law governing cases of this kind, and is not distinguishable from the present case insofar as the first branch of the appellants' case is concerned, *viz.*: negligence by the officer of the defendants.

Counsel for the appellants drew particular attention to the dissenting judgment of Mr. Justice Mabee in that case, but in reading that judgment I think it is rather against Mr. *Craig* because the learned judge points out at page 555 that if the

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defendants had left the lock-up in charge of the chief of police and had not interfered by placing a servant of their own in charge, the position might have been different. But Mr. *Craig* says even if the defendants are not liable by reason of the negligence of their police officer, they are guilty of negligence in that they in addition to giving the constable charge of the lock-up assigned him to other duties, which he was bound to perform, and the performance of which in this case prevented him from properly supervising the prisoners which resulted in the death of Daniel McKenzie, and the jury having found the defendants negligent generally their verdict should stand.

I have given that contention very careful consideration.

I conceive that when the Legislature imposes upon a municipality the duty of providing and maintaining a lock-up, and of policing its district, when they provide the lock-up and appoint a competent person to discharge the duties cast upon them by the Legislature, they are not liable for acts of negligence of such person, but the point urged here is did the defendants by appointing their officer to take charge of the lock-up and then assigning to him other duties which made it impossible for him to properly discharge that duty, fail in the performance of the obligation imposed upon them by the Legislature so as to render them liable? Or to put it in another

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way: did the assigning of these extra duties practically nullify the effect of the officer's appointment as caretaker of the lock-up so as to render the municipality liable as in a case where prisoners were thrown into a lock-up and no one assigned to take charge of them.

Without expressing any opinion as to liability in the latter case, I will assume for the purposes of the present action that they would be liable in such a case. Assuming that, we must then inquire what effect the absence of the officer on other duties had in preventing him taking proper care of the deceased prisoner. I take it we must be reasonable in considering what care is necessary, and in doing so must be guided by the circumstances and conditions. To say that the same care and attention should be required from a thinly settled municipality such as this as in a large city would be going too far. There

is no suggestion that the lock-up was not properly provided or maintained, or that its equipment was defective so that a fire might be anticipated, and it does seem to me that no such event as happened could have been foreseen, and it would be unreasonable to hold that in the present case a municipality should be expected to have a man on duty every moment, or provide a substitute in case of short temporary absence, such as occurred here. Moreover, every precaution seems to have been taken against fire by removing matches from the deceased, and by the fact that there were no other means in the cell by which fire could start, and taking into consideration with all these the evidence of the constable as to the number of times he visited the prisoner, I do not find evidence upon which I think a jury might reasonably have come to the conclusion they did.

I would therefore dismiss the appeal.

Appeal dismissed.

Solicitors for appellant: *Martin, Craig, Bourne & Hay.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

14th April, 1910.

On this date, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.,

Craig, applied for leave to appeal to the Privy Council. We admit that there is a question whether this Court has power to grant leave. The old Full Court, of course, had, but it is doubtful if that power was transferred to the Court of Appeal.

[IRVING, J.A.: There is no doubt in my mind as to the old Full Court having power, but has this Court?]

So far as the Provincial Legislature can do so, it has granted power: see section 6 of the Court of Appeal Act.

Argument

Reid, K.C., contra: The right of appeal to the Privy Council is a discretionary right in the first place, and in the second place, there is no order in council for British Columbia providing for an appeal from the Court of Appeal. An amendment of the order in council is necessary. The procedure on appeal to the Privy Council is not analagous to that of an

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appeal to the Supreme Court of Canada. The latter is an appeal as of right, and all that devolves on the Court of Appeal is to see that the material is in proper form. The appeal is not given from the highest Court in British Columbia, but from a specified Court, namely the Supreme Court of British Columbia.

[MARTIN, J.A.: You say, in effect, that it is not a case of a new Court falling heir to an old jurisdiction, but a case of *curia designata*?]

Precisely.

[IRVING, J.A.: See the old order in council of 1887. There should be a new order drawn up in the same terms, only applying to this Court.]

Argument

Craig, in reply: I do not have to go quite so far as to say that the British Columbia Legislature has power to substitute one Court for another in this respect, but it can pass an Act saying that the Court of Appeal can grant leave to appeal to the Privy Council, just as in Ontario, and that is what, in effect, has been done here.

The Court reserved the question for further consideration, and on the 29th of June, dismissed the application and handed down the following reasons:

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MACDONALD, C.J.A.: On the 4th of April last this Court delivered judgment dismissing plaintiffs' appeal from the judgment of the trial judge dismissing the action.

Shortly afterwards plaintiffs applied to this Court for leave to appeal to the Judical Committee of the Privy Council.

By Imperial order in council dated the 12th day of July, 1887, the Supreme Court of British Columbia was given power to allow appeals from that Court to the Privy Council.

It was suggested that as the appellate jurisdiction of the Supreme Court has been transferred to this Court, the said order in council ought to be read widely enough to include this Court so as to confer on it power to allow appeals from this Court to the Privy Council.

Our power to allow such an appeal must be derived from the Sovereign, and not from the Legislature, and in the absence of

an order in council conferring such power upon this Court, we cannot make any order in the premises.

IRVING, J.A.: Mr. *Craig* applies for leave to appeal to the Privy Council from our decision. I do not think this Court has any jurisdiction to grant leave to appeal. The Imperial order in council of 12th July, 1887, regulates appeals from the Supreme Court of British Columbia. The Court of Appeal Act, 1907, cannot confer on us any jurisdiction in this matter.

MARTIN, J.A.: In the preamble of the Imperial order in council it is recited that "it is expedient that provision should be made by this order to enable parties to appeal from the decisions of the said Supreme Court of British Columbia to Her Majesty in Council," and it is directed by section 1 that "the person or persons feeling aggrieved by any such judgment . . . shall apply to the said Court by motion or petition for leave to appeal therefrom." While formerly it was proper to apply to the Full Court of the Supreme Court of British Columbia for such leave, yet that Full Court was simply the judges of the Supreme Court sitting together "for the hearing of appeals" (section 80 Supreme Court Act 1903-4, Cap. 15), and the application was "to the said Court" as the order in council directed. And even now, though its appellate jurisdiction has been transferred to and vested in this entirely distinct Court of Appeal, yet the Supreme Court otherwise preserves its powers and answers to its original designation in the order in council for the purposes mentioned.

To give effect to the present application would therefore be for us to add another tribunal to that one already selected as being the proper one to grant leave, but the only authority which can do that is the Privy Council itself. Until a new order in council is passed this Court can, in my opinion, no more give leave to appeal from its own decisions than it can from those of the Supreme Court, or the Federal Admiralty Court for the British Columbia District. The only thing that this Court has in common with the Supreme Court is that they are both Provincial Courts.

Leave refused.

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KENDALL AND ANOTHER v. WEBSTER.

Company law—Winding-up—Action by liquidators—Sanction of Court—Necessity for—General manager—Duty as servant or agent—Transactions on his own behalf similar to those of company—Liability to account for profits—Trustee—Winding-Up Act (Dominion), R.S.C. 1906, Cap. 144, Sec. 38.

In an order for the winding-up of a company, it was provided that the liquidators with the consent and approval of the inspectors appointed to advise in the winding-up, might exercise any of the powers conferred upon them by the Winding-up Act without any special sanction or intervention of the Court. Instituting or defending an action constituted one of the powers. Section 38 enables the Court to provide by any order subsequent to the winding-up order that the liquidator may exercise any of the powers conferred upon him by the Act without the sanction or intervention of the Court. The liquidators having brought an action, proceeding under the above order, MORRISON, J., at the trial held that it was necessary to obtain an order subsequent to the winding-up order before section 38 enured.

Held, on appeal, that the action having the consent and approval of the inspectors, was properly brought.

Defendant as general manager of a company engaged a timber cruiser to cruise and locate certain timber, which he did. On his way home from this work, the cruiser discovered a quantity of timber which he disclosed to the defendant, and entered into an arrangement with him for staking and acquiring it, but declined to deal with defendant as representative of the company. Defendant drew a cheque on the funds of the company for the Government dues on this timber, but did not cash the cheque, and the transaction appeared in the books as "Kitimat limits."

Held, on appeal, reversing the finding of MORRISON, J. (reported (1909), 14 B.C. 390), that as the limits were acquired for the company in the first instance, and the company's funds used for that purpose that the defendant was merely a trustee for the company, to which he was bound to account.

Held, further, that the transaction was one within the scope of the company's operations.

Statement

APPEAL from the judgment of MORRISON, J., reported (1909), 14 B.C. 390.

The appeal as argued at Vancouver on the 16th of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

A. D. Taylor, K.C., and *Walkem*, for appellants (plaintiffs).
L. G. McPhillips, K.C., for respondent (defendant).

Cur adv. vult.

5th April, 1910.

MACDONALD, C.J.A.: While my first impression on the opening of the case by counsel was that the liquidator had not been properly authorized to bring this action, yet, on consideration of section 38 of the Winding-Up Act, all doubt on this point was removed. I therefore think that the action was properly instituted.

The defendant Webster, acting as president and manager of the British Columbia General Contract Company, Ltd., arranged with one Newell to locate timber under the B.C. Land Act in the neighbourhood of the route of the Grand Trunk Pacific Railway. Newell staked a number of limits in the Bulkley valley in pursuance of this arrangement. It is conceded that these limits were acquired by the defendant Webster for and on behalf of his company and not for himself. On his return, Newell reported to the defendant Webster that he had obtained information as to timber in the Kitimat valley which he thought was open to location, and some time later Newell and the defendant came to an arrangement by which Newell was to go to Kitimat valley and make locations there. This resulted in the acquisition of some 35 licences, the property in question in this action.

Up to a certain point what was done admittedly on behalf of the company respecting the Bulkley valley limits was done in the case of the Kitimat valley limits, that is to say, the expenses not only of Newell's trip but of the advertising and other preliminaries to the acquisition of the licences, including a sum of over $2,000 of Government fees, were paid by the company and not by the defendant, and were charged up in the company's books in a manner exactly similar to that adopted with respect to the Bulkley valley transaction.

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At a later period, and when it became apparent that these Kitimat limits were of great value, a different course of book-keeping was adopted at the instance of the defendant. We find the defendant then treating the earlier payments admittedly made out of the company's funds, and charged against the company apparently as disbursements on its own behalf, as a loan or loans to him by the company; or, if we give effect to a suggestion of his, as profits which he was entitled to receive from the company.

Now, if the defendant's present contention is correct, what course should he have adopted in the beginning with regard to these Kitimat valley limits? I put aside for the moment the consideration of whether or not, in his position of manager of the company, he could honestly take advantage of the information obtained by Newell while Newell was in the company's employ to obtain these limits for himself instead of for his company. I deal with the course which defendant ought to have taken from the beginning had he then intended the Kitimat valley limits should be his. If he had desired to borrow from his company the books ought clearly to have shewn the nature of the transaction. If it was the intention that he should draw from the funds of the company moneys which he was entitled to as profits, the books of the company should clearly shew the transaction. It may be that, had this course been adopted, defendant's acquisition of these limits for himself, under the circumstances of the case, might have been supported. I do not say that it could have been supported. I am inclined to the opinion that the information which was obtained by Newell was information which, if acted upon by the defendant, should have been acted upon only in the interests of his company to which he owed a duty as manager. But it is sufficient for me to base my judgment upon the inference to be drawn from the earlier transactions, and the inference I draw from those transactions is that in the beginning the defendant was acting with regard to the Kitimat limits for the company, as he had been doing in the case of the Bulkley limits, and it was only at a later period that he conceived the idea of substituting himself for the company and taking the benefit of that which

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had been acquired, not for him, but for the company of which he was manager.

I would therefore allow the appeal.

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IRVING, J.A.: The plaintiffs are the official liquidators of the British Columbia General Contract Company, Limited. The defendant was the general manager and president of that company and the action is for a declaration that he is the trustee for certain lands bought by him when in the company's service.

The action was commenced after the winding-up order had been made and after the plaintiffs had been appointed official liquidators, and after the judge had made an order authorizing the liquidators with the consent and approval of the said inspectors to exercise any powers conferred upon them by the Winding-Up Act without the special sanction or intervention of the Court. That order, in my opinion, was well made within section 38 of the Winding-Up Act, and the action was properly brought.

The learned judge from whom this appeal is taken went on the ground, first of all, that there was no authority to the liquidators to bring the action, and on the ground that there was no order under section 34 authorizing them to sue, and in the event of that point being overruled, he came to the conclusion, on the merits, that Webster was not a trustee for the General Contract Company. With deference, I am not able to agree to either of these conclusions.

IRVING, J.A.

The land in question was timber land situate in the Kitimat valley. The memorandum of association authorized the company *inter alia* to purchase or otherwise acquire timber lands and timber leases, to manufacture lumber and to purchase and sell the same. Their chief business, as their name implies, was to carry on the business of contractors, railways, docks, excavation works and that class of thing, but the purchase of timber lands was within the scope of their memorandum of association. In anticipation of taking a contract on the Grand Trunk Pacific Railway, the defendant, as general manager, sent one Newell, a timber cruiser, up to Bulkley valley to search for timber in

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the early part of the year 1906. By the arrangement then made Newell was to receive an interest in the limits when sold, and his expenses were to be prepaid by the company. Before he started out he made an estimate of the money he would require to be advanced to him. This necessary amount was obtained for him on a voucher signed by the defendant. He went up, took up certain timber limits in the Bulkley valley, and, on his way out learned that there was a large area of timber land in Kitimat not yet taken up. On his arrival in Vancouver he brought this fact to the notice of the defendant, and it was arranged that these lands should be taken up by Newell, and that Newell should be paid so much per acre when the sale took place. Now these are the lands that the liquidators claim were taken up by Webster in breach of his duty to the company, and they, therefore, asked that he be declared a trustee for the company. As in the previous case, so in this. An advance of the company's money was made to Newell on a voucher signed by Webster for the purpose of enabling him to go on this expedition. He was accompanied by one Kyall, who was paid by the company for his services, the voucher being signed by the defendant. Newell and Webster joined in a report on the limits. On Kyall's return a voucher for his expenses was put through by the defendant, and other moneys were subsequently advanced by the company to complete the purchase of these lands. They were charged up in the company's books as having been disbursed for the benefit of the company. I think Mr. Webster in claiming that this was a purchase on his own behalf, has made a mistake, and the plaintiffs are entitled to the decree they ask.

IRVING, J.A.

Mr. McPhillips says that unless the witnesses are disbelieved, we must come to the conclusion that the purchase was a matter personal to the defendant and Newell, and known to everybody. I see that Newell took from the company an advance to enable him to cruise these timber lands; and that Newell joined with Kyall—an employee of the company—in making a report on these lands, and I believe these are more reliable guides for us to follow than the statement now made by Newell that he would not let the company come in on these

lands. The purchase of timber land was within the scope of the company's charter. The first information obtained by Newell and Webster was obtained in the course of the transaction of the company's business. It was cruised and staked by men in the company's employ. The company's money was used to acquire it from the Government. It was, in short, the company's land.

MARTIN, J.A., agreed that the appeal should be allowed

MARTIN, J.A.

GALLIHER, J.A.: The plaintiffs sue as the official liquidators of the British Columbia General Contract Company, Limited.

In the spring and summer of 1906 the defendant while still the president and manager of the company, caused certain timber limits to be located in Kitimat valley, in his own name, and afterwards procured the licences to be issued in his name, and subsequently sold same for the sum of $60,000 to one D. C. Cameron of Winnipeg. The plaintiffs ask for a declaration that the company are the owners of the timber licences subject to the sale; that the defendant is a trustee for the company for the licences, and for any money paid or to be paid on account of the same; for an account and for payment to the company of any moneys received by the defendant on account of said sale. The defendant besides traversing generally the allegations in the plaintiffs' statement of claim, objects that the plaintiffs have no authority to bring this action, as they have not complied with the provisions of the Winding-Up Act in that regard. The case came on for hearing before MORRISON, J., on the 3rd of March, 1909, who dismissed the plaintiffs' action with costs. Against this judgment the plaintiffs appeal. The following are the grounds of appeal: [which the learned judge set out].

GALLIHER, J.A.

The preliminary objection as to whether the plaintiffs had complied with the provisions of the Winding-Up Act so as to entitle them to bring an action was first argued.

Mr. *McPhillips* for the defendant, contended they had not, and referred us to section 34 of the Act and argued that the Court could not divest itself of authority or delegate its powers by its order of 9th March, 1908, the provision in such order affecting the question being:

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"And it is further ordered that the said liquidators with the consent and approval of the said inspectors may exercise any of the powers conferred upon them by this Act without the special sanction or intervention of the Court."

Sections 34 and 38 inclusive define the powers and duties of liquidators. The winding-up order is dated the 10th of February, 1908, and was made by Mr. Justice CLEMENT.

Then by the subsequent order of Mr. Justice CLEMENT dated March 9th, 1908, the plaintiffs were appointed liquidators of the company, and Robert M. Dyer and Knox Walkem of the City of Vancouver were appointed inspectors to advise the liquidators, and the order further contained, among other things, the clause above quoted. The liquidators obtained the consent and approval of the inspectors to bring this action, and the only question is, does section 38 of the Act empower the Court to make a general order permitting the liquidators to exercise any of their powers without further application to the Court or must an application be made in each instance.

Undoubtedly if we eliminate section 38, the liquidator must in each instance apply for the approval of the Court, then if the position is not altered by section 38 that section is of no effect.

The language of section 38 is very plain, and is as follows:

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"The Court may provide by any order subsequent to the winding-up order that the liquidator may exercise any of the powers conferred upon him by this Act without the sanction or intervention of the Court."

I can easily conceive that the object of section 38 was to give power to do away with the delay and expense of the liquidators applying at every step for the sanction of the Court.

I therefore hold that the action is properly brought.

Under the 4th ground the question in my opinion is not whether Newell would or would not have negotiated with the defendant in his capacity as managing director of the company, but has the conduct of the defendant throughout the transaction been such as would constitute him a trustee for the company in respect of these limits? And the answer to this will also dispose of the 6th ground of appeal.

Now, what are the main facts as disclosed by the evidence? In the first place, most of the plaintiffs' evidence on this head

is documentary based upon letters, documents, written statements and entries in the books of the company, and is not a case of a conflict of testimony so that we may very well inquire if the finding of the learned trial judge is supported by evidence.

It appears from the evidence that one D. K. Newell, a timber cruiser, was employed by the defendant to stake certain timber limits in the Bulkley valley, and an agreement was entered into which I think it is necessary to set out in full here:

"Memorandum of Agreement made the fifteenth day of January in the year of our Lord one thousand nine hundred and six between David Newell of the City of Vancouver in the Province of British Columbia, logger, of the first part and George H. Webster of the same place, general manager of the British Columbia General Contract Company, Limited, of the second part.

"Whereas the party of the first part has represented to the party of the second part that he has discovered certain timber lands in the Bulkley and Kispick valleys in the Province of British Columbia, bearing timber of suitable size and quantity for converting into railway ties, piles, lumber, etc. And whereas the party of the first part is desirous of staking out certain timber limits upon the said lands and of obtaining special licences to cut and carry away timber therefrom under the provisions of the Land Act and amendments thereto; and Whereas the party of the second part has agreed to advance certain moneys to the party of the first part to enable him so to do upon the following conditions, that is to say:

"1. The party of the first part will at once proceed to the lands in question and stake out five or more timber claims of 640 acres each in the manner prescribed by section 51 of the Land Act, and after so doing will further comply with the provisions of the Land Act by advertisement and otherwise and will apply to the Chief Commissioner of Lands and Works for special licences in the name of the party of the second part and will make and deposit all necessary affidavits and declarations in order to obtain the issuance of said licences.

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"2. The party of the second part agrees to advance a sum actually expended not to exceed $200 for the travelling and necessary expenses of himself and assistant in staking out said limits and no more. The services of the party of the first part are to be free.

"3. The party of the second part agrees to pay the cost of advertising said claims and also the licence fees for the first year.

"4. The party of the second part agrees to assign an undivided one-third interest in said licences when obtained to the party of the first part, subject to the annual dues on said one-third interest which may be payable to the Crown.

"5. All crown dues, royalties, licences, renewals, survey fees and taxes

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(after the first year) shall be paid by the parties hereto in the proportion of their respective interests.

"6. The number of claims staked and licences applied for shall not be less than five and not more than ten, and the party of the second part reserves to himself the right to accept or reject any or all of the same upon the return and report of the party of the first part, without any obligation other than is hereinbefore contained.

"7. The party of the first part agrees not to sell his interest in the said claims without the consent of the party of the second part and also in the event of his wishing to sell will give the party of the second part the first option of purchase.

"8. All moneys expended in exploiting, improving, installing machinery and developing the claims and taking out the products of same shall be paid by the parties hereto according to their respective interests and shall form and be a lien upon said interests.

"9. This agreement shall be binding upon the heirs, executors, administrators and assigns of the parties hereto."

Certain limits were staked under the agreement and the expenses in connection therewith from time to time were paid out of the company's funds and entered in the company's books under the heading "Bulkley Limits." On returning from staking these limits Newell informed the defendant that while on the trip he had learned of some valuable timber limits in the Kitimat valley, and as Newell and the defendant allege Newell asked the defendant if he could go in with him and stake these limits claiming he did not want to go in with the company on these.

GALLIHER, J.A.

On April 23rd, 1906, the following letter was written by Newell to Webster:

"Referring to your proposition in regard to locating timber claims in the Kitimat valley.

"I am agreeable that all the conditions and clauses in the agreement dated 15th January, 1906, between you and I should apply in this case excepting that where the Bulkley and Kispick valley are mentioned therein that the Kitimat valley and Lakelse district should be substituted, and that in clause 1 at least 30 claims shall be located, and in clause 2 that the amount advanced for expenses should be $150, and under clause 4 you are to pay me the sum of 50 cts. per acre when you have disposed of the property, but not otherwise. Under clause 6 not less than thirty, or more than thirty-five licences shall be applied for.

"I further undertake to prospect, as far as our opportunities will allow, for minerals of any kind in the Kitimat and Lakelse districts and agree that any minerals discovered shall be staked, and that the said agreement of January 15th, 1906, shall apply to them in every instance."

Under this second agreement some 35 claims were staked and acquired, and the expenses in connection with same were paid out of company funds and entered by the defendant in the company's books under the heading "Kitimat Limits."

Without recapitulating the evidence, it is noticeable throughout that all payments made were made with the company's moneys upon vouchers signed and approved by the defendant, and the Kitimat account in the company's books was charged with these payments.

Although there are several of these accounts all treated similarly by the defendant, I will only refer to one:

"The British Columbia General Contract Co., Ltd.

"Credit the Imperial Bank of Canada,

Vancouver, B. C.

"1906, Aug. 3rd.	Following payments made this day in connection with the Kitimat Timber Limits:	
	The Deputy Comm. Lands & Works, Victoria, 25 Timber Licences @ $140 ea.....	$3,500.00
	Exchange on ck.....	4.40
	R. Wolfenden, King's Printer, Victoria, 25 notices in B. C. Gazette	125.00
		$3,629.40

(Endorsement)

No. 2,380. The Imperial Bank, Vancouver, B. C.
Amount $3,629.40. Date Aug. 3rd, 1906.
Audited W. L. Darling. Approved Geo. H. Webster.
Cheque No. 1895-1896.
Chargeable to Kitimat Timber a/c. $3629.40.

The Bulkley limits account was treated in exactly the same way as the Kitimat account in the company's books, but these limits have not been sold and are as the defendant says the property of the company.

But the defendant says with regard to the Kitimat limits "they were mine always, and the company never had any interest in them, and my intention from the beginning was that they were to be mine entirely independent of the company," but how has he expressed that intention in any of his acts?

He paid all expenses and fees in connection with same from company funds. It is true he says that he would be entitled to do this as there were certain profits of the company in which he

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was entitled to share, and he was only advancing these moneys to himself, but where is the evidence that at any time he was taking these moneys as advances or as moneys owed by the company to him? There is not a single entry in the books of the company to shew that he ever charged himself or intended to charge himself with these moneys until after he was confident a sale could be made.

Mr. *McPhillips* says even if such entries had been made it would not prove his intention. I agree it would not be conclusive but it would be strong evidence of intention that would have to be rebutted and its absence is strong presumptive evidence the other way.

When it came to paying the Government for the licences and the advertising the company's cheque was sent and it was held and not cashed by the Government for some reason not very clearly explained, and was returned after the defendant had raised money from a Mr. Nicol with which to pay the licences, and the company was credited back with $3,500, on August 16th.

Again referring to exhibit 16, the defendant charges the company with an advance of $2,750 Nov. 10th, and finally on November 23rd and after the sale to Cameron he squares up the Kitimat account by an entry "Cash from Mr. Webster $3,257.90." Moreover, take the statement rendered by the defendant to his people in New York, and we find nothing there to shew the charge of August 3rd or the credit of August 16th, nor does it appear in evidence that he ever advised the company at the time of this large payment, or the advance he made to himself of $2,750 on November 10th, so as to in any way apprise them of what was going on.

GALLIHER, J.A.

All this evidence to my mind points to but one conclusion, that Webster used the moneys of the company for the purposes of the company up to the time he found out that a good sale of the limits could be made, and then and then only started to negotiate with outside parties to raise moneys to replace that expended by the company and decided to claim the limits as his own. Had there been no sale of the limits, and no negotiations with Nicol, and the second year's licences had fallen due, there

is not much question in my mind whose money would have been applied in payment.

I hold on this branch of the case that the defendant by his own acts constituted himself a trustee for the company.

There is only one other feature to deal with, *viz.*: was the transaction properly within the scope of the authorized business of the company?

I think it was. The memorandum of association contains a distinct provision permitting them to do so and in the case of a contracting company, such as this, where they anticipate the building of railways, the acquisition of timber limits is I might almost say a necessary adjunct of their business, at all events one allied with it.

I think the plaintiffs are entitled to the relief asked for and would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Burns & Walkem.*
Solicitors for respondent: *McPhillips, Tiffin & Laursen.*

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

Damages—Action for—Excessive or punitive damages—Permanent injury—New trial.

FARQUHARSON *v.* B. C. ELECTRIC RY. CO.

Plaintiff was injured in a collision between two cars of the defendant Company, the collision having occurred admittedly through the Company's negligence. No evidence was offered by the Company at the trial. Plaintiff's hip was dislocated and permanently injured, rendering him unable to follow certain branches of his trade, that of tinsmith. There was some medical evidence that an operation might improve his condition so as to reduce the disability. He was, at the time of the accident, 24 years of age, and earned $4 per day when working. His medical and other expenses in connection with the accident amounted, roughly, to $500. Added to this should be loss of work on account of the accident. In an action for damages, the jury awarded him $11,500.

Held, on appeal (IRVING, J.A., dissenting), that the damages were excessive, and there should be a new trial.

APPEAL from the judgment of CLEMENT, J., and the verdict of a jury in an action for damages tried at Vancouver on the 16th of June, 1909. The facts appear in the headnote and the reasons for judgment on appeal.

Statement

The appeal was argued at Vancouver on the 10th and 11th of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant (defendant) Company: We submit that the damages are excessive in the circumstances. Plaintiff was merely a journeyman tinsmith, capable only of doing outside work, which could not, of necessity in a climate like this, be constant work for the entire year. Further, on his own admission he was not competent for the higher class, or indoor work of his trade. Yet, notwithstanding this the jury have given him a sum which will secure him a life annuity and leave him also with the principal. At the trial, plaintiff's counsel, in his address to the jury, went beyond the evidence, and, we submit, so prejudiced the jury that they gave punitive

Argument

damages which were not justified by the evidence. It is true that the judge charged the jury to disregard this departure, but we submit that, once having been made, it was not possible to remove the effect from their minds. As to granting a new trial, we refer to *Bray* v. *Ford* (1896), A.C. 44; *Loughead* v. *Collingwood Shipbuilding Co.* (1908), 16 O.L.R. 64; *Hyndman* v. *Stephens* (1909), 12 W.L.R. 46.

[IRVING, J.A. referred to *Sornberger* v. *Canadian Pacific R. W. Co.* (1897), 24 A.R. 263.]

Argument

Craig, and *Hay,* for respondent (plaintiff): Both sides went beyond the evidence in their addresses to the jury, but we submit that the matter was fully cured by the judge in his summing up telling the jury to disregard what was said. Defendants took chances, and now that a large verdict is given they complain. We submit that in all the circumstances the damages were not excessive; the man is young; was just starting out in life, and according to the medical testimony is permanently crippled.

Cur. adv. vult.

5th April, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff suffered severe injuries in an accident which happened on the defendant Company's line through the admitted negligence of the defendants. The chief, and only serious injury, consisted in the dislocation of his thigh, and the medical evidence shews that he is never likely to wholly recover from this injury. The limb affected will always have a limited action, and he will be unable to follow at least some branches of his trade, which is that of a tinsmith; he will be unable to get about on roofs and scaffolding, and will have to confine himself to work which will require less activity.

No evidence was given shewing the nature of the negligence —nothing which would enable the jury to give punitive damages. The jury awarded the plaintiff $11,500, his medical and hospital bills amounted to about $500, and up to the time of the trial he had been idle by reason of this accident about eight months. It is therefore apparent that about $10,000 of

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the amount awarded is available to compensate the plaintiff for his pain and suffering and decreased earning powers.

Some argument took place before us to shew that counsel for the plaintiff had inflamed the minds of the jurors by statements made with respect to the character of defendants' negligence which was not in evidence. The only evidence which we have of this is what might be inferred from the opening remarks of the learned trial judge who warned the jury against these statements of counsel. If the defendants' case for a new trial rested upon these inflammatory statements of counsel, I should have no hesitation in deciding this appeal against that contention. I think, however, that the damages awarded by the jury in this case are excessive. The amount awarded will give the plaintiff an annuity amounting probably to more than 50 per cent., nearer 75 per cent., of what he could be reasonably expected to earn without the disabilities occasioned by the accident.

MACDONALD, C.J.A.

Believing as I do that a new trial should be ordered, I do not wish to say any more respecting the merits of the case.

There should be a new trial.

IRVING, J.A.: This is an application for a new trial on the ground that the jury who tried the case awarded excessive damages, and that the jury had been unduly prejudiced against the defendants by the address of plaintiff's counsel. The action was founded on the negligence of the defendants in permitting the street car in which the plaintiff was travelling as passenger to come into collision with another street car owned and operated by the defendants on their railway whereby the plaintiff received the injuries complained of.

IRVING, J.A.

The evidence at the trial consisted of the evidence of the plaintiff and three doctors. The plaintiff was a man of about 24 years of age. He had served his time under articles as a tinsmith and at the time of the accident was engaged in tinsmith roofing. He was earning $24 per week. There is no reason to suppose that he would not improve and be able to earn a higher salary at that business. The result of the accident is such that the plaintiff is unable to work, and there was evidence

from which the jury might infer that he would never be able to work in the future and certainly not to the same extent or anything like the same extent he had been able to work in the past. His doctor's bill was $350, hospital bill $156.70, and his clothes were ruined, so that his out-of-pocket disbursements amounted to something over $500. His hip was dislocated. An operation may improve it, but there is evidence from which the jury could infer that he was crippled for life. In addition he got cut on the left leg, at the ankle and again at the knee and received a cut in the face. All the effects of the accident were such as would cause the plaintiff great pain.

The defence called no evidence. The plaintiff's counsel in addressing the jury used some language which may be fairly characterized as inflammatory. The matter was discussed at the close of the judge's charge, but not in the presence of the jury, and the judge apparently took the view that there would be no injustice done to the plaintiff by permitting the case to be dealt with by the jury then considering its verdict, and as no application was then made to him by the defendants' counsel to discharge the jury before the verdict was taken, I do not think it is now open to the defendants to ask for a new trial on that ground. When the matter was fresh, and the plaintiff's counsel admittedly in the wrong, defendants had an opportunity then to apply for a new trial, for it would practically come to that if the judge in his discretion thought proper to discharge the jury without a verdict, a matter which is well within the power of a judge at *nisi prius,* but they elected to go on. It does not seem to me to be right when after an election has been made and a verdict rendered, that the defendants should come to this Court and ask on that ground that the verdict should be set aside.

IRVING, J.A.

The judge's charge is not complained of. It seems to me to be fair and to raise the proper points for the consideration of the jury as indicated in *Phillips* v. *London and South Western Railway Co.* (1879), 5 C.P.D. 280, that is to say, that the jury should take into consideration (a.) the expenses occasioned to the plaintiff by the accident; (b.) the loss he would suffer by being incapacitated for a certain length of time; and (c.) for

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the loss which he would sustain by reason of his inability to earn full wages for such period as the jury should think fit; and (d.) an amount for the suffering and pain he underwent at the time, and also for the future, it might almost be said for the remainder of his life.

There being no question of misdirection, the test by which the Court of Appeal should be governed in this matter, as in all other matters of fact to be determined by a jury, is the test laid down in *Metropolitan Railway Co.* v. *Wright* (1886), 11 App. Cas. 152.

The jury took the view that the accident was a very serious one and that the man was permanently injured. I think that their verdict must be sustained. They saw the man and had an opportunity of judging what his expectation of life might reasonably be. We have not seen him, but he was described to us as being a man of ordinary appearance. The ordinary expectation of the life of a man of 24 would be some 36 years. An allowance of $50 a month for ten months in the year cannot, in my opinion, in the circumstances be considered unreasonable. Now, then, the expectation of life being about 36 years and the annuity being $500 assuming interest at the rate of 7 per cent., a fair sum to compute that annuity at for present payment, would be 13 years' purchase, or $7,500. Can anyone say that under those circumstances it would be unreasonable for a jury to allow a man $6,000 in respect of his future disabilities, or can it be said that $5,000 is an unreasonable sum to be allowed in respect of his disfigurement for life? Those two sums, $11,000, with $500 for the doctor's bill, brings the matter up to the total sum found by the jury. I cannot say the amount is so excessive that reasonable men could not find the verdict they did find.

IRVING, J.A.

MARTIN, J.A.: While it is conceded that in one aspect of the damages we should not be justified in disturbing this verdict unless it is of such a nature that the jury could not reasonably have found it, according to *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250, yet if we do reach that conclusion we must not hesitate to give effect to it, otherwise

MARTIN, J.A.

our jurisdiction becomes a dead letter. Since the argument I have, as requested, carefully read and weighed all the evidence. The facts are not in dispute, and the only witnesses called were those of the plaintiff himself and three doctors. It appears that the plaintiff was at the time of the accident 24 years of age and had served his time as an apprentice to the tinsmithing trade, and had been working for his late employer for a short period, six or seven months, at $4 per day, as an outside man going on roofs and scaffolding, etc. Before that he had been working at clearing land at $12 per week, and this was "the first time he had a job of anything like $4 a day." He was, he admits, not experienced enough for inside work at which he tells us "an experienced man gets more than $24 a week," but unfortunately we are not told how much more, and we have no evidence shewing the amount that such a workman ought to earn for any given period. Obviously no outside workman of the plaintiff's class can expect to work at his trade all the year round, a fact which the plaintiff himself recognizes when he says that he was "working at tinsmithing when he could get a job." Again, unfortunately, the evidence as to the duration of outside work is wanting, though *Johnston's* case, *supra,* shews that evidence of capacity, prospects, and probable future earnings is all-important in such cases. He does not on his own shewing, appear to be, to say the least of it, a very competent or progressive man, otherwise, with the opportunities open to him in these prosperous times in the building trade he would ere now have acquired the experience which would have fitted him for more remunerative inside work. His education has been of a very limited kind—having, he says, left school when he "was in the third book." He has endured much pain and suffering, has a slight scar on his face, is hampered by an injury to his hip which causes him to limp and is a permanent disability owing to the movement being more or less limited in that joint. His principal witness, Dr. Mackechnie, agrees with Dr. Lockett in thinking that in certain movements, as time goes on, an improvement not exceeding twenty per cent. may be expected, and he also says that the plaintiff "can engage in an occupation where he could stand at a bench all day, but if he had to stoop

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down to pick things up or to work on objects on the floor he would be more or less impaired." Admittedly he cannot engage in roof or scaffold work and as regards inside work he says that while the workman has to stand at a bench and do soldering and draw patterns there is also a lot of it that has to be done on the floor and he could not bend to do it. Up to the time of the trial he said he had not been able to work at his trade since the accident, and in answer to the Court he said that he had formed no opinion at all as to what work he was going to do in future. He seems, indeed, to have become discouraged, needlessly, I think, because assuming he is debarred from one branch of his trade, and hampered in another (which, however, it is very doubtful he would ever have attained to) it does not follow that there are not many other kinds of employment which he could learn and successfully pursue, of which, indeed we have daily laudable and inspiring examples in the case of many who have suffered much greater injuries, such as the loss of an arm or leg. It would be as contrary to the public interest as unjust to the defendant Company for this Court to encourage the belief that because a man has sustained injuries which partially impair certain movements he is to seek to live in idleness for the remainder of his days at the expense of some one else. At the same time it would be quite proper for the jury in considering the amount of damages to make due provision for the loss of time and expense that he would incur in getting new employment suited to his changed circumstances. But here they have gone very much further and, in my opinion, have treated this case as one of total permanent disability, which on the evidence (unsatisfactory as I have shewn it to be in important respects) is unwarranted, and a disregarding of the direction of the learned trial judge that the plaintiff

MARTIN, J.A.

> "is not entitled to sit down and take an annuity from the Company and not try to do anything. You have to consider the position the young man was in. You may suppose that he would act as a young man would reasonably act and get what work he can in his condition. To what extent during life has his earning power been impaired by the condition to which he has been brought by the negligence of this defendant Company?"

Therefore, also, in my opinion, and apart from the bare ques-

tion of reasonableness as regards the excessive damages, this case comes within the further rule given by Vaughan Williams, L.J., in *Johnston's* case, *supra,* p. 255 wherein he says that

"The amount (awarded) enables the Court to say that the jury must have disregarded a direction as to the measure of damages which they ought to have regarded."

See also the language at p. 258:

"In any case in which you are able to draw the inference that the jury either included a topic which ought not to have been included, or measured the damages by a measure which ought not to have been applied, I think there ought to be a new trial."

An illustration of the application of this principle is to be found in *Canadian Pacific Railway Co.* v. *Blain* (1903), 34 S.C.R. 74, (1904), A.C. 453, wherein, under the old practice, the damages were reduced from $3,500 to $1,000, because the jury improperly took into consideration the consequences of a second assault, in a case coming from this Province: *Walkem* v. *Higgins* (1889), 17 S.C.R. 225, the Supreme Court of Canada, on the ground that the case was submitted to the jury in a way which may have misled them (pp. 231, 233) and therefore it was impossible to say how much the opinion of Chief Justice BEGBIE on certain points may have influenced the question of damages, reduced the damages from $2,500 to $500. More recently the late Full Court in *Warmington* v. *Palmer* (1901), 8 B.C. 344, set aside a verdict (for $4,000) on the ground of excessive damages, though the judgment was reversed by the Supreme Court on other grounds: (1902), 32 S.C.R. 126.

MARTIN, J.A.

In my opinion the case at bar is a strong one for our intervention and there must be a new trial for both the reasons above mentioned; it is therefore unnecessary to consider the other question raised.

GALLIHER, J.A.: In this case I think the damages are excessive and that a new trial should be granted.

The case was heard before CLEMENT, J., with a jury and verdict given for $11,500. Against this verdict the defendants appeal, chiefly on the ground that the damages awarded are excessive.

GALLIHER, J.A.

Now it is not sufficient in order that a new trial be granted

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that the damages are greater than would be allowed by a Court sitting in appeal, but the principle laid down by Lord Esher in *Praed* v. *Graham* (1889), 24 Q.B.D. 53, 59 L.J., Q.B. 230 and approved of in *Johnston* v. *Great Western Railway* (1904), 2 K.B. 250, 73 L.J., K.B. 568, seems to be the proper one. If the Court, having fully considered the whole circumstances of the case, comes to this conclusion only: "We think the damages are larger than we ourselves should have given but not so large as that 12 sensible men could not reasonably have given them, then they ought not to interfere with the verdict." But, on looking at the evidence in this case and all the attendant circumstances, I cannot come to the conclusion that the verdict is one which the jury could reasonably have given. I think the evidence from the circumstances shews that it is an unreasonable verdict.

GALLIHER, J.A.

After a perusal of numerous cases on the subject of damages, the one which strikes me as being more nearly applicable to the case at bar is that of *Johnston* v. *Great Western Railway,* which I have cited above. In that case the plaintiff was a trained marine engineer and it was shewn that he had applied and would have been accepted for the position of superintendent of engineers had it not been for defects caused by the accident upon which he sued, that the salary would have been—starting at $3,000 with a gradual increase up to $5,000 a year. The injury was one to his leg and prevented him from going up and down ladders, in that respect very similar to the injury here. It was also in evidence in that case that his condition might be improved by an operation, an element which also enters into the present case, and there was the same uncertainty as to how much such an operation might improve him as pertains here. In that case the jury awarded £3,000, or $15,000, $2,250 of that being for medical expenses and loss of time up to the trial and the balance for the injury and loss of earning power to plaintiff. That balance was about $12,000. In the present case the jury have found $1,500 as the amount for medical attendance and loss of time up to trial and $10,000 for injury and loss of earning power. Now in the *Johnston* case, Vaughan Williams, L.J., while he expressed the opinion

that the damages were excessive, held they were not so much so that he could say the jury could not reasonably come to the conclusion they did, and in this finding he was followed by the rest of the Court. Now, when we compare the earning power of the plaintiff in that case and the plaintiff in the present case and also the fact that the injury to each seems to have been somewhat similar, I cannot but conclude that the damages granted by the jury here are excessive. The earning power in the *Johnston* case, according to the evidence, was from three to five times as great as that in the present case and the amount given by the jury on that branch of damages is only $2,000 in excess of what was given here. That seems to me to be carrying it to an extent that is unreasonable. There can be no question that this Court has the power to order a new trial in cases where they are clearly of opinion that the evidence did not warrant the finding of the jury. I take it we are very much in the same position in this as we would be in a case where we were deciding upon the weight of evidence, and, while Courts of appeal must exercise great care in overruling the findings of juries, yet, if they did not in a clear case exercise their powers, their functions as a Court of appeal would be very much limited.

GALLIHER, J.A.

I think this is clearly a case where the Court should interfere and order a new trial.

New trial ordered, Irving, J.A., dissenting.

Solicitors for appellant Company: *McPhillips, Tiffin & Laursen.*

Solicitors for respondent: *Martin, Craig, Bourne & Hay.*

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MERCHANTS BANK OF CANADA v. McLEOD AND LEESON.

Banks and banking—Promissory note discounted by bank—Insurance company—Power of to borrow or negotiate notes—Indorsement of note by company to bank—Holder in due course—Fraud—Illegality—Bills of Exchange Act, Secs. 48, 58.

Defendants, in certain transactions with an insurance company who under their charter had no power to indorse, give or accept negotiable instruments, gave the company a promissory note, which the company indorsed to the plaintiff Bank. They did not pay the note when it fell due. The company was heavily indebted to the Bank which held this and other notes for advances to the company. The practice was for the company to sell shares and take notes therefor which were discounted with the plaintiff Bank. On suit being brought, defendants set up that the note was given for the accommodation of the company who took and held it without consideration; that the Bank, having knowledge of the circumstances under which the note was given, and of the company's legal position as to negotiable instruments, was not a holder in due course, and that the note was therefore tainted with fraud and illegality.

Held, upon the evidence, that defendants had failed to prove under section 58 of the Bills of Exchange Act that there was such fraud or illegality in the issue or negotiation of the note as to deprive the plaintiff Bank of its status as holder in due course and therefore entitled to recover.

Held, further, that the company under section 48 of the Bills of Exchange Act could, notwithstanding their inability to borrow, indorse over to a third party any negotiable instrument made in their favour, and thus enable such third party to enforce payment against the maker or acceptor; and that the company would be estopped from denying that shares issued for such negotiable instrument were legally issued.

Per IRVING, J.A.: The note in question having been given carrying seven per cent. interest until paid, and the trial judge having given judgment for seven per cent. to due date and five per cent. afterwards to date of writ, the judgment should be corrected to allow seven per cent. to date of judgment.

Statement

APPEAL from the judgment of MARTIN, J., in an action tried by him at Vancouver on the 13th and 14th of January, 1909.

Abbott, and *Hart-McHarg*, for plaintiff Bank.
W. S. Deacon, and *T. E. Wilson*, for defendants.

11th November, 1909. MARTIN, J.

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MARTIN, J.

MARTIN, J.: With respect to the facts I have reached the conclusion, after an extended consideration of the evidence before me, that, first, the discounting of the Bentley note may fairly be taken as proved, the circumstances being much stronger here in support of that view than in the two cases cited to the contrary. Second, though M. L. Leitch deceived both the defendants and the plaintiff, nevertheless the former had no notice of his deception to the latter, and discounted for value and in good faith the note sued on; and I also find that value was given for the Bentley note.

As to the legal objections, of several heads, that were taken to the legality of the transaction and the right of the plaintiff to enforce payment of the note, I must at present content myself with saying briefly, after a careful examination of all the authorities cited, that whatever may have been the position of affairs between the Bank and the company I can find nothing which would warrant my reaching the conclusion that as between the defendants and the Bank payment of the note sued on can be successfully resisted by the former.

Judgment will therefore be entered for the plaintiff.

The appeal was argued at Vancouver on the 26th and 27th of April, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

W. S. Deacon, and *T. E. Wilson*, for appellants (defendants): It is the contention that during the course of the trial facts were proved which shifted the onus on plaintiffs to shew that they gave value for the note. There is no evidence whatever that they did give value for the note or that they took it without notice of this defect. On the contrary, the evidence shews affirmatively that the plaintiff Bank did not give value for the note, and that they took it with notice of the defect. By the company's Act of incorporation they were not to commence business until they had a certain amount of cash paid in. They never had the required amount, and had to make up the necessary deposit with the Government by the assistance of the Bank. These transactions virtually made the Bank a promoter of the company.

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Further, the company took notes, instead of cash, in payment for shares. The company not having any borrowing powers it was illegal for the Bank to lend it any money; and the company had no power to indorse, give or accept negotiable instruments: see *In re National Motor Mail-Coach Company, Limited* (1908), 2 Ch. 228; *Mears* v. *Western Canada Pulp and Paper Company, Limited* (1905), 2 Ch. 353; *Burton* v. *Bevan* (1908), 2 Ch. 240. There must be no trafficking in the company's shares: *Trevot* v. *Whitworth* (1887), 12 App. Cas. 409. By such methods the security of the creditors is swept away. As to illegal lending by a bank to a company, see *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks, & Co.* (1885), 29 Ch.D. 902, 54 L.J., Ch. 1,091; and as to a company suing where there is illegality of this kind: see *Forster* v. *Taylor* (1834), 5 B. & Ad. 887; *Balfour* v. *Ernest* (1859), 28 L.J., C.P. 170; *Jones* v. *Merionethshire Permanent Benefit Building Society* (1891), 2 Ch. 587, 61 L.J., Ch. 139; Broom's Legal Maxims, 7th Ed., 562; *In re Companies Acts. Ex parte Watson* (1888), 21 Q.B.D. 301, 57 L.J., Q.B. 609.

Argument

Abbott, and *A. Bull,* for respondents (plaintiffs): There is no evidence that the Company entered on an insurance business before they had the required cash capital, and their standing is not affected by the manner in which they raised the $80,000 to be deposited with the Government. They cited *Ontario Investment Association* v. *Lippi* (1890), 20 Ont. 440; *St. Stephen Branch Railway Co.* v. *Black* (1870), 13 N.B. 139; *Re Standard Fire Insurance Co.* (1884), 7 Ont. 448; *Smith* v. *Johnson* (1858), 3 H. & N. 222.

Deacon, in reply.

Cur. adv. vult.

2nd June, 1910.

MACDONALD, C.J.A.

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

IRVING, J.A.

IRVING, J.A.: The claim indorsed on the writ was against the defendants as makers of a promissory note for $5,500 and interest thereon at the rate of seven per cent. per annum until paid. The note was dated the 12th of December, 1907, and fell

due on the 16th of March, 1908. After a trial in January, 1909, judgment was delivered on the 14th of November, 1909, for the sum of $5,646.81, being principal and interest at seven per cent. up to the due date, and at five per cent. from that date to the date of the writ. It seems to me that the interest being contractual interest, and the plaintiffs having claimed it in the statement of claim, they are entitled (if entitled to anything) to interest up to the day of judgment.

On the main question, the facts are somewhat involved. The point the defendants are endeavouring to establish is that they, in their defence, have given under section 58 of the Bills of Exchange Act sufficient evidence of fraud or illegality in connection with the issue or negotiation of the note, to place on the plaintiff the onus of shewing that the Bank is the holder in due course, and if they have succeeded in doing that, their contention is that the plaintiff has not satisfied that onus. The Empire Company was incorporated in June, 1903, by 3 Edw. VII., Cap. 118, with a nominal capital of $1,000,000 in shares of $100 each. The company opened an account in 1904 with the plaintiff Bank at Stratford, and as shares were sold the money received from such sales was deposited with the Bank at that branch.

The defendants allege that the company's practice was to sell the shares on credit, taking notes from the purchaser, and these they discounted with the plaintiff Bank, and that this course of dealing was *ultra vires* of the company's powers. They also allege that the company in order to obtain the $80,000 deposit required by Government, improperly borrowed $20,000 from the plaintiff Bank on the company's notes, and they charge that generally the plaintiff Bank was during 1903 and up to the time of the taking of the Bentley note hereafter mentioned financing the Empire Company in an illegal manner.

The defendants, who reside in Vancouver, were in 1906 engaged in selling the shares of the company. The arrangement between them and the company was that they (they were not then in partnership) were to give the company their notes for $22,500 and $22,500 respectively (for convenience, these notes have been spoken of as one note for $45,000) and were to sell

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the shares at $115 or $15 above par, $5 of this premium was to be their commission. They sold a number of shares in this way, in particular they sold to one Bentley 200 shares, and for these he gave his note for $7,000, being 20 per cent. of the value of the shares, plus $15 premium, payable to the Empire Company. Perhaps it would be more correct to say the defendants induced Bentley to buy rather than they sold. He bought the 200 shares from one Leitch, the president of the company, and the note was sent to Stratford branch of plaintiffs' Bank.

During the currency of this Bentley note (say in January, 1907) the company's banking account was transferred to the London branch of the plaintiff Bank. At that time the Empire Company was indebted to the Bank in some $45,000 secured by the company's note, as collateral to that the Bank held the bond of the directors. The Bank also held a large number of notes given for shares, sold (some of them at any rate) through McLeod and Leeson.

Now, the Empire Company had no power to borrow money by its act of incorporation, and Mr. *Deacon* lays a great deal of stress on that circumstance; and says they had no power to borrow money at all, but I would point out that assuming the company could not borrow, they could, by virtue of section 48 of the Bills of Exchange Act indorse over to the Bank any note or bill which might be drawn payable to them, and thereby enable the Bank to enforce payment against the maker or acceptor, and that if they issued shares, whether for cash or on notes, they (the company) would be estopped from denying that the shares were legally issued.

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The Bentley note was not met when it fell due, so the Empire Company on the 14th of March, 1907, drew on him at 90 days, through the plaintiff Bank, which on that date placed $7,000 (the amount of the draft) to the company's credit. In ordinary course this draft with the share certificate annexed would be sent out to Vancouver where it would be accepted by Bentley. That I understand was done, but he did not pay it on its due date, the 15th of June, 1907; and on the 20th of June, the Empire Company issued a writ against him. That action was settled—or dropped—in October, 1907, and as part of the settle-

ment the renewal bill was then returned to Bentley; but not the note, nor the certificate for the 200 shares. These remained in the hands of the Bank. The note might be valueless, but the Bank would have a lien on the shares covered by the certificate, which lien they could enforce by sale of the shares.

In October, 1907, Mr. Leitch, the president of the company, came out to Vancouver, and the settlement of the action *Empire* v. *Bentley* was made by him or under his instructions. I think we may safely draw the inference that matters were not, at that time, in a satisfactory condition for the Bank so far as the Empire Company was concerned. He was here until December trying to get several of these notes paid, and the Bank was pressing him to expedite matters as much as possible; and we may be sure that the fact that the Bank had permitted him to deliver up the Bentley note was not lost sight of.

When the settlement was made with Bentley, he indorsed on the share certificate some sort of assignment or transfer or release, the certificate was not produced to us, so I am not able to say what it was—but the exact terms are not material. In December, 1907, there was due from the Empire Company to the defendants for commission on shares sold by them some $4,000. In addition to the business relations between the defendants and Mr. Leitch, the plaintiff McLeod was on friendly terms with Leitch, so in that way they became aware of his difficulties and naturally he informed them that he was being pressed by the Bank for money, and in particular that the Bank wanted some one to take up these 200 shares which Bentley had just renounced, and on which the Bank had advanced $7,000. It was through him and in this way that the defendants got into relations with the Bank. McLeod and Leitch had an interview in McLeod's office when it was stated by Leitch that the Empire Company had on deposit with the Government $80,000 and that the liabilities of the company did not exceed $10,000 and that if McLeod and Leeson would give $1,500 cash and a $5,500 note at three months, and take over the Bentley 200 shares, he would undertake to transfer them (the shares) before three months. He assured them that they would never be called on to pay the note. He promised also that upon the

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transfer of the shares which he was to bring about within the three months, they were to receive back their $1,500 cash.

I break off from the recital of the facts to say that it has not been established to my satisfaction that the indebtedness of the company was at this time greater than $10,000. Nor, in my opinion, does the fact (assuming that it is a fact and also contrary to law) that the Bank illegally advanced to the company $20,000 prevent the Bank from at any time subsequent to such advance recovering moneys advanced by it, to others on the collateral security of the company's shares. The defendants say that relying on these representations, they agreed to take over the Bentley shares, and they all three went to the Bank, paid the $1,500 and signed the note for $5,500. That is the note now sued on. After this had been done, and the transaction completed, they say that Leitch gave them a letter saying that they could have back, at once, their $45,000 note and that Mr. Harrison, the Bank manager, proposed that they should accept fifty shares in the Empire Company (the par value of which would be $5,000) for the $4,000 cash commission which was then due them. This proposal they accepted and so instead of 200 shares they were to get 250. These two matters, *viz.:* the return of the $45,000 note and the accepting $5,000 in shares in lieu of $4,000 cash, the defendants say had nothing to do with the purchase by them of the 200 Bentley shares. That purchase they say was wholly independent of these two matters.

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The result of the interview was reported upon by Mr. Harrison in a letter to the manager at London. It is clear that the manager at Vancouver did not discount the note now sued on. Indeed, it would not be negotiable until indorsed by the company. His letter notified the London branch that he had credited it with $1,500 cash. He returned the Bentley 200 share certificate and enclosed the $5,500 note. He asked for the $45,000 note so that he could return it to the defendants, and requested that two share certificates, one for 125 for McLeod, and the other for 125 for Leeson, be obtained. He enclosed a letter from McLeod and Leeson releasing the company from liability for all commission earned if the stock was issued in accordance with his request. In due time the new

shares were issued as requested, that is to say, in two certificates, 125 for each of the defendants; the Bank at London paid the Empire Company the sum of $5,500, proceeds of the said note, which the company then indorsed over to the Bank and then sent the note with the two certificates attached to Vancouver, where it was duly presented for payment, but the plaintiffs failed to pay, hence this action.

I cannot see any fraud in the issue or the subsequent negotiation of the note. The representation by Leitch (assuming that he could bind the company) that he would transfer the shares to someone within three months does not amount to fraud. Nor can I see anything illegal in the negotiation of the note by the Bank at Vancouver or at London. The defendants intended to take the Bentley shares, they intended their note to be cashed. When they handed their $1,500 in cash and the note now sued on to the manager at the Bank in Vancouver, they, in effect, authorized him to carry out the matter for them, to act for them as well as for the Bank. They knew, or must have known if they had thought for a moment, that it would be necessary for the manager of the Bank at London to see the Empire Company's manager and arrange for the acceptance by the company of the surrender of the Bentley certificate, and for the issue of new certificates to them. They knew that if the Bank gave up the Bentley certificates for this purpose its lien on the shares was gone, and so in effect they said to the manager at Vancouver—"Here is our note for $5,500 and $1,500 in cash, arrange the matter for us, so as to put our friend Leitch in a position to handle these shares for us." What he and the manager at London did was exactly what the defendants wished to have done. The Bentley share certificate was surrendered to the company, new certificates were issued to the defendants, and paid for by the proceeds of their note, which the Bank at London discounted for them in order to carry out their wishes. That the company subsequently applied this money in reducing the Bank's claim is a matter of no moment to the defendants. I am unable to see anything in their defence. When the Empire Company indorsed the note over to the Bank at London, and the

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Bank paid the company the sum of $5,500 the Bank became holders in due course.

I would dismiss the appeal, and correct the judgment as to interest.

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GALLIHER, J.A.: I find as a fact that whatever the understanding was between Leitch and the defendants as to the note sued on being an accommodation, the Bank had no notice of this. The correspondence between the Bank's managers at London and Vancouver shews this, and McLeod himself admits in his evidence that he did not tell the Bank until he was being pressed for payment of the note. The correspondence further discloses that the Bank's understanding was that the note and the $1,500 cash paid by McLeod and Leeson were for the purchase of the Bentley block of shares for which Bentley had given his note for $7,000, but had failed to pay and which note was returned to Bentley. The evidence shews this note to have been discounted by the Bank. It is quite apparent too that the note sued on here was discounted by the Bank on the strength of the financial standing of the makers.

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The Empire Accident and Insurance Company, while they had not the power under their charter to borrow upon notes, and while it may well be that they could not themselves have enforced payment of this note by the makers, could nevertheless by indorsement render them liable thereon to third parties: section 48 of Bills of Exchange Act, R.S.C. 1906.

So far as the Bank is concerned, I think it must be taken to be a holder in due course for value without notice, and therefore entitled to enforce payment. I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Deacon, Deacon & Wilson.*
Solicitors for respondents: *Abbott & Hart-McHarg.*

EASTERN TOWNSHIPS BANK v. VAUGHAN.

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EASTERN TOWNSHIPS BANK v. VAUGHAN

Practice—Taxation of costs—Counsel fee on view before trial—Affidavit of counsel—Witness not called—Fees of—Discretion of taxing officer—Interference with—Order LXV., r. 27 (42).

Plaintiff having obtained a review of the taxation of the defendant's costs, an affidavit by counsel who attended the taxation, and was at the trial and on appeal, was submitted and allowed to be read. The affidavit having shewn that the applicant informed the taxing officer that a view by counsel before the trial was necessary and had been had, the judge refused to disallow the counsel fee, or interfere with the discretion of the registrar.

The onus is on a party seeking to tax fees for a witness not called at the trial, to shew by affidavit, the relevancy and nature of his evidence, the necessity for it, that he was in attendance and the reason why he was not called.

APPLICATION by plaintiffs for a review of the taxation of defendant's costs. Heard by GREGORY, J., at Victoria on the 31st of May, 1910. Statement

H. C. Hanington, for plaintiffs.

A. E. McPhillips, K.C., for defendant.

1st June, 1910.

GREGORY, J.: Review of taxation. Objection being taken to the allowance by the registrar of two items: (a.) Counsel fee on view before trial to enable counsel to properly understand the case; (b.) Fees to witnesses not called.

In general the registrar is the sole judge as to what costs shall be allowed, and the discretion exercised by him will not be reviewed by the judge, unless it is clear that he has come to a wrong conclusion. Judgment

(a.) It was not objected that a counsel fee could not be allowed in this case, but it was objected that it should not be allowed without an affidavit that a view by counsel was necessary: Chit. Arch. Pr. 14th Ed., 695; and that an affidavit could not now be made: Supreme Court Rules, Order LXV., r. 27, Sub-Sec. 42. In support of the registrar's ruling it was urged that a similar item had been allowed the plaintiff when

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taxing his costs before his judgment had been reversed on appeal.

As it is practically impossible to communicate with the taxing officer as to what took place at the taxation, I allow the affidavit of Mr. Whiteside, who was junior counsel at the trial, and on appeal to be used so far as it relates to what took place before him. It shews that Mr. Whiteside had as counsel stated on that occasion that a view had been had, and it was necessary for a proper understanding of the case. In these circumstances I cannot say that the registrar was clearly wrong in allowing the item; it will therefore stand as taxed. See *Leeds Forge Company, Limited* v. *Deighton's Patent Flue and Tube Company, Limited* (1903), 1 Ch. 475 at p. 478, where the costs of a view by counsel after judgment for the purpose of appeal was allowed.

(b.) As to the allowance of the fees to witnesses not called, I think the registrar was wrong. In such cases the onus is on the party subpœnaing them to shew their relevancy, etc.: *Carlisle* v. *Roblin* (1894), 16 Pr. 328; Cameron on Costs, 275.

This was not done by affidavit on the taxation. There does not appear to have been any material before the registrar to justify the item, and in view of Order LXV., r. 27, s.-s. 42, an affidavit for that purpose should not be allowed now without some special reason. None has been suggested. Mr. Whiteside's affidavit cannot therefore be used for that purpose; but even if allowed, it does not go far enough for the rule seems to be that the party claiming should shew four things, *viz.:* (1.) That the witness was a necessary and material witness; (2.) That he was in attendance; (3.) What he was brought to depose to; (4.) The reason why he was not examined. A general statement that he was necessary and material and the course the trial took made it unnecessary to call him, is not sufficient, as it does not enable the taxing officer to form any independent judgment on the matter. *McMicken* v. *Ontario Bank* (1892), 8 Man. L.R. 513.

Judgment

The fees to the witness will be disallowed. The plaintiff will have the costs of this application.

Order accordingly.

SEMI-READY, LIMITED v. SEMI-READY, LIMITED.

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SEMI-READY v. SEMI-READY

Companies—Dominion and Provincial—Legislation affecting—Companies incorporated with same trade name—Injunction.

Where plaintiff Company had obtained incorporation under the Dominion Companies Act with a certain name, a company subsequently formed under a Provincial Act with the same name, was restrained from operating under such name.

APPLICATION for an interim injunction, heard by CLEMENT, J. at Vancouver on the 16th of September, 1910. Plaintiff Company was incorporated under the Dominion Companies Act as manufacturers and dealers in clothing, and the defendant Company having become incorporated with the same name under the Provincial statute for the same purposes, action was brought to restrain them from infringing on the trade name of the plaintiff Company.

Statement

Bloomfield, for plaintiffs.
Killam, for defendants.

CLEMENT, J.: The interim injunction must go in this case and the defendant Company must not act upon its certificate of incorporation until this action is tried.

In view of the decision of the Privy Council in *La Compagnie Hydraulique de St. Francois* v. *Continental Heat and Light Co.* (1909), A.C. 194, it seems to me that it might be argued successfully that when once a company is incorporated under the Dominion Act with a particular name, the field is exclusively occupied so far as that identical name is concerned, so that the defendant Company's certificate of incorporation under Provincial legislation is absolutely inoperative. If that view be sound the plaintiff Company might be obliged to amend their writ by adding as defendants the individuals who are actively concerned in putting the defendant Company into actual operation. But for the purpose of this motion I need not, I think, go so far as to

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pronounce definitely upon the point. Given, as here, a Dominion company with a certain and somewhat odd name, the subsequent incorporation of a Provincial company with that identical name is so palpably a fraud upon the public and a wrong to the existing company that the onus is very strong upon the new company to justify its position. I would not go so far on this motion as to negative the possibility of successful justification; but, given the bald facts deposed to here, no answer is attempted to what is upon its face a legal fraud. If such a thing be permitted it will lead to "confusion worse confounded" in the commercial world.

Judgment

In my opinion section 123 of the Companies Act, 1897 (R.S. B.C. Cap. 44), which was in force when this action was instituted has no application here to bar these plaintiffs from access to this Court: *Charles H. Lilly Co.* v. *Johnston Fisheries Co.* (1909), 14 B.C. 174.

Costs reserved to be disposed of by the trial judge.

Injunction granted.

YOUNG HONG AND QWONG SANG CO. v. MACDONALD.

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YOUNG HONG v. MACDONALD

Practice—Costs—Scale of—Action in Supreme Court—Amount adjudged within County Court jurisdiction—Supreme Court Act, 1904, Sec. 100—Marginal rule 976—Costs follow event—Discretion.

Plaintiff having brought his action in the Supreme Court for $2,010, and recovering only $160:—

Held, that, notwithstanding the modification of section 100 of the Supreme Court Act by marginal rule 976, the amount recovered being more than $100, costs must follow the event and be allowed on the Supreme Court scale; but

Semble, the action here should have been brought in the County Court.

ACTION tried by MURPHY, J. at Vancouver on the 25th of May, 1910. The claim was for damages brought by a tenant against his landlord for removing a horse and not returning it, whereby plaintiff was damnified, the horse being included in the lease to the plaintiff. It appeared that Macdonald desired to exchange the horse for another one, and a note in Chinese was sent to the representative of the plaintiff on the farm where the horse was. The horse was taken away and a substitute left, but the substitute not being satisfactory to the plaintiff he demanded the return of the animal taken away. This not being done, action was brought for damages amounting to $2,010. Judgment was given for $160, being the cost of hire of horse to take the place of that removed by defendant, and the question remaining to be settled was as to the costs that should be allowed.

Statement

W. S. Deacon, and *Ogilvie*, for plaintiff.
Reid, K.C., for defendant.

15th June, 1910.

MURPHY, J.: By section 100 of the Supreme Court Act passed in 1904, it is declared that costs shall follow the event except in cases therein stated. The bringing of a suit in the Supreme Court which should have been brought in the County

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Court does not fall within the exceptions: *Russell* v. *Black* (1904), 10 B.C. 326.

Granting, for the sake of argument, that this principle has been modified by marginal rule 976, the utmost change made by this is that "costs shall follow the event unless the Court or a judge shall for good cause otherwise order." What, then, is the position? The Legislature has deprived judges of all jurisdiction *re* costs save "for good cause." It has further granted to every litigant the right to bring every action—however trivial—in the Supreme Court. The only restriction on this right is contained in section 110 of the Supreme Court Act whereby it is enacted that a plaintiff recovering not more than $100 in an action founded on contract or $50 in an action founded on tort, shall not be entitled to costs unless the judge certify there was a sufficient reason for bringing the action in the Supreme Court.

Here the plaintiff has exercised the privilege conferred on him by law of bringing an action in the Supreme Court which could have been, and, in my opinion, ought to have been brought in the County Court. He has recovered $160, a sum in excess of the sums named in section 110 of the Act. How can I say that bringing the action in the Supreme Court is "good cause" why costs should not follow the event when the law expressly gives him that privilege. In my opinion I cannot. If I thought I had any discretion I would award costs on the County Court scale for I think injustice is being inflicted on defendant by saddling him with costs on the Supreme Court scale when a much less expensive forum could have been, and in my opinion ought to have been invoked.

Judgment

But, for reasons above stated, I consider I have no power to so order and costs must follow the event and are to be taxed on the Supreme Court scale.

Order accordingly.

DISOURDI v. SULLIVAN GROUP MINING COMPANY AND MARYLAND CASUALTY COMPANY.

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DISOURDI v. SULLIVAN GROUP MINING CO. AND MARYLAND CASUALTY CO.

Workmen's Compensation Act, 1902, Sec. 6—Injury to servant—Award—Insolvency of employer—Enforcement of award against insurers—Liability—Determination of—Persona designata.

The plaintiff, a workman employed by the defendant Mining Company was injured in November, 1907. In October, 1908, he obtained an award for compensation under the Workmen's Compensation Act, 1902. At the date of the award the Mining Company were insolvent and in the course of winding up. The plaintiff alleged that the defendants, the Casualty Company, were liable to indemnify the Mining Company against losses or liability under the award, and an order was asked for directing payment by the Casualty Company of the amount of the award into a chartered bank, pursuant to section 6 of the Act, and a judge of the Supreme Court granted the order, but it was set aside by the Full Court: (1909), 14 B.C. 256. A subsequent application by the plaintiff for an issue to determine the liability of the Casualty Company to indemnify the Mining Company was dismissed (1909), 14 B.C. 273. The plaintiff then brought this action for a declaration that he had a first charge upon the moneys which the Mining Company were entitled to receive from the Casualty Company, and for an order for payment pursuant to section 6. The defendants admitted that they had issued a policy which was valid and subsisting at the date of the plaintiff's injuries, by which they agreed to indemnify the Mining Company against loss for damages on account of bodily injuries suffered within the period of the policy by any employee. The trial judge (HUNTER, C.J.B.C.), dismissed the action on the ground that there was no privity of contract between the plaintiff and the Casualty Company, in other words, that the plaintiff had no status.

Held, that the judgment should be affirmed.

Per MACDONALD, C.J.A.: Unless section 6 gave the plaintiff a status to maintain the action, he had none; and it was not open to the plaintiff to ascertain the liability of the insurers to the Mining Company in an action such as this. The creation of the charge alone, without reference to that part of the section which gives a remedy for enforcing it, does not effect the subrogation mentioned in *Northern Employers' Mutual Indemnity Company, Limited* v. *Kniveton* (1902), 1 K.B. 880, 18 T.L.R. 504, and *Morris* v. *Northern Employers' Mutual Indemnity Company, Limited* (1902), 2 K.B. 165, 18 T.L.R. 635. Were it not for the

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decision of the Full Court in (1909), 14 B.C. 256, section 6 might be construed as intended not only to give the workman a charge on the insurance moneys, but also to provide the means of enforcing it, whether the insurers disputed their liability or not.

Per IRVING, J.A.: The liability of the Casualty Company under section 6 can be determined only in an action by the liquidator of the Mining Company.

Per MARTIN, J.A.: Section 6 affords a novel measure of relief to the workman, which can be obtained or enforced only in the way specified in the section, which at the same time creates a first charge upon the amount due from the insurer to the employer, and directs how the workman shall assert his rights in the premises, *viz.:* by means of an application to a judge of the Supreme Court. An action in the Supreme Court cannot be deemed to be an application to a judge of the Supreme Court, because the judge is *persona designata:* aliter, had the appeal been to the Supreme Court or a judge thereof: *In re Vancouver Incorporation Act, 1900, and B. T. Rogers* (1902), 9 B.C. 373; and *Semble*, that the judge would be a competent tribunal to make a finding that the employer was entitled to a sum from the insurers, notwithstanding the absence of rules.

APPEAL from the judgment of HUNTER, C.J.B.C. in an action tried by him at Cranbrook on the 22nd of December, 1909, dismissing the plaintiff's claim against the defendant Casulty Company on the ground that he had no status to maintain the action as against them. The grounds on which the action was based are summarised in the headnote.

Statement

The appeal was argued at Vancouver on the 6th of April, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant (plaintiff): We submit there is privity, and in any event are given a status by the statute. The question is have we here a position by which the Maryland Company can be made to shew that they owe this money? All the parties are before the Court.

Argument

G. H. Thompson, for respondent, the Maryland Casualty Company: The Company did not appear on the arbitration proceedings. No question could arise at that time as to any defence which we might have as against the Sullivan Company, so that we could have no status. We deny our liability and ask for a proper trial to determine if we are liable. It is different

in England, where the workman has a direct right of action against the insurance company.

Taylor, in reply: The whole of the money is set apart for the workman. When it is ordered by a judge to pay the money due under the policy into a chartered bank, then it involves the settlement by that judge of who is entitled to receive that money. We say the insurance Company has a right to have their liability determined, but the statute being indefinite as to how that right is to be tried out, the Court will supply the machinery and facilities for doing so.

Cur. adv. vult.

30th June, 1910.

MACDONALD, C.J.A.: The plaintiff was a workman in the employ of the defendant, the Sullivan Group Mining Company, and while in such employ was injured on the 18th of November, 1907. On the 10th of October, 1908, he obtained an award in his favour for compensation under the Workmen's Compensation Act, 1902. By mistake the arbitrator awarded him $1,500 a lump sum, instead of a weekly allowance, which is the only compensation which he had power to grant under the Act where death does not occur.

At the date of this award the Sullivan Group Mining Company was insolvent and in course of winding up. On the 15th of October, 1908, the plaintiff took out a Chamber summons returnable before a judge of the Supreme Court claiming the relief provided for in section 6 of the Act. On said application it was alleged that the defendants, the Maryland Casualty Company, were liable to indemnify the said Mining Company against losses or liability under said award, and an order was asked for directing payment by the Casualty Company of the amount of the award into a chartered bank pursuant to said section 6. That application was granted on the 22nd of February, 1909. On appeal, the order was set aside by the Full Court on the 21st of April, 1909. In these proceedings the mistake of the arbitrator in awarding a lump sum was discovered, and the parties agreed to a rectification of the award, which rectification was made on the 16th of June, 1909. On the 22nd of June, 1909, the plaintiff applied to CLEMENT, J.

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by summons, for an order directing an issue to determine the liability of the Casualty Company to indemnify the Mining Company. That application was dismissed on the 29th of June, 1909. Thereupon, and on 10th August, 1909, the writ in this action was issued, in which the plaintiff claims to have it declared that he has a first charge upon the moneys which the Mining Company is entitled to receive from the Casualty Company, and for an order directing the Casualty Company, pursuant to said section 6, to pay the said award, or so much as was then payable, and the balance as the same became payable into a chartered bank in the name of the registrar of the Court; and for an order that the said moneys be invested and applied as required by said section 6.

The case was tried on admissions of fact. The defendants, the Casualty Company, admitted the accident; that it was within the Workmen's Compensation Act, the award of 10th October, and the amendment of 16th June; that no part of the award had been paid to the plaintiff; that the Mining Company was insolvent at the date of the award; that a petition had been presented against it under the Dominion Winding-Up Act; the policy of insurance, that it was valid and subsisting at the time the plaintiff received the injuries and up to the 1st of September, 1908, when it expired; that it had made no payments to the Mining Company in respect of the accident in question; that the Casualty Company appeared upon and conducted the defence in the arbitration proceedings in which the award was made, but that they did this acting on behalf of the defendant the Mining Company.

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In this policy the Casualty Company agrees to indemnify the Mining Company against loss for damages on account of bodily injuries suffered within the period of this policy by any employee. The limit of indemnity for each employee is $1,500. The policy is subject to certain conditions precedent. The only one which appears to me to affect the case is No. 7, which provides that no action shall lie against the Company respecting any loss under this policy unless it shall be brought by the assured itself to re-imburse it for loss actually sustained and paid to the employee in satisfaction of a judgment, within sixty

days from the date of such judgment, and after trial of the issue; that no such action shall lie unless brought within the period within which a claimant might sue the assured for damages, unless at the expiration of such period there is such an action pending against the assured, in which case the action may be brought against the Company by the assured within 60 days after final judgment has been rendered and satisfied as above.

The learned trial judge dismissed the action on the ground that there was no privity of contract between the plaintiff and the Casualty Company, or as he expressed it that the plaintiff had "no status." Section 6 of the Workmen's Compensation Act provides that:

"Where any employer becomes liable under this Act to pay compensation in respect of any accident, and is entitled to any sum from insurers in respect of the amount due to a workman under such liability, then in the event of the employer becoming bankrupt, making an assignment for the benefit of his creditors, or making a composition or arrangement with his creditors, or if the employer is a company, of the company having commenced to be wound up, such workman shall have a first charge upon the sum aforesaid for the amount so due, and a judge of the Supreme Court my direct the insurers to pay such sum into any chartered bank of Canada in the name of the registrar of such Court, and order the same to be invested or applied in accordance with the provisions of the first schedule hereto with reference to the investment in any chartered bank of Canada of any sum allotted as compensation, and those provisions shall apply accordingly."

MACDONALD, C.J.A.

Unless this section gives the plaintiff a status to maintain this action the judgment at the trial was right. The several attempts made by the plaintiff recited above to obtain what he conceived to be his rights under this section failed because it was held in each case that he had taken wrong proceedings, and that before the plaintiff could succeed in an application before a judge under section 6, the liability of the insurer must either be admitted or be established in an action between the assured and the insurers.

The question which we have to consider in this appeal is whether or not it was open to the plaintiff to ascertain the liability of the insurers to the Mining Company in an action at law, such as he is now maintaining. Section 6 of our Act is the same as section 5 of the Imperial Act, 1897. The con-

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struction of this section was considered by a Divisional Court in the case of *The Northern Employers' Mutual Indemnity Company (Limited)* v. *Kniveton;* and again by the Court of Appeal in *Morris* v. *Northern Employers' Mutual Indemnity Company (Limited)*, both reported in (1902), 18 T.L.R., the first at p. 504, and the other at p. 635. These cases decided a point which seems to me to be important in this case, namely, that as against the insurers, the workman is subrogated to the position of the employer. The Lord Chief Justice in the first case says:

"Section 5" (section 6 of our Act), "was merely a statutory subrogation of the workman to the rights of the employer."

And Mr. Justice Channell says:

"Section 5 of the Act was a subrogation of the workman to the rights of the employer against the Insurance Company."

And in the latter case, the Master of the Rolls, at p. 636, says:

"That section (section 5) dealt with the case where a workman had met with an accident in the course of his employment, and had acquired a right to compensation, and the employer then became bankrupt, and it turned out that the employer had insured against liability under the Act, and the section gave the workman a right under those circumstances to follow the insurance money into the hands of the Insurance Company."

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Apart from the statute the plaintiff has no rights against the Insurance Company. The statute creates a charge in his favour, and by the same statute, in fact in the same section, provides a means of enforcing it. I think the English Courts in the cases above cited had reference both to the charge and to the means of enforcing it when they declared in the one case that there was a subrogation, and in the other that the workman is given the right to follow the moneys into the hands of the insurers. I am unable to reach the conclusion that the creation of the charge alone without reference to that part of the section which gives a remedy for enforcing it effects the subrogation mentioned in the English cases.

For this reason I think the action cannot be maintained.

But it was argued before us that if the statute does not give an efficient and complete remedy, an action such as this will lie. I cannot accede to that even on the assumption that the remedy provided by the section is incomplete, and if it were not for the importance of this case in its bearing upon the working out of

this very badly framed piece of legislation, and the unfortunate results which have already followed the attempts of the plaintiff to obtain what the Legislature plainly intended him to have, I should say nothing more.

Were it not for the decision of the Full Court in *Disourdi* v. *Sullivan Group Mining Co. and Maryland Casualty Co.* (1909), 14 B.C. 256, I should have thought that section 6 ought to be construed as intended not only to give the workman a charge on the insurance moneys, but also to provide the means of enforcing it whether the insurer disputed his liability or not. The power given to the judge to order payment into a bank for the benefit of the workman or his dependents, seems to me to imply as necessarily incidental thereto, authority to decide whether a sum be due by the insurer to the assured or not. That was clearly so in England as the cases above cited shew, and while it is true that there the Act is supplemented by rules of procedure, still I am not convinced that the absence of such rules would be fatal. The intent of the whole Act is to give the workman a summary and inexpensive remedy in the fixing and recovery of compensation, and while the interests of insurers may according to our notions not be fully protected by reserving to them all the rights and privileges of a trial in the ordinary way, yet that was for the Legislature to say, and not the Court, and the Legislature does not appear in this legislation to have favoured actions.

It is to be regretted that the Maryland Casualty Company should have departed from the course pursued by all reputable insurance companies, which is to pay meritorious claims and not to take cover under such a defence as was resorted to here.

IRVING, J.A.: I would dismiss this appeal for the reasons expressed in the order of the learned Chief Justice appealed from, namely, that the liability of the Company under section 6 can only be determined after action commenced by writ in which action the liquidator of the Company should be plaintiff. That decision is consistent with the opinion delivered by CLEMENT, J. in (1909), 14 B.C. 273.

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MARTIN, J.A.

MARTIN, J.A.: Section 6 of the Workmen's Compensation Act, 1902, affords, in my opinion, a novel measure of relief to the workman which can only be obtained or enforced in the way specified in the section, which at the same time creates a first charge upon the amount due from the insurer to the employer and directs how the workman shall assert his rights in the premises, *viz.*: by means of "a judge of the Supreme Court." The judgments of the English Courts, on the corresponding English section 5, in *Northern Employers' Mutual Indemnity Company* v. *Kniveton* (1902), 1 K.B. 880, 18 T.L.R. 504; and *Morris* v. the same Company (1902), 2 K.B. 165, 18 T.L.R. 635, support this view; I refer specially to the reports of those cases in the Times Law Reports because they are much better and fuller than those in the Law Reports. At the time of these decisions the application in England was to a County Court judge; since then the English Act has been materially changed—see the new Act of 21st December, 1906; 6 Edw. VII., Cap. 58, Sec. 5, whereby the rights of the employer against the insurers are "transferred to and vest in the workman. . . ."

The first point for our determination is, can an action in the Supreme Court be deemed to be an application to "a judge of the Supreme Court?" The answer to that must be in the negative because it has been decided by the late Full Court that where an appeal lies to "a judge of the Supreme Court," there is no appeal from his decision because he is *persona designata* and not the Court: *aliter* had the appeal been to the "Supreme Court or a judge thereof": *In re Vancouver Incorporation Act 1900, and B. T. Rogers* (1902), 9 B.C. 373. See also *Murphy* v. *Star Exploring and Mining Co.* (1901), 8 B.C. 421, 1 M.M.C. 450.

It follows from this decision that the present action cannot be maintained because the only tribunal for dealing with the matter is a judge as specified. This result is unfortunate because an application was made to such a judge (Mr. Justice Morrison) to give the necessary statutory direction, and he made the order, but it was set aside by the Full Court (1909), 14 B.C. 256, on the ground that there had been no antecedent finding by a "competent tribunal" that the employer was "entitled"

to any sum from the insurers, though it was conceded that an admission of liability by the insurers would have the same effect. It is a very strange thing, but true nevertheless, according to the report of the case (which is all we have to go by) that on that appeal it does not appear to have been suggested by anyone that the competent tribunal to determine that very question might be the judge applied to and that he was not only a competent but a special tribunal created for the express purpose of determining in a summary manner that very question which would be sure to arise as a precedent one on many applications to direct payment over. It is true that no special machinery exists for that purpose, as in England, and that the rules—Nos. 70-6—to carry it out have been declared, in an application in this case, to be *ultra vires* (1909, 14 B.C. 273) nevertheless I should be inclined to think (subject, however, to hearing other views should the matter be raised again) that such omission does not leave the *persona designata* powerless, because summary powers, as the name implies, require no rules other than the observance of the course of natural justice. As I held in *Re the Slocan Municipal Election* (1902), 9 B.C. 113, in construing a statute which contemplated a speedy and simple form of adjudication:

"To carry out these simple matters no rules or regulations are necessary in my opinion; such powers are naturally incident to any tribunal authorized to 'try' a cause or matter."

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And see to a similar effect, *Wallace* v. *Flewin* (1905), 11 B.C. 328, 2 M.M.C. 283. The effect of the Workmen's Compensation Act was to introduce "a new and somewhat startling principle," as is pointed out in Ruegg's Employers' Liability, 7th Ed., 217. In the *Kniveton* case (*supra*) the Lord Chief Justice said the

"Act and the rules under it were not intended to provide for every particular case in detail. They were intended to be and were the embodiment of broad principles, and the Court ought to endeavour to apply the rules of law to these principles."

And in *Powell* v. *Main Colliery Company* (1900), A.C. 366 at p. 371, Lord Chancellor Halsbury points out the spirit in which the Act should be administered:

"But, my Lords, I wish to say something, apart from the mere words, upon the whole of the statute itself. It appears to me that the statute

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deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, 'I claim so much,' and that then he should go to the County Court judge and say, 'Now please to hear this case, because my employer will not give me what I have claimed.' It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent, and had sufficient knowledge to say what it meant. Why is it that there is no suggestion here of 'plaint', 'suit', 'writ', 'bill' or any other proceeding in the form of claim, such as is recognized as a statement of claim? Nothing of the sort is to be found in the whole of the statute . . ."

And further, at p. 372:

"Then an argument was suggested to your Lordships that there is no mode of procedure here for a defendant who wants to get rid of the question and to have it settled. I entirely differ. If it is meant that there is no mode actually pointed out by the statute, I agree; but it is left to the ordinary law in that respect, and I have never heard yet that a defendant cannot apply to an arbitrator for an appointment to have settled a question which has arisen between himself and his co-litigant. It has happened to me before now and I daresay to all of your Lordships who have sat as arbitrators, that if a plaintiff has been found shilly-shallying and declining to go on, an appointment has been applied for; and I daresay it has happened to most of your Lordships in that event to give peremptory appointment for such and such a day, and to say that you would go on in the absence of the plaintiff unless he appears. Why is not that procedure applicable to this matter?"

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It seems, therefore that the intention of the Legislature was to empower the judge to dispose of the whole matter in a simple and summary way, and, indeed, there is nothing new in such a provision in legal procedure, because *e.g.*, a judge has power in interpleader matters, in certain circumstances, to "dispose of the merits of (the) claim, and decide the same in a summary manner and on such terms as may be just": Supreme Court Rule 857.

I have thus considered this important point at some length because of the unfortunate position the plaintiff at bar finds himself in as the result of the prior proceedings, and also because

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the Full Court did not deal with that aspect of the matter, and therefore it is, fortunately, open to discussion should it arise, quite apart from the question of this Court being bound by the decisions of the Full Court, as to which I express no opinion, because it may become necessary at some future time to consider it.

With some reluctance, if I may say so, I see no other course open than to dismiss the appeal.

GALLIHER, J.A. concurred in dismissing the appeal.

Appeal dismissed.

Solicitors for appellant: *Harvey, McCarter & Macdonald.*
Solicitor for respondent: *G. H. Thompson.*

McDONALD v. THE VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY.

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McDONALD v. V., V. & E. R. & N. Co.

Railways—Right of way—Land required for or actually taken—Obligation of company to take lands—Railway Act (Dominion), Secs. 158, 159, 160.

A railway company, in its requirement of right of way, included, *inter alia*, land in which the plaintiff had a leasehold interest, but the right of way was at no time wholly upon the plaintiff's property, the greater portion being upon adjoining lands. The Company, without proceeding to arbitration, acquired the interest of the plaintiff's lessor, and built its road clear of but adjoining that portion of the indicated right of way over the land in which the plaintiff was interested. In an action to compel the Company to acquire and pay for the right of way as indicated, the Company contended that it could be compelled to pay for only that portion of the right of way which it actually took possession of, and IRVING, J., at the trial dismissed that contention and held that the plaintiff was injuriously affected by the construction and operation of the railway.

Held, on appeal (MARTIN, J.A., dissenting), that the trial judge was right.

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APPEAL from the judgment of IRVING, J. in favour of the plaintiff in an action for compensation for lands defined by a railway company as their right of way, but not taken possession of by them in circumstances set out in the headnote.

The appeal was argued at Vancouver on the 5th and 6th of April, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

A. H. MacNeill, K.C., for appellant Company: The sections of the Act under which the Company have proceeded are permissive; the taking of the land is compulsory on us only after we have given notice to treat, when to be relieved we must abandon. The bald question here is: can we be compelled to take this land whether we want it or not? *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602, is not applicable. We have not injured or damnified the plaintiff, but he is anxious for us to do so. We have not entered upon the land, but merely filed a plan shewing that we probably will take it.

[MACDONALD, C.J.A.: Is not that a charge on the land?]

Possibly; but I can find no reported authority shewing that it is.

[GALLIHER, J.A.: Is it not a cloud on his title?]

We are not met with that here; but we are dealing with an order that we take and expropriate these lands.

Argument

[MACDONALD, C.J.A.: The only way that you can remove whatever charge or cloud that has been placed upon the lands is by either taking or abandoning them.]

Here we have the single question: Can we be compelled to take these lands now? If we had given notice to treat we could abandon; not having done so, there is nothing to abandon. As to the powers of the Company being permissive only, and not compulsory: *Regina* v. *York, &c. Railway Co.* (1852), 1 E. & B. 178; *Scottish North-Eastern Railway Company* v. *Stewart* (1859), 3 Macq. H.L. 382; *The Queen* v. *Great Western Rail. Co.* (1893), 62 L.J., Q.B. 572. The land is not necessary for our requirements at the present time, and according to section 194, the certificate of the surveyor must shew that the lands are necessary or required for the railway, also there is no evidence that the lands are injuriously affected.

G. E. Martin, for respondent (plaintiff): The lands are appurtenant, and access to our premises has been destroyed. The Company have filed a notice that they intend to take the land; we do not know when we shall be called upon to surrender it, *ergo* we are in suspense.

MacNeill, in reply: We must shew what we actually take, not what we originally proposed to take.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.: The sole question in this appeal is one of law. The plaintiff is lessee of land which was on the projected line of defendants' railway. The defendants, pursuant to sections 158, 159 and 160 of the Railway Act prepared, had approved, and deposited a plan, profile and book of reference. The right of way as shewn upon said plan, profile and book of reference, took in part of the plaintiff's property, but at no point was the whole of the right of way upon the plaintiff's property, the greater part of it was on adjoining lands. The Company without resorting to arbitration, acquired the interest of plaintiff's landlord, and built its roadbed clear of that portion of the right of way extending over the lands in which the plaintiff was interested. In other words, the roadbed was kept upon that portion of the right of way which was upon adjoining lands in which the plaintiff had no interest. The Railway Company having acquired the landlord's interest, apparently proposes to wait until the expiration of the plaintiff's lease before taking possession of that portion of its right of way in question. The Railway Company claims that it has the right to do this and can only be compelled to pay compensation for such portion of its right of way as it actually takes possession of.

The position taken by the Railway Company is a plausible one, but I think upon a careful consideration of the provisions of the Railway Act it is more plausible than sound. Parliament has been careful to safe-guard the interests of landowners through whose properties railways are projected. The Railway Company is required to make a plan and book of reference setting out in detail, amongst other things the right of way, property

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lines and owners' names, the area, and the length and width of the lands proposed to be taken in figures, stating every change in width. Such plan, profile and book of reference must receive the sanction of the Board, which is authorized to make changes therein, and thereafter must be deposited with the registrar in the land district in which the lands affected are situated. It is also to be noted that the Railway Company is not now allowed to deviate from this plan without the sanction of the Board.

While the Company would not be allowed to extend the limits of its right of way without the sanction of the Board, it claims the right to pick and choose within the limits established and sanctioned by the Board. If this contention be right, then notwithstanding the care which has been exercised by Parliament and by the Board to have a proper right of way through the course of the line, the Railway Company may have its right of way ten feet wide at one point, one hundred or two hundred feet wide at another point, and so on in and out throughout its whole course. Bearing in mind also the fact that the plan, profile and book of reference when deposited in the Land Registry office is declared to be notice to all parties concerned, and in a way constitutes a lien or charge upon the land, I think it would be unreasonable to hold that the Railway Company was intended to have power to retain such lien or charge indefinitely in the manner in which it is attempting here.

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It was argued that the abandonment clauses of the Railway Act shews that it was not intended that the Railway Company should be compelled to take every portion of its right of way, but only such as it desired to take. I think these clauses can be applied without affecting the principle involved in this action. The Railway Company might desire properly to abandon land shewn on its plan. For instance, it may desire to deviate from the original plan, and it can do this with the sanction of the Board. It may desire to do this after it has given notice to treat, and in such a case it would become necessary to abandon, but it will be noted that the Company is only authorized to abandon where the notice to treat improperly describes the land, or where the Company decides not to take the land described,

and such abandonment is final, and no new notice can be given except for other lands, or for lands otherwise described. In other words, this power may be enjoyed by the Railway Company and may become necessary to it, in connection with matters having no relation at all to the question in issue in this action.

Again, it was said that the amendment to the Railway Act, 1909, 8 & 9 Edw. VII., Cap. 32, Sec. 3, shews that Parliament intended that a railway company might indefinitely delay its proceeding to take land shewn on its plan. I do not think that that amendment shews anything of the kind. It is true that it shews that Parliament had in contemplation that delays might occur, but that it intended, or indicated an intention, to give to the railway company a right to hold its indefinite lien or charge over lands without making compensation by such tactics as are shewn in this case, and without any fault or waiver on the part of the landowner, I cannot for a moment accede to.

Then again our attention is called to the form of certificate which a surveyor or engineer is required to give to accompany a notice to treat. He must certify that the land proposed to be taken is necessary for railway purposes, and it is argued that if the Company is bound to take the whole of the land covered by the plan and book of reference, why this clause in the certificate? I think the answer is that the form of certificate has been carried down from a time when the Company was not precluded by the Act without sanction from deviating within certain limits. At one time it was a useful provision, but the Act has been amended so as to destroy its usefulness, at all events as a guide to the intention of Parliament on the point before us.

A number of cases were cited before us, among them *Corporation of Parkdale* v. *West* (1887), 12 App. Cas. 602. The case is not in point except insofar as it indicates the opinion of the Judical Committee of the Privy Council that in a proper case a *mandamus* may issue to compel a railway company to proceed to arbitrate. I think that principle has been established in other cases not cited to us, and that it is now well-settled that where a railway company declines or neglects to proceed to make compensation as provided by the Railway Act, the land-

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owner may bring an action for a *mandamus* to compel it to take these proceedings. Since the amendment of 1907, giving the landowner the right to continue the proceedings after the railway company have served notice to treat, such an action is unnecessary after the initial step of notice to treat has been taken. But before that initial step has been taken, as in this case, it seems to me that if the landowner desires that compensation should be fixed under the Act, an action for a *mandamus* is his proper remedy.

I would dismiss the appeal.

MARTIN, J.A.: Though it is not precisely so put, yet on the facts of this case the real effect of the contention of the plaintiff is that as soon as a railway company deposits its plan, profile and book of reference under sections 157-60 of the Railway Act, Cap. 37, R.S.C. 1906, it can at once be compelled to take and make compensation for all the land shewn in those documents, and in pursuance of this view a mandatory order has been made herein directing the Company to proceed "forthwith to acquire the right of way for their railway through and over lots 19 and 20, block 10, Townsite of Huntington and pay the plaintiff compensation to which he is entitled by virtue of the Railway Act." The Company has not entered upon or occupied any portion of said lots, though its right of way is shewn in the plan to include a portion of them; it has built its line across a lane to the rear of them pursuant to leave given by an order of the Board of Railway Commissioners dated the 12th of June, 1908, empowering the Company to "construct its railway across public highways. . ." which includes lanes. The railway was in operation at the locality in question at the time action was brought, but there is no evidence to shew when it was completed and in operation according to section 164. No notice of intention to take the lands has been given under section 193, and it is pointed out that even if it had been the Company could nevertheless, under section 207, reconsider the matter, decide not to take them, and abandon its notice. Then again, reliance is placed on the form of the certificate to accompany the notice directed to be given by the engineer under section 194 certifying that the land "is required for the railway," which

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has not been given, and it would be superfluous to give it if the Company is otherwise bound to take all the land. We are also referred to the subsequent amendment in section 2 of Cap. 32 of 1909 as an indication of the view of Parliament that the Company theretofore could not be compelled to take as now submitted. Without laying undue stress on this new enactment I think that the others do materially support the defendants' argument. On the other hand there is no apt section which supports directly, or, in my opinion, indirectly, the contention of the plaintiff, and I think that there ought to be before we can give effect to it, though I recognize at the same time, that it is not desirable that after the "general notice" mentioned in section 192, parties concerned should be kept in a state of doubt and uncertainty, for an unreasonable time. It is, however, purely a question of statutory provisions.

So far as regards the claim for compensation by reason of a diminution of access to the rear of the property by means of the lane, it is sufficient to say that the objection of the appellants' counsel is correct and should be upheld; *viz.:* that there is not a word of evidence of anything of the kind at the trial, merely some statements of counsel which not only were not admitted, but were contradicted. The lane has not been fenced in, and the learned trial judge remarked that though it was closed on paper it was not closed "in fact." The power given to cross its lane did not even close it "on paper," and I confess with all deference, that I cannot see what application *Corporation of Parkdale* v. *West, supra,* relied on by the learned judge below, has to this case, except the remarks on pp. 612 and 615 about rights over lands being injuriously affected, and the time compensation should be made therefor, which are in favour of the defendant Company.

MARTIN, J.A.

The appeal should, in my opinion, be allowed.

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

GALLIHER, J.A.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *MacNeill & Bird.*
Solicitor for respondent: *G. E. Martin.*

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REX v. FORSHAW

REX v. FORSHAW.

Municipal law—Certiorari—Power to impose licence—Discrimination between vehicles drawn by horses used for hire and vehicles propelled by power—Vancouver Incorporation Act, 1900, B.C. Stat. Cap. 54, Sec. 125, Sub-Secs. 130, 131; 1909, Cap. 63, Sec. 5.

Pursuant to sub-sections 130 and 131 of section 125 of the Vancouver Incorporation Act, 1900, empowering the council to regulate and licence owners and drivers of stage coaches, livery, feed and sale stables and of horses, drays, express waggons, carts, cabs, carriages, omnibuses, automobiles and other vehicles used for hire, the council passed a by-law imposing a licence for each vehicle drawn by one or two horses, $5 per annum; by more than two horses $10; and for each automobile or taxi-cab carrying up to seven passengers, $25; over seven passengers, $50 per annum.

On an application for a writ of *certiorari* to bring up a conviction under the by-law on the ground that it made a discrimination between vehicles drawn by horses used for hire and other vehicles used for hire:—

Held, that the conviction was valid.

APPLICATION for a writ of *certiorari* producing a conviction under By-law No. 712 of the City of Vancouver, passed pursuant to section 125, sub-sections 130 and 131 of the Vancouver Incorporation Act imposing licences on vehicles used for hire within the city. Defendant was charged in the police court for the non-payment of the licence fee and was convicted.

Statement

An application was made for writ of *certiorari* on the ground that the by-law made a discrimination between vehicles drawn by horses used for hire and other vehicles used for hire, the tariff under section 12 of the by-law making no distinction as to rates between these classes of vehicles but only making a difference between vehicles provided with taximeters and vehicles without.

Reid, K.C., for the application.

J. K. Kennedy, for the City, *contra*.

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MURPHY, J.: In this matter I have come to the conclusion that the conviction is valid. This being so I express no opinion as to the preliminary objection to the procedure raised by Mr. *Kennedy*. The conviction is attacked on the ground that the by-law under which it was made is *ultra vires* because the Vancouver Incorporation Act, 1900, as amended in 1909, gives no power to the Council to discriminate between vehicles drawn by horses used for hire and automobiles or taxi-cabs used for hire in the matter of the amount of the licence fee to be imposed.

The sections of the by-law upon which the conviction is grounded are:

"(2.) No person, shall, after the passing of this by-law, drive or own any vehicle used for hire for the carriage of passengers in the city without being licensed so to do under the provisions of this by-law.

"(5.) The following sums of money shall respectively be paid for licences issued under this by-law:

"For each vehicle drawn by one or two horses, the sum of $5 per annum.

"For each vehicle drawn by more than two horses, the sum of $10 per annum.

"For each automobile or taxi-cab, carrying up to seven passengers, the sum of $25 per annum; over seven passengers, the sum of $50 per annum.

"Provided always that every licence granted under this by-law shall be invalid and inoperative and of no effect until the applicant shall have paid to the treasurer of the city the sum fixed therefor by this by-law, and shall have obtained a receipt for such payment signed by the city treasurer upon the said licence."

Judgment

This by-law was passed pursuant to powers contained in subsections 130 and 131 of section 125 of the Vancouver Incorporation Act, 1900, which, so far as material, read:

"The Council may from time to time pass, alter and repeal by-laws:

"(130.) For regulating and licensing the owners and drivers of stage coaches, livery, feed and sale stables, and of horses, drays, express waggons, carts, cabs, carriages, omnibuses, automobiles, and other vehicles used for hire;

"(131.) For fixing the fee to be paid for every licence required under by-laws passed under this section."

Mr. *Reid* in support of his contention cited *Jones* v. *Gilbert* (1880), 5 S.C.R. 356. If the above sections authorized the imposition of a licence on the business of transporting passengers in the city this case might have some bearing on the question,

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but I read them as authorizing a tax on the owners of various kinds of vehicles used for hire, which vehicles differ *inter se.* The Legislature required, it is true, that before owners could be required to take out a licence under these sections their vehicles must be intended to be used for hire, but it was not the business implied in the words "used for hire" that was required to be licensed but the ownership and operation of the means whereby that business was carried on. Now, as it cannot be contended that a taxi-cab is the same means of carrying on the transportation of passengers as a cab or other horse drawn vehicle, it follows, if my view of the section be correct, that there can be no discrimination in imposing different licence fees. The application is dismissed.

Judgment

Application dismissed.

MARTIN, J.
1909
Oct. 27.
DARNLEY v. CANADIAN PACIFIC RY. CO.

DARNLEY v. CANADIAN PACIFIC RAILWAY COMPANY.

Practice—Workmen's Compensation Act, 1902—Costs of special case—Jurisdiction to deal with—Whether in judge or arbitrator—Section 2, Second Schedule; Rule 42.

In a memorandum handed down by a judge of the Supreme Court on a special case under the Workmen's Compensation Act, 1902, no mention was made of costs. The memorandum was duly recorded under the Act and Rules, which makes it enforceable as a County Court judgment. On an application for an order to tax the costs:—

Held, that the judge had jurisdiction to deal with the costs of the special case under rule 42.

Statement

APPLICATION for costs of special case under Workmen's Compensation Act, 1902. In this action CANE, Co. J. was appointed arbitrator by order of CLEMENT, J., and made an award in favour of the applicant for $140, but during the

arbitration proceedings before the County judge two objections were raised upon which the respondents claimed that the applicant could not recover, *viz.*: (a.) that he had misrepresented his age at the time of entering into employment, and (b.) after injuries received, had signed a receipt for the sum of $21 as a release.

His Honour decided that these two facts disentitled the applicant to recover but submitted the questions of law involved (in the form of a special case under rule 37), for the decision of a judge of the Supreme Court pursuant to section 4 of the Second Schedule of the said Act, and MARTIN, J. of that Court decided the questions submitted to him as set out in the report thereof: see (1908), 14 B.C. 15.

After MARTIN, J. had handed down a memorandum of his decision, and before such memorandum, including the arbitrator's finding, was duly recorded, Judge CANE died. Thereupon the applicant applied to GRANT, Co.J., and such memorandum was duly recorded, which memorandum when so recorded under the Rules and the Act has the same effect, and may be enforced, as a County Court judgment. In the memorandum which was handed down by MARTIN, J. no mention was made of the costs of the special case, as mentioned in rule 42.

Statement

Application was then made by the applicant for an order from MARTIN, J. directing the registrar to tax to the applicant the costs of submission and case, and for a fiat for an increased counsel fee. Objection was made to such application by the respondents on the ground, *inter alia,* that the said costs should be dealt with by the arbitrator and not by the judge who decided the special case.

Lowe, for the applicant cited rules 2, 34, 41, 42, 80 (B.C. Gazette, 1909, Vol. 1 p. 289), and the following cases: *Fritz* v. *Hobson* (1880), 49 L.J., Ch. 735; *Attorney-General* v. *Lord Lonsdale* (1871), 40 L.J., Ch. 198; *Viney* v. *Chaplin* (1858), 3 De G. & J. 282; *In re Knight and The Tabernacle Building Arbitration Society* (1893), 62 L.J., Q.B. 33; *In re Gonty and Manchester, Sheffield, etc. Rail. Arbitration* (1896), 65 L.J., Q.B. 625 at p. 631.

Argument

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H. G. Lawson, contra: The arbitrator should deal with the costs of the special case which are included within the scope of the direct provision in section 6 of the Second Schedule and the judge of the Supreme Court has no jurisdiction. In any event rule 42 is inconsistent with section 2 of the Second Schedule, by which authority the rules were made: Hardcastle on Statutes, 312.

Lowe, in reply: There is no real conflict in the rules, as 42 is a specific direction to cover a special case.

27th October, 1909.

Per curiam: While the matter is not free from doubt yet I think I have jurisdiction under rule 42 to grant the application for the costs of the special case, the said rule being, in my opinion, sufficiently authorized by section 2 of the Second Schedule as being part of the procedure "prescribed by regulations made by the Lieutenant-Governor in Council."

Judgment

SPINKS, CO. J.

1909

May 13.

COURT OF APPEAL

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April 13.

LEE v. O'BRIEN AND CAMERON

LEE v O'BRIEN AND CAMERON.

Principal and agent—Sale of land—Introduction of purchaser—Options given to latter by owner and not taken up—Discontinuance of negotiations—Severance of land—Renewed negotiations with purchaser without agent's knowledge—Sale of balance of land at reduced price.

T., in 1904, having listed his property with plaintiff at the selling price of $30,000, the latter introduced P., who obtained from T. a three months' option, upon which $100 was paid. This was renewed for $50, and the second option was also allowed to lapse. A small portion of the property was sold to one L. after the expiration of the second option, on which plaintiff received a commission. In 1906, negotiations were revived between T. and P. which resulted in a sale to P. of the property for $26,000, but plaintiff was unaware of either the negotiations or sale at the time. Plaintiff, on learning of the sale, claimed a commission.

Held, on appeal (upholding the finding of SPINKS, Co. J. at the trial, IRVING, J.A. dissenting), that he was entitled to recover.

SPINKS, CO. J.

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COURT OF APPEAL

1910

April 13.

LEE v. O'BRIEN AND CAMERON

Statement

APPEAL from the judgment of SPINKS, Co. J. in an action for the recovery of commission on the sale of land, tried by him at Vernon on the 13th of May, 1909.

In December, 1904, E. J. Tronson listed his property for sale with the plaintiff at $30,000. Shortly afterwards, the plaintiff introduced one Samuel Polson who was instrumental in getting Tronson to give him an option for two or three months on which $100 was paid. This option fell through and the plaintiff got a renewal of it on which $50 was paid. The second option also fell through, and shortly afterwards a small portion of the property was sold to one Lyons for $1,039, on which sale the plaintiff received commission. In the spring of 1906 negotiations were renewed between Tronson and Polson and on the 23rd of April, 1906, the property was sold to Polson for $26,000 without the intervention or knowledge of the plaintiff. The plaintiff subsequently learned of the sale and claimed his commission, and upon Tronson's refusal to pay, brought action. Shortly after the action had been commenced, Tronson died, and leave was given to continue the action against his executors.

R. H. Rogers, for plaintiff.
Billings, for defendants.

SPINKS, Co. J.: I have read all the cases handed in and there is no contradiction. The law is well settled and it would be mere waste of time to state it to anyone who had read the cases cited.

In this case it is not denied that the late Mr. Tronson put his land into the hands of the plaintiff for sale. That he knew that the plaintiff was a real estate agent and that he agreed to pay a commission of 2½ per cent. That the plaintiff introduced Mr. Polson as a probable purchaser. That plaintiff was instrumental in options being given by Mr. Tronson to Mr. Polson, on both of which options small sums were paid. That the plaintiff advertised the property at his own expense and at his own expense drove Mr. Polson and others out to see the lands. That he instructed and partly paid Mr. Cummings to fix the

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boundaries of the property and to lay off a 10 acre plot. That he sold and was paid a commission on the sale of a small part of the property. That a sale was ultimately made by Mr. Tronson to Mr. Polson of the remainder of the property for $26,000. There is other evidence of the plaintiff that it has been said cannot be admitted because it is not corroborated. I do not agree with this contention. The plaintiff's evidence in the main is corroborated, and I am of the opinion that that is sufficient for the act. But without taking the rest of the plaintiff's evidence into account I am of the opinion that there is sufficient to support his claim. The land was put into his hands for sale and it is not contended that it was ever taken out of his hands. He introduced the purchaser and was an active agent during the negotiations. The fact that about 12 months elapsed between the expiration of the second option and the sale does not in my mind affect the question. The relation of principal and agent still existed and the agent has done all that was necessary to entitle him to his commission. That the final negotiations began by Mr. Tronson speaking first to Polson who said the price in the options was too high and Tronson asked for an offer. Almost at once they came to terms. It looks to me as one continual bargaining.

SPINKS, CO. J.

The appeal was argued at Vancouver on the 13th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Davis, K.C., for appellants (defendants), cited section 25 of the Evidence Act, as enacted by section 4 of chapter 9, 1900. Defendant died after action brought and before trial.

Creagh, for respondent (plaintiff): This was not raised in the notice of appeal.

Davis: The grounds of appeal are that the judgment is against the evidence and the weight of evidence, and that is sufficient. As to the merits, the law is well settled with regard to commission on sale of real estate. If the agent does not sell at the figure agreed upon he is not entitled to commission, assuming, of course, that everything connected with the transaction is *bona fide.* We say that Lee was not our agent to make a sale, except in bulk at $30,000, and in the second place, he did not

Argument

make a sale at all: *Bridgman* v. *Hepburn* (1908), 13 B.C. 389, 42 S.C.R. 228. There is no suggestion that commission was to be paid on any other figure than the $30,000, and if there was any variation of that on account of the sale of ten acres, the onus was upon Lee to shew it.

Creagh: As to corroboration, this is not an action brought against the estate of a deceased person, and we submit in any event that there is ample corroboration to satisfy the statute. There is also ample evidence to justify the finding that plaintiff had obtained a purchaser. *Bridgman* v. *Hepburn, supra,* is rather in our favour. Here the property was sold through the efforts of the plaintiff in the first instance. He cited *Toulmin* v. *Millar* (1888), 58 L.T. N.S. 96; *Murray* v. *Currie* (1836), 7 C. & P. 584; *Mansell* v. *Clements* (1874), L.R. 9 C.P. 139; *Wolf* v. *Tait* (1887), 4 Man. L.R. 59.

Argument

Davis in reply: All that took place in this case was that a purchaser was introduced. A long period intervened; the purchaser in the meantime settled in the country and had had time to look around and investigate as to values. Eventually he effected the purchase himself.

MACDONALD, C.J.A.: I would dismiss the appeal. The fact is undisputed that the plaintiff did introduce the purchaser; negotiations took place; there was a change on account of the sale of 10 acres; there was a renewed option, and the sale eventually shews that from beginning to end, plaintiff was recognized as the agent.

MACDONALD, C.J.A.

IRVING, J.A.: The trial judge in my opinion misdirected himself. He has not stated the most important fact, *viz.:* the terms on which the plaintiff was employed. I think he was employed to find a purchaser at a specified price, he failed to do so and authority for any departure from that price should be shewn before he can get a commission.

IRVING, J.A.

MARTIN, J.A.: I do not think that we would be justified in disturbing the findings of fact of the trial judge, and on them and on the other facts which have been called to our

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attention, the law, to my mind, presents no difficulty. I agree that the appeal should be dismissed.

Appeal dismissed, Irving J.A., dissenting.

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LEE v. O'BRIEN AND CAMERON

Solicitors for appellants: *Cochrane & Billings.*
Solicitor for respondent: *R. H. Rogers.*

COURT OF APPEAL 1910 June 1.

ATWOOD v. KETTLE RIVER VALLEY RAILWAY COMPANY.

ATWOOD v. KETTLE RIVER VALLEY RAILWAY CO.

Railways—Expropriation of lands—Notice to treat—Abandonment of—Service of new notice—Whether proceedings abandoned with notice—Costs of abandoned notice—Taxation of costs by judge under Railway Act—Delegation of taxation by judge to taxing officer—Adoption of taxation by judge—Res judicata—Railway Act (Dominion) Secs. 193, 194, 196, 199, 207.

Defendant Company proposing to expropriate certain lands of plaintiff, served notice to treat pursuant to section 193 of the Railway Act; but upon disagreement as to price, applied to a judge for the appointment of an arbitrator, under section 196, and also for a warrant of possession under sections 217 and 218. This application was refused because the notice to treat was not accompanied by the certificate of a disinterested surveyor under section 194. Thereupon the Company served a new notice, accompanied by a proper certificate, and at the same time served a notice abandoning and desisting from the first notice and all proceedings had thereon. Plaintiff treated this latter notice as given under section 207 and proceeded to tax costs as of an abandonment under sections 199 and 207. The costs were submitted to CLEMENT, J., the judge applied to, who directed that they be taxed by the registrar, and CLEMENT, J. adopted the taxation. At the trial, IRVING, J. came to the conclusion that the confirmation by the judge after preliminary taxation by his clerk, amounted to a taxation in fact by him, and on the merits was of opinion that there was no abandonment, and dismissed the plaintiff's action.

Held, on appeal, that the new notice to treat, being served at the same time as the abandonment of the first notice, was manifestly a con-

tinuation of the original proceedings, and did not come within section 207, an abandonment under which is one with the intention of wholly discontinuing and taking no further action.

Held, further, that the subject was not *res judicata* by reason of the taxation by the judge or by the taxing officer on the judge's direction.

Semble, *per* GALLIHER, J.A.: That it was competent for the judge to direct the taxation as he did and then adopt it as his own act, it not being the intention of the statute that the judge should perform the actual clerical work of taxation.

APPEAL from the judgment of IRVING, J. in an action tried by him at Grand Forks, on the 13th of February, 1909.

The appeal was argued at Vancouver on the 15th of March, 1910, before MARTIN and GALLIHER, JJ.A., and MORRISON, J.

Statement

S. S. Taylor, K.C., for appellant: We say there were two separate and independent notices to treat, the first of which was absolutely abandoned. Further, there is a difference of some 60 feet in the amount of land in the area taken under the second notice. If the learned judge [IRVING, J.] was right in concluding that the second notice referred to the same lands, then there was no power to give a new notice and we are entitled to the costs of the first or abandoned notice up to the time of the abandonment. They could have filed a new certificate instead of abandoning as they did.

As to the taxation of the costs. CLEMENT, J. was acting as *persona designata*, and there is no appeal from him, and as to the mode of taxation, see *Re Oliver and Bay of Quinte R. W. Co.* (1903), 6 O.L.R. 543, and on appeal (1904), 7 O.L.R. 567. The matter is now *res judicata*.

Argument

As to the mode of collection, our proper remedy was to sue: *Metropolitan District Railway Co.* v. *Sharpe* (1880), 5 App. Cas. 425 at p. 434; *Holdsworth* v. *Wilson* (1863), 4 B. & S. 1; 32 L.J., Q.B. 289; Russell on Arbitration and Awards, 7th Ed. 622; *London and North Western Railway Co.* v. *Quick* (1849), 5 D. & L. 214.

A. H. MacNeill, K.C., for respondent: We submit that the only power which the judge had to deal with the matter of costs must be found within the statute; his authority as *persona designata* must be clear: *In re Mills' Estate* (1886), 56 L.J.,

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1910

June 1.

ATWOOD v. KETTLE RIVER VALLEY RAILWAY CO.

Ch. 60; *Cobb* v. *Mid Wales Railway Co.* (1866), L.R. 1 Q.B. 348 at p. 351; *Re Beatye and City of Toronto* (1889), 13 Pr. 316.

We say that there was in reality no abandonment; it was merely a continuation of the old proceedings. Once having served the notice, we have entered into a contract which we must carry out, and we can be forced to the limit. But if both parties meet and decide to abandon the contract then the Court has no jurisdiction over costs. Neither party is injured by the decision of IRVING, J. Further, as to the costs, the judge has no power to say what they shall be; the matter is determined by the statute. The judge here being *persona designata* could not delegate the taxation to the registrar. He confirmed a taxation made by another person.

As to estoppel, the proceedings having taken place before a mandatary of the statute, *persona designata,* and there being consequently no appeal, *ergo* there cannot be any estoppel created: *The Canadian Pacific Railway Company* v. *The Little Seminary of Ste. Therese* (1889), 16 S.C.R. 606 at p. 618.

Argument

A. M. Whiteside, on the same side: The plaintiffs say that the first notice was a nullity, but we say if it was a proper notice to treat, it could not be abandoned. Plaintiffs once taking the objection that the notice was a nullity cannot now change their position.

Taylor, in reply: We have never contended that the notice was a nullity, but simply that the certificate given in connection with the notice was that of an interested party. The railway Company are not in possession here; they have abandoned, and having done so, we are immediately entitled to our costs.

Cur. adv. vult.

1st June, 1910.

MARTIN, J.A.

MARTIN, J.A.: With respect to the question of taxation I am of the opinion that the learned judge took the correct view.

As regards the question of abandonment of the notice to treat raised by the notice of the 3rd of October, 1907, I have not found that an easy matter to determine. I agree that the notice under section 193 and the certificate under section 194 are two

independent things, and that the former can be abandoned under section 207 irrespective of any defect in the latter. The last mentioned section provides for abandonment of the notice and proceedings in two cases: (a.) improper description of lands, etc.; and (b.) decision by the Company not to take the lands, etc. In the case at bar it is urged that the only evidence of the decision of the Company that we can consider is the notice of abandonment and that so soon as such notice was given the Company must be held to have come to a final decision or election which cannot be altered.

The fact for us to determine is the "decision" of the Company, and in determining that question I have come to the conclusion, not without hesitation, that we are not restricted to the notice but must consider other relevant evidence. The evidence of the Company's solicitor as to what passed between him and the plaintiff's solicitor respecting the intention of the Company is as follows:

"As to the abandonment of that notice itself, did anything pass between you? Yes, I informed him that we would serve a new notice to treat because it was impossible to do anything under the old notice.

"When did that occur? That occurred at the time I served the notice of abandonment of appeal.

"After that conversation with Mr. Hanington what did you do with reference to the first notice to treat? I handed a notice of abandonment of it to the sheriff together with the new notice to treat for service on Mrs. Atwood.

"And that notice of abandonment is I presume the one marked here Exhibit A14, dated 3rd October, 1907, and the new notice to treat of the same date is Exhibit A16? Yes."

The new notice to treat bears the same date as the notice of abandonment, and we were given to understand that they were served on the plaintiff at the same time. In these circumstances I do not think we could say, as we must say to entitle the plaintiff to succeed on this point, that the Company had "decided not to take the lands," and therefore the new notice must be regarded as a continuation of the old proceedings. The question of *res judicata* does not, I think, present any difficulty; it should be answered in favour of the respondent.

The appeal should be dismissed.

COURT OF APPEAL

1910

June 1.

ATWOOD v. KETTLE RIVER VALLEY RAILWAY CO.

GALLIHER, J.A.: This action arose out of expropriation proceedings taken by the defendants under the provisions of the Railway Act of Canada. The defendants served notice to treat under section 193 of the Act, but the parties could not agree upon the price, whereupon the defendants applied to a judge of the Supreme Court pursuant to section 196 for the appointment of an arbitrator, and also, pursuant to sections 217 and 218 of the Act for a warrant of possession. This was refused, the notice to treat not being accompanied by a proper certificate, *viz.*: that of an independent person, as required by section 194. The defendants then served another notice to treat accompanied by the proper certificate. The defendants on October 3rd, 1907, also served upon the plaintiff a notice desisting from and abandoning the first notice to treat and all subsequent proceedings. The plaintiff assumed to treat this notice of October 3rd as a notice given in pursuance of section 207 of the Act and claimed to be entitled to costs as of an abandonment under that section and section 199. The plaintiff procured her costs to be taxed before CLEMENT, J., to whom the same was referred for taxation under the provisions of section 199 of the Act, and brought this action to enforce payment of same. The trial came on before IRVING, J., who dismissed the action, and from his judgment the plaintiff appeals.

GALLIHER, J.A.

The main grounds of the plaintiff's appeal are: That the defences set up at the trial were *res judicata* by reason of the proceedings taken before CLEMENT, J., on taxation, and the orders made by him thereon; and that the notice of abandonment served by the defendants on the plaintiff dated the 3rd of October, 1907, was a notice within the purview and meaning of section 207 of the Act.

Counsel for the defendants raised the point that there had been no proper taxation of the costs as the judge to whom the matter was referred under the Act referred the matter for taxation to the local registrar and merely confirmed the registrar's taxation, and, in reality, it was not a taxation by the judge as required by the Act.

I do not agree with this contention. I do not think that it was intended by the Act that the judge should actually do the

clerical work of taxation, but, having referred it to the registrar and having confirmed and adopted the registrar's report, he said, in effect, "I make this my taxation," and I so hold it to be.

Counsel for the plaintiff cited numerous authorities on the doctrine of *res judicata,* but I do not think they apply to this case, and I understood him to intimate later on in his argument that he was not placing much reliance on that point. In any event, I do not think the doctrine applies here.

The judge was acting, not as a Court, but as an "individual" designated for a specific purpose, in fact, *persona designata.*

On the question of abandonment, after going carefully into the material presented to us on appeal and considering section 207 of the Act, I have come to the conclusion that the abandonment contemplated by the Act must be one with the intention of taking no further action with regard to the acquiring of the lands mentioned in the notice to treat, and, although the words used in that notice are "wholly desist from and abandon," yet, taking all the circumstances of the case and the conduct of the defendants, I have come to the same conclusion as the learned trial judge.

GALLIHER, J.A.

I would therefore dismiss the appeal.

MORRISON, J.: I do not think that the plaintiff can invoke section 207 of the Railway Act. The notice to treat herein does not improperly describe the lands intended to be taken, nor did the Company decide not to take the lands mentioned therein. There could not, therefore, be an abandonment of this notice in the statutory sense. There was, of course, a literal abandonment or withdrawal of it. It was quite permissible for the Company to so abandon or drop the notice so given, and I think the Railway Act does not impose upon them any liability to pay costs for their abortive proceeding. There was certainly no abandonment of the intention to acquire the lands in question.

MORRISON, J.

The case of *Wild* v. *Woolwich Borough Council* (1910), 1 Ch. 35 (C.A.) seems to me very much in point.

I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellant: *H. C. Hanington.*
Solicitor for respondent: *A. M. Whiteside.*

CLEMENT, J. (At Chambers)

1910

Sept. 24.

TIMMS v. THE CORPORATION OF THE CITY OF VANCOUVER AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LTD.

TIMMS v. VANCOUVER

Practice—Parties—Action of tort against two defendants jointly—Joint tort feasors—Claim for damages—Order XVI.

Plaintiff suing the defendant Corporations for damage to his land by reason of the construction by the municipal Corporation of certain embankments and obstructions and the building by the railway Company of a car barn whereby a watercourse on plaintiff's land was obstructed or its capacity diminished, and the water could not get away freely, the defendant municipal Corporation applied for an order directing the plaintiff to elect as to which of the defendants he should abandon and which he should proceed against.

Held, that as the defendant Corporations were alleged to be joint tort feasors they could properly be joined in one action.

Statement

APPLICATION by the defendant municipal Corporation, for an order directing plaintiff to elect as to which defendant he would proceed against. Heard by CLEMENT, J. at chambers, in Vancouver on the 23rd of September, 1910. The facts on which the application was made are shortly stated in the headnote.

E. J. F. Jones, for the defendant municipal Corporation.
L. G. McPhillips, K.C., for the defendant Company.
Hill, for plaintiff.

24th September, 1910.

Judgment

CLEMENT, J.: It can hardly be denied that the authorities upon Order XVI., rules 1, 4 and 7, are not at all clear. The latest decision of the English Court of Appeal, *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited* (1910), 2 K.B. 354, must now be taken into account, particularly in construing rule 4 of the Order, and just how far that decision will carry us it would, perhaps, be rash to predict. It is pointed out by Collins, M.R., in another comparatively recent case, *Bullock* v. *London General Omnibus Co.* (1906), 76 L.J., K.B. 127, at p. 131, that

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"The applicability of the rule is to be tested not by the standard of proof, but by the standard of allegation."

One must not prejudge what a plaintiff will prove; the question is: What does he claim? And the judgment of Vaughan Williams, L.J., in the latest case, above mentioned, emphasizes this, that under our present system of pleading, extreme precision in putting forward what he calls the points of claim can hardly be enforced. That remark applies here for I find it somewhat difficult to appreciate just what is intended by the statement of claim. If it is to be read as alleging separate and independent action on the part of the two defendants in placing obstructions in the alleged watercourse without proper precaution taken to prevent a damming back of the water, then I think the authorities are against the right of the plaintiff to join the two defendants in one action: see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co., Limited, ubi supra,* at p. 369, where the earlier case of *Thompson* v. *London County Council* (1899), 1 Q.B. 840 is approved of, though distinguished. But it seems to me that this statement of claim may be read as alleging, shortly, that these defendants, recognizing their duty not to obstruct the flow of water in this watercourse, have, in connection with their constructive operations (embankments, buildings, etc.), which in a sense are separate and independent, joined together in an effort to provide a proper drainage system (culverts, etc.) to carry off the water. Paragraphs 10, 11 and 12 of the statement of claim allege, *prima facie,* joint action along the line I have suggested and I would hardly be warranted in saying that they must be construed distributively. If there was joint action by the two defendants in the laying out of a drainage system and that system should prove to have been negligently devised or carried out (with, of course, resultant damage to riparian owners) the defendants would in my opinion be joint tort feasors, in which case they would be properly joined in one action. That being a possible construction of this statement of claim this motion must be dismissed; costs to plaintiff in any event.

Judgment

Application dismissed.

CLEMENT, J.

1910

Sept. 21.

REX v. SCHYFFER.

Criminal law—Arrest on telegram—Legality of—Criminal Code, Secs. 30, 33, 347, 355 and 649.

REX v. SCHYFFER

The applicant had been arrested, without a warrant, by the chief of police for Vancouver at the instance of a private detective there who had received a telegram from a private detective in Montreal. The offence alleged was that the accused had, in Montreal, received a ring with instructions to hand it over to a third person. A second ring he had, as alleged, stolen from such third person directly. He converted it to his own use and left for British Columbia.

Held, that this was not an offence within the meaning of section 355 for which an arrest could be made without a warrant.

APPLICATION for a writ of *habeas corpus* made to CLEMENT, J. at Vancouver on the 21st of September, 1910. Accused was arrested without a warrant upon a telegram from a private detective in Montreal to a private detective in Vancouver. A letter written from the Montreal Detective Agency to the Vancouver one was received before the telegram and stated that Schyffer had obtained two rings in Montreal, one from the father of the girl to whom he was engaged, with instructions to hand the ring over to her; and the other ring the instructions were was stolen from the girl directly. The ring which he had received instructions concerning he converted and left Montreal for Vancouver. The chief of police having been instructed by the private detective of the facts arrested Schyffer without a warrant and *habeas corpus* proceedings were immediately instituted.

Statement

S. S. Taylor, K.C., in support of the application.
J. K. Kennedy, contra.

CLEMENT, J.: Mr. *Kennedy*, who appears for the Chief of Police, conceded that the police of one Province can arrest without warrant a person charged with having committed a crime in another Province only where the crime is one for which the accused could have been arrested without warrant in the Province where the crime was committed, or where the accused is escaping fresh pursuit: Criminal Code, Secs. 30, 33 and 649.

Judgment

It can hardly be seriously contended that the coming of an officer from Montreal at this date is a fresh pursuit in respect of a crime said to have been committed on August the 1st.

The question then resolves itself into this: Is the offence as set forth in the return one for which the accused might be arrested in Quebec without a warrant? If so, he can legally be arrested here without a warrant; otherwise not.

The facts set up in the return are, shortly, that the accused received a ring from one Simons with directions to hand it to a third party, and that, instead, he converted it to his own use.

Mr. *Kennedy* urges that such a transaction is covered by section 355 of the Code, which provides:

"Every one commits theft who, having received any money or valuable security or other thing whatsoever, on terms requiring him to account for or pay the same, or the proceeds thereof, or any part of such proceeds, to any other person, though not requiring him to deliver over in specie the identical money, valuable security or other thing received, fraudulently converts the same to his own use, or fraudulently omits to account for or pay the same or any part thereof, or to account for or pay such proceeds or any part thereof, which he was required to account for or pay as aforesaid."

The offence covered by this section is one of those for which the offender can be arrested without a warrant, while ordinary theft, if I may so call it, as defined in section 347 is not one of them. Why this distinction, I do not know; but there it is. In my opinion this is a case falling within the ordinary definition of theft and not within section 355. In this case the accused was, it is alleged, required to deliver the ring in specie. He was not to "account for" it to the third party within the meaning of the section. Those words "account for" are not appropriate words to describe what the accused was required to do. On the other hand section 347, which defines theft or stealing as "the act of frauduently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, anything capable of being stolen, with intent," etc., fully covers the facts set up.

Judgment

With regret I must hold that the accused is illegally detained and must be discharged.

Prisoner discharged.

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March 16.

COURT OF APPEAL

Feb. 26.

WHITE v. MAYNARD

WHITE v. MAYNARD AND STOCKHAM.

Principal and agent—Sale of land—Commission—Purchaser found by agent—Owner giving subsequent option for sale to third party—Sale by such third party to purchaser found by agent.

An owner who had listed his property with an agent for sale on certain terms, subsequently and without notice to the agent, gave an option for sale to a third party. The latter, when the time for taking up his option arrived, had the property conveyed to a party originally found by the agent, and with whom the agent was negotiating for a sale. The purchase price was the same in both cases.

Held, on appeal (reversing the finding of LAMPMAN, Co. J.), that the circumstances connected with the granting of the option precluded any idea of a mere agency on the part of the optionholder, and his position as purchaser was not affected by the fact of his selling to the purchaser with whom the agent was negotiating.

Statement

APPEAL from the judgment of LAMPMAN, Co.J. in an action tried by him at Victoria on the 9th of February, 1910, for the recovery of commission on the sale of land under circumstances set out in the reasons for judgment of the trial judge.

R. T. Elliott, K.C., for plaintiff.
Fell, for defendants.

16th March, 1910.

LAMPMAN, Co.J.: The plaintiff, who is a real estate agent claims $750 commission on the sale of lot 562A, belonging to the defendants.

About the 1st of November the defendant Stockham listed the lot with plaintiff for sale at $1,500, and promised a commission of $1,000 for a quick sale, and plaintiff thereupon put up his "for sale" notice on the property. Percy Raymond saw the sign and went to plaintiff's office and asked the price: on being told the price he said he thought it was too high, but said he would talk it over with his father, as he was acting for him. Fred White, who works for the plaintiff, then saw Raymond, who asked him to get the lowest cash price which the owner would

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take: White then saw Maynard who said $15,000 was the lowest price, but afterwards he saw Stockham who told him that he and Maynard had talked the matter over and had concluded that they could cut the price down a little. White then told Stockham that as the commission was to be $1,000 in case of a quick sale, he was willing to modify that and accept 5 per cent. and Stockham replied that they could make satisfactory arrangements in case of sale, and urged White to go ahead and close the deal. White then saw Raymond and offered him the property for $14,500 and Raymond said he would think about it.

John Dean, a real estate agent and known as such to the defendant Maynard, approached Maynard and asked him his price, and was told $15,000, and that there was no difference in the price even if it was paid in cash, but he says he told Dean he would knock 5 per cent. off. Dean paid $50 and procured the following writing signed by Maynard for himself and Stockham.

"For and in consideration of the sum of fifty dollars to me in hand paid, the receipt of which is hereby acknowledged, we hereby give and grant unto John Dean or his assigns, the sole right to purchase lot 562A, northwest corner of Belleville and St. John streets, fronting on the inner harbour, Victoria, B. C., until 10 o'clock a.m. Thursday, the 16th day of December, 1909, at and for the price of $15,000, terms half cash, balance secured by mortgage, with interest at the rate of 7 per cent. per annum, to be paid within two years from December 16th, 1909, provided that the purchaser shall have the privilege of paying off at any time by paying a bonus of three months' interest or by giving three months' notice of intention to pay off. Provided that if half the above purchase price is not paid on or before 10 o'clock a.m. Thursday, the 16th instant, this agreement to be null and void, and the payment of fifty dollars absolutely forfeited.

"James Maynard, Thos. Stockham, per James Maynard."

Dean then saw Raymond, and in pointing out to him some waterfront lots included this one, Raymond thereupon said White said he had the sole right to sell that lot. Dean prepared the deed which conveyed the land straight from Maynard and Stockham to Raymond, and when White ascertained this he made his claim for commission. Maynard and Stockham got $14,250; Dean got $500 and Raymond got the land and White got nothing.

Dean says that after talking with Maynard he went to his office and prepared the option for $15,000 and took it back to

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Maynard for signature, and after it was signed he asked Maynard what rebate he would give and Maynard said 5 per cent. The defendants have not explained satisfactorily to me why $15,000 appears in writing as the purchase price when $14,250 was the real price. Why should Dean pay $50 for an agreement in which the price was stated to be $750 over the real price?

I think if I had the assistance of a jury in this case that the verdict would be that the 5 per cent. rebate that Dean speaks of was really a 5 per cent. commission in case he made a sale. "Rebate" and "commission" are sometimes used (I do not say correctly) to signify the same thing and a few days after trying this case I noticed that the Hon. G. E. Foster, in his examination in the libel case of *Foster* v. *Macdonald* is reported to have said in answer to the following question:

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"Now, was that $2,480 received in the Swan river lands a commission, or was it by way of reduction in the purchase price? You can apply your own name to it. Some might call it a commission and some a rebate on the purchase price": see Toronto Daily Star of 21st February last.

The manner in which this option was obtained and used leads me to the opinion that it was substantially an authority to Dean to sell and as he sold to the purchaser that White had already found, I think White is entitled to his commission.

Judgment for plaintiff for $700.

The appeal was argued at Victoria on the 25th of October, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Argument

Fell, for appellants (defendants): The agreement given to Dean was a straight option to him as purchaser, and the fact that he happened to sell to the proposed purchaser with whom plaintiff was dealing does not render the defendants liable to White, assuming, of course, that everything is *bona fide.* Dean having the conveyance made directly over from defendants to Raymond & Sons, instead of having a conveyance to himself and then his conveying to them, had the effect of simplifying and expediting the transaction.

He was stopped.

R. T. Elliott, K. C., for respondent (plaintiff) called upon: The learned judge below was forced to come to the conslusion he did by the decision of *Livingstone* v. *Ross* (1901), A.C. 327. Ostensibly Dean was a purchaser, but in reality he was only an agent. This so-called option was nothing more than a right to sell the property at $15,000 and retain $750; it was an option which in the circumstances was virtually an agency and could be revoked.

Fell, was not called upon in reply.

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MACDONALD, C.J.A. (oral): I think the appeal should be allowed. There does not seem to be any question on the evidence that the transaction between Dean and the owners of the property was *bona fide,* one without any collusion intended to defeat the plaintiff of his commission. Dean, without any knowledge at all of what the plaintiff had done towards bringing the property to the attention of Raymond, got his option to purchase, paying $50 for it. It is true that he afterwards sold, but he came in contact with Raymond not by reason of anything that White had done, but purely accidentally. He opened up his negotiation with Raymond without any reference to what White had done, and he made the sale. Now there is no evidence at all, so far as has been brought to our notice, that the owners of the property were aware until after the whole transaction was closed that Raymond was the purchaser. So that there could be no suggestion that the owner of the property colluded in any way in a scheme to deprive White of his commission. I do not think it can be said here that Dean was not a purchaser; that he was an agent. The reduction of the price was a reduction of five per cent.; not stated to be commission; because the owner of the property states distinctly that he understood Dean was purchasing it himself. Under the state of facts which are practically undisputed here, I do not see how the plaintiff can succeed.

MACDONALD, C.J.A.

MARTIN and GALLIHER, JJ.A., concurred.

MARTIN, J.A.
GALLIHER, J.A.

Appeal allowed.

Solicitor for appellants: *Thornton Fell.*
Solicitors for respondents: *Elliott & Shandley.*

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June 1.

IN RE SISTERS OF CHARITY ASSESSMENT

IN RE SISTERS OF CHARITY ASSESSMENT.

Municipal law—Assessment of charitable institutions—Buildings—Lands—"Grounds actually necessary"—Court of Revision—Power of to make general exemption—Duty to call evidence—Onus on complainant against assessment—Evidence—Certiorari—Vancouver Incorporation Act, 1900, Sec. 46, Sub-Sec. 3.

The whole of the lands appurtenant to St. Paul's Hospital, owned by the Sisters of Charity, and within the municipal limits of Vancouver, were assessed. By sub-section 3 of section 46 of the Vancouver Incorporation Act, 1900, the buildings and grounds of any incorporated charitable institution are exempt from taxation so long as such buildings and grounds are actually used and occupied by the institution, provided the grounds shall not exceed in extent the amount actually necessary for the requirements of the institution, the extent to be decided by the Court of Revision, whose decision shall be final. The Sisters complained of the assessment to the Court of Revision, but did not produce any evidence, and the Court, without dealing with the complaint laid by the Sisters, passed a resolution exempting in general terms from taxation all charitable institutions to the extent of the buildings occupied by them, and a further area of land equal to 25 per cent. of the area occupied by the buildings. The effect of this resolution was to reduce the assessment from $38,250 to $28,585. MORRISON, J., on the application of the Sisters granted a writ of *certiorari* removing up the assessment for review by a judge. The municipality appealed.

Held, on appeal, that if the Sisters were dissatisfied with the exemption thus voluntarily and generally made, they should have produced evidence at the time to shew that the exemption was not sufficient in the circumstances, as the onus is upon persons claiming the benefit of an exemption to produce evidence in support of it, and that the rule for a writ of *certiorari* should not have issued in this case.

Per MARTIN, J.A. (*dubitante* as to onus), that as the Court of Revision was *functus* at the time of the issuance of the rule, a writ of *certiorari* would be inoperative and therefore useless.

Statement

APPEAL by the Municipal Corporation of the City of Vancouver from an order of MORRISON, J. at Chambers, directing that a writ of *certiorari* should issue directed to the Court of Revision of Vancouver, to remove a certain decision of that Court made under section 46, sub-section 3, of the Vancouver Incorporation Act, 1900.

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1910

June 1.

IN RE SISTERS OF CHARITY ASSESSMENT

The appeal was argued at Victoria on the 17th of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

W. A. Macdonald, K.C., for appellant (the Corporation of the City of Vancouver): The writ should not have issued removing up the revision for review, and the material does not shew any ground for resorting to *certiorari* proceedings. The Court of Revision having ceased to exist, a writ cannot be sent to it; therefore, if the writ would be inoperative, it should not issue.

Argument

L. G. McPhillips, K.C., for respondents: While the decision of the Court of Revision stood it was a judgment by which we were bound, and our only remedy was by *certiorari*.

Macdonald, in reply.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.: This is an appeal from an order of MORRISON, J. directing that a writ of *certiorari* should issue directed to the Court of Revision at Vancouver to remove a certain decision of the said Court of Revision, which decision was made under section 46 sub-section 3 of the Vancouver Incorporation Act, 1900. The effect of it may be stated as follows:

All land, real property, etc., in the city shall be liable to taxation subject to the following exemptions, namely, the buildings and grounds of and attached to and belonging to any incorporated charitable institution so long as such buildings and grounds are actually used and occupied by such institution, provided that such grounds shall not exceed in extent the amount actually necessary for the requirements of the institution. The question as to what amount of land is necessary shall be decided by the Court of Revision, whose decision shall be final.

MACDONALD, C.J.A.

The assessor assessed the whole of the lands of St. Paul's Hospital, not covered by buildings, belonging to the Sisters of Charity of Providence in British Columbia, an incorporated institution, and admittedly falling within the class of institutions mentioned in said section. I think he was right in this, as the question as to how much, if any, should be exempt was not for him to decide, but for the Court of Revision. The Sisters com-

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plained to the Court of Revision, and I assume this complaint was by appeal in the way provided by the Act for bringing complaints before the Court of Revision. There was some discussion with regard to said sub-section 3, and the Court of Revision decided to exempt the institutions covered by said sub-section to the extent of the land actually occupied by their buildings with an amount equal to 25 per cent. thereof added.

I think this appeal can be decided by ascertaining where the onus of proof lay, if on the respondent then it has not satisfied it; if on the City, or Court of Revision, such Court it seems to me, did not do its duty in the premises.

The lands of such an institution are not by the Act declared to be absolutely exempt. The institution claiming exemption it seems to me must shew that it is of the class referred to in said sub-section 3. It must shew that the lands for which it claims an exemption are necessary for the purpose of the institution. It is then left for the Court of Revision to adjudicate upon such evidence, and not until the Court has adjudicated does the exemption take place. Such lands are only exempt conditionally, and the onus of proving that the conditions mentioned in the said sub-section coincide is upon the applicant for the exemption, in this case the respondent.

If I am right in this, two consequences flow from it, first, that the respondents have no cause of complaint against the Court of Revision, because the respondents had not fulfilled the conditions imposed upon them precedent to calling for the decision of the Court of Revision, and if the Court of Revision without any evidence at all chose of its own motion and of its own generosity to exempt land equal to 25 per cent. of that occupied by the buildings, the respondents were not injured thereby but benefited.

MACDONALD, C.J.A.

The second consequence which flows from such a finding is that the remedy by *certiorari* would apart from other features of it, which I am not considering, afford no relief to the respondents. The Court could in a proper case set aside the order of the Court of Revision. The effect of that would be to restore the assessment on the 25 per cent. I do not understand, although I have not considered it carefully owing to the conclusion that

I have come to on the merits, that the Court could on *certiorari* proceedings make a mandatory order directing the Court of Revision to rehear the respondent's complaint, and to adjudicate upon it in a different manner from that before adopted. If the setting aside of the order would afford relief, *certiorari* might be a remedy, but to merely set aside the decision of the Court of Revision is to leave the respondents worse off than ever.

I think it was suggested by counsel for respondents in the argument before us that he felt that in view of the position taken by the Board to allow a 25 per cent. exemption to all institutions of that class, it would be idle for him to offer evidence. I do not see anything to sustain such a suggestion. Had the Court laid down its rule and declared that it would not listen to evidence bearing on the particular case, then doubtless the respondents would have been relieved from the necessity of tendering or insisting further in the matter. But clearly that did not occur.

MACDONALD, C.J.A.

I would allow the appeal, but without costs.

IRVING, J.A.: This is an appeal from the decision of MORRISON, J. who ordered a writ of *certiorori* to issue directed to the Court of Revision to compel them to return to the Supreme Court the proceedings of the Court of Revision in connection with the assessment of the lands held by the Sisters of Charity.

The property is situate within the city limits and it would therefore be rateable were it not for the exemption which is granted by sub-section 3 of section 46, Vancouver Incorporation Act, 1900, which is as follows: [effect already set out by MACDONALD, C.J.A.]

IRVING, J.A.

It would seem that the assessor in obedience to section 39 included the property of the plaintiffs in the roll and that they, on the 25th of February, 1909, appeared before the Court of Revision by counsel. The Court of Revision, instead of dealing with this particular exemption, by itself, passed an omnibus resolution, exempting all charitable institutions from taxation to the extent of the area occupied by the building thereon, and an additional amount of land equal to 25 per cent. of the said area. The respondents' contention is that

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this was a wrong way of treating the matter and that therefore a writ of *cortiorari* should issue in order to have the matter discussed. I think that that was an objectionable way of dealing with the matter, because different quantities of land are necessarily required for different institutions. The amount of land will vary with the purpose for which the institution is carried on, *e.g.*, an orphans' home would require more land than a hospital. But I do not think the plaintiffs can succeed for this reason: The assessment was levied upon them. It included all their property. The onus was upon them to produce evidence shewing to the Court of Revision the quantity of land they required for the purpose of the hospital. This, apparently, they did not do. It has been argued before us that it was for the corporation or the Court of Revision to produce that evidence. That argument I cannot accept. People claiming the benefit of an exemption of this character must have evidence to support it.

IRVING, J.A.

The proceedings, however, did not stop with the passing of the resolution referred to. Afterwards, the Court, acting on the omnibus resolution, amended the assessment roll by reducing the assessment from $38,250 to $28,585, by allowing for the area covered by the buildings plus 25 per cent. That they made this reduction voluntarily without hearing evidence, I think gives no ground to the issue of a writ of *certiorari*. If the plaintiffs were dissatisfied with that reduction which was agreed to by the Court as a proper reduction in every case, then they should have called evidence to shew that that voluntary allowance was not sufficient to meet the requirements of the Act, and on those grounds I think that the writ of *certiorari* should have been refused.

MARTIN, J.A.: I must confess that I have much doubt regarding the question of onus, but seeing that the Court of Revision had ceased to exist, for the time being, before the rule

MARTIN, J.A.

nisi for *certiorari* had been taken out, I am of the opinion that, having regard to the functions of that tribunal, as set out in sections 50-55 of the Vancouver Incorporation Act, 1900, the result of the writ would be substantially inoperative, and there-

fore it ought not to have been granted in such peculiar circumstances.

The appeal should be allowed with costs.

GALLIHER, J.A.: A number of points of law were raised, and argued before us on this appeal, but in the view I take of the interpretation of section 46 of the (and particularly sub-section 3 of said section) Vancouver Incorporation Act, I do not find it necessary to deal with these. Section 46 states that all lands, etc., shall be liable to taxation subject to certain exemptions, and sub-section 3 deals with the particular class of lands in question in this appeal.

It will be seen that the lands in question here are exempt provided they do not exceed in extent the amount actually necessary for the requirements of the institution, and the amount deemed necessary is to be decided by the Court of Revision and from this decision there is no appeal.

It was argued by Mr. *McPhillips,* that the Board in fixing that amount acted upon a wrong principle in that they fixed an equal amount, *viz.:* 25 per cent. in all cases, whereas they should have considered each case separately. In view of what took place at the Court of Revision, and in the proceedings generally, I do not feel called upon to decide this point. What took place was this: The assessor assessed the buildings and lands of the respondents, and they by their counsel appeared before the Court of Revision claiming exemption under section 46.

GALLIHER, J.A.

With regard to the buildings and the land covered by them, they were undoubtedly entitled to exemption, and as I read the section they were further entitled to exemption on lands to the extent that such lands were necessary for the requirements of the institution. If the 25 per cent. fixed by the Court of Revision was not sufficient, surely the onus was on the respondents to shew this, as they were the applicants for exemption seeking the benefit of the Act, but we find that apart from objecting that it was not sufficient, they produce no evidence whatever to support their contention. Had the assessor in the first instance assessed only such lands as were not covered by buildings, less

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25 per cent., and the respondents had come before the Court of Revision, the onus would undoubtedly have been on them to shew that 25 per cent. was not sufficient.

To my mind they are in no better position here, and having failed to satisfy the onus which I think is cast upon them, their application for a writ of *certiorari* should fail. I would allow the appeal.

Appeal allowed.

Solicitors for appellants: *Cowan, Macdonald & Parkes.*
Solicitors for respondents: *McPhillips, Tiffin & Laursen.*

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1910

June 2.

BROWN v. B. C. ELECTRIC RY. CO.

BROWN v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Master and servant—Action by parents of deceased workman—Admission by employer of liability—Expectation by parents of benefit from son—Evidence—New trial.

In an action for damages resulting from the death of a workman, the employers admitted liability under the Employers' Liability Act, but disputed the right of the parents to sue as defendants, or that they had any reasonable expectation of benefit from the continuance of his life. There was evidence that the deceased had sent money on two occasions to his parents, but they had in the first instance assisted him by advancing money for his passage to Canada.

Held, on appeal, that the parents had failed to shew that they had any reasonable expectation of benefit from the son had he lived.

The proceedings at the trial shewed that there had been no attempt, by commission or otherwise, to prove the financial condition of the parents.

Held, that a new trial should not be granted to enable the plaintiffs to make out a stronger case.

Statement

APPEAL from the judgment of CLEMENT, J. and the verdict of a jury in an action tried by him at Vancouver on the 21st of December, 1909, in favour of the plaintiffs, suing as the parents

of a workman who had been killed while in the employment of the defendant Company. The latter admitted liability under the Employers' Liability Act, but disputed any dependency of the plaintiffs, or any reasonable expectation of pecuniary benefit from a continuance of his life. The deceased had received from his parents, to enable him to come to Canada, a sum of about $68, and he had sent back to his parents, two remittances, one in 1907 of $41, and one in 1908 of $50. There was no direct evidence of the exact financial condition of the parents.

Statement

The appeal was argued at Vancouver on the 21st of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

L. G. McPhillips, K.C., for appellant (defendant) Company: We have admitted liability under the Employers' Liability Act, and the sole question is whether there was any ground for the parents believing that there was any expectation of receiving benefit or support from this man had he lived. There is no evidence of such expectation; on the contrary, the parents were sufficiently well-off to assist their son to come to this country. He referred to *Davidson* v. *Stuart* (1902), 14 Man. L.R. 74; *Mason* v. *Bertram* (1889), 18 Ont. 1.

Price, for respondent (plaintiff): It is not necessary for us to shew that the deceased was actually contributing to his parents' support; the shewing of a reasonable expectation is sufficient. Because parents happen to be "well-off" they are not necessarily debarred from receiving benefit from a son. But it happens here that the parents are not well-off.

Argument

[MARTIN, J.A.: Why was not a commission issued?]

The parents were too poor.

[MARTIN, J.A.: You have the liability admitted there; and the costs would be costs in the cause.]

The administrator was deceased's cousin and knew all the circumstances.

Cur. adv. vult.

2nd June, 1910.

MACDONALD, C.J.A., concurred in allowing the appeal.

MACDONALD, C.J.A.

IRVING, J.A.: The judgment of Killam, C.J. in *Davidson* v.

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BROWN v. B. C. ELECTRIC RY. CO.

Stuart (1902), 14 Man. L.R. 74, satisfies me that the plaintiff did not give sufficient evidence to warrant the jury in finding any verdict in this case, and therefore the learned judge should have withdrawn the case from their consideration. The case of *Davidson* v. *Stuart* was taken to the Supreme Court of Canada, but the judgment went off on another point: (1903), 34 S.C.R. 215 p. 223.

The following extract (p. 81) states Chief Justice Killam's views:

"In many cases, as where a wife sues for loss of her husband, or children for the loss of their father, the mere relationship usually raises a presumption of pecuniary loss. But still the right of action does not arise from relationship alone; there must be something to raise the presumption that there has been such loss. Where a parent sues for loss of son or daughter, or brothers or sisters for the loss of brother or sister, the inference is not so readily drawn.

"It is clearly not sufficient in every instance, in order to raise a case for the jury, to shew the mere relationship and the circumstances of the family. The Court has first to determine whether there is ground for the necessary inference."

Again at pp. 85-6:

"No doubt the rule is, as laid down in the *Franklin* case, that it is not absolutely necessary to shew previous assistance, and that a reasonable expectation is sufficient. But in this case there does not seem to be anything to shew that there should have been such expectation.

"It appears to me that there is no ground for anything but the merest conjecture upon the point, and that the verdict cannot be sustained."

IRVING, J.A.

The question has been discussed in *Rombough* v. *Balch* (1900), 27 A.R. 32; *Blackley* v. *Toronto Railway Company, ib.*, 44; and in *Doyle* v. *Diamond Flint Glass Co.* (1904), 8 O.L.R. 499, affirmed by the Court of Appeal (1905), 10 O.L.R. 567, the case of *Davidson* v. *Stuart, supra,* was cited, and the judges all agreed that there was no reasonable evidence of any pecuniary loss present or prospective by the mother as would entitle her to damages.

Then should we under the circumstances allow a new trial? I think we should not.

In *Shedden* v. *Patrick and the Attorney-General* (1869), L.R. 1 H.L. (Sc.) 470 at p. 545, Lord Chelmsford, in giving his opinion, spoke as follows:

"It is an invariable rule in all the Courts, and one founded upon the clearest principles of reason and justice, that if evidence which either was in the possession of parties at the time of a trial, or by proper diligence might have been obtained, is either not produced, or has not been procured, and the case is decided adversely to the side to which the evidence was available, no opportunity for procuring that evidence ought to be given by granting a new trial. If this were permitted, it is obvious that parties might endeavour to obtain the determination of their case upon the least amount of evidence, reserving the right, if they failed, to have the case retried upon additional evidence, which was all the time within their power."

I would allow the appeal.

IRVING, J.A.

MARTIN, J.A.: All that I think it necessary to say in this case is that the objection taken by counsel for the defendant at the trial should be sustained, *viz.*: that there was no case to go to the jury because the plaintiff had wholly failed to adduce evidence to shew that the parents had "any reasonable expectation of pecuniary benefit from the deceased." It seems unfortunate that the precaution was not taken of sending a commission to Austria to get the necessary evidence, assuming it to exist.

MARTIN, J.A.

Appeal allowed.

Solicitors for appellants: *McPhillips & Tiffin.*
Solicitors for respondent: *Brydone-Jack & Ross.*

GRANT, CO. J.

1909

June 10.

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1910

June 1.

GLENDENNING v. DICKINSON

GLENDENNING v. DICKINSON.

Will—Construction of—Vested remainder subject to be divested—Executory gift over to class—Rule in Shelley's Case.

Where the testator devised to his wife all his real estate for life and directed that at her death it should be divided equally between two brothers, children of a deceased brother, and a sister, and added "should either of my two brothers or my sister predecease my said wife, then one-quarter of my real estate is to go to their heirs, executors and administrators," and where the sister predeceased the wife, leaving a son, the plaintiff, and disposed by will of her real and personal property:—

Held, on appeal, that the sister took a vested remainder to which the rule in *Shelley's Case* was not applicable; that, she having died before her estate became vested in possession, her estate, under the clause above quoted, was divested, and her heirs took her share as *personæ designatæ* as upon an executory gift over to them as a class, and that the plaintiff was therefore entitled to take his share as purchaser under the will of the testator.

Statement

APPEAL from the judgment of GRANT, Co. J., in an action tried by him at Vancouver on admissions of fact, on the 10th of June, 1909.

Griffin, for plaintiff.
Reid, K.C., for defendant.

GRANT, CO. J.

GRANT, Co. J.: In this action the plaintiff seeks to recover from the defendant the sum of $234.25, being as he alleges the value of his interest in certain property in the city of Brandon under the will of one John Dickinson, deceased, sold by the defendant. This claim is disputed by the defendant who alleges that under the said will the fee simple in remainder in the said lands vested in one Sarah Glendenning, the mother of the plaintiff, who by her will dated September 5th, 1903, devised the same to trustees as therein set forth and that the plaintiff acquired no interest in the said lands whatever under

the will of John Dickinson but took under the will of Sarah Glendenning.

When the matter came before me it was admitted by the respective counsel that about the 24th of December, 1897, John Dickinson made his will which in part is as follows:

"Third: I give devise and bequeath unto my said wife all my real estate of whatsoever kind wheresoever situated to be held by her and enjoyed for the period of her natural life and on her death to be divided equally share and share alike between my brother Thomas G. Dickinson . . . . my brother Abraham Dickinson . . . . and the children of my late brother Isaac Dickinson living at the time of my decease . . . . and my sister Sarah Glendenning . . . . Should either of my two brothers or my sister pre-decease my said wife then their one-quarter of my real estate is to go to their heirs. . . . ;"

that John Dickinson died on the 11th of December, 1899, and at the time of his death was the owner of certain real estate in the City of Brandon; that Sarah Glendenning died on or about the 10th of December, 1903, leaving her surviving four children of whom the plaintiff is one; that Sarah Glendenning made her will on September 5th, 1903, which is, in part, as follows:

"I give, devise and bequeath all my real and personal property, estate and effects of whatsoever kind wheresoever situate of which I may die possessed or entitled to unto and to William Anderson and Alexander B. Makod . . . . upon trust to sell and convert those portions of the same . . . . into money and after paying all my just debts and funeral and testamentary expenses and a legacy of one hundred dollars to my son Jonathan Dickinson Glendenning (the plaintiff) . . . . and a legacy of one hundred dollars to my son John Archibald Glendenning . . . . to divide the remainder of said trust moneys equally between my two daughters . . . . share and share alike . . . ."

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which said will has been duly admitted to probate.

Mr. *Griffin,* for the plaintiff, contended that under the will of John Dickinson, Sarah Glendenning, his daughter, took a fee simple in remainder, subject to be defeated by her death in the lifetime of the defendant, in which event the children of the said Sarah Glendenning took under the will of the said John Dickinson share and share alike. To this contention Mr. *Reid,* for the defendant, submitted that the fee having vested in Sarah Glendenning under the will there was nothing left by way of remainder to be given away and the gift over to the

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children of Sarah Glendenning by the will of John Dickinson was void, and the fee having passed or vested in Sarah Glendenning, she took an immediate disposable interest therein which was not affected by her death in the lifetime of the defendant—the tenant for life.

I have looked carefully into the authorities cited in the arguments before me and have made independent research and as I understand the law it is clear that my duty is to give effect to the intention of the testator as expressed in his will. This rule is laid down by Lord Mansfield in *Oates* v. *Cooke* (1756), 3 Burr. 1,684 at p. 1,686, by Baron Bayley in *Anthony* v. *Rees* (1831), 2 Cr. & J. 75 at p. 83, and by Mr. Justice Pearson in *Davies* to *Jones and Evans* (1883), 34 Ch. D. 190 at p. 194.

Construing the will of John Dickinson according to this rule, I find it to be the clearly expressed intention of the testator that his wife—the present defendant—should take the personal estate absolutely, and the life interest in the entire real estate left by the testator, and that as far as Sarah Glendenning is concerned, she, if living, upon the death of the tenant for life should take a one-quarter interest in the real estate in fee, but in the event of her pre-deceasing the tenant for life—a contingency that actually took place—then the estate or interest that would have gone to her had she outlived the tenant for life was to vest in her heirs under the will.

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If this is the correct interpretation of the meaning of the testator as expressed in the will, I hold that, until the death of the tenant for life, whatever interest Sarah Glendenning had under the will was subject to be defeated by her own death taking place before that of the tenant for life. The gift to her was an executory devise subject to be determined upon some future event, to wit, her own death in the lifetime of the tenant for life, whereupon the interest was to go over under the terms of the will to her heirs. She had therefore no disposable interest in the said estate in the event of her death taking place before that of the tenant for life and as that contingency actually happened I find the plaintiff's claim to an interest in the said lands to be under the will of John Dickinson, and

not under that of Sarah Glendenning, and in the terms of the admissions filed by counsel I find for the plaintiff in the sum of $234.25 and costs.

The appeal was argued at Vancouver on the 3rd of March, 1910, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Reid, K.C., and *R. M. Macdonald,* for appellant.
Griffin, for plaintiff.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.: John Dickinson, who died on the 11th of September, 1899, by his last will and testament appointed his wife Jane Dickinson, the defendant herein, his executrix and devised his real estate as follows:

"Third. I give, devise and bequeath unto my said wife all my real estate . . . . . to be held by her and enjoyed for the period of her natural life and at her death to be divided equally share and share alike between my brother Thomas G. Dickinson and my brother Abraham Dickinson, the children of my late brother Isaac Dickinson, living at the time of her decease, and my sister Sarah Glendenning. Should either of my two brothers or my sister predecease my said wife, then one-quarter of my real estate is to go to their heirs, executors and administrators."

Sarah Glendenning died on the 10th of September, 1903, during the lifetime of the life tenant, leaving a will in which she disposed of her real and personal property. Subsequently, with the consent of all the heirs of the testator John Dickinson, including the plaintiff, certain real estate of the testator was sold and converted into money, which the life tenant was willing to divide or distribute to those entitled to it in remainder. She seems to have been advised that the plaintiff could take his share under the will of his mother, the late Sarah Glendenning, while the plaintiff on the other hand claimed that he was entitled to take his share under the will of the testator, the real contest being did the plaintiff take as a purchaser under the will of the testator, or, on the other hand, did Sarah Glendenning take a remainder in fee which she could dispose of in the lifetime of the life tenant.

The learned County Court judge before whom the case was tried held that the plaintiff was entitled to take as such purchaser. From that judgment the defendant appeals, and

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contends that the devise to Sarah Glendenning was a devise to her and her heirs, and falls within the rule in *Shelley's Case* (1579-81), 1 Co. Rep. 227. The rule in *Shelley's Case* has been so often resorted to in cases involving the construction of deeds and wills, and is so well known, that I need not repeat it here. There must be an estate of freehold in the ancestor in order to make this rule applicable; and the first inquiry here is did Sarah Glendenning, the ancestor in this case, take an estate of freehold? If she did not, then the rule in *Shelley's Case* is not applicable. If she did, then we have to deal not with a rule of construction, but with a strict rule of law, as was stated by Lord Herschell in *Van Grutten* v. *Foxwell* (1897), A.C. 658 at p. 662. At the same time it was pointed out that while the rule must be applied wherever it is applicable, yet if words are added to the devise, or any provisions be found in the will shewing that the expression "heirs" was not intended to be used in the ordinary legal sense, but to designate some particular person, or particular class of persons, then effect may be given to the intention of the testator thus expressed.

To come back now to the question of the estate or interest which the ancestor takes, which must, in order to fall within the rule in *Shelley's Case,* be an estate of freehold, Blackstone says:

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"Such an estate and no other as requires actual possession of the land is legally speaking freehold."

And Butler in a note to 2 Co. Lit. 266b. says:

"The word freehold is now generally used to denote an estate for life in opposition to an estate of inheritance."

I have examined all the cases which were cited in argument, and a great many others which were not cited, to ascertain whether or not it was sought in any of them to apply the rule in *Shelley's Case* to an ancestor who had a remainder only. In *Shelley's Case* itself the ancestor had a life estate, and in all the other cases so far as I have examined them, the ancestor had a life estate. In fact the rule in *Shelley's Case* is stated in *Perrin* v. *Blake* (1770), 4 Burr. 2,579 as follows:

"When the ancestor, by any gift, devise or conveyance, takes an estate for life, with remainder," etc.

"An estate for life" is there substituted for an "estate of freehold." And in *Roe* v. *Bedford* (1815), 4 M. & S. 362, Bayley, J. at p. 365, said:

"I have always understood the rule to be, that wherever an estate for life is given to the first taker," etc.

Now, in this case Sarah Glendenning took a vested remainder. Whether it was subject to be divested on her death in the lifetime of the defendant or not is a question which I shall have to consider later. If therefore I am right in supposing that the rule in *Shelley's Case* cannot be applied where the ancestor takes a remainder and not an estate for life, then I am relieved in the construction of this will from that highly technical rule of law, and have only to inquire what was the intention of the testator with regard to Sarah Glendenning and her heirs to be gathered from the will.

There is no question that in the first part of the devise he gave her a vested remainder in fee. It is not necessary since the legislation contained in R.S.B.C. 1897, Cap. 193, Sec. 25, to add words of limitation after a devise. The first part of the devise is therefore as if it read "After the death of my wife my real estate is to be divided between my brothers, etc., and my sister Sarah Glendenning, her heirs and assigns." Had the testator stopped there Sarah Glendenning would have taken an interest which she could have disposed of in defendant's lifetime. But the testator did not stop there. He provided further that should Sarah Glendenning die in the lifetime of the life tenant, then her share was to go to her heirs, or, as it is put in the will, "her heirs, executors and administrators." The words "executors and administrators" may be disregarded as the property in question was real property.

I think this latter provision of the will cuts down the interest which was at first given to Sarah Glendenning, and indicates the intention of the testator that should Sarah Glendenning die before her interest should become vested in possession by the death of the life tenant, the persons who should at the death of Sarah Glendenning be her heirs should take her share *personæ designatæ*.

If this be the true interpretation of the will then the plaintiff

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is entitled to take his share of the moneys in question as purchaser under the will of the late John Dickinson. Sarah Glendenning on the death of the testator took a vested remainder subject to be divested in case of her death in the defendant's lifetime, and there was an executory gift over to her heirs as a class.

The case of *Metcalfe* v. *Metcalfe* (1900), 32 Ont. 103, is of some assistance in this case. The gift by will was in words almost identical with those used by the testator in this. There the two brothers took a vested remainder subject to be divested on the death of both of them in the lifetime of the life tenant. One only of the brothers died in her lifetime, and it was held that this was not sufficient to divest the remainder to the two brothers, but if both had died in her lifetime, the gift would have gone to the "heirs."

I therefore think that the learned County Court judge was right in his conclusion, and that the appeal ought to be dismissed.

IRVING, J.A.: The learned County Court judge was of opinion that until the death of Jane, whatever interest Sarah had under the will of John was subject to be defeated by the death of Sarah during the lifetime of Jane, and that, therefore, Sarah had no disposable interest. That seems to me to be the intention of John, as expressed in his will, and I see no difficulty in giving effect to it.

IRVING, J.A.

In the books, there has been much discussion as to the definition of a contingent remainder, and the distinguishing a contingent from a vested remainder. The different views are sketched in the notes to *Duncomb* v. *Duncomb* (1695), 10 Camp. R.C. 803; but each case must depend on its own facts. The use of the word "then," in the will, not as a period of time but as a synonym for "in that event" turns the scale.

Here, the words are, substantially: "At Jane's death my real estate is to be divided equally between my brothers and sisters; should any of them predecease my said wife, then (that means in that contingency) the quarter-interest of that person so dying is

to go to his or her heirs, executors and administrators": that is, that they shall represent her.

Sarah, in my opinion, never took any interest within the meaning of *Shelly's Case*.

I would dismiss the appeal.

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

Appeal dismissed.

Solicitors for appellant: *Tupper & Griffin.*

Solicitors for respondent: *Bowser, Reid & Wallbridge.*

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RAYFIELD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY.

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RAYFIELD v. B.C. ELECTRIC RY. CO.

Trial—Jury—General verdict—Doubt as to intention of jury—Answers to some but not all of the questions put—New trial—Misdirection—Negligence—Contributory negligence—Ultimate negligence—Appeal—Costs.

In submitting the case to the jury in an action for damages arising out of injury to a child by one of the defendant Company's cars, five questions were submitted by the judge, who also instructed the jury that they might if they chose, bring in a general verdict. The jury returned a verdict for the plaintiff in $300 damages. On the judge asking whether they had answered the questions, the foreman replied that they had answered three: "(1.) Was the Company guilty of negligence? Yes. (2.) If so, in what did such negligence consist? Overspeed. (3.) Was the plaintiff guilty of contributory negligence? Yes." The trial judge, on this, dismissed the action.

Held, that while it was probable that the jury intended to return a general verdict, yet the matter was not free from doubt, and should have been cleared up before the jury was discharged. There should, therefore, be a new trial.

One of the questions not answered was "Could the motorman, after it became apparent to him that the boy was going to cross the track, by

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the exercise of reasonable care and skill, have prevented the accident *if he had been running at a reasonable rate of speed?*" The judge said, in submitting this question: "I want you to consider that last element, because it is not: 'Could he have prevented the accident if running at an *unreasonable* rate of speed?'"

Held, that this question was improperly framed, and the jury were not properly directed; that the original rate of speed was the original negligence, and after finding such negligence the jury had to consider whether, notwithstanding the unreasonable rate of speed, the motorman, after seeing the boy commit or about to commit a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it.

New trial ordered, costs of appeal to appellant (MARTIN, J.A., dissenting), and costs of trial below to abide the event of the new trial.

APPEAL from the judgment of GRANT, Co.J., dismissing the plaintiff's action after the jury had given a verdict in her favour for $300, in circumstances set out in the headnote and the reasons for judgment of MACDONALD, C.J.A.

Statement

The appeal was argued at Vancouver on the 18th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Brydone-Jack, and *Price*, for appellant (plaintiff): When the jury gave damages it was plainly their intention to support the verdict. It is true that questions were submitted to the jury, and they answered some but not all of them. In that case we say they brought in a general verdict, and the trial judge should have given us the judgment on the general verdict.

Argument

L. G. McPhillips, K.C., for respondent (defendant) Company: The jury have answered sufficient of the questions to shew that plaintiff cannot recover. Because they have not answered all the questions is no reason why judgment cannot go as it has been given. This is not a general verdict, because the judge asked what is the amount of damages.

Price, in reply:

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff, Haidee Rayfield, is a widow, and sues as well on her own behalf as next friend of her infant son, Charles Rayfield, eleven years old. The boy while

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crossing a street in Vancouver was injured by one of the defendants' tramcars. The trial judge held, and I think rightly, that there was evidence to go to the jury of the defendants' liability for the accident. He submitted several questions to the jury, and told them they might, if they thought fit, find a general verdict instead of answering the questions. On the return of the jury, the foreman announced as the verdict: "We award the plaintiff $300 damages." On being asked by the learned trial judge:

"Did you answer the questions?" the foreman said:

"We answered the first: 'Was the Company guilty of negligence? Yes.

"'Second: If so, in what did such negligence consist? Overspeed.

"'Third: Was the plaintiff guilty of contributory negligence? Yes.'

"We did not answer the others."

On this, the learned judge dismissed the action. While I think the verdict was a general verdict, yet the matter is not free from doubt, and I think the jury should have been asked to make the matter plain before being discharged. Among the questions that were not answered was the following:

"Fifth: Could the motorman, after it became apparent to him that the boy was going to cross the track, by the exercise of reasonable care and skill have prevented the accident if he had been running at a reasonable rate of speed?"

Now, it was open to the jury to find a verdict for the plaintiff even after answering the first three questions as they did. It was open to the jury to find that notwithstanding the negligence of the boy, the motorman could have, by the exercise of reasonable care after he first saw the boy about to cross, prevented the accident. Assuming, as the jury found, that there was evidence of negligence, and that that evidence was overspeed, and that the boy was negligent, yet the motorman saw the boy in a position which challenged his attention and made him fear that the boy would cross the track in time to have reduced that speed, and to have got his car under control. Mayhood, the motorman, says that he saw the three little boys three or four feet from the curb. He then says:

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"Well, as soon as I saw them they seemed to me as though they started to run. The three boys. There was a slight difference in the distance between the three boys, but not very much, and they had not I do not think made above a few steps when I noticed one boy made a dash to come across the tracks."

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Asked as to the distance he was away he answered:

"Pretty hard for me to make a statement in that respect because I really was not watching the distance. I was watching the boy more particularly than anything else. Of course when we see boys like that we watch them more particularly when they are moving than anything else, and I kept my eyes on the boys, and I saw one boy make a dash to come across the track. I immediately pulled the reverse and gave the car back power."

I think the jury were justified in coming to the conclusion that the motorman after he saw the boys on the street, with the likelihood or possibility of their crossing ahead of him, should have slowed down. I have no doubt on the evidence, apart from the finding, that the car was running at an excessive rate of speed, and upon seeing these boys and anticipating, as he did, the possibility of their crossing ahead of him, it was more than ever his duty to slow down his car and get it under control, so that if the boy darted ahead of his car, he could do something effectual to prevent injury.

I do not, however, think that the fifth question was properly framed, or, what is of more importance in this case, that the jury were properly directed with respect to what ought to have been the subject-matter of that question. The learned trial judge seems to have confused the original negligence, which was over-speeding, with that which ought to have been covered by question five. The learned judge said:

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"Could the motorman, by the exercise of reasonable care and skill have prevented the accident if he had been running at a reasonable rate of speed. I want you to consider that last element because it is not: could he have prevented the accident if running at an *unreasonable* rate of speed?"

In this I think the learned judge erred. The unreasonable rate of speed was the original negligence, and the question which the jury had to consider, after finding such negligence, was whether, notwithstanding that unreasonable rate of speed, the motorman, after seeing the boy committing or about to commit, a negligent act, could, by the exercise of reasonable care, have avoided the consequences of it. As pointed out above, if the motorman, seeing the boy as he says he did, and keeping his eye on him, ought to have reduced his unreasonable rate of speed, in anticipation of what happened, then I think it could

be said that he could have avoided the accident, notwithstanding the negligence of the boy.

I therefore think the jury were misdirected and that there should be a new trial. The costs of the first trial to abide the result of the new trial. The appellant is entitled to the costs of this appeal.

IRVING, J.A.: Having read the evidence and proceedings, I am satisfied that the jury intended to bring in a general verdict in favour of the plaintiff. The answer to the third question shewing that the boy was guilty of contributory negligence prevents them finding a general verdict in his favour. I doubt if they properly understood the true meaning of contributory negligence.

In these circumstances, I am not at all confident as to the course we should adopt: see the remarks of Meredith, J.A., in *Brenner* v. *Toronto Railway* (1907), 15 O.L.R. 195 at p. 201. To assume that the jury really thought the boy was guilty of contributory negligence is to attribute to them a determination to give a verdict for the plaintiff in any event. I do not think it would be right to impute such an intention to them, and therefore I think a new trial should be ordered.

In these cases which are, by reason of the increase of rapid mechanical transit, of everyday occurrence, the judges in Ontario have adpoted a formula of questions in which they ask the jury as to the defendant's negligence, plaintiff's contributory negligence, and finally as to the ultimate negligence. When the learned judge announced that he was framing his questions on the questions put before the jury in *Hinsley* v. *London Street R. W. Co.* (1907), 16 O.L.R. 350, I think counsel should have drawn his attention to the fact that the words "if he had been running at a reasonable rate of speed" were not in the formula. It was the addition by the jury of these words as a rider to the answer to the question framed by the judge that created the difficulty in the mind of Chief Justice Moss in dealing with the *Hinsley* case.

IRVING, J.A.

I think it is well to point out that a judge is not bound to accept the first verdict given by a jury (I am not referring to the first answer to a series of questions) but may send them back

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to reconsider their verdict; that course should have been adopted in this instance. Then instead of the judge below speculating as to what the jury meant to say, a definite answer could have been obtained before they were dismissed, and this appeal avoided.

As to the costs of this appeal. In my opinion the defendants were wrong in trying to escape from a general verdict, and therefore they must pay the costs of this appeal. Costs below should abide the result of the new trial.

MARTIN, J.A.: It is unfortunate I think that the jury was not asked upon their return to Court to clear up the doubt that exists as to their intention to return a general verdict, or their inability or disinclination to answer three out of the five questions submitted to them. As it stands it has been plausibly argued to be neither one nor the other kind of verdict. I find a great difficulty, in fact an impossibility, in satisfying myself as to their intentions, and in such case I think the only proper course to adopt is to send the case back for a new trial, on this aspect of the case alone.

MARTIN, J.A.

With respect to costs, I think as both parties are equally in default in leaving the matter in this uncertain position that we should do as was done in *Nightingale* v. *Union Colliery Co.* (1901), 8 B.C. 134, *viz.*: make the costs of the appeal as well as of the first trial abide the event.

New trial ordered.

Solicitors for appellants: *McPhillips & Tiffin.*

Solicitors for respondent: *Brydone-Jack, Ross, Price & Woods.*

McPHALEN v. THE CORPORATION OF THE CITY OF VANCOUVER.

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McPHALEN v. VANCOUVER

Municipal law—Highway—Non-repair—Defective sidewalk—Injury to pedestrian from—Nuisance of long standing amounting to misfeasance—Duty of corporation—Right of action—Vancouver Incorporation Act, 1900—Amendment, Cap. 63, 1909, Sec. 219.

Plaintiff lost the sight of one eye by falling on a loose plank in a sidewalk, a spike from the end of the plank penetrating the eye, and the jury found negligence against the municipality and awarded the plaintiff damages. The municipality operated under a special charter, in which it was provided that every public street, road, square, lane, bridge and highway should be kept in repair by the Corporation.

Held, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that under the provision in the charter for repair of highways, it was the intention of the Legislature that a person injured through an omission to repair should have a right of action.

IRVING and MARTIN, JJ.A., took a different view.

The Court being evenly divided, the appeal was dismissed.

Remarks as to the Court of Appeal following or being bound by the decisions of the late Full Court.

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action tried at Vancouver on the 16th of February, 1909. Plaintiff, walking on a plank sidewalk constructed by the defendants, slipped and fell by reason of some of the planks being loose, and one of them, in his fall, flew up striking him in the face, a spike penetrating his eye. The case went to the jury on the issue of negligence in not keeping the sidewalk in proper repair under the following provision in the Act of incorporation: Statement

"Every public street, road, square, lane, bridge and highway shall be kept in repair by the Corporation."

Previously to the incorporation of the municipality the locality was not organized or within the limits of any defined district.

The appeal was argued at Vancouver on the 28th of

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February and the 1st of March, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

W. A. Macdonald, K.C., for appellant (defendant) Corporation: *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330 is not applicable here, but it is of interest from the fact that the statutes are similar. He referred to *Municipality of Pictou* v. *Geldert* (1893), A.C. 524; *Lambert* v. *Lowestoft Corporation* (1901), 1 K.B. 591; *The City of Montreal* v. *Mulcair* (1898), 28 S.C.R. 458; *Thistleton* v. *Frewer* (1861), 31 L.J., Ex. 230; *Knight* v. *Lee* (1892), 62 L.J., Q.B. 28; *Maguire* v. *Corporation of Liverpool* (1905), 1 K.B. 767, 74 L.J., K.B. 369; *Wallis* v. *The Municipality of Assiniboia* (1886), 4 Man. L.R. 89; *Municipal Council of Sydney* v. *Bourke* (1895), A.C. 433. The liability of the Corporation must be imposed in express terms, nor does the incorporation of a district into a municipality increase the liability of the inhabitants, unless it is expressly provided for: *Cowley* v. *Newmarket Local Board* (1892), A.C. 345, 62 L.J., Q.B. 65.

A. D. Taylor, K.C., for respondent (plaintiff): The English cases are distinguishable, as there duties were merely transferred from the inhabitants of a district to municipal bodies. The mere transfer did not impose on the municipal body a liability to action unless the statute creating the duty was express and specific. Therefore we do not quarrel with the principle of law. Under the statute in question here, however, section 219, there is no duty transferred from any old body, but the Legislature meant to impose a distinct duty and penalty for the neglect of that duty. The amendment to the statute in 1909 may properly be taken as intending to shew the meaning of the 1900 enactment. Section 219 is in the old Act of 1886, and the general municipal Act in the Consolidated Acts of 1888. Previous to then the inhabitants of the district now embraced in the municipality of Vancouver may have been subject to the common law, with the single difficulty that defined districts were not in existence. Without this section 219, Vancouver would be the same as other cities under the general municipal law, but, there being an express statutory duty cast on the

Corporation why should they be exempt from the consequences of that duty any more than a railway company or a private company. Their Act of incorporation is a private Act, and must be construed strictly: *David* v. *Britannic Merthyr Coal Company* (1909), 2 K.B. 146 at p. 157. The want of repair here had been of such long standing as to have become a nuisance and amount to misfeasance. It was the duty of the Corporation to inspect.

Macdonald, in reply.

Cur. adv. vult.

1st June, 1910.

MACDONALD, C.J.A.: The defendant is a municipal body incorporated by a special Act of the Legislature, which contains the following provision:

"Every public street, road, square, lane, bridge and highway shall be kept in repair by the corporation."

Before the incorporation of the defendant the locality now included within its limits was not organized, nor was it within the limits of any organized district. The Act therefore did not transfer common law powers and liabilities from the inhabitants of a district to an incorporated body, but the powers granted and liabilities imposed were original. After its incorporation, the defendant constructed a wooden sidewalk on and along 9th Avenue, one of the streets within the limits of its jurisdiction, and on the 11th of May, 1909, the plaintiff, while lawfully walking upon the sidewalk, suffered injury by reason of its defective condition. This sidewalk was constructed of planks laid crosswise, several of which on the night of the accident were loose. It appears from the evidence that the plaintiff tripped and fell forward over these loose planks, one of which flew up and struck him in the face, a spike in this plank penetrating his eye.

The case went to the jury on the issue of negligence in not keeping the sidewalk in repair, and the jury found a verdict for the plaintiff. The defendant claims that non-repair in this case was non-feasance only, and that the law does not cast upon it any liability for damages to a person injured by reason of such non-feasance.

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We were referred to a number of well-known cases dealing with the distinction between the liability of corporations for misfeasance and non-feasance. In all of these cases it is pointed out that where the question is governed by statute, the intention of the Legislature is the test, and that each case is to be decided upon construction of the governing statute.

In many of the cases the defendants were bodies charged with the management of streets, sewers or other works, with power to repair, and in some cases with the duty to repair, either expressed, or fairly to be inferred from the language of the statutes. In most of these cases the powers and liabilities imposed upon the new bodies were merely transferred from the inhabitants of districts or boroughs, and as it was decided that the inhabitants could not be sued for non-repair, it was held in most of the cases that the Acts of incorporation in question disclosed no intention on the part of Parliament to impose upon the incorporated bodies greater liability with respect to repair than rested at common law upon the inhabitants.

In a new country, however, and in the case of a municipal corporation, upon which original duties are imposed, and having regard to the very extensive powers with which this Corporation is clothed, and to the fact that it is not the inheritor but the creator of streets, sidewalks and other conveniences, I think I

MACDONALD, C.J.A.

should be right in holding that when the Legislature under such circumstances imposed in express terms a duty upon the Corporation to keep its streets in repair, it intended that a person injured by a breach of such duty should have an action.

In my opinion we have to consider which of the two rules of construction discussed in the English cases is applicable here; first, that mentioned by Lord Blackburn in *The Mersey Docks Trustees* v. *Gibbs* (1866), L.R. 1 H.L. 93 at p. 110, where he says:

> "In our opinion the proper rule of construction of such statutes is, that, in the absence of something to shew a contrary intention, the Legislature intends that the body, the creature of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities as the general law would impose on a private person doing the same things";

and second, that underlying the decision in *Cowley* v. *New-*

market Local Board (1892), A.C. 345, and a number of other cases before and since that decision, that where an Act of the Legislature appears to have been passed not for the purpose of creating a new liability, but for the purpose of transferring, for convenience, to a new body created by statute, an existing duty of the inhabitants of a parish or borough to repair, the liability of the new body, unless the contrary intention appears, is not to be deemed to be greater than that of the inhabitants, and that therefore where an action would not lie against the inhabitants it will not lie against the new body.

I think this case falls within the first rule, and that here we are untrammeled by the considerations which influenced the decisions in England, and which were so fully considered and adopted by the House of Lords in *Cowley* v. *Newmarket Local Board, supra,* and by the Court of Appeal in the later case of *Maguire* v. *Corporation of Liverpool* (1905), 1 K.B. 767.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: The charge of the learned judge opens with a definition of negligence, and after amplifying that definition, proceeds to deal with the particular negligence of the City in omitting to repair. In my opinion the only question submitted to the jury was the question of negligence to repair. It is therefore not necessary for me to refer to the question of nuisance raised on the appeal. If counsel for the plaintiff thought that there was evidence which justified the judge in leaving negligence in construction, or nuisance amounting to misfeasance, then he should have applied to the judge for further directions on that point. The case having proceeded on the ground of negligence to repair, we are brought face to face with the question which the Full Court did not determine in *Cooksley* v. *Corporation of New Westminster* (1909), 14 B.C. 330.

IRVING, J.A.

The argument of plaintiff's counsel fails to convince me that the language of section 219 of the Vancouver Incorporation Act, 1900, is sufficient to give a right of action for damages to any person injured, by reason of the breach of the duty to repair. The Legislature has not gone far enough to satisfy the requirements laid down in *Municipal Council of Sydney* v. *Bourke*

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(1895), A.C. 433 at pp. 435 and 436. The amendment of 1909 does not, in my opinion, in view of section 5 of the Interpretation Act, help the plaintiff.

In this case the question was raised whether this Court be bound by the decisions of the old Full Court. Brett, M.R., in *The Vera Cruz.* (No. 2.) (1884), 9 P.D. 96 at p. 98, says:

> "It was the custom for each of the Courts in Westminster Hall to hold itself bound by the previous decision of itself or of a Court of co-ordinate jurisdiction. But there is no statute or common law rule by which one Court is bound to abide by the decision of another of equal rank, it does so simply from what may be called the comity among judges. In the same way there is no common law or statutory rule to oblige a Court to bow to its own decisions, it does so again on the grounds of judicial comity."

And in *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351 at p. 355, he says:

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> "A court of law is not justified, according to the comity of our Courts, in overruling the decision of another Court of co-ordinate jurisdiction."

I think it would be a most unfortunate thing if we were to hold ourselves not bound by the decisions of the former Court of Appeal of this Province which exercised the same jurisdiction now given to this Court.

MARTIN, J.A.: This appeal in my opinion should be allowed. The leading authorities cited support the view contended for by the appellant Corporation though there may be differences of opinion as to the application of the historical element (if I may so style it) which was considered in those authorities. Personally I think it better for this Court to follow the result of those decisions and hold that the defendant is not liable for non-repair, leaving it for a higher tribunal to draw the distinction (should it be found to exist) necessary to support the judgment below. The question of misfeasance is not in my opinion open to the respondent, because the case was tried solely on the point of non-repair, and there was no misdirection, and therefore comes within the scope of *Scott* v. *Fernie Lumber Co.* (1904), 11 B.C. 91, and consequently a new trial should not be granted.

MARTIN, J.A.

I think it better not to express any opinion as to this Court being bound by the decisions of the Full Court. The point was

only mentioned incidentally and no argument was advanced upon it because it was unnecessary to consider it.

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

[The Court being evenly divided, no order was made except as to costs which were given to respondent.]

Solicitors for appellant: *Cowan & Parkes.*
Solicitors for respondent: *Taylor, Hulme & Innes.*

GABRIELE *ET AL.* v. JACKSON MINES, LIMITED.

(2 M.M.C. 399).

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Mechanic's lien—Miner's lien—Consolidated actions—Appeal in claims of $250—Mechanics' Lien Act, Secs. 13, 14, 15 and 22, and amendment of 1900, Secs. 16, 24 and 26—Joint or several judgment—Distinct adjudication.

Though several lienholders may bring suit on their respective and distinct claims in one action and judgment may be entered for the whole amount of said claims, yet for the purposes of appeal each claim is deemed to be severable, and the adjudication thereon is a distinct one, and not appealable unless it amounts to $250.

APPEAL by defendant Company from a judgment of FORIN, Co. J. in favour of the lien of the plaintiff and several other miners against the defendants' mining property.

Statement

The lienholders had voluntarily joined their claims, nearly all of which were under $250, in one suit under section 13 of the Mechanics' Lien Act, and joint judgment was recovered for one total sum of $3,670.40, but in the formal judgment it was provided that "This Court doth declare that each of the above-named plaintiffs has and is entitled to a mechanic's lien . . . . for the amount claimed by each of the said plaintiffs

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respectively in the plaint herein . . . ." and the said claims were set out in a schedule to the judgment.

The appeal was argued at Vancouver on the 9th of November, 1906, before IRVING, MARTIN and MORRISON, JJ.

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

S. S. Taylor, K.C., for the respondents objected that under section 24* of the Mechanics' Lien Act Amendment Act, 1900, there was no appeal in the case of those lienholders whose claims were less than $250. Though for purposes of convenience the judgment is joint in form, yet it is distinct and severable in nature, and in each case is an individual adjudication, and must in practice be construed distributively to carry out the intention of sections 13 and 22.

Argument

Macdonald, in reply: It is all one action; the suits were not consolidated by order under sections 14 or 15, in which case it might be different. See sections 16 and 26 of 1900.

[MARTIN, J.: Your position must be then that because these lienholders voluntarily complied with section 13 by joining in one suit to save expense and delay, they are in a worse position than if they had not done so, or if their claims had been consolidated by order: that view seems certainly against the spirit of the Act.]

Judgment

Per curiam: We think that section 24 applies to these cases separately, and the appeal can only proceed as against the claims of $250 and over.

Objection sustained.

*24. Where in any action for a lien the amount claimed to be owing is adjudged to be less than two hundred and fifty dollars the judgment shall be final, binding and without appeal.

GILLIES SUPPLY COMPANY v. ALLAN *ET AL.*

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June 2.

GILLIES v. ALLAN

Mechanic's lien—Appeal—Jurisdiction—Amount adjudged—Mechanics' Lien Act Amendment Act, 1900, Sec. 24.

In an action on a mechanic's lien, the amount adjudged to be owing was $172.05. Section 24 of the Mechanic's Lien Act enacts that there is no appeal where the amount claimed to be owing is adjudged to be less than $250. Therefore an appeal from the judgment was dismissed.

APPEAL from the judgment of MCINNES, Co. J. in an action to enforce a mechanic's lien, tried by him at Vancouver on the 18th of December, 1909, when judgment was given for plaintiffs in the sum of $172.05.

Statement

The appeal was argued at Vancouver on the 19th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

A. H. MacNeill, K.C., for appellant.

S. S. Taylor, K.C., for respondent, took the preliminary objection that section 24 of the Mechanics' Lien Act applied, the amount involved herein not being $250.

MacNeill, referred to *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339 at pp. 343, 345. We are not questioning the amount of the lien; the Court can review the judgment appealed from to ascertain if there was a valid lien.

Argument

Taylor: The *Coughlan* case meant that where a judgment is given finding there is no lien, then the matter is open to appeal, but that if the judgment is given with respect to a valid lien, and the amount adjudged due is less than $250, then there is no appeal. The judgment here is for a sum of money, and in default of payment, then that the property be sold. Therefore there was a valid lien and a finding within section 24.

MacNeill, in reply: Sections 16 and 24 should be read together.

Cur. adv. vult.

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GILLIES v. ALLAN

2nd June, 1910.

MACDONALD, C.J.A., concurred in the reasons for judgment of IRVING, J.A., dismissing the appeal.

IRVING, J.A.: This is an appeal from the decision of McINNES, Co. J. who found that the plaintiffs were entitled to a mechanic's lien for $172.05 on the property of defendants Bird and McLeod, on which property the defendants the Pacific Loan Company, had a mortgage. The "amount claimed to be owing" as stated in sub-section (*d.*) of section 8 of the Mechanics' Lien Act Amendment Act, 1900, was $172.05. By section 24 there is no appeal if the "amount claimed to be owing" is adjudged to be less than $250, and as there is no adjudication within section 23, we are not permitted to deal with the matter. The appeal should be dismissed on the ground of want of jurisdiction, with costs.

IRVING, J.A.

MARTIN, J.A.: In this case, as section 24 of the Mechanics' Lien Act puts it "the amount claimed to be owing (has) been adjudged to be less than $250" and therefore the point on jurisdiction comes exactly within the prior decision of the late Full Court in *Gabriele* v. *Jackson Mines, Limited* (1906), *ante* p. 373; 2 M.M.C. 399, and no cause has been shewn for a departure from that adjudication.

MARTIN, J.A.

Appeal dismissed.

Solicitors for appellants: *MacNeill & Bird.*
Solicitors for respondents: *Taylor & Harvey.*

MacBETH v. VANDALL.

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MacBETH v. VANDALL

Practice—Appeal—Discharge of notice of—Appeal not set down, nor books filed or submitted for approval—Costs—Demand for payment—Condition precedent.

An application for costs to the opposite party of an abandoned appeal will not be allowed unless the applicant has made a previous demand for payment which has not been complied with.

MOTION, *ex parte,* for an order discharging the notice of appeal and for costs of the appeal, including this motion. The notice of appeal had been served, but the appeal had not been entered for hearing or otherwise proceeded with. Heard by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A. at Vancouver on the 16th of November, 1910. Statement

Harris, K.C., for the motion.

The judgment of the Court was delivered by

IRVING, J.A.: Judgment having been given for the plaintiff on the 16th of May, defendant gave notice of appeal to this Court. No further proceedings were taken, that is to say, the appeal was not set down, nor the appeal books filed nor submitted to the other side. The inference therefore is that the appeal has been abandoned.

The appellant now applies to this Court on notice to the other side for an order (1.) discharging the notice of appeal, and (2.) for costs of the appeal including this motion.

The practice is well settled. An application for costs of an abandoned appeal will not be allowed unless the applicant has made a previous demand for payment, which has not been complied with. That rule was laid down in 1879 by the Court of Appeals in *Griffin* v. *Allen* (1879), 11 Ch. D. 913, and was accepted and acted upon many times by the old Full Court. The order can go, however, for the striking out of the notice Judgment

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of appeal if the applicant desires to take it out. The order will carry the costs of the appeal but not of this motion.

Motion allowed.

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SCHNELL v. B. C. ELECTRIC RY. CO.

SCHNELL v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Master and servant—Street car conductor—Scope of authority—Onus of proof of—Transfer of passenger at dangerous place—Non-direction—Judicial notice.

Owing to fog disarranging the schedule time of defendant Company's cars, they were not running on time. That which the plaintiff was riding in stopped on a bridge. There was another car immediately ahead which, in due course, would take plaintiff to her destination before that in which plaintiff was. The conductor asked or told her and another passenger to transfer to that car, and in doing so, she was injured by falling on the bridge in the darkness.

Held, that, in the absence of evidence to the contrary, it must be assumed that the conductor had authority to use his judgment in the circumstances to forward the passengers to their destination.

The question of the scope of the conductor's authority having been twice brought to the notice of the judge during the trial, yet he did not direct the jury on that point, and the case having been allowed to go to them without direction, and no objection taken to the charge on that account:—

Held, that this brought the case within *Scott* v. *Fernie* (1904), 11 B.C. 91, and therefore the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass.

APPEAL from the judgment of HUNTER, C.J.B.C. and the verdict of a jury in an action for damages tried by him at Vancouver. The facts appear fully in the reasons for judgment on appeal.

Statement

The appeal was argued at Vancouver on the 12th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

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L. G. McPhillips, K.C., for appellant (defendant) Company: The question here is was it within the scope of the conductor's authority to transfer the plaintiff at this particular point. That must be left to the jury. He cited *McManus* v. *Crickett* (1800), 1 East, 105; *Limpus* v. *London General Omnibus Co.* (1862), 1 H. & C. 526; *Poulton* v. *London and South Western Railway Co.* (1867), L.R. 2 Q.B. 534 at p. 538. There was no necessity for the action of the conductor here so as to bring the responsibility home to the Company. The act was in the interest of the passenger only, to enable her to proceed on her journey. The onus was on the plaintiff: *Beard* v. *London General Omnibus Company* (1900), 2 K.B. 530; *Dawdy* v. *Hamilton Electric R. W. Co.* (1902), 5 O.L.R. 92; *Coll* v. *Toronto R. W. Co.* (1898), 25 A.R. 55. The trial judge omitted to direct the jury on the scope of the conductor's authority.

Argument

Craig, and *G. G. Duncan,* for respondent (plaintiff): Non-direction is not mentioned in the notice of appeal.

McPhillips, in reply: The onus was on plaintiff to prove the extent of the conductor's authority.

Cur. adv. vult.

29th June, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff was a passenger on one of the defendants' tramcars on the night of October the 27th, 1908, which was a dark and foggy night. When the car in question was upon a bridge on Granville street in the City of Vancouver, it was stopped by the conductor in charge to await a pilot to take it across the bridge. The stoppage was not usual, but was, as I understand it, occasioned by the fog. It is in evidence that the car was not running that night on schedule time, and this also may have had something to do with the delay. The plaintiff's story is that after some delay the conductor told her and the only other passenger aboard, to transfer to a car which was standing some distance ahead, but gave her no warning of the character of the place where she was about to alight. When she alighted she fell through the bridge and was injured. It was impossible to see owing to the fog and darkness.

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The appellant contended before us (1.) that the conductor acted outside of the scope of his authority when he requested or directed the plaintiff to transfer to the car ahead; (2.) that there was no evidence of negligence on the part of the defendants which ought to be submitted to the jury; (3.) that if there was, the trial judge did not direct the jury on the question of the scope of the conductor's authority.

The notice of appeal also set forth the ground that the plaintiff had been guilty of contributory negligence, but this was not pressed before us. There is no evidence shewing the extent or limits of the conductor's authority. Such evidence as deals with the subject at all goes only to the extent of shewing that the conductor had no instructions at all to govern him under the circumstances which arose in this case. The conductor was asked this question:

"Did you know of any orders as to transferring passengers there? I know of no orders concerning it at all.

Now, bearing in mind that the conductor was the person in charge of the car, the person placed there by the defendants charged with the duty of carrying the plaintiff safely to her destination, I think it must be inferred that he had authority to exercise his judgment as to how he could best get her to her destination under the circumstances which have already been referred to. In the absence of express rules—and perhaps even with such express rules not known to the plaintiff—the person in charge of the car *prima facie* has authority to act for his employer in matters incidental to the transportation of the passenger, and if he *bona fide* exercises that authority in the interest of the employer, or what he believes to be of the employer, and without malice, the employer is liable although the employee has made a mistake in judgment. I think therefore there is evidence to go to the jury justifying them in finding the employer liable for the negligent act and want of care of the conductor occasioning the accident.

MACDONALD, C.J.A.

The appellant complains, however, that the learned trial judge did not explain this phase of the case to the jury, and that a new trial should be ordered. It might have been better had the learned judge called the attention of the jury to this

question, and in direct terms asked them to consider it. There was no conflicting evidence on the point, and if we come to the conclusion that the evidence is sufficient to sustain the verdict, we ought not to grant a new trial for mere non-direction unless we think there was a miscarriage of justice by reason of this non-direction, or that the jury by reason of the non-direction proceeded on a wrong principle. In this case there is nothing of the kind apparent.

No objection was taken to the judge's charge. Mr. *McPhillips,* for the appellant, claims that it was not for him to take the objection; that a proper direction on the point was necessary in the plaintiff's interest, not in his. I do not think this contention is sound.

The plaintiff charges the defendants with negligence. *Prima facie* the conductor had authority to do all things reasonably necessary, expedient or convenient to carry the plaintiff to her destination. An interruption had occurred on the line; the conductor exercised his judgment apparently *bona fide* in transferring or directing the plaintiff to transfer from this particular car to the one ahead. There is no necessity for obtaining a special finding that the conductor acted within the scope of his authority. Under such circumstances the onus would be on the defendants to shew that he acted outside the scope of his authority. In *Beard* v. *London General Omnibus Company* (1900), 2 K.B. 530, the Court of Appeal considered a similar question, and the rule is expressed by A. L. Smith, L.J. at p. 532 as follows:

MACDONALD, C.J.A.

"I agree that on a plaintiff giving evidence that the driver of an omnibus of the defendants was guilty of negligence, there would be a *prima facie* case that the omnibus was being driven by an authorized servant of the company within the scope of his employment."

And Romer, L.J., in the same case, at p. 534, says:

"If one sees in the streets of London an omnibus admittedly belonging to the defendant company driven in the ordinary way by a person who appears to be a driver, the presumption is that he is authorized by the company."

I think the principles enunciated there apply to this case. The direction given by the conductor to the plaintiff to transfer from one of the Company's cars to another, during temporary stoppage

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in the traffic, was one which can fairly be held to be *prima facie* within the authority of the conductor, and the onus of proof therefore is upon the defendants to rebut that presumption, which has not been done in this case. If therefore, there was non-direction, defendants' counsel cannot maintain the position which he took before us that such non-direction was a matter which concerned the plaintiff alone, and not the defendants.

I think the appeal should be dismissed.

IRVING, J.A.: Defendants applied for a nonsuit on the ground that it was not shewn that the conductor had authority to transfer the plaintiff from one car to another under the circumstances. The application was refused and from that decision the defendants gave notice of appeal. On the appeal, it was argued that in any event they were entitled to a new trial as the judge did not ask the jury to find as a fact that the conductor had authority from the Company to do what he did, namely, transfer or attempt to transfer the passenger at that place from the car she was in to another car.

This action arises from the contractual relations of the plaintiff and defendants. The jury would require no oral evidence to warrant them in concluding that a conductor in a street car is a person in authority.

IRVING, J.A.

Courts and juries—for a jury is bound to keep within the restrictions imposed upon Courts by the principle of judicial notice—may and should notice without proof, and assume as known by others "whatever" as the phrase is "everybody knows." Holt, C.J. in *Ford* v. *Hopkins* (1700), 1 Salk. 283, said that the way and manner of trading is to be taken notice of. In *Turley* v. *Thomas* (1837), 8 Car. & P. 103, the judge took notice of the rule of the road to pass each other on the whip hand. In *Lumley* v. *Gye* (1853), 2 El. & Bl. 216, in an action relating to the engagement of an opera singer, Coleridge, J. said at p. 267:

> "Nor, I think, can it be successfully contended that we may not take judicial cognizance of the nature of the service spoken of in the declaration. Judges are not necessarily to be ignorant in Court of what every one else, and they themselves out of Court, are familiar with; nor was that unreal ignorance considered to be an attribute of the Bench in early and

strict times. We find in the Year Books the judges reasoning about the ability of knights, esquires, and gentlemen to maintain themselves without wages; distinguishing between private chaplains and parochial chaplains from the nature of their employments; and in later days we have ventured to take judicial cognizance of the moral qualities of Robinson Crusoe's 'man Friday' and Esop's 'frozen snake.'"

The Court in *Williamson* v. *Freer* (1874), L.R. 9 C.P. 393, took notice of the fact that post cards and telegrams are likely to be read by others than those to whom they are addressed.

Before leaving the subject, it may be as well to add that taking judicial notice does not import that the matter is undisputable. It is a *prima facie* recognition of the fact or practice—the matter may be still open to refutation. Where the line between what may be noticed and what is not to be noticed is to be drawn is not easily definable. There is no general principle. It must rest in the discretion of the trial judge, and if too loosely exercised it may be corrected by the Court of Appeal.

Now, whatever a Court will notice without proof, it may state to the jury, or allow to be stated to it without proof, so I think we may assume that it is unnecessary to give evidence to a jury in Vancouver of the fact that a street car conductor is a man in authority, and acts for the Company in the car, and that there exists a practice of transferring passengers from one car to another. The objection then must be that there was no evidence of authority to do the particular thing it was alleged that he had done, *viz.*: tell the plaintiff that she must then and there transfer to the car just ahead.

IRVING, J.A.

In my opinion no such evidence is necessary, as a master may be liable for the errors made by a servant disobeying the orders given to him. The scope of the servant's authority would be measured by the ordinary duties performed by street car conductors on this Company's cars. The question does not turn on what the Company's rules are. The Company may have said to their conductors "you shall not stop on the bridge to transfer passengers. You shall not in the case of a blockade transfer a passenger to a forward car." And yet if the conductor does these things a jury may find the Company liable, because transferring passengers is, as may be noticed, within the scope of the conductor's employment. If he transfers them at a

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dangerous or improper place the negligence is the negligence of the Company, although the particular act which gives the cause of action may not be authorized, still if the act is done in the course of employment which is authorized, then the master is liable for the act of the servant.

Now, in a case of this kind arising from the conduct of the Company, I think that where the conductor in charge of a car says to a passenger about to alight "Come this way," that the passenger would be justified in expecting to alight in a place of safety, and that he or she should be warned if there was danger. If the conductor omitted to give such notice, the jury I think would be justified in drawing the conclusion that the conductor was negligent and I think that conclusion might be reached without any oral evidence as to the duties of the conductor. That seems to me the common sense of the matter, and I therefore think the judge was right in permitting the case to go to the jury in the way he did.

As to the request for a new trial (if that is open to defendant) I think the learned judge left to the jury the question: "Were these injuries caused by the negligence of the Company," and that having regard to what was said on the motion for non-suit, there is nothing in the point now taken.

IRVING, J.A.

Mr. *McPhillips* referred us to *Coll* v. *Toronto R. W. Co.* (1898), 25 A.R. 55, where a motorman shoved or threw off the car a newsboy; and to *Dawdy* v. *Hamilton Electric R. W. Co.* (1902), 5 O.L.R. 92, in which case, he said, the verdict was set aside because the question he now speaks of was not put to the jury. In that case, which was one of assault, plaintiff alleged that she had no intention of getting on the passing car, but that the conductor reached out and tried to drag her on board. The jury found that the injury to the plaintiff was caused by the conductor seizing her hand; that he was trying to pull her on the car; that he acted negligently in doing so, but not through impertinence. The trial judge dismissed the action because he (the judge) came to the conclusion that the conductor was not acting within the scope of his duties. The Divisional Court thought there ought to be a new trial. Plaintiff's counsel argued that this was a matter which should

have been dealt with by the jury. It was for the jury, not the judge. On the findings, the verdict ought to have been for the plaintiff: see remarks of Meredith, J., but the Court felt a difficulty in giving a judgment in her favour, when she had sworn that she was not attempting to get on the car. For if her story was true, then there arose a question whether the conductor was acting within the scope of his authority. To assist her to get on the car would be within his duty, but the swooping down on a person standing on the platform, and dragging that person aboard a flying car was quite a different matter. In those circumstances a new trial was ordered; the Chancellor saying the case had not been fully tried by the jury. He thought the judge was not justified after verdict in determining for himself whether the conductor was not acting within the scope of his duty as a servant of the Company, and then dismissing the action on his own conclusion. He goes on (p. 96): "It is the duty of the conductor to assist people in getting on and off the car" (he takes judicial notice of that practice) "but whether it is within the limit of his duty to assist those who are apparently about to get on the car while slowing up, he (the judge) cannot determine, that matter would be for the jury to pass upon."

IRVING, J.A.

Meredith, J., thought the jury might have drawn inferences against the defendants from the fact that they did not call the conductor or any other of their officers to prove what the conductor's duties were.

That case is not an authority for saying the plaintiff in an action arising out of contract must prove what the conductor's duties are, or that a verdict cannot stand unless there is a specific finding on that point.

I would dismiss the appeal.

MARTIN, J.A.: On behalf of this appeal it was primarily urged that the plaintiff has not got the necessary finding to support his verdict. Seeing that the verdict was a general one, it is more difficult to establish this position than it would be had questions been put to the jury as they ought to have been, in my opinion, in accordance with long established practice, for

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reasons which I am giving in my judgment in *Guthrie* v. *Huntting,* where the point was argued at some length.

The learned counsel for the appellant correctly said that the matter turns upon the authority of the conductor of the tram-car, but his view of the evidence on the crucial point as to what were the orders of the Company in that regard is contested by the respondent's counsel. I have consequently carefully examined the evidence, and am of the opinion that there is no definite evidence as to the existence of any orders at all, and therefore the submission of counsel on moving for a nonsuit on the ground that "no authority from the Company was given to this man to transfer at that point, and that he had no right to transfer," cannot be sustained.

Such being the case, the only other point open is an application for a new trial, under section 66 of the Supreme Court Act, because of non-direction to the jury regarding the authority of the conductor to make the passenger leave the car and transfer to another in the absence of any specific orders from the employers as to transferring at that place.

Section 66 contains the following proviso:

"Provided further, that in the event of a new trial being granted upon ground of objection not taken at the trial, the costs of the appeal shall be paid by the appellant, and the costs of the abortive trial shall be in the discretion of the Court."

MARTIN, J.A.

This proviso was considered in *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473 at p. 491, 35 S.C.R. 362; and in *Blue* v. *Red Mountain Ry. Co.* (1907), 12 B.C. 460 at p. 467, 39 S.C.R. 390, (1909), A.C. 361, 78 L.J., P.C. 107. Were it not for this section the appellant could have no hope for the success of his application because after the jury had brought in their verdict for $3,500 damages the plaintiff's counsel moved for judgment whereupon the record states that this question was asked:

"Court: I was going to ask you, gentlemen, if there was any objection to my charge.

"Mr. *Duncan:* No.

"Mr. *McPhillips:* No, my Lord. The only point I took was a point that would be open to me anyway."

Now, in the first place, with all due respect, I do not think

it is a proper course for the judge to ask counsel if they object to his charge, and such a practice ought not to be introduced because it places the litigants in an embarrassing position, and as was pointed out by Lord Justice Vaughan Williams in *Weiser* v. *Segar* (1904), W.N. 93, in considering the point of questions to the jury,

"The judge could not shift from his own shoulders the responsibility of putting proper questions to the jury by asking counsel (who might be a junior just called to the Bar), whether there were other questions which he desired to have put to the jury, so as to prevent it being said on a motion for a new trial that the proper questions were not put to the jury."

In the second place, what could be gained by asking such a question after the jury had returned their verdict, as was the case here? I do not think, therefore, that what happened should properly be regarded as anything further than an omission by counsel to take objection.

As to the charge itself, it was urged upon us that though counsel had twice brought the attention of the Court to the question of the scope of the authority of the conductor—first on the motion for nonsuit and second on the renewal of that motion just before counsel addressed the jury—yet the judge in no way referred to that matter and the jury were without instruction on it. It does seem strange that such is the case, but on the other hand it is equally strange that the defendants' counsel did not draw the judge's attention to it before the case went to the jury. It was not the part of the plaintiff's counsel to refer to the matter because he no doubt was prepared to take the position that in the absence (very unfortunately as it turned out) of questions the omission would be covered by the general verdict because there was unquestionably evidence to go to the jury. The only explanation must be that the plaintiff's counsel had decided to rely on the unsubstantial (as it has turned out) legal point open to him, as is indeed indicated by his reply to the question of the Court above cited. But in such case his course of conduct brings the question within the decision, on said section 66, in *Scott* v. *Fernie* (1904), 11 B.C. 91, because the effect of what was done was that "the issues submitted (were) accepted on both sides as the only issues on which the jury (was) asked to pass."

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Taking this in conjunction with the fact that the pure non-direction now complained of has not produced a verdict against the evidence, there should not be a new trial. The appeal, therefore, fails.

I conclude with this instructive and timely extract from the judgment of Mr. Justice Killam in *Alaska Packers Association* v. *Spencer, supra,* at p. 373:

"If in the opinion of counsel some further direction than that given by the judge is required, in justice to his client, counsel should formulate the propositions of law, applicable to the facts, which he desires that the judge should express to the jury and ask the judge to instruct the jury accordingly."

Appeal dismissed.

Solicitors for appellant: *McPhillips, Tiffin & Laursen.*
Solicitor for respondent: *G. G. Duncan.*

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FYFFE *ET AL.* v. LOO GEE WING.

Practice—Court of Appeal—Costs of appeal—Security for—Order of County judge—Court of Appeal Act, 1907, Cap. 10, Secs. 9 and 26—County Courts Act, B. C. Stat. 1905, Cap. 14, Sec. 120.

FYFFE v. LOO GEE WING

Section 9 of the Court of Appeal Act, 1907, which provides that after notice of appeal given, all further proceedings in relation to the Court of Appeal shall be had in the Court of Appeal, excludes the operation of section 120 of the County Courts Act.

Statement

APPEAL from an order made by GRANT, Co. J. at Chambers, directing appellants to furnish security for costs of appeal in a mechanics' lien action.

The appeal was argued at Victoria on the 2nd of June, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Brydone-Jack, for appellants: We say that the County Court judge had no authority to make an order directing us to furnish security for costs; see section 9 of the Court of Appeal

Act; that is a code in itself. All proceedings after notice of appeal must be had and taken in the Court of Appeal. Two tribunals cannot deal with the same case. In any event, the amount ordered is excessive: see section 34 Mechanics' Lien Act, as enacted by chapter 35 of the statutes of 1903-4; also section 122, sub-section 2 of the County Courts Act.

A. D. Taylor, K.C., for respondents: The question to be considered is whether section 120 of the County Courts Act is repealed by section 9 of the Court of Appeal Act. We submit that it is not.

[MARTIN, J.A., referred to section 26.]

Argument

The amount of security is a matter of discretion. Here it is ordered against a number of respondents, not against one only.

MACDONALD, C.J.A.: I do not see how we can get away from section 9. That seems to exclude the operation of section 120 of the County Courts Act. That section in precise terms provides:

"Such deposit or other security for the costs to be occasioned by any appeal hereunder shall be made or given, as may be directed by the judge of the County Court appealed from, or by the Full Court of the Supreme Court, or a judge thereof."

MACDONALD, C.J.A.

It might be very convenient for us, if section 120 could be held to be still operative in a case of this kind, but in face of the express words of section 9, I think we are compelled to come to the conclusion that Mr. *Brydone-Jack's* contention must be sustained.

IRVING, J.A.: I agree. Section 23 confers appellate jurisdiction, section 9 relates to procedure as distinguished from jurisdiction, and I think in that way sections 9, 23 and 26 can be read so as to harmonize with one another.

IRVING, J.A.

MARTIN, J.A. I agree with the remarks of the learned Chief Justice.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

Appeal allowed.

Solicitors for appellant: *Brydone-Jack, Ross, Price & Woods.*
Solicitors for respondent: *Taylor, Hulme & Innes.*

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Nov. 14.

IN RE LEE HIM. (No. 2.)

Statute—Construction of—Chinese Immigration Act, R.S.C. 1906, Cap. 95, Sec. 7—Exemption from entry tax—Onus on applicant—Appeal from decision of controller of customs—Habeas corpus.

IN RE LEE HIM

An appeal from the decision of GREGORY, J., reported ante p. 163, was affirmed by the Court of Appeal.

Statement

APPEAL from the decision of GREGORY, J. (reported ante, p. 163) on an application for a writ of *habeas corpus.*

The appeal was heard at Vancouver on the 14th of November, 1910, by MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

J. W. de B. Farris, in support of the appeal.

Senkler, K.C., contra, was not called upon.

Judgment

Per curiam: We think that the appeal ought to be dismissed. The proper course to pursue was to appeal from the decision of the controller to the minister of customs.

Appeal dismissed.

Solicitors for appellant: *Macdonell, Killam & Farris.*

Solicitors for respondent: *Senkler & Spinks.*

MOORE v. CROW'S NEST PASS COAL COMPANY, LIMITED.

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May 18.

MOORE v. CROW'S NEST PASS COAL CO.

Practice—Workmen's Compensation Act, 1902—Pleadings under—Power of arbitrator to allow applicant to amend his particulars.

An arbitrator appointed under the Workmen's Compensation Act, 1902, has the same powers as to amendments of pleadings in proceedings before him as a judge has in a civil action.

CASE stated under the Workmen's Compensation Act, 1902, for the opinion of a judge of the Supreme Court, heard by HUNTER, C.J.B.C. at Fernie on the 18th of May, 1910. The applicant, a workman employed by the respondents at their mine at Michel, was injured and at the date of these proceedings was still incapacitated. At the time of his injury the claim was taken up by the miners' union and was after in due course passed upon by a committee of the men and a committee of the Company consisting of the general manager, superintendent and another official. That committee decided that the case was a fair one for compensation and fixed the amount at $10 per week, and the respondents for some 38 weeks continued paying compensation when for some reason they ceased payment, whereupon these proceedings were commenced. It was objected by the Company: (1.) That a copy of the notice of accident had not been annexed to the particulars, nor had any reason been given for the omission, and (2.) that there was no notice of accident given as required by the Act. The learned arbitrator allowed the applicant to amend as to the reason of omission not being given, and held as to the notice, that as the claim was taken up and dealt with by the committee, the Company was not prejudiced in its defence by the want of the notice. There was a third objection that the claim for compensation was not made within six months, but on this the learned arbitrator, following *Wright* v. *Bagnall & Sons, Lim.* (1900), 69 L.J., Q.B. 551, held that the defendants had barred

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themselves from setting up the lapse of time by leading the applicant to act upon the view that the matter was settled.

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Eckstein, for the applicant, cited *Wright* v. *Bagnall & Sons, Lim.* (1900), 69 L.J., Q.B. 551; *Osborn* v. *Vicars, Sons & Maxim, ib.,* 606; *Beadle* v. *Milton* (1903), 5 W.C.C. 55; *Southwick Fireclay Co. Ltd.* v. *Loughland* (1908), 1 B.W.C.C. 405; *Charing Cross, Euston and Hampstead Railway* v. *Boots* (1909), 78 L.J., K.B. 1,115; *Powell* v. *Main Colliery Co.* (1900), 69 L.J., Q.B. 758 at p. 761; *Disourdi* v. *Sullivan Group Mining Co.* (1909), 14 B.C. 273; *Follis* v. *Schaake Machine Works* (1908), 13 B.C. 471.

Argument

G. H. Thompson, for respondent Company, referred to *Randall* v. *Hill's Dry Dock and Engineering Co.* (1900), 69 L.J., Q.B. 554; *Hughes* v. *Coed Talon Colliery Co.* (1909), 78 L.J., K.B. 539.

HUNTER, C.J.B.C.: The Workmen's Compensation Act would be a useless piece of legislation if the arbitrator did not have the right to allow amendments to the pleadings in proceedings under it.

Judgment

Order accordingly.

TUCKER v. PUGET SOUND BRIDGE AND DREDGING COMPANY.

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June 2.

TUCKER v. PUGET SOUND BRIDGE AND DREDGING CO.

Contract—Sub-contract—Failure of contractor to complete work—Money spent in completing the work—Rent of equipment—Payment for—Waiver—Consideration—Quantum meruit.

A company which had a contract to grade and excavate a portion of a railway line, sub-let a certain portion to plaintiff. Subsequently the company went into liquidation and abandoned the contract. The plaintiff at this time had removed some 3,000 cubic yards, part of a cut of 4,710 yards, for which he was to be paid at the rate of 20 cents a yard. He did not proceed with the work after the company went into liquidation, and was not paid for what he had done. Defendants herein contracted with the railway company to continue the work at the same price as the original contractors, 23 cents per yard, and upon their completing the cut on which plaintiff had worked, they were paid for the whole, including the 3,000 yards taken out by the plaintiff. In settling with plaintiff for other work done by him under their contract, they charged him with the cost of completing the cut, $1,882.72, and credited him with $1,083.30, leaving a balance against him of $99.42, and later with a further sum of $90, as having over-credited him three cents a yard on 3,000 yards.

Held, on appeal, that plaintiff was not entitled to recover $600 for the work done by him as money had and received for him or paid to his use; that there was no privity of contract between the plaintiff and the railway company or between him and the defendants with respect to this particular work, and that the money was not paid upon a trust, express or implied; but that he was entitled to succeed as to the two items of $99.42 and $90; that he was under no obligation to the defendants to complete the work and that they could not charge him with their loss in completing it.

On a counterclaim for $2,000, rent of engine and cars:—

Held, on the evidence (IRVING, J.A., dissenting), that defendants had waived their right to this, and there was consideration in the plaintiff foregoing his right to purchase the engine and cars on the price of which the payments for rent made by him would have been applied otherwise.

APPEAL from the judgment of MCINNES, Co. J. in an action tried by him at Vancouver in October, 1909, to recover a balance due on a contract. Indebtedness was denied and a

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counterclaim set up, which included $2,000 for rent of donkey-engine and cars. Judgment was given for plaintiff for $444.44; the counterclaim for $2,000 dismissed as well as two additional items amounting to $943.74. Both parties appealed.

The appeal was argued at Vancouver on the 8th of April, 1910, before IRVING, MARTIN and GALLIHER, JJ.A.

Craig, for appellant.

A. D. Taylor, K.C., for respondent.

Cur. adv. vult.

2nd June, 1910.

IRVING, J.A.: The plaintiff was a sub-contractor under the B. C. General Contract Company, Limited, which company was constructing a line of railway for the Victoria, Vancouver and Eastern Railway Company between Cloverdale and Sumas. He had a contract with the B. C. General Contract Company to do the work of excavating between stations 580 and 770 on the said work. He had excavated and hauled some 3,000 yards of earth on his contract when the B. C. General Contract Company failed and threw up their contract.

As the contract under which he was working was a contract entire, and was with the B. C. General Contract Company, he had no claim against the railway company for what he had done and, his claim if against anyone, must have been the General Contract Company.

IRVING, J.A.

After the General Contract Company had abandoned their contract, the defendants entered into an arrangement with the Victoria, Vancouver and Eastern Railway to carry on the construction work. The contract entered into between the defendants and the Victoria, Vancouver and Eastern Railway has not been produced to us. The plaintiff accepted a contract and also did other work for the defendant Company, but he was not allowed to work on this part of the work, namely, between stations 580 and 633. No evidence is given to the effect that he could expect to be paid by the railway company or by the defendants when the whole work was completed. When the work between stations 580 and 770 was completed an estimate was made up by the Victoria, Vancouver and Eastern Railway

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Company in favour of the defendants, item 7 of which shewed that 3,000 yards between stations 580 and 633 removed by Tucker, had been allowed by the railway company to the defendants. This is the item plaintiff now sues for alleging that the defendants are indebted to him in the sum of $600 for money had and received by them to the use of the plaintiff. In an action for money had and received, the plaintiff must shew (1.) that the money was not received by the defendants to their own use; (2.) that there is privity between plaintiff and defendants; and (3.) that the plaintiff occupies such a relation to the defendants that he is entitled to recall the money out of defendants' hands into his own. Now, it seems to me there was no privity between the plaintiff and the defendants in respect of this $600, and that, if the defendants had raised that objection to the action, they would have been entitled to have the action dismissed so far as this $600 is concerned. But they did not resort to that course, and the question arises can the Court deal with the matter at all? I feel that there is a great deal in the argument that by their conduct they are estopped from doing anything more than this, *viz.*: shewing that the plaintiff is not entitled to receive from them anything more than he would have been entitled to receive if the work had been done for them instead of for the B. C. General Contract Company.

IRVING, J.A.

If I could do so, I would like to settle the question which the defendants seem willing to have decided by the Courts, but there is no rule of law applicable to a case of this kind. It is a matter to be dealt with *in foro conscientiæ*, and we should therefore dismiss the appeal so far as this $600 item is concerned. The Company are not entitled to charge him with the $90 and $99.42 items.

Now, on the cross-appeal. It appears that Tucker was charged with $2,000 for the rental of a donkey-engine. Tucker employed in his said contract two engines and a certain number of cars. He bought one of the engines and the other he rented for 200 days at $10 per day from the 1st of November, 1907, to the 1st of June, 1908. Tucker admits he agreed to pay the rental, but says, as a defence to the claim put forward by the

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Company, that Dyer said he would waive this rent. The learned County Court judge came to the conclusion that Dyer had made some statement indicating his intention to waive the claim for this rental. It is perfectly plain that the defendants did not include in their accounts against the plaintiff this sum of $2,000 until this action was commenced, and I have no doubt in my own mind it was not their intention to charge him with the rental had it not been necessary for them to insert this item so as to balance Tucker's account against them, so I think a finding of fact that Dyer had made some statement indicating his intention not to charge this up against Tucker is correct. But assuming that statement may have misled Tucker, it does not follow that Tucker is entitled to escape from his obligation to pay. Where a person possesses a legal right (and here it is admitted that the rental payable was $2,000) a court of equity will not interfere to restrain him from enforcing it, though, between the time of its creation and that of his attempt to enforce it, he has made representations of his intention to abandon it, nor will equity interfere even if the parties to whom these representations were made have acted on them, and have, in full belief in them, entered into an irrevocable engagement. To raise an equity in such a case there must be a misrepresentation of existing facts and not of mere intention: *Chadwick* v. *Manning* (1896), A.C. 231, is an illustration of this rule. There Mr. Justice Manning had been misled by an expression of an intention on the part of his friend Mr. Chadwick that he (Chadwick) did not intend to enforce an indemnity given to him by Manning, but the Judicial Committee referred to the principle I have above stated and gave judgment in favour of Mr. Chadwick. It was suggested by Mr. *Craig* that there was a contract between the plaintiffs and defendants and that the consideration was the cancellation by the plaintiffs of the contract to sell. I am not able to see where there was any consideration moving from the plaintiffs to Tucker or from Tucker to the plaintiffs.

IRVING, J.A.

I would allow the cross-appeal, and I would allow the appeal as to items of $90 and $99.42.

In *Piper* v. *Burnett* (1909), 14 B.C. 209, the costs of one

appeal against the costs of another were set off. I think we ought to set off the costs here and the cross-appeal.

MARTIN, J.A.: I agree with my brother GALLIHER respecting the course to be taken in regard to these appeals, *viz.*: that the plaintiff should succeed with costs of the two items amounting to $189.42; and that the cross-appeal on the $2,000 item should be dismissed with costs, there being in my opinion ample evidence of consideration in the waiving of that item.

GALLIHER, J.A.: This was an action brought by the plaintiffs to recover the sum of $805.47 as a balance due them upon a contract with defendants. The defendants denied the indebtedness and claimed a balance due them of $2,565.35 including an item of $2,000 for rent of donkey-engine and cars. The learned trial judge gave judgment in favour of the plaintiff for $444.44 and disallowed the defendants' claim for rent of donkey-engine—$2,000—and also two items of insurance claimed by the defendants amounting to $943.74.

Against this decision both plaintiff and defendants appeal. In the argument on appeal counsel for the plaintiff dealt with three items of account only, one for $600, one for $99.42, and one for $90 and in the cross-appeal the item of $2,000 for rent of donkey-engine and cars was the only one dealt with, the items for insurance being abandoned.

In April, 1907, the B. C. General Contract Company, Limited, entered into a contract with the Victoria, Vancouver and Eastern Railway Company to grade and excavate a portion of their line between Sumas and Cloverdale, and sub-let a portion of this work between stations 500 and 770 to the plaintiff.

After the work had progressed for a time, the B. C. General Contract Company went into liquidation, and at that time the plaintiff had been engaged in a cut between stations 580 and 633, which was estimated at 4,710 yards, of which the plaintiff had then removed 3,000 yards. Had he completed his contract on this cut he would have been entitled to 20 cents a yard, but as he did not go on with his contract and complete the cut after his superiors had gone into liquidation,

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nothing was paid him for the 3,000 yards he had then taken out.

The present defendants entered into a contract with the Vancouver, Victoria and Eastern Railway to do the work originally let to the B. C. General Contract Company, at the same price for that class of work, *viz.*: 23 cents per yard, and upon their completing this particular cut, were paid by the railway company for the full 4,710 yards at that rate.

In the general estimate given the defendants by the railway company for June was included an item of 3,000 yards, and Tucker's name was placed opposite this. There is no doubt this was the 3,000 yards which had been removed by Tucker from cut between stations 580 and 633; there was also the further item for 1,710 yards, the balance to complete cut which had been done by the defendants themselves.

When the defendants entered into the contract with the Victoria, Vancouver and Eastern Railway Tucker did considerable work for them, but none on this particular cut. When the defendants finished this cut by removing the remaining 1,710 yards of earth, they received from the Victoria, Vancouver and Eastern Railway Company $1,083.30, which included the 3,000 yards taken out by Tucker, and in settling with Tucker they charged him with the cost of completing the cut (which was done under what is known as force account) amounting to $1,182.72, and credited him with the total received from the Victoria, Vancouver and Eastern Railway on account of same $1,083.30, leaving a balance against Tucker on that account of $99.42 and later charged him with a further sum of $90 as having over-credited him three cents per yard on 3,000 yards, Tucker's price per yard being 20 cents and not 23 cents.

GALLIHER, J.A.

The plaintiff-appellant claims that whatever it cost the defendants to complete this particular cut the $600 they received for the work done by him should be paid him, but even if that were not so they have no right to charge him with the two items of $99.42 and $90.

Taking the $600 item. When that was paid by the Victoria, Vancouver and Eastern Railway to the defendants, nothing

was said as to how they should apply it. It was simply included in the general estimate for work done by the defendants up to that time.

We must bear in mind that there was no privity of contract between the plaintiff and the Victoria, Vancouver and Eastern Railway or between the plaintiff and defendants with respect to this particular work, and in order to find the plaintiff entitled to this amount I must find that it was paid in upon a trust either express or implied. The evidence does not support an express trust. Was there an implied trust?

It is quite clear the plaintiff could not have collected it from the Victoria, Vancouver and Eastern Railway, nor had the Victoria, Vancouver and Eastern Railway paid it to the plaintiff could the defendants have recovered it from him, but in the usual course of railway building they recognized only the contractors, and paid them as for a work complete, and the placing of Tucker's name in the estimate would have no more significance as far as indicating any intention on the part of the railway company to designate to whom the money belonged than would the placing of any other sub-contractor's name in connection with other portions of the work. It is merely an indication to the contractor that there is due him in respect of work at such and such a point being done by such and such a contractor so much.

There being no privity of contract, and so far as I can see, no trust express or implied, I hold that the plaintiff cannot recover this amount. In my opinion the plaintiff is entitled to succeed as to the two items of $99.42 and $90. The plaintiff was under no obligation to the defendants to complete this work. The defendants have received the benefit of work the plaintiff undoubtedly did, and I regret I cannot see my way to allowing that, but in addition they seek to charge him with the loss in completing a work which they undertook to complete themselves, and which the plaintiff was under no obligation whatever to complete insofar as the defendants were concerned.

I would allow the appeal to the extent of $189.42. I would dismiss the cross-appeal. I am satisfied the defendants

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waived their right as to the $2,000 for rent of engine and cars.

To make this binding on the defendants there must of course be a consideration; that can consist of the giving of something as an equivalent or the foregoing of some right or privilege to which the plaintiff was entitled. At the time the plaintiff alleges the waiver took place some $6,000 of rent had accrued which under his agreement with the defendants he was entitled to apply in payment on the engines and cars, but he was still about $1,700 short of enough to complete payment. He would have had to borrow this, and he agreed to do so, and pay it in and exercise his right to have accrued rent applied in payment as well, if they would not cancel the rent, but the defendants agreed to do so and to keep the engine.

I am the more impressed that this arrangement was made because nowhere in the accounts rendered the plaintiff or in the books of the defendants, does this appear to have been charged before suit was brought.

GALLIHER, J.A.

The plaintiff should have costs of the appeal and cross-appeal.

Judgment accordingly.

Solicitors for appellants: *Martin, Craig, Bourne & Hay.*
Solicitors for respondents: *Taylor, Hulme & Innes.*

IN RE MARGARET MURPHY.

MURPHY, J.

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Oct. 24.

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Nov. 14.

IN RE MARGARET MURPHY

Statute, construction of—Immigration Act, 1910 (Dom.), Sec. 2, Sub-Sec. (d.) —Sec. 3, Sub-Sec. (d.)—Cap. 27—Canadian domicile.

Applicant, who had resided in British Columbia for over three years, went to the State of Washington for a few days' visit. A couple of months before her visit, she had been convicted of being an inmate of a house of ill-fame. On her returning to British Columbia she was held for deportation under sub-section (*d.*) of section 3 of the Immigration Act, 1910.

Held, on appeal, reversing the decision of MURPHY, J. (IRVING, J.A., dissenting), that she had acquired a Canadian domicile at common law.

APPEAL from a decision of MURPHY, J. on an application made to him at Vancouver on the 24th of October, 1910, for a writ of *habeas corpus*. The applicant came to Canada from the United States on the 27th of February, 1907. She resided in Vancouver continuously for a period of over three years when she went on a visit to the State of Washington, and on attempting to return to Canada was ordered to be deported by the immigration authorities. On the 4th of March, 1910, previous to her departure for said visit, she was convicted in Vancouver of being an inmate of a house of ill-fame. The action of the authorities was based on section 3 of the Immigration Act which, so far as material, is as follows: Statement

"No immigrant passenger or other person unless he is a Canadian citizen or has Canadian domicile shall be permitted to land in Canada, or in case of having landed in or entered Canada shall be permitted to remain therein who belongs to any of the following classes hereinafter called 'prohibited classes': (*d.*) Persons who have been convicted of any crime involving moral turpitude."

Gordon M. Grant, for the applicant:
Macdonell, for the Department:

MURPHY, J. (after stating the facts set out above): Applicant was a "passenger" on a train of the Great Northern Railway entering Canada at the port of White Rock when she MURPHY, J.

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was taken in charge by the immigration officer and she is a person who has been convicted of a crime involving moral turpitude. Section 3, therefore, excludes her from Canada, unless she can bring herself within its exceptions. She is admittedly not a Canadian citizen, but she claims she has a Canadian domicile. Sub-section (*d.*) of section 2 states *inter alia* "domicile" means the place in which a person has his present home or in which he resides or to which he returns as his place of present permanent abode and not for a mere special or temporary purpose. Canadian domicile is acquired for the purposes of this Act by a person having his domicile for at least three years in Canada after having been landed therein within the meaning of this Act. It is to be noted that what section 3 requires to make the particular exception relied upon by the applicant applicable is "Canadian domicile" and not "domicile." Therefore, the party claiming its benefit must shew not only "domicile" as defined by the Act for three years but must shew this to have been acquired "after having been landed in Canada" within the meaning of the Immigration Act. In other words the "landing" is a condition precedent without which Canadian domicile under the Act cannot be acquired at all. By sub-section (*p.*) of section 2 of the Act "land," "landed" or "landing" as applied to passengers or immigrants means their lawful admission into Canada by an officer under this Act otherwise than for inspection or treatment or other temporary purpose provided for by this Act.

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Admittedly, applicant never was "landed" in Canada within the meaning by said sub-section (*p.*) assigned to that word. She therefore fails to bring herself within the exception relied upon to make section 3 inoperative against her and the application must be dismissed.

The appeal was argued at Vancouver on the 8th of November, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Gordon M. Grant, for the appellant (applicant): We say that the applicant has acquired a Canadian domicile at common law, and comes within the exception provided for in

section 3 of the Act. It was not intended that the statute should deprive persons of their citizenship once properly and fully acquired; otherwise a person who had lived in the country 20 or 30 years, and during a temporary absence became afflicted with sickness, or otherwise, would be prevented from re-entering Canada.

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Macdonell, for the respondent: The Court cannot place an interpretation on the term domicile when the statute provides for it. A person, to become domiciled under this statute must be landed in the country by an immigration officer. The person must be here three years after the passing of the Act.

[MACDONALD, C.J.A.: What about a domicile at common law?]

That is not under consideration here. The applicant is proceeding under the Immigration Act.

Grant, in reply: Section 3 is not retroactive, and the applicant cannot be deprived of her legal rights. Some consideration must be given to the fact that at the time of the passage of the Act, there must have been thousands of persons out of Canada, but yet with a Canadian domicile; and it is unreasonable to suppose that they must be deprived of their legal status as Canadian citizens, and proceed to acquire it over again under this Act.

Argument

Cur. adv. vult.

14th November, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A., concurred in the reasons for judgment of MARTIN, J.A.

IRVING, J.A.

IRVING, J.A.: In my opinion the wording of the statute will sustain the judgment appealed from. When I ask myself why should not effect be given to the words of the Act?—the only answer that occurs to me is that the Act, if so read, interferes with the common law status acquired by the applicant, and therefore as it deprives the applicant of a privilege and the enforcement of the order might put her to some expense and inconvenience we should hold that the statute is not applicable to her. But the Act is intended to be drastic. It must be so, of necessity. When I look at the 40th section I feel that if

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that section has application—as it undoubtedly has—to those who have acquired not only a domicile for probate and divorce purposes but even a "Canadian domicile" within the meaning of the Act, it is impossible to say that the third section should not be given effect to on the ground of hardship.

MARTIN, J.A.: This appeal turns upon the question as to whether or no domicile for the purpose of the Immigration Act can only be acquired under section 2, sub-section (*d.*) of that Act which provides that

> "Canadian domicile is acquired for the purposes of this Act by a person having his domicile for at least three years in Canada after having been landed therein within the meaning of this Act. . . . ."

It is admitted that the appellant does not satisfy this requirement, but on the other hand she has at common law a Canadian domicile which would otherwise be sufficient to satisfy section 3. The expression "Canadian domicile is acquired" in sub-section (*d.*) is far from being of certain import, and one would think that if it were the intention of the Legislature to make that an exclusive definition, language would have been used which would have avoided all doubt. If section 3 had said, "Canadian domicile as defined by this Act," the doubt which now exists would never have arisen. In a case like the present, which is of a quasi-criminal character, I think the benefit of any sound doubt in legal construction should be given to the person who has acquired a domicile at common law, especially in view of the fact that to hold otherwise might easily have the effect under this Act of excluding or deporting from Canada respectable persons long domiciled therein.

MARTIN, J.A.

Due effect may still be given to sub-section (*d.*) by applying it to cases not within the scope of this decision. The appeal I think should be allowed.

GALLIHER, J.A.

GALLIHER, J.A., concurred in the reasons for judgment of MARTIN, J.A.

Appeal allowed, Irving, J.A., dissenting.

Solicitors for appellant: *Jones & Grant.*
Solicitors for respondent: *Macdonell, Killam & Farris.*

THE TRITES-WOOD COMPANY, LIMITED v. WESTERN ASSURANCE COMPANY.

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TRITES-WOOD COMPANY v. WESTERN ASSURANCE CO.

Fire insurance—Premises "occupied as a sporting house"—Contract against public policy—Whether Court should entertain such contract—Higher rate charged—Increased risk—Variation—Change in situation of insured premises—Addition of party plaintiff.

Defendant Company issued a fire insurance policy to H., loss, if any, to be payable to W. The latter assigned his interest to plaintiffs. The policy covered a building situated, detached, 100 feet from any other building, "while occupied as a sporting house." The rate charged for insurance on dwelling-houses in that locality was one per cent., while on the class of houses such as that in question the rate charged was two and a half per cent. After the issue of the policy a building was erected within 30 feet of the premises insured. It was provided in the policy that any change material to the risk should be communicated, in writing, to the local agent. The insured mentioned to the local agent the fact of the new building being put up, and was informed by him that it made no difference as he had charged a rate sufficient to cover the increased risk. There was also a provision that no agent could waive any condition in the policy, except by a document in writing, signed by him. On a claim arising under the policy, the Company set up illegality on account of the premises being used for immoral or unlawful purposes, and also that the policy became void by reason of the construction of the new building and the omission to communicate the fact, in writing, to the local agent. At the trial an amendment was allowed making H., the assured, a party plaintiff.

Held (IRVING, J.A., dissenting), that the policy was not void merely because it was issued in respect of premises used as those in question had been; that the insurance of property against loss is one of the things useful and necessary for the ordinary purposes of life, and that the owner of such property is just as much entitled to protection from loss by means of a fire policy as by other means.

Per MARTIN and GALLIHER, JJ.A.: That the plaintiffs were not entitled to sue on the contract of insurance, there being no evidence of privity of contract between them and W., their assignor, and that H. had not been properly added as a party.

Statement

APPEAL from the judgment of WILSON Co. J. in an action on a fire insurance policy, tried by him at Fernie on the 16th

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of September, 1909. The facts are stated in the reasons for judgment on appeal.

The appeal was argued at Victoria on the 24th, 27th and 28th of June, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Craig, for appellant (defendant) Company: The policy is for insurance on a building used as a bawdy house, and is therefore illegal and void as being against public policy.

[MACDONALD, C.J.A.: Is it not therefore our duty to say we will not have anything to do with it at all?]

The Court of Appeal must do what the learned trial judge should have done.

[IRVING, J.A.: What the learned Chief Justice says is: we should not be called upon to dabble in this dirty matter at all.

MACDONALD, C.J.A.: In the ordinary case, of course, this Court ought to make the order which the trial judge should have made but in this a different principle applies: that the Court will not do anything.]

Where it has gone wrong in the first instance it is different; the Court will not help a plaintiff in an action of that kind: *Morin* v. *Anglo-Canadian Fire Insurance Co.* (1909), 12 W.L. R. 387. This Court should pronounce the judgment which the trial judge should have pronounced. The course the Court of Appeal should take if they will not deal with the case is to allow the appeal. He cited and referred to *Begbie* v. *Phosphate Sewage* Co. (1875), L.R. 10 Q.B. 491; *Brook* v. *Hook* (1871), L.R. 6 Ex. 89; *Taylor* v. *Chester* (1869), L.R. 4 Q.B. 309; *Scott* v. *Brown, Doering, McNab & Co.* (1892), 2 Q.B. 724; *Jones* v. *Merionethshire Permanent Benefit Building Society* (1892), 1 Ch. 173; *Windhill Local Board of Health* v. *Vint* (1890), 45 Ch. D. 351; *Williams* v. *Bayley* (1866), L.R. 1 H.L. 200; *McKewan* v. *Sanderson* (1875), L.R. 20 Eq. 65; *Pearce* v. *Brooks* (1866), L.R. 1 Ex. 213.

Argument

[IRVING, J.A., referred to *The Marchioness of Huntly* v. *Gaskell* (1905), 22 T.L.R. 20.]

On the merits: There was a change of risk by erecting buildings adjacent to the property insured. The fire occurred in

the new building. Further the Company were not notified in writing, under the terms of the policy, of the increase in the risk. The agent assumed to decide that there would be no extra premium payable on account of the increased risk: *McIntyre* v. *East Williams Mutual Fire Ins. Co.* (1889), 18 Ont. 79; *Hawke* v. *Niagara District Mutual Fire Insurance Co.* (1876), 23 Gr. 139; *London and Western Trust Co.* v. *Canada Fire Insurance Co.* (1906), 13 O.L.R. 543; *The Atlas Assurance Company* v. *Brownell* (1899), 29 S.C.R. 537; *The Commercial Union Assurance Company* v. *Margeson, ib.* 601; *Hyde* v. *Lefaivre* (1902), 32 S.C.R. 474. When the insured premises ceased to be detached the policy ceased to apply: *The London Assurance Corporation* v. *The Great Northern Transit Company* (1899), 29 S.C.R. 577 at p. 583. Notice of loss was not given in accordance with the statutory condition.

We also say that the order adding Gertrude Howe as party plaintiff was wrongly made, as her right of action, if she ever had one, was barred under the policy: *Johnston* v. *Consumers' Gas Co.* (1896), 17 Pr. 279; *Hudson* v. *Fernyhough* (1890), 61 L.T.N.S. 722; *Doyle* v. *Kaufman* (1877), 3 Q.B.D. 7; *Watson Manufacturing Co.* v. *Bowser* (1909), 18 Man. L.R. 425.

D. A. McDonald, for respondents (plaintiffs): As to adding party plaintiff, see *Thompson* v. *Equity Fire Insurance Co.* (1907), 17 O.L.R. 214, (1909), 41 S.C.R. 491. Argument

There was no material change in the class of risk within the meaning of the third condition in the policy; and in any event there was no change material to this risk, because a high enough rate was charged to cover the risk even with increased exposure. The plaintiffs have a status to maintain the action: *Mitchell* v. *City of London Assurance Co.* (1888), 15 A.R. 262; *Agricultural Loan Co.* v. *Liverpool, etc. Ins. Co.* (1901), 3 O.L.R. 127; and if not, then the trial judge was right in adding the insured as plaintiff. As to proof of loss, we have to give notice only to the agent, and as the adjusters representing all the companies were there at the time, notice was given to them. But the giving of notice of loss is not a condition precedent to a right to recover. Finally, we say that the contract

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made here is not illegal or void as against public policy under the decisions in *Morin* v. *Anglo-Canadian Fire Insurance Co.* (1909), 12 W.L.R. 387; *Clark* v. *Hagar* (1894), 22 S.C.R. 510.

Craig, in reply.

Cur. adv. vult.

TRITES-WOOD COMPANY v. WESTERN ASSURANCE CO.

1st November, 1910.

MACDONALD, C.J.A.: It appears from the evidence of two insurance agents that insurance companies have what is called basis rates. The rates are published in a manual except the rate on houses of the class in question in this action. According to these agents, or at all events to one of them a rate is provided, though not published applicable to this class of houses. This rate is fixed by a board of underwriters acting on behalf of the insurance companies. From the evidence of these witnesses it also appears that whereas the basis rate applicable to the house in question if it had been a dwelling-house merely, is one per cent., the basis rate applicable because it was a brothel is two and a half per cent. It also appears that in either case the basis rate may be increased by reason of the situation of the house, *i.e.*, the proximity of other buildings.

In this case the policy was issued to the owner of a house which is described in the policy as a "sporting house" and it is described as situate detached from other buildings 100 feet.

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The local agent of the Insurance Company who obtained the risk says he knew that other houses would be erected within this distance, and having that in mind charged a rate to meet these anticipated changes in conditions. As matters stood at the time of the fire the rate applicable would have been just the rate charged, *viz.*, three per cent., or if it had been an ordinary dwelling-house, one and a half per cent.

The Insurance Company refuses to pay, not because it suspects incendiarism or dishonesty on the part of the assured, but, firstly, because it says that this contract of insurance was one which tended to promote immorality and is therefore void as being contrary to public policy; and secondly, that because subsequently to the date of the policy buildings were erected within the 100 feet above referred to, and the assured did not

notify the Company thereof in writing, the policy became void under statutory condition No. 3.

Without deciding whether the erection of these buildings by strangers would or not under ordinary circumstances be a change material to the risk within the meaning of condition No. 3, I think that as the change was contemplated by the Company's agent, and as he charged the higher rate on that account, the erection afterwards of these contemplated buildings was not in this case a change material to the risk.

In her written application the assured makes no such statement as that contained in the policy, that the house is "situate detached at least 100 feet from any other building." These are the Company's words, and if its agent deceived it and made the above statement without also communicating the fact that he had allowed, in the rate, for a change in this condition, it cannot be said that the assured contributed to the deception. Under the circumstances I do not think any notice under condition No. 3 was necessary.

Was this contract contrary to public policy? The subject of contracts of this nature has been exhaustively dealt with by Mr. Justice Gwynne in delivering the reasons of the majority of the Supreme Court of Canada in *Clark* v. *Hagar* (1894), 22 S.C.R. 510. While that judgment turned partly on a question of pleading, yet to my mind a disposition was shewn to uphold contracts which were not clearly in furtherance of illegal or immoral purposes. It was pointed out, p. 541:

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> "That it is necessary to distinguish between such things as, while being necessary or useful for the ordinary purposes of life, may also be applied to an immoral purpose, and those which are such as under the circumstances in evidence would appear not to be required except for an immoral purpose."

The insurance of property is one of the things useful for the ordinary purposes of life. Such protection is no more contributory to the immoral trade carried on by the owner of these premises than are the necessaries of life. A policy of insurance is not one of those things which would appear not to be required except for an immoral purpose. It was not an inducement to the assured to build and furnish a house for immoral purposes.

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It was to protect her property from those risks of destruction against which those in every walk of life protect themselves.

But it appears from the evidence of the insurance agents that a higher rate is charged upon risks of this nature, and it might be said that the contract is tantamount to a division of profits of the immoral business. There might be something to be said on this phase of the case if it appeared by the evidence that the assured was aware that she was being charged a higher rate on account of the character of her house, but nothing of the kind does appear. She may have thought she was making the ordinary contract of insurance, *i.e.*, paying the ordinary rate payable by respectable householders. True the Company knew what it was about and had a back-room scale of rates for this class of business, though it seems to have lacked the gambler's sense of honour, but whatever could be urged on this point had it been shewn that both parties were bargaining, the one for protection against risks peculiarly incidental to premises frequented by disorderly persons, the other for an increased premium for such protection, cannot be urged against this plaintiff because there is no evidence that the assured was knowingly a party to such transaction.

The further question was raised as to the status of the plaintiffs to sue owing to the fact that the policy itself was not assigned to the plaintiffs' assignor, Waters, and by him to the plaintiffs. The evidence is that Waters was a lienholder, and requested the assured to insure the house with loss (if any) payable to him. He arranged an appointment with Kastner, the defendants' agent at Hosmer, and was present when the policy was arranged for. Waters, in his evidence says:

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"I had the lady insure it to protect my interest.

"Did you see Mr. Kastner about it? Yes.

"What did you tell Mr. Kastner? I told him I wanted some insurance on the property to protect my interest."

And Kastner in his evidence says:

"At the time the insurance was put on the assured told you there was no incumbrance against the property—is that right? She told me that she owed a small amount to Waters."

I think the fair inference to be drawn from this evidence, and other evidence of the same nature which I do not think it neces-

sary to quote, is that the [illegible] given to understand that Waters [illegible]erty, and was not a mere unsecure[illegible]at Waters virtually arranged the i[illegible] to a person of reasonable intelligence[illegible]ge that Waters had an interest of some [illegible]nd that when the Company issued the p[illegible]on of Waters and Miss Howe, with the [illegible]s payable to Waters, he was in just as str[illegible]he mortgagee in *Agricultural Savings &* [illegible] *Alliance Insurance Company* (1901), 3 [illegible]ision of a very strong Court, and one wh[illegible] to follow until overruled by a higher authority. That case was dealt with by the Supreme Court of Canada, but that Court found it unnecessary to express an opinion on the point now in question, and while some observations were made in that Court indicating that the question was not finally settled, yet I do not understand those observations to have been intended to foreshadow dissent from the Ontario decisions.

Nor do I regard a lienholder with whom the owner of the property agrees to insure as being in a weaker position than a mortgagee with whom the mortgagor has covenanted to insure. I do not see that a covenant in this connection has greater virtue than an agreement or promise, and holding as I do that there is evidence of an agreement on the part of the assured to insure for the benefit of Waters, of which the Company had notice, I think the plaintiff is entitled to maintain the action.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: In my opinion the plaintiff may maintain this action not by virtue of a contractual relation between him and the parties to the contract of insurance, but by virtue of the trust created in his favour, by the request or assignment of the assured and by the assent of the Insurance Company to hold the moneys payable in respect of loss (if any) for his benefit. After the delivery of the contract of insurance, it would have been a breach of trust for the Insurance Company to have entered into a new policy with the insured and releasing the policy now under consideration.

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But I [illegible] expressed on the argument that this [illegible] rning which class of contract *Peare* [illegible] 1 Ex. 213, and *Cowan* v. *Melbourn* (1 [illegible] may be referred to for guidance.

The defendan [illegible] "while occupied as a sporting house" an [illegible] ead of paying in cash to the person to whom [illegible] e they, the Company, might "rebuild, repa [illegible] operty damaged." I fail to see the difference [illegible] carriage as in the *Brook's* case and the restora [illegible] of a house to be used for the balance of the ter [illegible] house was intended to be used. The Company knowing the character of the house exacted a higher rate than if it had been the intention of the owner to occupy it as a private dwelling-house. This fixes the Company with knowledge. The assured already had knowledge. Then the question arises what should we do with the case? Dismiss it out of this Court and allow the County Court judgment to stand? I think not. The authority given to this Court enables it to make the order that the trial judge should have made, "or such further or other order as the case may require" would justify us in dismissing the action out of this Court and the Court below.

IRVING, J.A.

I would dismiss this appeal and order that the plaint and all subsequent proceedings in the County Court be struck out.

MARTIN, J.A.

MARTIN, J.A.: A preliminary question was raised before us respecting the proper course for this Court to adopt if this contract should be deemed to be void as against public policy because the insurance was effected on a building "while occupied as a sporting house," by which expression the Company's agent says he meant "house of ill-fame." A similar contract was considered in *Morin* v. *Anglo-Canadian Fire Insurance Co.* (1909), 12 W.L.R. 387, though there the word "while" was absent before the expression "occupied as a sporting house" and the use of the premises for the unlawful purpose had ceased before the fire, whereas in the case at bar it had continued to that event. In my opinion the *Morin* case was rightly decided, and

I do not think that the differences I have noted alter the principle. The use of the word "while" is not more than a descriptive addition, it may be for classifying purposes, and so long as there is nothing more than the mere knowledge on the part of the insurers, as defined by Mr. Justice Gwynne in *Clark* v. *Hagar* (1894), 22 S.C.R. 510 at p. 540 I see no good reason why a higher rate should not, if necessary, be charged on a bawdy house solely because of an increased hazard in the risk. The owner of such property is entitled to protect herself from loss by means of a fire policy just as well as by other means, and who shall say that it would be against public policy for a shop keeper to enter into a contract with her to supply a dozen ordinary fire extinguishers, or for a carpenter to put a row of water barrels on the roof, or for a plumber to put in water pipes, or hose attachments, even though they knew what the house was being used for? Common sense dictates that such bald business transactions necessary for the protection of property and life must be upheld. It is indeed against public policy in the true sense to leave such houses, or any house, without the means of fighting fire, and the placing of a fire policy on a house tends to make the occupants more careful because of the necessity of observing the restrictions and conditions which aim at the lessening of danger to the premises and the greater danger of a fire spreading widely to other houses. It may be that it was open to the insurer as an innocent party, with knowledge but not sharing the unlawful intent, to declare the contract void before the loss, but not afterwards.

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Such being my view it is not strictly necessary to consider what course we should have adopted if the contrary view had prevailed. I note however that in *The Consumers Cordage Company* v. *Connolly* (1901), 31 S.C.R. 244, it was stated by Mr. Justice Girouard in delivering the judgment of the majority of the Court, at p. 302, that

> "There may possibly be cases where the sense of justice would be so shocked as to close its eyes and ears and turn the rascals out of court the moment the true character of the suit is revealed, for instance, a demand to recover back moneys paid to commit murder or other atrocious crimes, although I do not wish to express any opinion upon a supposition of that kind."

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Apparently the course to be adopted is one of degree depending upon the circumstances. In the case of *Arnold* v. *Schaich*, tried by me at Nelson, and in which I delivered on 30th June, 1904, a written judgment (unreported), I considered the subject at length and refused to entertain at all that branch of the action which set up a scandalous and vicious claim to inquire into and ascertain the partnership interests of the litigants in a house admittedly built by them for and carried on as a bawdy house. Speaking to such a state of circumstances I said in conclusion:

> "What the extent of that unlawful interest may be it is at once contrary to the practice and dignity of this Court to inquire into in such circumstances; nor will it give partners in illegal transactions any assistance in the settlement of their private difficulties, but will leave them to their own devices to extricate themselves from the consequences of their unlawful partnership as best they may: *Sykes v. Beadon* (1879), 11 Ch. D. 170. On this branch of the case the Court does not see fit to make any order."

I have only to add that the opinion I expressed in *Guilbault* v. *Brothier* (1904), 10 B.C. 449 at p. 460, that where several causes of action are combined in one action and one of the claims is of so scandalous a nature that the Court will not entertain it then the whole proceedings may become so tainted that the records of the Court should be wholly purged from the whole action, has received later confirmation from the decision of the Court of Appeal in *The Marchioness of Huntly* v. *Gaskell* (1905), 22 T.L.R. 20.

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The next objection taken is that the plaintiff Company has no right to maintain this action as it is simply the assignee of one F. G. Waters who was not a party to the contract of insurance but simply a person to whom the "loss if any (is) payable . . . as his interest may appear."

It is important to understand clearly what was said and done at the time the application for the policy was taken by the defendant Company's agent, Kastner. The insured, Gertrude F. Howe, having built a house of ill-fame intended of her own accord to protect herself from loss by insuring it and sent for Waters to whom she was largely indebted for materials supplied, and said she would have the house insured and in answer to his request and so as to protect him agreed to make the loss if

any payable to him, which was done and the policy was so issued and given to her, as the assured. She says that at the time there was no other incumbrance on the property than Waters's lien (presumably under the Mechanics' Lien Act) for material supplied to the builder, yet there is no statement from her or Waters that she told the agent that Waters had a lien. All she says is that she said she "owed Mr. Waters some money and of course it was made payable to himself, loss made payable to him as his interest may appear." Waters does not suggest that he spoke about his lien to the agent but simply that he "wanted some insurance on the property to protect my interest," which then was he says "about $1,300." The agent testifies that "Miss Howe said that she owed a certain amount to Mr. Waters and that she wanted to protect him in that way and wanted the policy made payable to him." And again, in answer to a question about incumbrances, he says, "She told me that she owed a small amount to Waters" and he knew nothing about "a mortgage or anything to cover that." A formal application for a policy was made out and signed by Gertrude Howe in which it was stated that there was no incumbrance on the property. In such circumstances it is obvious that there is a great distinction between this case and such cases as *Greet et al.* v. *Citizens' Ins. Co.* (1880), 5 A.R. 596; *Mitchell* v. *City of London Assurance Co.* (1888), 15 A.R. 262; *Agricultural Loan Co.* v. *Liverpool, Etc., Ins. Co.* (1901), 3 O.L.R. 127, (1903), 33 S.C.R. 94; and *Haslem* v. *Equity Fire Ins. Co.* (1904), 8 O.L.R. 246, which are all cases brought by the owners of the legal estate, as mortgagees, or otherwise, wherein the insurance was effected by the owners or by a mortgagor pursuant to a covenant in the mortgage, and in some of them there is a mortgage or subrogation clause, and in all of them the existence of the mortgagee's rights was set out in the application for insurance, and furthermore in *Greet's* case (pp. 125-7) there was in law an express covenant between the parties to assign the policy as Burton, J.A., pointed out in *Mitchell* v. *City of London Assurance Co., supra,* at p. 285. The observations of Chief Justice Armour at p. 137 of the *Agricultural Loan Co.* case, *supra,* and of Mr. Justice Osler in *Agricultural Loan Co.* v. *Alliance Ass. Co., ib.* 139 at p. 141,

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as to the covenant to insure, notice in the application and knowledge of the insurance company shew how far removed the authorities relied upon really are from the case at bar. But even were the facts at bar identical with the strongest Ontario cases in the plaintiffs' favour, I should, with all possible respect, feel a hesitation in deciding the legal questions in the same way as the Ontario Court of Appeal because of the doubt that has been thrown upon the views entertained by that Court by the Supreme Court of Canada in *McQueen* v. *Phœnix Mutual Fire Ins. Co.* (1880), 4 S.C.R. 660, in the judgment of Mr. Justice Gwynne, pp. 703-4, with whom Strong, J. concurred; and in *Caldwell* v. *Stadacona Fire and Life Ins. Co.* (1883), 11 S.C.R. 212, in the judgment of Mr. Justice Strong at p. 235, and of Mr. Justice Gwynne at p. 251, affirming his views in *McQueen's* case and pointing out that the mortgagee (Anderson) in *Caldwell's* case stood in a different position on the facts, from the mortgagee in a Nova Scotia case relied upon. And lastly in the *Agricultural Loan Co.* case, *supra,* Mr. Justice Davies, p. 109 (Sedgewick and Mills, JJ., concurring) refers to the prior decisions of the Court and, without deciding the point says, that "the question is one of some doubt and there are some observations made in cases already decided in this Court which seem to support the appellant Company's contention," *viz.*: that a mortgagee could not sue in his own name even where there was what is known as a mortgage or subrogation clause. The learned judge remarks upon the conflicting decisions in the United States, and the difficulty of understanding why mortgagees do not take proper steps to secure themselves by taking an assignment of the policy or otherwise.

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In the case at bar I find myself quite unable to discover the existence of anything in the nature of a trust or such a beneficial interest as would entitle the payee to sue, and the facts do not make so strong a case as that stated by Mr. Justice Osler in *Mitchell's* case, *supra,* page 276 wherein he said:

> "If the case presented was merely that of a bare contract evidenced by the policy between A., the insurance company, and B., the mortgagor, that A. should pay C., the mortgagee, out of the insurance money, the debt which B. owed the latter, it would probably come within the general rule that a contract cannot be enforced except by one who is a party to it,

and therefore the mortgagee, as a third person not a party to the contract, could not maintain any action thereon."

We have here not even a mortgagee, nor, to the knowledge of the Company, is the payee more than a mere creditor. Even if he were a mere lienholder for 30 days, and subject to the statutory limitation of action to enforce the same, he is on a lower plane than a mortgagee, who is the owner of the legal estate. With all due respect to the other views of his learned colleagues, I am of the opinion that the able dissenting judgment of Mr. Justice Burton in *Mitchell's* case is that which has the soundest foundation, *e.g.,* at p. 28, he disposes of the supposed distinction between policies under seal and simple contract policies, so far as strangers are concerned.

Then the action of the learned trial judge in adding the insured, Gertrude Howe, as a party plaintiff remains to be considered. The powers of the County Court in that respect under County Court Rule 223 are the same, in essentials, as those under Supreme Court Rule 124, and under the corresponding English rule the decision of the Court of Appeal in *Hughes* v. *Pump House Hotel Company* (No. 2) (1902), 2 K.B. 485, would in ordinary circumstances justify the action taken, assuming (which I do not) that it can be said that there was the necessary proof of "a *bona fide* mistake" as defined by *Duckett* v. *Gover* (1877), 6 Ch. D. 82, and required by *The Duke of Buccleuch* (1892), P. 201, in the absence of any facts on that point and seeing that the learned judge below took the same view of the law as we do, or he would not have made the order he did make. But the further question arises, as to whether it was proper to have made the order seeing that by statutory condition No. 12, which is a part of the contract, the right of the added plaintiff, *i.e.,* the insured, to bring an action has become barred, owing to the limitation of twelve months, since the beginning of this action by the sole original plaintiff Company. But it is quite clear that an amendment will not be allowed to revive a stale claim and as the Court of Appeal said in *Lancaster* v. *Moss* (1899), 15 T.L.R. 476: "such an exercise of jurisdiction ought not to be acceded to. It was an injury to the defendants to take away an existing right," and the judgment

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below allowing the amendment was reversed, and entered for the defendants. The same Court had already applied the same rule in *Hudson* v. *Fernyhough* (1890), 88 L.T.J. 253, affirming the judgment of the Queen's Bench Division (1889), 61 L.T. N.S. 722 wherein Lord Coleridge, C.J., says:

"As a general rule the Statute of Limitations is not a plea to be encouraged; but, at the same time, it seems to me that it would be an indefensible practice to take away from a party to a suit a legal right which has already accrued to him by virtue of that statute . . . I think, therefore, that this amendment ought not to have been made, and that the defendant's appeal from the learned judge's order should be allowed."

The application was to avoid the effect of the statute by adding the assignor of a debt as a party to an action brought by the assignee who had neglected to give notice to the defendant of the assignment. Between the issuing of the writ and the application the statute had barred the remedy, just as in the case at bar.

The case of *Davis* v. *Reilly* (1898), 1 Q.B. 1, is another strong illustration of the disinclination of Courts to amend when the plaintiff was not entitled to sue at the commencement of the action, the learned judges saying, at p. 3:

" We have no power to amend so as to give him a new cause of action which he had not got when the action was begun."

In support of the amendment granted herein *Thompson* v. *Equity Fire Insurance Co.* (1907), 17 O.L.R. 214, (1909), 41 S.C.R. 491, was cited. That is a case of a very different nature from the one at bar. There the plaintiff was the insured under the policy and at the trial the Union Bank, to which he had made an assignment was added as a party plaintiff. Chief Justice Moss pointed out, p. 238, that "at the utmost they (the actions) were defectively constituted." In *Mitchell's* case, *supra,* Mr. Justice Osler, p. 277, pointed out that it was too late to add the original insurer because no action could be brought by him "having regard to the limitation clause of the policy." Here the plaintiffs are only the assignees of one who is not the assured, but is in law a stranger to the contract of insurance. Such being the case I am of the opinion that the amendment should not have been made and consequently the action must fail, and the appeal should be allowed.

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GALLIHER, J.A., concurred in the reasons for judgment of MARTIN, J.A.

Appeal dismissed.

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Solicitors for appellant: *Martin, Craig, Bourne & Hay.*
Solicitors for respondent: *Herchmer & McDonald.*

RORISON v. KOLOSOFF.

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Foreshore—Rights of riparian owner—Access to river—Plan of sub-division—Registration—Order cancelling—Exemption of part—Effect of—Road allowance—Description of lands in certificate and plan attached—Conflict between.

An appeal in this case, reported *ante* p. 26, was allowed for insufficiency of proof of plaintiff's title.

APPEAL from the judgment of CLEMENT, J. reported *ante* p. 26. The action was for the recovery of land, an injunction compelling the defendant to move a scow house and certain other buildings, and to desist from further trespassing upon the property in dispute.

The plaintiff claimed to be the owner in fee simple of the property by virtue of certificates of indefeasible title dated the 16th of May, 1908. A portion of the property which the plaintiff alleged to be his lay south and west of the defendant's property, and comprised the eastern portion of section 21 and the western portion of section 22 down to a certain public road running along the bank of the river. The foreshore property which he claimed to own fronted on the defendant's property, lot 6. The public road separated the foreshore claimed from lot 6. One certificate of indefeasible title was alleged to cover the foreshore and whatever else might be in front of lot 6. The

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other certificate of indefeasible title was alleged to include the balance of the plaintiff's property in the said sections 21 and 22, or, in other words, whatever property he might have on the south side of the road. Both certificates were based on a deed obtained by the plaintiff from one David M. Webster bearing date the 8th of April, 1908.

Previous to 1889 there was a dyke where the public road was at the time of action, but in that year the municipality, wishing to put a road along the river directly in front of lot 6, and other adjoining properties, built a new dyke some 40 or 50 feet nearer the bed of the river, so that the public road ran where the old dyke was. Outside the present dyke was a scow house constructed by the defendant some years previously, and used by him and the public to land goods from a tug-boat and other small craft. The plaintiff asked for a mandatory injunction compelling the defendant to remove the scow house. In addition to asking for relief as to the foreshore the plaintiff also claimed the right to recover the strip of land 20 feet wide, alleged to be a private road, on the southwestern boundary of lot 6, on which rested a portion of buildings belonging to the defendant. The plaintiff alleged that he is the owner in fee simple of the strip under one of the certificates of indefeasible title aforesaid, and on that ground asked for its recovery, and a mandatory injunction compelling the defendant to remove his buildings.

Statement

The appeal was argued at Victoria on the 10th and 13th of June, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Price, for appellant: We say that the scow house is on the foreshore adjoining the defendant's property, lot 6, which foreshore does not pass under the certificate of indefeasible title, for the following reasons: (a.) The certificate is so indefinite as to make it impossible to say what land it includes; (b.) the registrar in granting the certificate made a mistake in boundaries, and under section 81, sub-section (*i.*) of the Land Registry Act, the certificate is no evidence of title to land which should not have been included; (c.) the plaintiff in applying for the certificate suppressed the fact that a portion of the land to be included was foreshore, for which he had no Crown grant,

Argument

and under section 152 of the Land Registry Act, the certificate is void for fraud. Further the strip of land on the southwest boundary of the defendant's lot sought to be recovered by the plaintiff is a private road by virtue of a sub-division plan filed by the predecessor in title of both parties, on the 2nd of March, 1903, the fee in one-half of which road is vested in the defendant at common law, and the fee in the other half is not vested in the plaintiff because the certificate on which he relies is indefinite as to what it includes. The plaintiff not being in possession, the onus is on him to shew other title beyond all doubt.

Craig, for respondent: The certificates of title are plain enough; if not, the registrar may be allowed to amend them. There is no doubt that the sketch annexed is intended to shew the land meant to be included. He referred to *Lyon* v. *Fishmongers' Company* (1876), 1 App. Cas. 662; *Blundell* v. *Catterall* (1821), 5 B. & Ald. 268; *The Mayor, &c., of Brighton* v. *Packham* (1908), 24 T.L.R. 603; *Brinckman* v. *Matley* (1904), 2 Ch. 313; *Blount* v. *Layard* (1891), 2 Ch. 681 (*n.*); *Harrison* v. *Duke of Rutland* (1893), 1 Q.B. 142; *Hickman* v. *Maisey* (1900), 1 Q.B. 752. The defendants had no right there, whilst we have a certificate of title and the finding of a judge. Argument

Cur. adv. vult.

1st November, 1910.

MACDONALD, C.J.A.: The subject-matter in dispute in this action is of very trifling value. Lot 6, the property of the defendant Alice Sophie Kolosoff, whose husband in his lifetime was a fisherman, comprised about half an acre situate practically on the North Arm of the Fraser River. There are two small strips of land in dispute, one is a road 20 feet wide which runs along the westerly boundary of lot 6 in a southerly direction from a municipal road on the river bank in front of lot 6; the other strip of land lies between this municipal road in front of lot 6 and the waters of the said North Arm of the Fraser, which is a navigable and tidal river. The plaintiff claims to be the owner of lands adjacent to lot 6. Instead of producing his title MACDONALD, C.J.A.

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deeds from the Crown down through his predecessors in title to himself, he chooses to rely upon two certificates of indefeasible title. Unless the Court is satisfied that these certificates of title prove the plaintiff's title to the land in question he must fail in his action because we have no other evidence from which we can satisfy ourselves upon this point. It is true that at the trial the plaintiff put in his deed from his immediate predecessor in title, Webster, to himself, but that is only one link in the chain. The land included in that deed lying within section 21 is described in one parcel by metes and bounds, and upon its registration the plaintiff applied for two separate certificates of indefeasible title, or at least he afterwards procured to be issued to him two such certificates, neither of which describes the land intended to be included in it by metes and bounds, or other description contained in the deed. To my mind it was an attempt to sub-divide on paper one parcel into two parcels. It does not appear to me that the Land Registry Act authorizes an owner with the assistance of the registrar of titles to sub-divide his land in this way and to secure a certificate which contains no description in the body of the certificate itself which would identify the land, but with a sketch annexed to it which purports to identify it. I do not say that a map or plan may not be used to supplement the description in the body of the certificate, but I think such map or plan should be such as taken together with the writing would constitute the "full description" which the registrar is required by section 80 and Form L to give. A certificate of indefeasible title is a most important document; subject to certain exceptions and conditions it is declared to be conclusive evidence of the title of the person to whom it is issued. The Legislature doubtless realized that in providing for the proof of ownership by documents of such high evidentiary character, great care should be taken in the description of the land, and therefore provided that the certificate should contain a "full description and map if necessary." The description contained in the certificates in question is "that piece of land known as part of section 21, block 5, north range, 6 west (sketch annexed) in the district of New Westminster." The "sketch annexed" purports to be in the

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case of exhibit 10 a plan of the water-front, and contains a note to this effect: "This plan is compiled from information gathered in the Land Registry Office at New Westminster, B. C., signed E. A. Cleveland, B.C.L.S." There is no pretence that any survey was made to define the limits of the property which the certificate and sketch purport to describe. It is not even stated in the certificate that the strip coloured pink in the sketch is the land meant to be described; there is nothing to shew whether the northerly boundary of the pink strip is along high water mark or low water mark. In fact in my opinion the whole thing is illusory and cleary identifies nothing. What is true of exhibit 10 is also true of exhibit 11.

There are other features about this case which call for some comment. The application by the plaintiff for registration as the owner and presumably also for his two certificates of title, was made in May, 1908. The sketches purporting to be compiled on information gathered in the Land Registry Office are dated the 6th of February, 1909. This action was commenced by the plaintiff in May, 1908, and the certificates of title were not actually issued until very shortly before the trial. The registrar says he does not know the date, and when cross-examined said that they may possibly have been issued a week or two before, that is to say, before his examination in the witness box. The certificates are dated as of May, 1908, which is clearly not the true date. The registrar excuses this by saying that the statute provides that the certificate shall take effect from the date of the application, which in this case would be May, 1908. That is true, but that does not justify him in giving a wrong date to his certificate. The form in the Act provides that the date of the application shall be stated as well as the date of the issue: see Form L.

If we were to accept certificates of this character as proof of title I think we should be laying up a store of trouble not only for the Courts but for landowners for all time to come. I think when a plaintiff comes into Court seeking to eject a person in possession from land which he claims to own, he should come with evidence which would enable the Court to decide with some reasonable degree of certainty or satisfaction what the

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boundaries of the lands are. This case may not be entirely free from doubt, but having regard to all the evidence I think it would be extremely unsafe to accept the plaintiff's proof of his title, and on that oust the defendant.

Had the title deeds been produced, particularly the grant from the Crown, I think, judging from the description contained in the deed which is in evidence that it would be found that section 21 extended to the river bank, which I should interpret as high water mark. There is evidence that the municipal road in front of defendant's lot was originally a dyke and that when the municipality desired it for a road they built another dyke lower down, nearer to the water. If therefore the present road was the river bank at the time of the grant from the Crown, the plaintiff has no right to the land lying between that road and the water. I have no doubt that the defendant when she purchased her lot understood that it was a water front lot and that she had free access to the river. In fact the evidence is that the lower dyke was kept in repair by defendant's husband.

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There is another significant fact stated in the evidence of the agent of the B. C. Land & Investment Agency, the former owners of both plaintiff and defendant's lands, that when they sub-divided they instructed their surveyors to include the whole property owned by them. The plan of the sub-division shews that the survey extended to this municipal road only, and did not cover the strip of so-called water-front now in dispute.

I think the appeal should be allowed and the action dismissed.

IRVING, J.A.: As to the side road, I would refer to *Sklitzsky* v. *Cranston* (1892), 22 Ont. 590. The defendant has no right to erect buildings on that part.

IRVING, J.A.

As to the rest of the case, I confess I am unable, owing to the way the evidence was given, to follow the evidence with any satisfaction to myself. I think the trial judge should have compelled the defendant to amend his pleadings so as to fairly state his defence.

The plaintiff had set up his title and then alleged that the

defendant claimed possession of the land. The defendant answered "I deny your title, but I do not claim possession, nor have I been in possession, nor do I set up any right or title to the land"; and yet it was the right of the public to the land that the defendant sought to establish, affirmatively, in his evidence.

The map or sketch annexed to the certificate of title is very unsatisfactory. Theoretically, at any rate, a certificate should state with precision what it certifies. This certificate of title was so loosely drawn that the registrar had to be called as a witness to testify orally to the facts which the certificate was supposed to cover.

The plaintiff to succeed ought to produce satisfactory evidence of his title. This satisfactory evidence I have not been able to discover and therefore I agree that the appeal should be allowed and action dismissed.

IRVING, J.A.

I observe that the action was commenced on the 29th of May, 1908, plaintiff's certificate of title is dated the 16th of May, 1908, but the plan attached was not made until February, 1909.

MARTIN, J.A.: This appeal has in my opinion no prospect of success unless the appellant's counsel can succeed in his contention that the plaintiff's certificates of title are invalid because of the alleged uncertainty in the maps or plans thereto annexed. These certificates are two in number, being for no good apparent reason issued separately, one for the water-front and one for the inner portion of the property south and east of the road. They are specially indorsed in red ink as "separate certificate (1.)" and "separate certificate (2.)" respectively.

MARTIN, J.A.

The first objection taken is that though the certificates are properly dated the 16th of May, 1908 (being the date when application therefor was made under section 55 of the Land Registry Act, 1906), yet the plan annexed to each of them is dated the 6th of February, 1909, and it is argued that on the face of the certificate there is a manifest error and that the plan must be rejected because the land was not described or identified until after the certificate was issued.

It is a strange fact that the date of application is not given

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in the certificate as Form L requires, and though this would not of itself invalidate the certificate, because a substantial compliance with the form would, in essentials, be sufficient as hereinafter noted, yet the date is of importance and it is hard to conceive how it came to be wholly omitted, being mentioned as it is at the top of the form.

Our attention was also drawn to the further strange fact that the following memorandum appears on each of the plans:

"This plan is compiled from information gathered in the Land Registry Office at New Westminster, B.C.,

"E. A. Cleveland, B.C.L.S.,
"Vancouver, B.C.
"Feby. 6-1909."

And it was also pointed out that the surveyor who signed this official plan is a witness called on behalf of the plaintiff, and who made in May-October, 1908, a survey of the premises. I am of the opinion that this memorandum should not have been put on the plans, because it could not detract from or add anything to the plan which, when necessary, is to be furnished by the registrar as authorized by said Form L, and nothing should be put on such a plan which could by any means raise any doubt or uncertainty. At the same time, however, I am equally clear that the memorandum can be rejected as surplusage and wholly disregarded because it is admitted that at the time the certificates were handed out by the registrar to the plaintiff these plans were attached to them, and therefore it must be assumed that they had been approved and sanctioned by the registrar as and for his own plans, whoever might have been the author or compiler of them, and whoever did so compile them must be regarded as the servant of the registrar in that behalf.

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The second objection to the certificate is that the land is not sufficiently indentified. In Form L, after referring "to that piece of land known as . . . . ," these words are added in brackets: "(full description and map if necessary.)"

Section 80 says that:

"If no valid objection be made the registrar shall issue a certificate of indefeasible title to the applicant in the form marked L in the said first schedule, a duplicate of which shall be retained by the registrar."

The certificates, save as aforesaid, are in proper form, duly

sealed and signed by the district registrar at New Westminster, so the question to decide is, has the direction as to the "full description, and map if necessary" been sufficiently complied with?

It must be borne in mind that even in the matter of following the form itself the Interpretation Act, section 10, sub-section 38, provides:

"Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them."

Quite apart from this section, the provision as to the description is, I think, clearly not imperative, but an instruction to the registrar which, of course, ought to be complied with. At the same time if the "full description" in words is wanting, but the omission can be supplied by an attached map, the absence of a complete description in the body of the certificate would clearly, I think, not justify a Court taking the serious step of declaring it invalid. I observe that in the forms of similar certificates under corresponding Acts in Manitoba and the former North West Territories no provision is made for identification by a plan: Coutlee's Manual of Titles (1890), pp. 104, 237.

The written description in the body of the certificates in question is admittedly insufficient, being, in No. 1, "that piece of land known as part of section 21, block 5, north range, 6 west (sketch annexed) in the district of New Westminster." The sketch attached is stated to be a "plan of water-front of part of section 21, block 5, N . . . . " etc., and shews a strip of land along the water-front coloured pink. In certificate No. 2 the land is described as "that piece of land known as part of sections 21 and 22, block 5, north range, 6 west (sketch attached) in the district of New Westminster." The sketch is entitled "Plan of part of sections 21 and 22, block 5, N . . . . " etc., and a certain portion of the plan is shewn within a pink coloured border. But there is nothing to connect or identify these pink portions with the lands mentioned in the certificates, and the intent of the certificates is thus left to mere speculation. Obviously these instruments must speak for themselves and cannot, in such a case as the present, at least, be sup-

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plemented or aided by other evidence. If the expression had been "as shewn in that portion coloured pink in the sketch annexed" or words to a similar effect, the uncertainty would have been removed, but in the absence of any connecting link of identification we should not be warranted in giving any effect to these certificates; they must, in my opinion, be deemed to be void for uncertainty. It seems unfortunate that a man should lose his case because of the carelessness of a public official, but these certificates of indefeasible title are public documents of grave import and corresponding care should be taken by the registrar in their preparation; no room should be left for any reasonable doubt or uncertainty as to the land to which title is given.

MARTIN, J.A.

Such being my opinion it is not necessary to consider the point of the sub-division of the land by the registrar on paper, instead of by the result of an actual survey. I prefer to leave that question open for further consideration as we did not have the benefit of any argument upon it.

It follows that the appeal must be allowed.

GALLIHER, J.A.

GALLIHER, J.A., concurred in allowing the appeal.

Appeal allowed.

Solicitors for appellant: *Brydone-Jack & Ross.*
Solicitors for respondent: *Martin, Craig, Bourne & Hay.*

DYNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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DYNES v. B. C. ELECTRIC RY. CO.

Negligence—Passenger on street car—Riding on platform—Doors open—No protective arrangements—Platform part of car—Privilege to smokers.

Plaintiff's husband was a passenger on one of defendant Company's cars, riding on the front platform, where it was customary for passengers to ride. The doors were open and there was no protecting bar across the opening, or other measures of safety taken. On the car approaching a switch, at a speed of three or four miles an hour, he was jolted off the car and, falling under the wheels, was killed. A jury gave a verdict of $3,500, but the trial judge entered judgment for the defendant Company on the ground that there was no evidence of negligence on their part.

Held, on appeal, that there was evidence of negligence and that the verdict should stand.

APPEAL from the judgment of IRVING, J., setting aside the verdict of a jury in an action by the plaintiff for damages for the death of her husband. Deceased, a passenger, was riding on the front platform of one of the defendant Company's cars between New Westminster and Sapperton, a suburb of New Westminster. The car was running at a speed of three or four miles an hour, approaching a switch, on reaching which the car jolted, throwing the deceased off the platform and under the wheels. The evidence shewed that the doors were open and that there were no bars or other protection across the doors on that end of the car to prevent a person from falling off. The jury gave a verdict for $3,500, but the trial judge set aside the verdict on the ground that there had been no negligence on the part of the defendant Company.

Statement

The appeal was argued at Vancouver on the 29th of April, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Davis, K.C., for appellant (plaintiff): We set up negligence on the part of the Company in allowing passengers to ride in

Argument

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that part of the car without any protective measures being taken for their safety. It is also in evidence that after the accident notices were put up prohibiting passengers from riding on the platform. We say it was dangerous for persons to ride on that platform with the doors open and no guards placed there. A passenger on a public conveyance should not be allowed to stand or ride in a dangerous position.

Argument

L. G. McPhillips, K.C., for respondent (defendant) Company: This was a place where men were permitted to smoke on the cars. Deceased was not a smoker, therefore there was not even that inducement for him to take the risk he did. Further, he knew of this switch. There is no evidence of how he fell off, nor of a jar or jolt to other men standing there. The Company did not invite him to ride there; he was a volunteer, and consequently was bound to take as much care as we were. A passenger in a public vehicle accepts the risk attaching to the mode of public conveyance he chooses. Here he chose that place. Smokers in return for the privilege of smoking on the cars, take the risk of a more dangerous place on the car. The platform was not intended to be a part of the car for riding in and there was no duty on us to make it so.

Davis, in reply: There was no evidence of the permission to ride on the front of the car being a special privilege to smokers; everyone was allowed to ride there. Every part of the car where passengers are invited to ride is a part of the car.

Judgment

Per curiam: We think the learned trial judge should have entered judgment in accordance with the verdict of the jury, and the appeal should therefore be allowed. It cannot be said that the jury had no evidence before them on which negligence could reasonably be found, and the same with regard to contributory negligence.

Appeal allowed.

Solicitors for appellant: *Davis, Marshall & Macneill.*
Solicitors for respondents: *McPhillips, Tiffin & Laursen.*

[Note: An appeal from this judgment to the Supreme Court of Canada was dismissed on the 21st of November, 1910.]

RICHARDS v. VERRINDER *ET AL.*

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Practice—Costs—Security for—Plaintiff resident temporarily out of jurisdiction—Affidavit—Necessity for clearness—Frankness with Court.

Where a party resident out of the jurisdiction opposes an application for security for costs, he should set out clearly and frankly in his affidavit, for the information of the Court, the facts on which he relies.

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APPEAL from the decision of HUNTER, C.J.B.C. reported (1909), 14 B.C. 438.

The affidavit on which plaintiff resisted the application for security for costs stated:

"2. That I was born in the City of Victoria, was brought up in said city, and there educated.

"3. That at present I am temporarily in the City of Seattle, State of Washington, and intend to return to the City of Victoria.

Statement

"4. That I have no intention of residing or making a home in the said City of Seattle, and a large part of my personal belongings are still in the said City of Victoria at my home, No. 1342 Fort Street.

"5. That it is my intention to again present myself for examination in British Columbia as a dental surgeon, and I am merely at the City of Seattle until I am able to do so."

The appeal was heard at Vancouver on the 18th of April, 1910, by MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

A. H. MacNeill, K.C., for appellants (defendants): The affidavit is not frank; it is equivocal, and does not shew what the plaintiff's present address is.

Argument

Abbott, for respondents: We shew that the plaintiff is resident in Seattle for a purpose only, and that his home is really in Victoria.

MACDONALD, C.J.A.: The appeal should be allowed. When a party makes an affidavit of this kind, it is made for the information of the Court and it should be a little fuller than it is here, instead of leaving us to draw inferences. A deponent

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should at least be frank with the Court. Here the plaintiff has not displaced the onus upon him which was created by the affidavit of the defendant.

IRVING, J.A.: I agree.

MARTIN, J.A.: I also concur.

Appeal allowed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Eberts & Taylor.*

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VANCOUVER LUMBER COMPANY v. THE CORPORATION OF THE CITY OF VANCOUVER.

Crown lands—Military reserve—Order in Council—Licence from Crown to use lands as public park—Lease of part of park for industrial purposes—Foreshore—Tidal lands—Mistake—Waiver—Priorities—Breach of trust—R.S.C. 1886, Cap. 55.

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On the 8th of June, 1887, a portion of land near the City of Vancouver, and known as Stanley Park, was handed over to the municipality for an indefinite period for use as a public park. The land, which had been an Imperial military reserve, had been transferred to the Dominion on the 7th of March, 1884. The City's petition, presented in 1886 to the Dominion, asked for "that portion of land [described as within the City limits] known as the Dominion Government military reserve near the First Narrows . . . bounded on the west by English Bay and on the east by Burrard Inlet." Adjacent to the peninsula known as Stanley Park, and within Vancouver harbour, is a small island, and there was some evidence that at certain stages of the tide during the year, there was bare land between the island and the peninsula. Shortly prior to the 8th of June above mentioned, the City's boundaries, by an amendment to the charter, were stated so as to extend down to low water mark. It was contended for the City that this made the island a portion of the park. But in all charts and maps the land was shewn as an island. The City assumed to use

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the island as a portion of the park, and built out to it a foot-bridge, which afterwards was allowed to fall into disuse and decay. Plaintiffs' predecessor, in 1898, applied for a lease of the island, and although the City was notified of such application, no reply was given until when, in February, 1899, an order was passed authorizing the Minister of Militia to grant a lease for 25 years, the City protested and asserted a right to possession of the island under the terms of the order of the 8th of June, 1887. A question then arose between the Province and the Dominion as to the ownership of the island [see (1901), 8 B.C. 242; (1904), 11 B.C. 258; (1906), A.C. 552], resulting in favour of the Dominion. In consequence, the City opened negotiations with the Dominion for a lease of Stanley Park, and sought to have Deadman's Island specifically included in such lease. Eventually a lease was executed of "all that portion of the City of Vancouver (and the foreshore adjacent thereto, bounded by the western limit of district lot 185, group 1, New Westminster District, as shewn on the official plan thereof filed in the Land Registry office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay, and being all that *peninsula* lying to the west and north of said district lot 185, known as 'Stanley Park'." The lease was also "subject, until their determination, to any existing leases of portions of said land." Two small portions of Stanley Park were leased to athletic clubs.

Held that, in all the circumstances, the City's lease granted in 1908 embraced only the portion of the reserve set out in the peninsula.

Held, also, that the plaintiffs' lease was a valid one.

APPEAL from a judgment of MORRISON, J. in an action tried by him at Vancouver for possession of Deadman's Island, and for damages for trespass. The facts are set out shortly in the head note and at length in the reasons for judgment. Statement

Davis, K.C., and *Marshall*, for plaintiff Company.

W. A. Macdonald, K.C., and *Campbell*, for defendant Corporation.

29th January, 1910.

MORRISON, J.: Stanley Park, which includes Deadman's Island (see *Attorney-General of British Columbia* v. *Attorney-General of Canada* (1906), A.C. 552) and which, then being an Imperial military reserve, had been some years previously transferred by the Home Government to Canada, was, in turn, by order in council of the 8th of June, 1887, handed over by the Dominion of Canada whilst still a military reserve to the newly MORRISON, J.

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incorporated City of Vancouver for use as a public park. Possession was immediately taken by the City pursuant to this authority and large expenditures of municipal moneys were and are being made periodically in improvements and maintenance. Possession has been held since, continuously, by the City.

However, on the 3rd of February, 1899, the plaintiff made application to the Minister of Militia and Defence for a lease of Deadman's Island to be used for industrial purposes and on the 14th of February following, a lease of Deadman's Island, which is described therein as being near the City of Vancouver, was executed by the Minister of Militia and the plaintiff acting for the Vancouver Lumber Company. This lease was for a term of 25 years with the right by the lessor to terminate the alleged demise at any time upon demand if required for military purposes. At that particular date there was no order in council in existence authorizing such a lease, although on the 10th of February, 1899, as appears from a report of the committee of the Honourable the Privy Council, a memorandum from the Minister of Militia recommending that a lease be given the plaintiff of Deadman's Island for a term of 25 years at a rental of $500 per annum was submitted to His Excellency the Governor-General for his approval. His Excellency did not give his approval until the 16th. No notice or intimation of the minister's intention in this respect was given by him or on his behalf to the defendants. On the contrary, negotiations with the City were then actually pending with a view to granting to them a lease pursuant to the order in council of 1887 and later correspondence. On the 4th of April, 1900, at the request of the plaintiff the lease of the 14th of February, 1899, was, as the instrument, recites "modified," by removing therefrom the conditions as to determining the demise and also any restrictions as to the lawful user of the said premises as contained therein. This "modified" document further provided that the said lease so modified should, after the expiration of the first 25 years, be renewed for a further term of 25 years at a rental for each renewal term to be then determined by arbitration in case of any difference as to the amount of rental.

MORRISON, J.

The plaintiff, however, it would seem, magnanimously consented to the reservations to the lessor of any right the Crown might then or hereafter possess of expropriating the demised premises for the public use. Whatever view may be taken of the validity of the lease of the 14th of February, 1899, there was no authority whatever upon which the minister could alter its terms so fundamentally, so that it cannot be taken as any sort of ratification of the instrument of February 14th, 1899. Armed with this equivocal title the plaintiff on the 7th of June, 1909, demanded possession of the premises in question from the City who had by force resisted his intrusion. The City had in the meantime succeeded in getting a lease from the Minister of Militia of Stanley Park in this way: Whilst continuing in possession undisturbed and recognized by the Government and negotiating for what they claimed as better evidence of their title they were advised at one time, in effect, by the Minister of Militia, that no instrument other than the order in council could be given. Later on it appears that upon further advice received from the Department of Justice the minister in 1898 expressed his consent to granting a lease, and although the City kept demanding one *pursuant* to the order in council, 1887, it was not till the 31st of August, 1906, that an order in council was passed purporting to cancel this order in council of 1887, and, in the same order, authorizing that a lease be given the City of Stanley Park, the lease to be made to six commissioners. As this arrangement did not seem to meet the desired requirements a further order in council was passed on the 13th of August, 1908, amending that of 1906 and authorizing that the park be leased to the City instead of six commissioners for 99 years, the lease to be made generally on the lines of an agreement upon which the Imperial Government had leased the military property known as Point Pleasant Park at Halifax, Nova Scotia. A copy of this agreement was annexed to the order in council, and it contains among other things copied by the City, word for word, into its own form of lease, this clause: "Subject, until their determination, to any existing leases of portions of said land."

It appears that on November 27th, 1906, Mr. MacPherson,

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who then represented the City of Vancouver in Parliament, wrote the Minister of Militia recommending that from the proposed lease to the City, there be exempted a portion of the premises occupied by them for the Royal Vancouver Yacht Club and also for the Vancouver Rowing Club—two distinct clubs. That Mr. MacPherson's recommendation for a lease to those two clubs was kept in mind by the Department seems clear from the correspondence. On the 30th of July, 1908, an order in council was passed approving of a lease to the Royal Vancouver Yacht Club. Whether a lease was in fact given pursuant to this order in council does not appear. This briefly was the position of affairs when the plaintiff having failed to get possession of the property in question, brought this action for possession and trespass and damages against the City, resting his case upon the instruments of the 14th of February, 1899, and the 4th of April, 1900. The validity of the City's lease is not questioned by the plaintiff. He contends, however, that it is specifically subjected to his lease as above recited. I cannot go so far as to agree that the Ludgate lease is specifically or at all referred to in the City's lease. The clause in the City's lease relied upon by the plaintiff is in general terms and there is some evidence as to how that clause was inserted and to shew that the lessor at the time of executing the City lease had not the Ludgate lease in mind. It appears that the City had the control of the drafting of the instrument and were then and at all times previous thereto taking a position at entire variance with the contention that they were in any way a party to recognizing the plaintiff as having any interest in the premises in question.

MORRISON, J.

Even assuming there was an order in council upon which the lease of February, 1899, was based, that order in council is *ultra vires* inasmuch as the licence granted the defendants by the order in council of 1887 became, in my opinion, irrevocable before 1899: *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699; *James Jones & Sons, Limited* v. *Earl of Tankerville* (1909), 2 Ch. 440. But it is contended by the plaintiff that by the order in council of 1906, the City waived any right they previously might have had. I do not agree. The action of the City in having the order in council of 1887

cancelled (and in the same order receiving authorization for a lease) was simply the act of passing one hand over the other in their grip on the chain of possession in order to more firmly retain it. I cannot quite understand the reason for such a superfluous act, as this notional cancellation of the original order in council unless, indeed, it be accounted for, by the inexactitudes of the departmental terminology, on the one hand and the over-confidence of the City in the good faith of the Department on the other. If the plaintiff thought he was securing a lease of a portion of Stanley Park then the minister and he was never *ad idem* for the minister committed a fundamental mistake of fact as to the identity of the property demised, and, as against the plaintiff, the language, if necessary, must be subordinated to the intent. There was at no time any relinquishment, waiver, abandonment or surrender of their position first obtained in 1887 in full reliance upon the faith of the Government of Canada. To hold otherwise on the evidence would be to assert a serious breach of public faith by that ruling part of the ministry to which alone is entrusted the practical functions of Government. Why the Department came to deal at all with the plaintiff in respect to the *locus* under all the circumstances disclosed at the trial is quite inexplicable to me except on the assumption that the minister, upon whose recommendation the lease to the plaintiff was made, was not aware of the exact location of this property, and this assumption is borne out by the statements of the Minister of Militia in his evidence on commission. I admit this evidence not to vary or alter the Ludgate lease, but to shew that it is not an agreement intended to relate to any portion of Stanley Park: *Pym* v. *Campbell* (1856), 6 El. & Bl. 370, 25 L.J., Q.B. 227; *Doe d. George Gord* v. *Needs* (1836), 2 M. & W. 129, 6 L.J., Ex. 59; Phipson on Evidence, 3rd Ed., 521, 536, 552, 581.

Another ground upon which I think the plaintiff fails is this: From the dispatches between the Imperial Government and the Dominion, the land in question was transferred to the Dominion of Canada by the Imperial Government impressed with a trust, the recognition of which by the Dominion is manifested in the departmental correspondence and their dealings with the City.

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The alienation or leasing of Deadman's Island as was sought to be effected by the instrument of February 14th, 1899, and the order in council of February 16th, 1899, would be a breach of that trust as well as of their grant of possession to the defendant in 1887. The plaintiff was not a stranger to the circumstances under which the City held possession. He knew, or must be taken to have known, of the subsisting equities to which the property was subject and which the Government in all conscience was bound to respect. But, parenthetically, even if it be conceded that Ludgate had obtained thus a legal status, he cannot invoke, as was contended he could, the doctrine *qui prior est tempore potior est jure: Bailey* v. *Barnes* (1894), 1 Ch. (C.A.) 25 at p. 37; *Perham* v. *Kempster* (1907), 1 Ch. 373, 76 L.J., Ch. 223; *Jared* v. *Clements* (1903), 1 Ch. 428, 72 L.J., Ch. (C.A.) 291.

In *Alcock* v. *Cooke* (1829), 5 Bing. 340 at p. 348 Best, C.J. held it to be a principle of common law:

> "That if the King makes a grant which cannot take effect in the manner in which it ought to take effect according to its terms, we must conclude that the King has been deceived in that grant and, therefore, that grant is void. . . . . Having already leased the right of possession, he proposes, by this grant, to convey the same right of possession to another person. Now, it would be inconsistent with the King's honour (and, as it is stated in a case to which I shall presently refer, the common law has no object that is dearer to it than to preserve that honour), it would be inconsistent with the King's honour that he should grant the right of possession in the same thing to two. And, therefore, the latter grant is altogether void. If the King is deceived in his grant it is perfectly clear the grant is void. It cannot be supposed, unless he is deceived in his grant, that he would grant to A. that which he has already granted to B.; that would be giving occasion to litigation, which it is always the object of the King to prevent."

MORRISON, J.

As to the nature of the orders in council and as to how they are now substituted, in effect, for the old Crown prerogatives, I refer to the works of Broom and of Dicey on Constitutional law: *Institute of Patent Agents* v. *Lockwood* (1894), A.C. 347 at p. 359 *et seq.;* and section 37 of the Interpretation Act (Canada) 1906. In the case at bar I do not think the minister in entering into the lease in question which contains no reference to the defendants' position in the premises, took an accurate and deliberate view of all the circumstances and in dealing with the

plaintiff he must be held to have been misled and mistaken: *Alcock* v. *Cooke, supra; Gledstanes* v. *The Earl of Sandwich* (1842), 4 M. & G. 995; and *Esquimalt and Nanaimo Railway Co.* v. *Fiddick* (1909), 14 B.C. 412, are authorities which shew that Crown grants have been held void and in some cases upheld in actions in which the Crown was not joined.

Mr. *Macdonald* invoked the provisions of an Act respecting Ordinance and Admiralty lands, being chapter 55 of the Revised Statutes of Canada, 1886. But the lands to which alone that Act applies are designated in the schedule to the Act which does not include apparently the lands in question. Of course it does not appear that the Dominion in their correspondence with the Imperial Government asked to have the lands in question transferred as were the lands mentioned in the Act, and in the later correspondence between the Department of Militia and Defence and certain of the military officers to whom the minister referred the question of this reserve, references were made from which it may be inferred that this property was treated as having been denominated as class one or class two provided for in the Act. If the Dominion, therefore, dealt with military property (reserves) in British Columbia in the same way as they dealt with the ordinance lands under the Act, which declares they shall be retained by the Government of Canada for the defence of Canada, then, if this property in question is still in class one, although there is no power to sell it, there is power to lease it or to use it otherwise as the Governor in Council may think best for the advantage of Canada. Having regard to the scope of the Act and the context, what is meant by leasing or otherwise using lands of this nature to the best advantage of Canada? Counsel have not dealt with this question and the only reference I can find to this clause of the Act is that by Burbidge, J. in *The Quebec Skating Club* v. *The Queen* (1893), 3 Ex. C.R. 387. It may be inferred that the learned judge considered that a lease or grant to a skating club would be such a use. I certainly do not think that handing over this portion of Stanley Park, known locally as Deadman's Island, as claimed by the plaintiff, is putting the property to a use that is to the advantage of Canada as contemplated by the Act.

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If, on the other hand, the property is in class two then before sale (which cannot however in any way prejudice the right acquired by any person) or other disposal thereof where the property is in actual occupation of any person with the assent of the Crown, and improvements have been made thereon, it must be exposed to competition, which was not done in this instance.

The action is dismissed with costs.

The appeal was argued at Vancouver on the 27th, 28th and 29th of April, 1910, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.:

Davis, K.C., and *Marshall,* for appellants (plaintiffs): The question is whether the City obtained a good title by the order in council, or Theodore Ludgate by his lease of 1899. We rely on our lease and the defendants rely on the order in council of 1887, and that it includes Deadman's Island; but then the island not only is not mentioned in the lease of 1908 to the City, but the lease of Stanley Park is made subject to all prior leases. If so, they thereby effected a surrender at law. They cannot now set up mistake except for rectification of the document and all the parties must be before the Court. The document being subject to existing leases, we shew that the Ludgate lease was in existence when that to the City was given. The City had the park subject to the right of the Dominion to resume possession. By the Ludgate lease the Dominion have resumed it; there was no specific requirement necessary; they could take it, or any portion of it. Assuming that the City has a lease of the military reserve, we say that Deadman's Island, although a part of the military reserve, was never intended to be included in the order in council of 1887. The City did not then ask in their petition for Deadman's Island, *ergo* it follows that they were not given it. They asked for that portion of the military reserve which was within the City limits; Deadman's Island was not within the City limits at that time. If an owner of land leads another person, by his conduct, to accept a certain interest in that land, the owner will not, after a while, be permitted to repudiate the suggestions made or encourage-

Argument

ment held out. Here the government gave to the City an indefinite permission to use that property as a park on certain conditions, to keep it in proper order, not to keep it in proper order *as a park;* there was no mutual benefit of any kind; therefore all that the City could claim would be the use of the property for an indefinite time as a park, but not the ownership in any way. There was no interest in the property given or conveyed. There is the broad distinction here that all that could be said that the Government encouraged in the mind so to speak of the City was that they should have the use of that land in a vague way as a park. The taking out of Deadman's Island does not interfere with the use of the property for park purposes. We say in any event that by its acceptance of the lease of 1908, the City surrendered any rights it may have had under the order in council of 1887. The lease (even excluding Deadman's Island) was a business-like exchange for the former uncertain tenure. Therefore, to repeat, assuming that all our contentions are wrong, and that the order in council of 1887 was a lease, we submit that the old lease is surrendered in exchange for the new. To summarize, we say, first: The government in granting the order in council of 1887 retained the right to resume possession of the reserve at any time, and that it did so in granting the lease to Ludgate.

Argument

Second: That Deadman's Island was not included and was never intended to be included in the order in council granting the reserve to the City in June, 1907, the limits of the City when it petitioned for it being to high water mark only, which excluded Deadman's Island.

Third: That the order in council only gave a revocable right, and was cancelled on the 31st of August, 1908.

W. A. Macdonald, K.C., and *Campbell,* for respondent (defendant) Corporation: The Ludgate lease is dated the 14th of February, 1899, and the order in council is dated the 16th of February. Therefore there is no order in council supporting the lease. It is an anomaly and consequently a nullity. Further the lease is for 25 years, renewable, and the authority given was for a 25 year lease simply. At the time of the

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Ludgate lease, the City had been in possession for twelve years. Then they merely asked for better evidence of their title by means of a lease so as to be able to deal with squatters and others, so that the City's has been one continuous possession. The lease to us merely incorporated that which we already possessed, and does not pretend to cancel or destroy the previous state of holding. Resumption, if any, should be in fact and not in law. Plaintiffs should shew this, but there is nothing in the order in council shewing that the Government had taken or intended to take over the property.

Davis, in reply.

Cur. adv. vult.

1st November, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: It is now settled by the decision of the Judicial Committee of the Privy Council that what is now known as Stanley Park and Deadman's Island was an Imperial military reserve, and was by despatch dated 7th March, 1884, transferred by the Imperial to the Dominion authorities. On the 18th of June, 1887, a Dominion order in council was passed giving to the City of Vancouver certain rights or privileges in this reserve, and one of the questions raised before us is whether or not this order in council embraces the whole reserve or only that portion of it situate upon the mainland and exclusive of the island in question in this action. The petition of the City to the Governor in council, presented in 1886, recited that:

> "Whereas there is within our city limits a portion of land known as the Dominion Government military reserve near the First Narrows and is bounded on the west by English Bay and on the east by Burrard Inlet, your petitioners therefore pray that the said reserve should be handed over to the said Corporation to be used by them subject to such restrictions as to your Excellency may seem right to be and to be held by them as a public park."

It will be noted that the land is described to be within the City limits. The City's limits were defined by 49 Vict., Cap. 2, section 2, and this section was amended in the following year shortly prior to the 8th of June, 1887, so as to extend the boundaries of the City down to low water mark. This definition of the City's boundaries would not in my opinion include the

island in question unless we give effect to the City's contention that the so-called island is in reality not an island at all, but part of the mainland. This contention is founded upon some rather unsatisfactory evidence that at low tide certain persons have been known to walk across the tide flats between the mainland and the island. It is to be noted, however, that the parcel of land in question is shewn on all the maps and charts referred to in the evidence as an island; that it appears on Captain Richards's admiralty chart of 1859-60 as an island, and is referred to prior to the 8th of June, 1887, in the correspondence between the Federal and Provincial Governments as Deadman's Island. Whether, therefore, the land is technically an island or not, it was called an island and apparently treated as such at that time. Under these circumstances it is at least open to doubt that the City was ever in a position to assert that the island fell within the description of the property given over to its use by the said order in council. But in view of what afterwards took place, and to which I shall refer presently, I do not think that a decision on this point is necessary to the ascertainment of the present rights of the City. It does appear, however, that the City assumed to use the island as part of its park, and shortly after the date of the order in council built a foot-bridge from the mainland to the island and made a trail across the island itself. At a later period this foot-bridge was allowed to fall into decay, and no further care was taken of the trail. I refer to these facts not as shewing that the City intended to abandon what it conceived to be its rights in the island, but simply that it did not openly and publicly assert those rights in such a way as to give notice to persons who might desire to acquire the island that it claimed it. Matters remained in this position until 1898, when the plaintiffs applied to the Dominion Government for a lease of the island. It appears from a letter written by the Department of Militia and Defence, dated the 3rd of February, 1899, that the City was notified that the plaintiffs were applying for such lease, and was asked whether the City had any objection thereto. It is difficult to say whether the department had in mind that the City might claim the island under the said order in council,

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or simply wished to notify the City that it proposed to lease for a site for a sawmill an island close to the City. Such a disposition of the island might be objectionable to the City quite apart from any possessory interest which it might claim. No answer to that letter was made for over a month and in the meantime a Dominion order in council, dated the 16th of February, 1899, was passed authorizing the Minister of Militia and Defence to lease the island to the plaintiffs for a term of 25 years at a rental of $500. In the following month the City sent a memorial to the Government protesting against the lease and asserting its right to possession of the island under the order in council of the 8th of June, 1887.

Then arose a dispute between the Province and the Dominion with respect to the ownership of this island. It was finally decided by the Privy Council in favour of the Dominion. Thereupon the City began negotiations with the Government of Canada for a lease of Stanley Park, and during these negotiations the city clerk, who was also city solicitor, at the instance of the council, wrote to the Government asking that such lease should specifically include Deadman's Island. Whatever vagueness there may have theretofore been with regard to what was intended to be included in the order in council of the 8th of June, 1887, the City now sought to have eliminated by the new arrangement which it was proposed to enter into. These negotiations resulted in the passing of the order in council dated the 31st of August, 1906, which authorized a lease of Stanley Park to commissioners, and at the same time purported to cancel the order of the 8th of June, 1887. This was not satisfactory to the City, and as far as the evidence goes the dissatisfaction seems to have been on account of the provision vesting the park in commissioners, and after two years' delay a second order in council was passed on the 13th of August, 1908, varying the first by authorizing a lease direct to the City. In pursuance of this authority a lease was on the 1st of November, 1908, executed and delivered to the City. The terms of the lease appear to have been settled between the parties, the City being represented by a gentleman who had authority to act for the City, and who had previously

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been city solicitor, and who had written the letter of the 11th of August, 1906. In view of these facts and circumstances it seems to me that we must look for the rights of the City after that date within the four corners of that lease. The property in it is described as follows:

"And whereas the said property consists of all that portion of the City of Vancouver (and the foreshore adjacent thereto bounded by the western limit of district lot 185, group 1, New Westminster District, as shewn on the official plan thereof filed in the Land Registry Office at Vancouver) and the low water mark of the waters of Burrard Inlet, the First Narrows and English Bay and being all that peninsula lying to the west and north of said district lot 185 known as 'Stanley Park.'"

A glance at the maps and charts in evidence will shew that that portion of the reserve on the mainland is aptly described as a peninsula. Having regard to all the premises I am driven to the conclusion that the description in the lease "all that peninsula lying to the west and north of district lot 187 known as Stanley Park" does not include the island in question, and that the City having accepted the lease, following as it did the cancellation of the order in council of the 8th of June, must be held to have acquiesced in that cancellation and cannot now rely upon that order.

The City's lease also contained a clause as follows:

"Subject, until their determination, to any existing leases of portions of said land."

It appears that there were a couple of leases to athletic associations of small portions of Stanley Park. Both parties were aware of the existence of the plaintiffs' lease, which had never been cancelled. Now it is contended on the part of the City that the exceptions in favour of existing leases had reference only to the leases firstly above mentioned, and not to the plaintiffs' lease. That contention seems to support the conclusion to which I have come that the island was not included in the City's lease because it is difficult to understand that the parties should ignore the plaintiffs' lease which is the most important one of all the existing leases. The inference that I should draw is that it was only intended to lease Stanley Park, using that term as applicable to the mainland, and that the City's request that Deadman's Island should be specifically included not

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having been acceded to, both parties quite well knew and intended that the description above recited, describing Stanley Park as a peninsula, was restricted to the mainland and did not extend to the island. But if the other view be taken, and it be held or assumed that the City's lease did embrace the island, then in view of the facts already appearing above, I am of opinion that the plaintiffs' lease falls within the description "existing leases" excepted from the lease to the City.

The next question is that of the validity of the plaintiffs' lease. The objection was taken that the transfer of this reserve to Canada was not absolute but was for military or public purposes only. Canada applied for it "to be held and administered in the same manner as the lands of corresponding character in the older Provinces formerly transferred by Her Majesty's Government to Canada."

The despatch already referred to specified no terms. If therefore there are any limitations upon the use by Canada of this reserve, they must be sought in the conditions, if any, attached to such previously transferred lands. There is nothing in the evidence to shew what those conditions, if any, were, but we are referred to the Ordinance and Admiralty Lands Act as indicating how Canada assumes to deal with them. It was indeed argued by counsel for the City that this Act is applicable to the reserve in question, but it is plain that this is not so. The Act, however, does shew that Canada assumes power to alienate for private as well as public purposes the lands transferred by the War Department mentioned in the schedule to said Act. As the disposition of the reserve in question is not governed by the said Act, therefore the classifications mentioned in it are not applicable here. This reserve in my opinion could be dealt with or disposed of as provided in the Public Lands Grants Act, R.S.C. 1906, Cap. 57, section 2 (*b*) and section 4, which were in force in former statutes at the date of the plaintiffs' lease.

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It was also urged against the validity of the plaintiffs' lease that it was given at a time when the Government had no power to lease owing to the existence of the City's rights under the order of the 8th of June, and it was urged that the Crown

must have been deceived when it authorized a lease without referring to the prior rights of the City; and the case of *Alcock* v. *Cooke* (1829), 5 Bing. 340, was relied on in support of this. Assuming that the island was embraced in the order of the 8th of June, still I do not see that the doctrine laid down in *Alcock* v. *Cooke* is applicable to the facts of this case. I say this with all deference to the learned trial judge who came to the opposite conclusion. In *Alcock* v. *Cooke* the Court was careful to point out that it came to the conclusion that the Crown had been deceived by reason of one essential fact, namely, that the prior title, in that case a lease, had been enrolled, and was therefore notice to all the world; that the plaintiff who obtained a grant subsequent to such lease, knew, or must be assumed to have known, of the prior lease, and must have concealed the fact from the King, and therefore deceived him into making the subsequent grant. I do not think the evidence in this case would justify me in saying that the plaintiffs knew of the order in council of the 8th of June, or that they even knew that the City was making claims to the island. On the facts of this case it seems to me that we ought not to presume, and cannot properly presume that the plaintiffs deceived the Crown.

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It is also urged that the plaintiffs' lease is not in accord with the order in council of the 16th of February, 1899, under which it was authorized. This is true, but the provisions of the lease which go beyond the terms of the order are severable, in which case the lease is good for the balance. In *Hervey* v. *Hervey* (1739), 1 Atk. 561, Lord Hardwicke at p. 569 said:

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> "Suppose a power to lease for 21 years, and the person leases for 40, this is void only for the surplus, and good within the limits of the power."

See also *Parry* v. *Bowen* (1661), Nelson, 87; *Alexander* v. *Alexander* (1755), 2 Ves. Sen. 640; and *Re Lord Sondes' Will* (1854), 2 Sm. & G. 416.

Objection was taken by counsel for the plaintiffs to the evidence of several of the defendants' witnesses, and also to the admission of certain letters and other documents. It seems to me that a considerable portion of the evidence was inadmissible. An example is contained in the following extract from the evidence of one of those witnesses:

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"In connection with this lease of Deadman's Island did you as an alderman intend that any rights you had should be lost under this new lease? [Mr. *Davis* objects.] No.

"Was there any intention on your part or as far as you know on the part of the council to let the Ludgate lease or any lease in ahead of the City's lease? No."

I do not propose, however, to go into an analysis of the evidence objected to, but simply say that I have paid no attention to evidence of the character above recited. Some of the correspondence objected to is also clearly inadmissible, while some portions of it have some bearing as shewing notice or knowledge on the part of one or other of the parties of circumstances which may be looked at in interpreting the different leases and orders in council under review.

I think the appeal should be allowed.

IRVING, J.A.: I agree that the appeal should be allowed and judgment entered for plaintiffs. The dispute is as to the title to Deadman's Island, and the sole point is: Did the Dominion Government lease it to the plaintiffs or the defendants? That question seems very simple if we read the documents under which the parties make their respective claims. On the 14th of February, 1899, a lease for 25 years was issued to the plaintiffs. It is said that this lease is bad because the order in council under which it was said to have been executed is dated two days later. That seems to me to be immaterial for more than one reason, but in any event the lease was recognized as being a good and valid lease by a subsequent document executed on the 4th of April, 1900, under authority of the order in council of the 16th of February, 1899.

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The plaintiffs, then, having shewn their title, in what way does the City support its claim?

First of all the City puts forward the order in council dated the 8th of June, 1887. Then, secondly, a lease to the City dated the 1st of November, 1908. The order in council of the 8th of June, 1887, is to a certain extent indefinite in its description of the property proposed to be dealt with. The application for the land uses the expression "a portion of land known as the Dominion Government military reserve within our

City limits," but assuming that it was intended to include the island, and that the order in council of the 5th of June conferred any title, that order in council was wholly cancelled by an order dated the 31st of August, 1906. It is urged that "nothing was done" under this order in council of the 31st of August, 1906. I do not understand exactly what is meant by that expression. If you repeal an Act by another Act, there is an end of the first Act and the rights conferred by it. If you cancel an order in council by another order in council, there is an end of the first order in council, and the privileges granted by it. The first order in council granted to the City the use of the park "subject to the right of the Dominion Government to resume the property when required at any time." The order in council of the 31st of August, 1907, was a resumption by the Dominion Government and when that order was passed, the privilege granted by the order of June, 1887, was at an end, so it may truly be said that on the 1st of September, 1907, the City had no title whatever to the property that had been handed over to it for use as a park.

If the island fell within the reserve there described—and I do not think it did—the right of the City thereto was gone, cancelled.

Then, on the 1st of November, 1908, the City got a lease—but of what? "All that peninsula lying to the west and north of district lot 185, known as Stanley Park."

It seems to me to be unnecessary to go further than this. These words "All that peninsula lying to the west and north of district lot 185, known as Stanley Park" are altogether inapplicable to Deadman's Island.

If one looks at the land itself, or at a map or chart of the harbour and the narrows, or if you read the judgment of the Privy Council (1906), A.C. 552, delivered in July, 1906, in the action brought by the Attorney-General of British Columbia against Ludgate, or the letter of the 11th of August, 1906, asking that the island be specifically included in the new lease, one cannot help seeing that the Dominion Government did not intended to include the island in the lease of November, 1908. If anyone will read the lease granted to Ludgate in February,

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1899, and the lease granted to the City in November, 1908, he or she will see that they relate to two different properties and are granted for different purposes. Ludgate has the island with power to cut down trees and the right of erecting thereon a lumbering plant, wharves, etc.

The City, on the other hand, has the "peninsula" for use as a public park. The City is "to keep the existing main road round the peninsula in good order, and no trees shall be cut by the City, without permission of the Government." Does not the use of the words "existing main road round the peninsula" shew, beyond doubt, what peninsula is meant?"

I would rest my decision on these few documents, and as they seem so exceedingly plain I shall not deal with the many alternative propositions which in my opinion only obscure the issue to be decided.

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MARTIN, J.A.: My view of this case is that the order in council of 8th June, 1887 (which I think was a valid one) was not more than a licence to the City to use the property for park purposes, which licence was revocable at will, being made expressly subject to two definite conditions, one of which was the right of the Dominion Government "to resume the property when required at any time."

There is no limitation of this right of resumption, and in my opinion it might be exercised, as it plainly says, at "any time" and as to the whole or part of the property, and for any reason, good or bad, or, indeed, for no reason at all; it is quite outside our province to inquire into this phase of the matter. The case of *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699, really supports the plaintiffs and not the defendants. I fail to see the application of *James Jones & Sons, Limited* v. *Earl of Tankerville* (1909), 2 Ch. 440 to the facts at bar.

MARTIN, J.A.

The lease of the 4th of February, 1899, to the plaintiff Company of Deadman's Island standing by itself, and assuming it to be valid, would be of itself, apart from any other acts, a resumption of that small part of the park (assuming the defendants' contention is correct that Deadman's Island is part of the park) which has admittedly not been used by the public

since the bridge was destroyed on the 24th of December, 1901, and nothing happened between 1887 and the date of this lease that had the effect of altering the right of the Federal Government.

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As to its validity, even if it could not be upheld because the order in council authorizing it was not approved till two days after its execution, nevertheless in the lease of the 4th of April in the following year (which must be held to be authorized by said order in council at least for the term of 25 years) the first lease is recited and treated as a valid instrument and amended as agreed to by the same parties.

In such circumstances I am of the opinion that the joint effect of these two instruments is at least to place the plaintiffs in such a position that they are not open to attack from a party holding the status of the defendant Corporation, which, in law, was at the mercy of the Crown. I cannot accept the view that in any event there was authority to resume for military purposes only, in face of the statute (Cap. 55, R. S. C. 1886) which says that lands in class one "may be leased or otherwise used as the Governor in council thinks best for the advantage of Canada." This Court cannot substitute its opinion for that of the Governor in council.

The fact, that more than eight years afterwards, the Corporation at last obtained a lease (which I presume to be valid) of the whole area cannot, in the circumstances, have the effect of disturbing the plaintiff Company in its vested rights in the small portion already long before leased to it.

MARTIN, J.A.

Taking this view of the main questions it is unnecessary to consider the other points raised further than to say that to my mind no element of a trust is present, and that section 6 of the rejoinder clearly should be struck out.

Appeal allowed.

Solicitors for appellants: *Davis, Marshall & Macneill.*
Solicitors for respondents: *Cowan, Macdonald & Parkes.*

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Nov. 3.

CUDDY *v.* CAMERON

CUDDY *ET AL.* v. CAMERON.

Agreement—Construction of—Set-off for deficiency to be decided by arbitration—Arbitration condition precedent to right of action.

In an agreement between the parties for the purchase and sale of a logging plant, one of the provisions was:

"The said parties of the first part further guarantee that the balance of the assets of the said Company . . . are truly and correctly set forth in the said schedule, and if upon investigation and examination it turns out that the said assets or any of them are not forthcoming and cannot be delivered, the value of said deficiency shall be estimated by three arbitrators . . . and the amount of of the award of the said arbitrators shall, in the manner hereinbefore mentioned, be deducted from the said purchase money still owing and unpaid under this agreement."

Held, on appeal (affirming the judgment of CLEMENT, J.), that the holding of an arbitration to determine any deficiency was a condition precedent to the claiming of any set-off against the purchase price.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver in January, 1910. The point on which the case was decided is stated in the headnote.

Davis, K. C., for plaintiffs.
L. G. McPhillips, K. C., for defendant.

3rd March, 1910.

CLEMENT, J.

CLEMENT, J.: Paragraph 6 of the statement of defence is not put forward as a claim, under paragraph 6 of the agreement, to a deduction from the balance unpaid of $150,000, either *pro tanto* or to an amount equal to that unpaid balance. If it were, it might become necessary to consider whether the principle of *Scott* v. *Avery* (1856), 5 H. L. Cas. 811, would apply; in other words, whether the amount of the deduction to which, *ex hypothesi*, the defendant is entitled could be proved otherwise than by the award of arbitrators. But the claim put forward is this: Given a shortage in assets, the plaintiffs cannot

sue upon the contract for the unpaid balance of the $150,000 unless and until the deduction from such balance proper to be made in respect of such shortage has been determined by arbitration. I cannot find any warrant for such an interpretation of this agreement. The defendant's agreement is to pay, not the balance after deduction made, but $150,000 in specified instalments at specified times. Under paragraph 6 of the agreement the defendant is, it is true, entitled in certain events to a deduction, but this is, in my opinion, a purely collateral bargain, and it is for the defendant to put forward his claim to such deduction thereunder. As I have said, he does not advance any such claim in paragraph 6 of his statement of defence; and in my opinion, the award of arbitrators is in no way a condition precedent to or part of the plaintiffs' cause of action.

CLEMENT, J.

The plaintiffs are entitled to judgment on the question of law, and paragraph 6 of the statement of defence must be struck out. All costs occasioned by it will be to the plaintiffs in any event.

The appeal was argued at Vancouver on the 3rd of November, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K. C., for appellant: It is not denied that there is a deficiency. The agreement sued upon is similar to that of *Swift* v. *David* (1910), 15 B. C. 70, and the judge below decided practically as was decided in that case. The grantor here is suing us for payment of the purchase money, and we reply that there must be an arbitration held first.

Davis, K.C., for respondent: There is no similarity between this case and *Swift* v. *David*. We admit that any sum which the defendant is entitled to deduct from the purchase price by way of set-off against our claim must be fixed by arbitration. We have a straight covenant to pay, and have not pleaded a set-off as there has been no arbitration. It appears on the pleadings that no award has been made since the money became due. We have a covenant to pay $150,000, "the said purchase price to be paid into the Bank of Montreal"; we

Argument

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guarantee that the logs in respect of which the said purchase price is to be paid are there, but it is stipulated that any deficiency is to be ascertained by arbitration and the amount of the deficiency is to be deducted from the purchase price. They must first set up the deficiency, but if they do not do that we are not to be deprived of the right of bringing our action. All they could do at the time would be to bring in an award; they cannot produce evidence of a deficiency.

McPhillips, in reply.

Judgment

Per curiam: The appeal should be dismissed. The only defence set up is a shortage in the amount of logs, and under the agreement that shortage has to be found by arbitration, but no arbitration has been held.

Appeal dismissed.

Solicitors for appellant: *McPhillips & Tiffin.*
Solicitors for respondent: *Davis, Marshall, Macneill & Pugh.*

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RE PORTER (AN INFANT).

Infant—Custody of—Agreement by father to surrender child—Restoration to father—Paternal rights.

Following *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305, an agreement by a father to surrender his paternal rights will neither relieve nor bind him.

Where a father, on the death of his wife, allowed his child to be given into the custody of other persons owing to his being then so situated that he could not properly care for it, and, when able to do so, sought to have the child restored to him:—

Held, that there was nothing in the circumstances to justify the continuance of the separation between father and son.

Statement

APPLICATION by way of *habeas corpus* by a father to obtain possession of his son, 11 years old, who, through force of

circumstances on the part of the father, had to be given into the care of other persons on the mother's death. Heard by CLEMENT, J. at Vancouver on the 12th of September, 1910.

D. Donaghy, in support of the application.
Reid, K.C., contra.

15th September, 1910.

CLEMENT, J.: On the somewhat meagre statements as to what occurred after the funeral of Mrs. Porter, I should hesitate to find that the applicant agreed, or intended to agree, to surrender his paternal rights. But, however that may be, such an agreement can neither bind nor relieve a parent: *The Queen* v. *Barnardo* (1889), 23 Q.B.D. 305. If acted upon for such a length of time and under such circumstances as to bring about a condition of things which would make it hazardous to the child's welfare to remove him from the custody of those who have, in fact, had charge of his upbringing, the Court will not, as of course, order his restoration to the parent. There is no such situation here. Nothing is alleged against the applicant beyond the fact that his circumstances, without fault on his part, have caused a separation hitherto between this son and himself; and it seems to me that, on reflection, Mr. and Mrs. Baker will realize, under such circumstances it would be absolutely a wrong to this boy to keep him from his father. From 11 years to young manhood is particularly the period during which a father's loving care is most needed, and there is nothing here to suggest that that loving care will not be bestowed by this father. Deliberately to withhold his sonship, with all that the term implies, from a boy of 11 would, to my mind, be a refinement of cruelty.

CLEMENT, J.

I cannot impose any terms upon the father, but I venture to express a hope that he will not merely carry out his expressed intention to deal generously with Mr. and Mrs. Baker so far as the financial aspect of the matter is concerned, but also that he will not hold it as an offence against himself that their affection for the boy has led them to oppose this application.

Order made.

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RE PILKINGTON

RE PILKINGTON.

Infant—Custody of—Children's Aid Society—Foster parent—Child transferred by magistrate's order to another society without notice to foster parent—Habeas corpus—Children's Protection Act of British Columbia, Secs. 7 (1), 39.

An infant duly committed to the care of the Children's Aid Society of Vancouver under the provisions of the Children's Protection Act of British Columbia, was by such Society placed with P. as a foster parent. Subsequently another society, upon notice to the Children's Aid Society of Vancouver, but without notice to P., applied to the magistrate who made the order originally, and, under section 39 of the Act, obtained an order for the surrender of the child, on the ground that it was of a different religion from the Society with which it was first placed. Upon said application the fact was ascertained that the child had been placed in a foster home, but its whereabouts was not disclosed by the officer appearing for the Society. Later the second society, on obtaining this information procured an order for and served a writ of *habeas corpus* on P., directing him to produce the child. He appeared and moved to set aside the writ and the order.

Held, that although the first Society was the legal guardian of the child when the second order was made, yet P. could not be deprived of his legal rights without notice and without an opportunity of being heard, that under section 7 of the Act, the contract placing the child with P. divested the Society of any authority to interfere with his rights unless the child's welfare demanded that it should be withdrawn from his care.

Statement

MOTION to set aside an order for a writ of *habeas corpus* to produce in Court an infant originally committed to the care of the Children's Aid Society of Vancouver, and by them placed with a foster parent. The proceedings arose out of the claim of a second society to the care of the child on the ground that it was of a different religious belief from that of the Society in whose care it had been placed. No notice of such proceedings had been given to the foster parent until, it having been ascertained that the child was not with the Society, the foster parent was served with the writ of *habeas corpus.* The motion was heard by MURPHY, J. at Vancouver on the 12th of August, 1910.

Sir C. H. Tupper, K.C., for the motion.
L. G. McPhillips, K.C., contra.

31st August, 1910.

MURPHY, J.: The facts, so far as material, are that on the 20th of April, 1908, the infant had been by order of a police magistrate committed to the custody of the Children's Aid Society of Vancouver under the authority of the Children's Protection Act of British Columbia.

It is shewn by the affidavit of Phinney that on the 20th of August, 1908, she was placed by the Society with him as her foster parent, thereby carrying out the duty imposed by section 7, sub-section 1, of the Act upon the Society. In December, 1909, an application was made to Joseph Ryan, by the Children's Aid Society of the Church of the Holy Rosary, Vancouver, B. C., for an order to place the child in their custody under the provisions of section 39 of the Act, it being alleged that she was a Roman Catholic and had been placed with a person or society not of the same religious persuasion as that to which she belonged. At the hearing, which occurred on the 10th of December, 1909, leave was granted by the magistrate to substitute the Children's Aid Society of New Westminster, B. C., as the applicants in lieu of the Children's Aid Society of the Church of the Holy Rosary, Vancouver, B. C. Notice of the hearing was given to the Children's Aid Society of Vancouver, B. C., and they were represented by counsel on the proceedings. The magistrate reserved his decision, and on the 15th of December delivered judgment whereby he found that the child was a Roman Catholic, that the applicants were of that religious persuasion, and that at the time of the hearing she was not placed with a person or society of her religious persuasion, and ordered that she be delivered into the custody of the applicants, who had expressed willingness to receive and care for her. A formal order was subsequently, on the 21st of December, 1909, signed by the magistrate. No notice of these proceedings was given to Phinney, nor does any effort appear to have been made, so far as the record before me shews, to ascertain the where-

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abouts of the child or in whose custody she was previous to the hearing. It is very probable that the applicants assumed that she was still in the custody of the Children's Aid Society of Vancouver, B.C. At the hearing, however, it transpired that she had been placed in a foster home, but Mr. South, who appeared as a witness on behalf of the last named Society, refused to inform the Court either as to the whereabouts of the child or as to the name and address of the persons with whom she had been placed. As a matter of fact, she was then and had been since August, 1908, in the care of Phinney.

On the 29th of July, 1910, application was made for the writ of *habeas corpus,* and the same, being granted, was duly served on him. He, having made the return above mentioned, now applies to have the order granting the writ and the writ set aside, on a number of grounds. In the view I take of the matter, I need deal with but one of these, *viz.,* that Phinney received no notice of the proceedings before the magistrate. It is an elementary principle of natural justice that on any inquiry all persons whose rights may be affected by the decision should be heard. This principle has been acted on in a number of cases, notably quite recently in our own Courts in the case of *Esquimalt and Nanaimo Railway Company* v. *Fiddick* (1909), 14 B. C. 412, and in the Privy Council in *Lapointe* v. *L'Association de Bienfaisance et de*

MURPHY, J.

Retraite de la Police de Montreal (1906), A.C. 535, 75 L.J., P.C. 73, where, at p. 74, Lord Macnaghten quotes with approval this passage:

> "They, *i.e.*, persons having judicial functions to perform, even if not judges, are bound, in the exercise of their functions, by the rule expressed in the maxim *audi alteram partem,* that no man shall be condemned to consequences resulting from alleged misconduct unheard and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

The test, then, is, do the proceedings taken herein involve civil consequences to Phinney, for *a fortiori,* since they took place before a legal tribunal, the principle above laid down applies to them. Phinney, by virtue of his agreement, which, by section 7, is not only a legal binding document but one which

the societies under the Act are enjoined to exercise special diligence in entering into, is entitled to the custody of this child as against all comers, subject only to the clause which the statute directs to be inserted therein, and which presumably it contains, *viz.*, all such contracts shall contain a clause reserving the right to withdraw the child from any person having the custody of such child when, in the opinion of the society placing out such child, the welfare of the child requires it, and subject, I think, also, to the provision contained in the latter part of section 39 as to transferring a child to the custody of a society or person of the same religious persuasion, and to some other provisions in the Act as to restoring children to their parents, which need not be considered here. Now, the effect of the magistrate's order is to render this agreement null and void. Surely that is a decision involving civil consequences of a most serious kind to Phinney. But it is contended that, as the Children's Aid Society of Vancouver are the legal guardians of the child, by virtue of section 7, they could and did deprive Phinney of his right to be heard, when, through Mr. South, they refused to tell in whose custody the child was. I am unable to accede to this contention. In the first place, the proceedings shew that the information was asked not with a view to giving notice to Phinney of what was going on so that he might attend and be heard, but in order to have recourse to *habeas corpus* proceedings to obtain possession of her in case of a decision favourable to the applicants being given. It cannot, I think, be successfully contended that the Society, through their representative, by refusing to aid *habeas corpus* proceedings, can be said to have waived a right which, so far as the record shews, was never brought to their attention. I express no opinion on the legality of the position taken by Mr. South in refusing to answer. It is quite possible that, had proper proceedings been taken, he could have been compelled to give the information, but that question is not before me.

MURPHY, J.

Further, I think the wording of section 7 shews that the effect of the agreement when made is to divest the Society of any authority to interfere with Phinney's rights in reference

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to the child, except only when, in their opinion, the welfare of the child demands that it should be withdrawn from his custody. It is not pretended here that the Society have come to any such conclusion or meant to give expression to any such conclusion by refusing to divulge Phinney's name to the magistrate. Again, a close scrutiny of the Act fails to reveal to me any power conferred by it on a judge to place a child in any custody other than that of a society. This is authorized by section 5, and reading the Act as a whole, I think "society" as used in that section must mean a Children's Aid Society, as defined by the interpretation clause of the Act. On turning to section 39, however, we find the words "person or society" used all through it. The word "person" must mean something different from the word "society." I confess that it would be difficult to explain the use of this phrase in the first part of the section were I concerned in its interpretation. Admittedly here, however, the magistrate was acting under the second part of the section. I think this part can be construed in harmony with the rest of the Act, because, bearing in mind that it is by virtue of the order awarding custody that the Society is empowered to place any child with foster parents, it becomes legally possible for a child to get into the custody of a person as distinct from a society, and it may be said that such child has been placed pursuant to such order with a "person" not of the same religious persuasion as that to which the child belongs. If that be so, then the magistrate must inquire what is the religious persuasion of such "person" (in this case Phinney) before he can make any order. No one would contend, I think, that such inquiry could be made in Phinney's absence, and without any effort being made to give him notice that it was to take place. I hold then that, Phinney not having been given an opportunity of being heard before the magistrate, the order for the writ of *habeas corpus,* which is issued on the basis of the magistrate's decision, should be set aside, and of course the writ falls with the order.

MURPHY, J.

This being my view, it is needless to add that I express no opinion as to the merits of the applicants' claim, that being a matter for a judge as defined by the Act to decide after

hearing both sides. In the meantime the child will be returned to Phinney's custody.

Order accordingly.

FAKKEMA v. BROOKS SCANLAN O'BRIEN COMPANY, LIMITED.

Master and servant—Injury—Defective system—Voluntary acceptance of risk—Common employment—Verdict at common law or under Employers' Liability Act—Volens.

Plaintiff's duty in a logging camp was to work a donkey-engine intended to extricate logs which might become jammed or stopped in their progress down a long chute leading to the water. The engine was placed near the water and close to the foot of the chute, down which the logs came with considerable speed. There was a foreman in charge of the logging operations, and plaintiff was subject to the directions of such foreman. The latter had made two changes in the position of the engine within a few days, the place it occupied at the time of the accident being the first location. There was no dispute as to the foreman's fitness. A log coming down jumped the chute and, striking the plaintiff, broke his leg and carried him into the sea.

Held, following *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, that the system was defective, and that the verdict of the jury giving common law damages should stand.

Observations *per* MARTIN, J.A. as to desirableness of submitting questions to the jury in negligence actions.

APPEAL from the judgment of MURPHY, J. and the verdict of a jury in an action for damages for injuries sustained by plaintiff while working as an engineer in defendants' logging camp. The action was tried at Vancouver in March, 1910, when the jury gave plaintiff a verdict for $4,500 under circumstances set out in the headnote. Statement

The appeal was argued at Victoria on the 30th of June, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

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Bodwell, K.C., for appellant: The jury have returned a common law verdict for $4,500 when they should have given a verdict, if any, under the Employers' Liability Act for $2,000, but we say that there is no evidence on which they could properly give a verdict against us in any event. The moving of the engine was the act of the foreman, a common servant in a common employment, and not part of the system. The engine had not been in that position long enough to form part of the system. There is no evidence of negligence on the part of the Company.

Woodworth, and *Smith,* for respondent.

Cur. adv. vult.

1st November, 1910.

MACDONALD, C.J.A.: The defendants employed a competent foreman to construct and operate a chute by means of which to deliver saw logs from a point considerably above the beach down to the sea. In the operation of the chute it was necessary to use an engine with which to release logs which should stick fast in their descent. The engine therefore formed part of the arrangement used in the operation of sending down the logs.

The jury has not found that there was any defect in the chute itself; indeed, the inference to be drawn from the verdict is that there was not, nor was there any defect in the engine itself. What the jury found was that the plaintiff received his injuries by reason of the fact that the engine was placed too close to the chute, and awarded him $4,500 damages.

MACDONALD, C.J.A.

In effect the verdict negatives contributory negligence and the defence of voluntary acceptance of the risk. I think there was evidence to justify these conclusions. We have the statement of the plaintiff that while he was aware of the danger and continued in the employment, he had pointed it out to the superintendent, and suggested that fenders should be put up to protect him. This was on either the day of the accident or the day before. I cannot therefore say that the jury could not reasonably have found that the plaintiff did not voluntarily accept the risk.

This brings me to what I consider the main question in the appeal. The verdict is a common law one, and the question is

whether or not there was evidence upon which the jury could find a verdict at common law. The work of constructing as well as of operating this plant was entrusted by the defendant to a foreman. He was supplied with everything necessary to enable him to give reasonable safety to the men. He seems to have done this insofar as everything was concerned with the exception of the placing of the engine. The accident apparently happened within a few days after the plant was put in operation, and the foreman seems to have been experimenting to ascertain where to place the engine so as to obtain the best results. A day or two before the accident it was moved from a higher position down to that which it occupied when the accident occurred. It is admitted that in the higher position it could be safely operated by the engineer, and it is contended on behalf of the defendants that the moving of it from this position to the beach was the negligent or improper act of the foreman, a fellow servant. In my opinion that is not the situation here. The employer had not finally completed the arrangement of the plant and machinery until after the removal of the engine to the place where it was at the time of the accident, if indeed then. It is a case of "neglect of the master's primary duty to provide in the first instance at least fit and proper places for the workmen to work in and a fit and proper system." Taking the view of the facts which I do, I think I am bound by *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420.

MACDONALD, C.J.A.

I would dismiss the appeal.

MARTIN, J.A.: So far as concerns the upholding of the verdict under the Employers' Liability Act, no difficulty need be experienced, though the question of amount would have to be settled. During the argument we intimated that the jury was justified in finding that the plaintiff was at his proper post when at or near the engine, and the other point is covered by the fact that there is evidence to shew that this log came down unusually quickly and that it had gone a considerable distance on its way down the chute before the signal was given.

MARTIN, J.A.

With respect to the liability at common law, which is what the jury found, I had at first some doubt, but after a careful

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perusal of the evidence I find that the engine in question had been stationed at three different places; first on the beach, then, as the chute was extended, on the brow of the hill, and lastly, "two or three days after (they) started logging," back to approximately its original position on the beach. Since, on the facts, this verdict can only be supported on the ground that the employer had neglected to establish and maintain a proper system or scheme of work, it was argued that the moving back of the engine to its original place was at most the negligent act of the foreman and not part of the system. But if the circumstances of the operation of a certain work of an extended or extending nature are such that it necessarily involves the moving about of machinery as the scope of the work is enlarged, or the selection as the result of experience of a more suitable place for such machinery (here, an engine on a wooden sled) that is none the less a part of the system established as a whole, and the principle of liability for such a system, if defective, is brought within such cases as *Sword* v. *Cameron,* 1 Dunlop 493, as explained in *Bartonshill Coal Company* v. *Reid* (1858), 3 Macq. H.L. 266 at p. 289; and approved in *Smith* v. *Baker & Sons* (1891), A.C. 325; *Bartonshill Coal Company* v. *McGuire* (1858), 3 Macq. H.L. 300, and *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. See also *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494 at p. 519; and the cases collected in Roberts & Wallace's Duty and Liability of Employers, 4th Ed., 186.

MARTIN, J.A.

I am of the opinion that the finding of the jury here that "the engine was placed too near the chute" and the award of "$4,500 in full as damages" must be taken in the circumstances and in the light of the charge as being a finding of a defective system. At the same time, and with all due deference, I draw attention to the fact that it would have been much better if the learned trial judge had followed the established practice in negligence cases of submitting questions to the jury which would have enabled them to take a clearer view of the real points at issue. With all respect to the learned judge, I feel sure that if this course had been followed, his charge would have been of more assistance to the jury in a case difficult to understand,

and he would also, in the course of explaining such questions, have brought home to himself the desirability of instructing them on the most important phase of this question of system in regard to which they were left without any direction at all. I confess also that if there had been questions I should have been spared much time and labour, and I refer to the remarks and authorities cited on this point in my recent judgment in *Guthrie* v. *Huntting,* delivered on the 29th of June last [*vide post,* p. 471].

GALLIHER, J.A.: As I view the evidence, there can be little doubt that the plaintiff would be entitled to damages under the Employers' Liability Act, but as the jury has awarded common law damages, can that verdict be sustained? In the light of the learned trial judge's charge and the finding of the jury that the engine was placed too close to the chute, I think we must regard it as a finding of a defective system. Had the engine been placed and maintained at the brow of the hill for a time sufficient to enable us to conclude that at that point it had become an established part of the system, then the moving of it from that point to where the accident occurred by a fellow employee, without the knowledge of the defendants, would, I think, be a bar to the plaintiff's recovery at common law.

The evidence, however, shews that the engine was first on the beach, then at the brow of the hill for two or three days only, when it was again moved to the point where the accident occurred. This would seem to me to eliminate the question of time fixing the location of the engine at any particular point as the established system; in other words, they appear to have been experimenting as to the most favourable location, and the jury having found that the accident occurred by reason of the engine (which was undoubtedly a part of the system) being placed too near the chute, I think their finding should not be disturbed.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Smith & Woodworth.*

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June 13.

REX v. WATT

REX v. WATT.

Criminal law—Appeal—Motion for leave—Sanity or insanity of accused—Inquiry into under section 967 of the Code—When to be held—Motion for inquiry, and then trial traversed to next assize—Procedure—Section 1,015.

On a trial for murder, the Crown moved for an inquiry as to prisoner's sanity and the case was sent over to the next assizes, the trial judge remarking: "There will be that preliminary trial first to determine. Of course, when that time arrives, there may not be any doubt about his sanity, or, on the other hand, there may not be any doubt about his insanity." At the next assizes, there was a different judge. The trial proceeded without the inquiry as to sanity being held as mentioned. It was then objected on behalf of accused that the inquiry should have been held before trial, and a reserved case requested for the opinion of the Court of Appeal. The objection was overruled, and a reserved case refused.

Held, on appeal, *per* MACDONALD, C.J.A., that the judge at the first assize merely directed counsel how they should proceed at the second assize, and that the motion should be dismissed.

Per IRVING and MARTIN, JJ.A.: That counsel for accused by proceeding to verdict at the second assize, had waived or abandoned any order that was made, or supposed to have been made, at the previous assize.

Per MARTIN, J.A.: The proper order to have made at the first assize was to have postponed the trial in the ordinary way, leaving it to the judge at the next assize to decide, *de novo*, the issue as to the sanity or insanity of the accused at the time of such next assize.

Statement

MOTION for leave to appeal, and for an order directing the trial judge, GREGORY, J., to state a case for the opinion of the Court of Appeal. In October, 1909, the accused was arraigned at the Nanaimo assizes on a charge of murder. Counsel for the Crown then moved, under section 967 of the Code, for an inquiry as to the sanity of the accused, stating that in his, counsel's opinion, from the evidence in his possession, this point should be cleared up, in justice to the accused, before he was put on his trial. This was objected to on behalf of the accused, and eventually the then judge of assize, CLEMENT, J., stood the case over to the spring assizes, saying: "There will be that preliminary trial first to determine. Of course when that

time arrives there may not be any doubt about his sanity, or, on the other hand there may not be any doubt about his insanity." The case came on for trial at the spring assizes in May, 1910, when a verdict of manslaughter was returned, and before verdict was returned, counsel for accused objected that the inquiry directed by CLEMENT, J. should have been held before the trial. The objection was overruled, and a reserved case refused, hence this motion, which was argued at Victoria on the 13th of June, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Aikman, in support of the motion: The trial on the indictment could not take place until after the holding of the inquiry into the prisoner's sanity as directed by CLEMENT, J. It was not the duty of counsel for the accused to raise the point, as the inquiry had been asked for by the Crown. We did not consent to anything, and even if we did, the accused is not prejudiced thereby.

[IRVING, J.A.: You had not pleaded to the indictment before CLEMENT, J. when the inquiry was asked for and directed, and then you came before GREGORY, J. and pleaded.]

Yes. Of course the plea of not guilty raises all questions of jurisdiction. The Crown having moved the Court for an order directing an inquiry as to sanity, should have proceeded with that order.

Argument

Maclean, K. C. (D. A.-G.), for the Crown, *contra:* This is a matter of procedure solely and not of jurisdiction. The objection should have been taken before the trial was gone into, and counsel for accused cannot stand by and take chances of an acquittal, but on the verdict going against the accused, then raise an objection of this kind. The order that was made was doubtless that an inquiry should be held as to the prisoner's sanity at the time he was up for trial. The judge could have made such an order then and traversed the trial on the indictment to the next assizes.

Aikman, in reply: The statute says a certain thing must be done when the order is made. That has not been done, and the accused is prejudiced.

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[MARTIN, J.A.: How can you be prejudiced by an impossibility? That order was exhausted by effluxion of time. The investigation must be made then, at the time of the trial, to decide the man's sanity to stand or be put upon his trial. This was not done by that judge or that jury at that time. How can that be done now, or how can this Court help you?]

The judge went beyond the law here and directed an issue to be tried at the following assizes. In doing so we say he erred and did us substantial wrong.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the motion must be dismissed. What the learned judge really did, it seems to me, was to direct counsel how they should proceed at the next assizes.

IRVING, J.A.

IRVING, J.A.: The object of section 967 was to secure a fair trial to the accused. Provision is made to raise a question of sanity at any time before the verdict was given, or the prisoner may be tried on that point before the jury is sworn. It therefore seems to be a matter of procedure. When a prisoner is represented by counsel and he is called upon to plead to the indictment, if his counsel is in doubt as to the man's sanity, it is his duty to bring that matter before the judge, but if he does not raise that point and goes before the jury, he practically says he is ready for trial and that his client is capable of advising him. I think in the present case counsel practically elected to waive and abandon any order that had been previously made and agreed that the matter should go to trial. I do not think that any injustice has been done, and that the application should therefore be refused.

MARTIN, J.A.

MARTIN, J.A.: This is a motion under section 1,015 for leave to appeal and that the learned trial judge shall state a case under section 1,016, if leave be granted, on the ground that there was no jurisdiction to try the accused (who was convicted at the Nanaimo assizes on the 17th of May, 1910), because a prior order had been made after indictment found for manslaughter at the preceding assizes in the same place on the 12th of October, 1909, directing that an issue should be tried under section 967 as to the sanity of the accused, yet no such issue had been tried,

though directed to be tried before trial upon indictment at the next assize sitting at Nanaimo.

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What happened is that at the first assizes after indictment found, and before being given in charge to the jury, it was made to "appear to the Court," under section 967, by the statement of the Crown counsel (which was accepted as satisfactory) that there was doubt as to the prisoner's sanity, and therefore an issue was asked for and granted, but because the Crown was not ready with certain expert evidence, the trial of the issue was postponed to the next assizes to come on, as the judge directed, "before the main trial is gone on with."

It is first to be observed that in any case this was not a proper course to adopt, and it is doubtful if the Court had jurisdiction to order it, because section 967 says the issue to be tried is "whether the accused is or is not then, on account of insanity, unfit to take his trial." The statute in such circumstances as are before us necessarily contemplates, as a perusal of the whole section clearly shews, that question being determined just before the accused is given in charge, and to postpone the trial of it till the next assize rendered the whole procedure abortive because, when that assize was held seven months later, in May, the issue directed by the Court in October to be tried had not been changed, and still was "whether the accused was *then* (*i.e.*, in October) fit to take his trial?"

MARTIN, J.A.

It would be a manifest absurdity to ask the May assize Court to try an irrelevant issue, the determination of which could admittedly be of no possible assistance to any one, and all that would be accomplished, after much waste of time and money, would be the production of a solemn judicial farce which could only have the effect of lowering the Court in the public estimation. I am glad to say that I am wholly unaware of any principle of law which requires us to hold that such a mockery of justice should be enacted. What should have been done is that if the Crown was not ready to try the issue in May, no direction should have been given concerning it, and the case should have been postponed in the ordinary way to the next assizes, leaving it for the trial judge then to decide, *de novo,* the necessity of such an issue as to the insanity of accused

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"then" as the statute directs. He should not be hampered in coming to a conclusion by any previous order, because the mental state of the accused may have altered in the meantime, as, indeed, was apparently the case here.

Furthermore, if the counsel for the accused at the May assize had any objection to what had been done, or not done, he should have raised it at the outset, because this is a matter of procedure, and he has, in my opinion, waived it by pleading and going to the jury.

In any event, the most that can be said in favour of the application is that, under section 1,019, "something not according to law was done at the trial," but seeing that "no substantial wrong or miscarriage was thereby occasioned," we cannot order a new trial. The failure to bring useless and misconceived proceedings to a termination which must inevitably be abortive, can never be a bar to a fair trial.

MARTIN, J.A.

I am of the opinion, therefore, that in the result the learned trial judge was right in refusing to state a case, though the refusal complained of was, with all respect, not put upon the proper ground; if it had been, I do not think this motion would have been made, because once the main principle involved is clearly apprehended, its application presents no difficulty to the facts before us.

GALLIHER, J.A., while entertaining some uncertainty as to what was intended by the order of CLEMENT, J., was not disposed to disagree with the conclusions arrived at by the other members of the Court.

GALLIHER, J.A.

Motion dismissed.

GUTHRIE v. W. F. HUNTTING LUMBER COMPANY, LIMITED.

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June 29.

GUTHRIE v. W. F. HUNTTING LUMBER CO.

Master and servant—Injury to Workman—Defective system—Risk—Voluntary assumption of—Negligence—Jury—Questions to—General verdict—Discretion of judge in submitting questions.

Plaintiff was injured whilst working as a shingle sawyer on a Perkins machine, the saw of which revolves in a horizontal position. His sole duty was to saw the shingles and attend to the saw. After the shingles passed from under the saw, they went down a chute to the floor. Plaintiff set up negligence on the part of defendants in not having the frame of the machine sufficiently high to provide such space below the chute as would lessen or do away with the possibility of the shingles becoming congested, and the congestion extending up under the saw. There was a conflict of evidence as to the height of the machine from the floor, but only as to a few inches. On the occasion of the accident, during the first hour in the morning, when his saw was sharp, plaintiff cut above the average of the day, and in that way the shingles became backed up under the saw. He, as sawyers usually do, leaned over the edge of the machine, put his hand under the saw, near the teeth, and took hold of a shingle to pull it out, when the friction upon the shingle drew his hand against the saw and cut off a portion of three fingers. Defendants denied negligence as to the construction of the machine; that if there was any negligence, it was not the cause of the accident, and that the sole cause was the plaintiff's unnecessarily using his hand to pull out the congested shingles whilst the machine was in motion, when he could, by a rope close within his reach, easily have stopped the machine; also, the machine being open at the top, the accumulation was readily observable and removable with a stick before the shingles became wedged.

Held, that the defendants had not been guilty of any negligence, and that therefore the plaintiff could not recover.

There was no misdirection or non-direction in this instance in not submitting questions to the jury.

APPEAL from the judgment of GREGORY, J. and the verdict of a jury in an action under the Employers' Liability Act, tried by him at Vancouver on the 10th of January, 1910. The facts appear in the headnote.

Statement

The appeal was argued at Victoria on the 8th of June, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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S. S. Taylor, K.C., for appellants (defendants): We say that on the evidence it is clear that the plaintiff was guilty of negligence in taking unnecessary risk. There was no negligence shewn on the part of the Company contributing to the accident, and we submit that the judge should have taken the case from the jury. Further, we say that the trial judge should have submitted questions to the jury in this case, and he was wrong in stating that it is the practice not to submit questions if either party objects, and if the omission to put questions had a tendency to mislead, we are entitled to a new trial. Also, the judge did not exercise his discretion on the basis whether or not it would be wise in this particular case to submit questions; he was of opinion that he was precluded by the practice or custom from submitting questions, and we submit that we were entitled to the exercise of such discretion. On that ground, also, there should be a new trial.

Argument

[*Per curiam:* There was no misdirection or non-direction by the exercise of the discretion in this instance because the judge endeavoured to get a general verdict instead of submitting questions.]

They have sued exclusively under the Employers' Liability Act, and yet there was no warning given pursuant to sub-section 3 of section 7.

We say that there was no negligence, but if there was, then it had nothing whatever to do with the causing of the accident; and we also submit that there was a voluntary assumption of the risk.

Farris, for respondent (plaintiff): The drop at the end of the platform was inadequate and therefore a defect, and we say that such defect was the cause of the accident.

Taylor, in reply: The plaintiff himself developed the defective system by adopting the mode of procedure which he followed in his work.

Cur. adv. vult.

29th June, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not think any negligence was proved. The saw in the situation in which it was placed had

a certain capacity. Plaintiff knew this, but worked it beyond its capacity, thereby causing the accumulation of shingles which brought about his injury.

Moreover, if there was negligence, the plaintiff placed or helped to place the machine, and operated it for a long time without complaint, and, I think, if there was a defect, he was *volens*.

IRVING, J.A.: I do not think the case should have been submitted to the jury. There was no evidence of negligence on the defendants' part. The machine was described by the paintiff's witnesses as "unhandy" and "inconvenient," but none of them ventured to say it was defective. No complaint had ever been made about it; it was not out of repair. The accident was the result of the plaintiff's own haste.

As to questions to the jury, it is a matter for the trial judge to determine in his discretion whether he will or will not put questions to the jury. Bowen, L.J. in *Abrath* v. *North Eastern Railway Co.* (1883), 11 Q. B. D. 440 at p. 456, *et seq.*, puts the different ways before us. I agree that directions couched in the form of questions are as a rule the best. As MCCREIGHT, J. pointed out in *Steves* v. *South Vancouver* (1897), 6 B. C. 17, answers to proper questions may be very useful in avoiding the expense of a new trial, but I cannot agree that a judge is bound to put questions. How can he be bound to do so, when the jury have the privilege of refusing to answer them? The jury has an undoubted right to return a general verdict. There has been no misdirection, or non-direction on that ground.

IRVING, J.A.

MARTIN, J.: I have already expressed my opinion orally, that this appeal should be allowed on the ground that whatever may be said about negligence, this is a clear case of *volens* on the part of the plaintiff.

But, further, and in view of the fact that considerable discussion took place respecting the putting of questions to the jury, it is desirable to consider that matter, because it has come up several times, and a misconception of it seems to prevail in certain quarters.

MARTIN, J.A.

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It was objected before us that though the counsel for the plaintiff requested the learned trial judge to put questions to the jury, yet the application was refused, the learned judge saying that if the opposing counsel consented he "would have no objection. But the usual practice is to allow the jury to bring in a general verdict. They can bring in a general verdict if they want to, in spite of questions." The plaintiff's counsel did object, whereupon the learned judge, after being again pressed by defendants' counsel to put questions, said:

"I have made inquiry, and it seems to be the practice of the judges of the Court not to ask questions if either cousel object, and I will follow that practice."

With all deference to the learned judge, I think it is to be regretted that he was misinformed as to the practice. My own experience of it for over 11 years when on the Bench of the Supreme Court is to the contrary, but apart from this the reported decisions of the late Full Court and of the Supreme Court of Canada put the matter beyond doubt. It will be found dealt with in *Alaska Packers Association* v. *Spencer* (1904), 10 B.C. 473 at p. 491, wherein it is stated that the trial judge "should have submitted questions to the jury as is the usual practice in cases of negligence other than those of a very simple character," and *Hornby* v. *New Westminster Southern Railway Company* (1899), 6 B. C. 588 at p. 595, and *Love* v. *Fairview*

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(1904), 10 B. C. 330 at p. 350 were referred to. In *MacLeod* v. *McLaughlin* (1907), 13 B. C. 16, the learned trial judge in charging the jury, said:

"The custom has been established for a long time for the Court to submit special questions in the majority of cases . . . But while it is the custom of the Court to submit special questions to the jury with the request that they answer them if possible, if either of the parties asks that the jury return a general verdict . . . then the jury must do so under the existing state of the law, unless, of course, they are unable to agree."

This latter statement as to the jury being controlled by or subject to the request of a party in returning a special or general verdict is, with all due deference, clearly erroneous and the case cited—*Mayor and Burgesses of Devizes* v. *Clark* (1835), 3 A. & E. 506—does not suppport that view. The *Alaska Packers* case went to the Supreme Court (1904), 35

S.C.R. 362, and at pp. 372-3, Mr. Justice Nesbitt (Mr. Justice Girouard concurring, p. 363), commented upon the failure of the learned trial judge to put questions, and said they ought to be put in the new trial which was ordered, speaking as follows:

"If questions are answered by a jury, many difficulties are avoided, and the jury's attention would be directed to the points at issue. In case of a new trial, I would suggest that, particularly in actions of negligence, it is well for a trial judge to get from a jury, by questions to be answered, the grounds specially upon which they find negligence. Lord Coleridge, in the case of *Pritchard* v. *Lang* (1889), 5 T.L.R. 639 at p. 640, uses some strong expressions in reference to this subject; in fact, saying that pursuing the course of not asking the jury to put the specific ground upon which they found negligence, was calculated to mislead them and to defeat justice."

The case at bar is eminently one wherein the judge should have exercised his discretion in favour of questions, and already during the sittings of this Court the desirability of following that practice has been remarked upon, thereby saving much expense and valuable time, and often preventing new trials because of uncertainty. Of course the jury cannot be compelled to answer them: *Mayor and Burgesses of Devizes* v. *Clark, supra,* but I am glad to be able to say that in my experience no jury ever failed to answer (unless in the very rare case of disagreement) the questions I submitted to them once they were made to understand that the answers were required to assist me in determining the legal issues. I call attention to the authority cited in my judgment in *Schnell* v. *B. C. Electric Ry. Co.* [*ante* 378], respecting the responsibility of the judge in framing proper questions.

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In conclusion, I repeat what I said during the argument when this Court gave the ruling that the failure of the learned judge to put questions amounted neither to misdirection nor non-direction, *viz.,* that the failure of the judge to apply his mind to the exercise of his discretion as to whether the case was a proper one for the putting of questions or not (as the result of incorrect information respecting the practice) did in effect work an unwitting injustice upon the defendant which I see no way of remedying, unless perhaps it might be a ground for a new trial

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because the defendant never had the benefit of the exercise of the judge's discretion at all, which nevertheless he was bound to exercise. It becomes, however, unnecessary to consider this interesting point because, as already pointed out, the appeal must be allowed on other grounds.

GALLIHER, J.A. concurred in allowing the appeal.

Appeal allowed.

Solicitors for appellants: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for respondent: *Macdonell, Killam & Farris.*

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Criminal law—Indecent assault—Corroboration—Other material evidence—Whether testimony in whole case, including defence, may be looked at for corroboration—Judge hearing one charge against accused, defers sentence and proceeds with another charge—Mixing up trials—Evidence of previous similar offence on same person—Admissibility of—Child of tender years—Canada Evidence Act, R.S.C. 1906, Cap. 145, Sec. 16—Crim. Code, Sec. 1,019.

There were four questions reserved for the opinion of the Court: (1.) Whether there was any corroboration of the evidence of the boy on whom the assault was committed, this corroboration being required on account of the fact that the boy was too young to take an oath? (2.) Was it competent for the trial judge to look to the whole case, including the evidence put in by the defence, for such corroboration? (3.) The judge having heard one charge against the accused, he then adjourned that case and proceeded with another charge. After hearing the second charge, he dismissed the first and convicted upon the second. Was it competent for the judge to adopt this procedure? (4.) The trial judge admitted evidence of a boy who testified to a previous similar offence committed by the accused with regard to himself (the boy). Was this evidence admissible in the present case?

Held, on the first point, *per* MACDONALD, C.J.A. and IRVING, J.A., that there was no corroboration.

Per MARTIN and GALLIHER, JJ.A., upholding the trial judge, that there was corroboration. Also that corroboration may be furnished by a child too young to take an oath.

Held, on the second point (*per curiam*) that the whole case might be looked to for corroboration.

Held, on the third point, *per* MACDONALD, C.J.A. and IRVING, J.A., that the matter involved in this question was simply one of procedure, and it was open to the judge to deal with the cases in any order he chose; or at all events that the accused was not prejudiced by the manner in which the judge heard and determined the charges.

Per MARTIN and GALLIHER, JJ.A.: That the mixing up of the two trials occasioned "a substantial wrong or miscarriage" under section 1,019.

Held, on the fourth point (*per curiam*) that evidence of a prior offence was not admissible on the charge in the present case.

The result was that the conviction was set aside and a new trial ordered.

CRIMINAL APPEAL, by way of case stated, from the judgment of MCINNES, Co. J. in the County Court Judge's Criminal Court at Vancouver on the 21st of September, 1910, sentencing the accused to ten years' imprisonment. The accused had been committed for trial for criminal assault on two boys at different times. In his case for the opinion of the Court of Appeal, the trial judge stated:

"At the conclusion of the Crown's case in the trial *Re Victor Nunn* (in which trial both Victor Nunn and Alex Ashford were called as witnesses), an application was made on behalf of the accused that the charge be dismissed. I reserved my decision, as the application was based upon points of law as well as of fact. Thereupon the accused immediately elected for speedy trial on the charge *Re Alex Ashford*. I fixed September 21st for the hearing of that charge and also adjourned the trial *Re Victor Nunn* to the same date. Statement

"On the 21st of September, 1910, I heard witnesses for the Crown and for the defence, and on the 22nd of September, after argument by counsel, I delivered my judgment, which was noted by the Court stenographer, and convicted Iman Din on the indictment preferred against him *re* his offence with Alex Ashford. In so doing I was not influenced by the evidence previously taken in the trial *Re Victor Nunn*. I then took up the case *Re Victor Nunn*, and decided I could not give the evidence of the chief witness, Victor Nunn, that credence which

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would warrant me in convicting the accused, and accordingly dismissed the charge.

"During the trial, counsel for the accused requested that certain points raised be reserved for the opinion of the Court of Appeal. As a result of such application, this case is stated for the opinion of the Court of Appeal.

"One Cyril Farron, a boy, was called as a witness for the prosecution. Because of his tender years he was not sworn. He gave evidence, subject to objection, that the accused previously, in his own house, had attempted to commit a like offence on his person, and had given him ten cents.

"I held this evidence was admissible as tending to shew the nature of the accused, such evidence being admissible in cases of similar offences against females, but did not rely upon this evidence for corroboration.

"At the conclusion of the case for the prosecution, counsel for accused asked for a dismissal of the charge on the ground that there had been not sufficient corroboration of the charge laid against the accused in the indictment.

"The principal witness for the prosecution, Alex Ashford, was a boy of eleven years of age. In my opinion he did not understand the nature of an oath, but was possessed of sufficient intelligence to justify the reception of his evidence, and understood the duty of speaking the truth without being sworn.

Statement

"I allowed the boys, Joe Ashford and Cyril Farron, to give evidence under like circumstances.

"The points reserved for the opinion of the Court are: (1.) Was I right in finding that the evidence of the boy, Alex Ashford, was corroborated by some other material evidence? (2.) Can such corroborative evidence be taken notice of when found in the evidence given for the defence? (3.) Was I right in regulating the practice of my Court as I did, in proceeding with and concluding the second trial before deciding the application made in the first trial? (4.) Was the evidence of Cyril Farron properly admissible?"

The appeal was argued at Victoria on the 13th of December, 1910, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

J. A. Russell, for the accused: The judge should not have proceeded with the trial of the second charge until he had disposed of the first. Then there was no sufficient corroboration. The boy, on whose evidence corroboration is based, was too young to be a competent witness, and it is submitted that it is only through a competent witness that the corroboration required by the Code can be obtained. There, in any event, is a conflict between the two boys. He referred to *Rex* v. *De Wolfe* (1904), 9 C.C.C. 38; *Rex* v. *Pailleur* (1909), 15 C.C.C. 339.

Maclean, K.C., for the Crown, called upon as to corroboration: There is clearly only one occasion referred to by the two boys. It is plain from the evidence that the boy Ashford had been tampered with between the date of the preliminary hearing and the trial, because he was on the latter occasion a most unwilling witness for the prosecution and quite willing for the defence. If it is clear that the boys are speaking of the one occasion, then there is sufficient corroboration. There is also a measure of corroboration in the fact of the accused giving the children money. He referred to *Rex* v. *Hedges* (1909), 3 Cr. App. R. 262; *Rex* v. *Good* (1909), 2 Cr. App. R. 278.

Russell, as to corroboration, referred to *In re Finch* (1883), 23 Ch. D. 267. As to whether corroborative evidence can be taken into account when it is found in the evidence of the defence, the only corroboration is that of a child whose evidence is prohibited by the statute and is therefore inadmissible. As to proceeding with the second trial before disposing of the charge in the first, see *Hamilton* v. *Walker* (1892), 2 Q.B. 25; *Reg.* v. *McBerny* (1897), 3 C.C.C. 339; *Reg.* v. *Fry* (1898), 19 Cox, C.C. 135; *Rex* v. *Sing* (1902), 9 B.C. 254; 6 C.C.C. 156; *Rex* v. *Bullock* (1903), 8 C.C.C. 8; *Rex* v. *Burke (No. 2)* (1904), *ib.* 14. As to the admissibility of Farron's evidence, see *Rex* v. *Komiensky (No. 2)* (1903), 7 C.C.C. 27; *Rex.* v. *Tutty* (1905), 9 C.C.C. 544; *Rex* v. *Dyson* (1908), 2 K.B. 454 at p. 457; *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65.

Argument

Maclean: The boy's evidence was properly admissible, even on the basis of being an accomplice: *Rex* v. *Barrett* (1908), 1

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Cr. App. R. 64. As to the mode of procedure adopted by the judge in hearing the first case, reserving his decision, then having heard the second charge, dismissed the first and convicted on the second, there is no decision shewing that a conviction has been quashed on that ground. The circumstances in *Reg.* v. *Fry, supra,* were quite different from those here. In that case there was a certificate by the justices that to the best of their recollection they had not imported anything of the evidence from the first case into the hearing of the second. Here there is an absolute certificate that the judge did not do so. Why should a judge with his experience and knowledge of dealing with trials, be put in a lower position than a magistrate, who is often a layman? The evidence of the boy as to a previous similar offence was admissible as shewing a course of conduct: *Rex* v. *Bond* (1906), 2 K.B. 389.

Argument

Cur. adv. vult.

21st December, 1910.

MACDONALD, C.J.A.: This case comes before us by way of a case reserved for the opinion of this Court. Four different questions are submitted to us by the learned County Court judge who tried and convicted the accused. The first question arises in this way: The principal witness against the accused was one Alex Ashford, a boy of eleven years of age, who was not considered to have sufficient understanding of the obligation of an oath to permit of his being sworn. Under section 16 of the Canada Evidence Act, it was necessary that his evidence should be corroborated, and his brother, Joe Ashford, a child of six years of age, was called to give this corroborative evidence; he also was not sworn.

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The first question is: "Was I right in finding that the evidence of the boy, Alex Ashford, was corroborated by some other material evidence?" After a careful consideration of the evidence, I am of opinion that there was no corroboration of the testimony of Alex Ashford. The only point upon which it could be contended that the evidence of Joe Ashford corroborated that of his brother arose in this way: Alex Ashford said that he went to the house of the accused about the 1st of August; that he

went into the house; that the accused locked the door and drew down the blinds. This was the occasion upon which the offence charged against the accused was alleged to have been committed. Asked as to whether anyone was with him at that time, he gave the following account:

"What had you been doing before you went to the house? Been herding my cows.

"Was there anybody with you? No, sir.

"Did you see anybody outside when you went in? No, sir."

Now, the evidence of Joe Ashford is that about two weeks before the trial, which was on the 12th of September, he was with his brother at the house of the accused, but did not go in; that he waited outside; that his brother Alex went in and locked the door and pulled down the blinds. Instead of being corroborative of Alex's story, this story is remarkably at variance with it. First, the occasion was a month later than that stated by Alex. Next, it directly contradicts Alex's statement that he was alone; and again, it is at variance with Alex's story as to the locking of the door and pulling down of the blinds. It was suggested that a variance with regard to dates is not of much significance; and that with regard to his being there at all, he may have been there without Alex seeing him; and that with regard to the locking of the door and pulling down blinds, the manner in which this was done was a matter of no importance. There is some force in all these observations, but when we remember that this witness was a child of six years of age, peculiarly susceptible to suggestions from his elders, and when we remember also that Parliament intended that the evidence of the principal witness should be corroborated by some other material evidence, I cannot think that we should be giving effect to that provision were we to hold that evidence of this kind is sufficient.

It was also urged that the evidence of the accused himself was corroborative, because it was alleged that accused did not tell consistent stories at different times. I do not see how this can corroborate the evidence of the boy. It would undoubtedly weaken the evidence of the accused, but in this case I cannot see that it goes further than that.

The second question is: Can such corroborative evidence be

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taken notice of when found in the evidence given for the defence? The contention of counsel for the accused was that the corroborative evidence must be found, if it exists at all, in the evidence given for the prosecution, and that the evidence given for the defence cannot be looked at for the purpose of discovering corroborative evidence. I do not think this is tenable. The accused had the right at the close of the case for the prosecution to rest upon its insufficiency. If he chooses to put in evidence then, that evidence may be looked at for any purpose, and if it corroborates the story of the principal witness, it must and ought to be taken into consideration in that connection.

The third question arises out of the following circumstances. The accused was charged with two distinct offences. He was tried on the first, and the learned County Court judge reserved his decision and then proceeded to try him on the second. At the conclusion of the trial of the second charge he convicted him, and that is the conviction herein complained of. He afterwards acquitted him on the first. The learned judge now asks this Court to say whether or not he was right in proceeding with the trial of the second charge before he had disposed of the first. A number of cases were cited to us bearing upon this question: *Reg.* v. *McBerny* (1897), 3 C.C.C. 339; *Rex* v. *Bullock* (1903), 8 C. C. C. 8; *Rex* v. *Burke* (*No. 2*) (1904), *ib.* 14; and some others. It would appear from *Rex* v. *Bullock* that the Court of Appeal in Ontario did not consider it obligatory to quash a conviction under circumstances similar to those in the present case. I think there is no hard and fast rule of law binding us in this matter, but that we are to be governed by the facts of each particular case. Now, in this case, had the judge reserved his decision upon the first charge until he had heard the evidence in the second, and then convicted the accused upon the first charge, I should say that that would be good ground for quashing that conviction. In this case, however, no harm was done. The judge properly heard the evidence on the first charge. Whether he convicted then or reserved his decision could make no difference in the effect this evidence would have with him when he tried the accused on the second

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charge. If it would affect his judgment in one case, it would in the other.

While, therefore, in my opinion we should not in this case be justified in quashing the conviction on this point, I wish to say that I think it an objectionable practice to proceed with the trial of a second charge against an accused person before disposing of the first.

The fourth question is: "Was the evidence of Cyril Farron properly admissible?" This witness was called to prove that the accused had attempted to commit a similar offence with respect to him some time prior to the offence alleged in this case. He did not know just how long before, but it seems to me this is not material. The learned County Court judge says that he admitted this evidence "as tending to shew the nature of the accused." I am clearly of opinion that this evidence was not admissible, and that we must answer this question in the negative.

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The result is that the conviction cannot stand.

My answer to the first question would entitle the accused to a discharge from custody, but as the Court is evenly divided upon this question, no order can be made for his discharge. We are, however, unanimous in answering the fourth question in favour of the accused. This would entitle him to a new trial. The order, therefore, which I think we should make, having regard to section 1,018 of the Code, is that the conviction be set aside, and that a new trial be directed.

IRVING, J.A.: In my opinion the evidence of the boy Joe does not amount to corroboration of the evidence of Alex within the meaning of sub-section 2, section 16, so as to justify the case going to a jury. This case was tried by a judge, but, for obvious reasons, I deal with this point as if the tribunal had consisted of a judge and jury. The evidence of Alex, to be decisive, must be corroborated by "some other material evidence." That is to say, there must be some strengthening or confirmation of Alex's evidence which will enable the judge or jury to decide upon the truthfulness of the story told by Alex. I put on one side the question of dates where there is a

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difference between witnesses whose evidence we are considering of the several weeks, because, although the fixing the time by date would be the most accurate, yet we know occasions can be identified by means of events noted by different witnesses.

Alex says he had visited the house on many occasions when nothing improper occurred, but on one afternoon he went there alone, and first after locking the door and pulling down the blinds, committed the offence in question; that the prisoner gave him ten cents.

Now follows the alleged corroboration. Joe says that he saw Alex go into the house on one occasion (no hour or time of day is fixed); that he (Joe) had to wait by the well until Alex came out (this expression "had to wait" suggests to me that he was waiting there by Alex's instructions); that when Alex did come out he had two bits; that he saw Alex pull down the blinds and lock the door, and that the prisoner was then in the house.

This testimony, if you take one part, *viz.*, preparations to prevent interruptions, agrees with that of Alex, but if you take the whole statement it is not corroboration, because the incidents mentioned by Joe do not identify the occasion he refers to as the time fixed by Alex's evidence as the only time when anything improper occurred.

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It is quite impossible to say that Joe's story corroborates that of Alex unless you say: (1) He (Joe) is mistaken as to date; (2) and he is also mistaken as to the indentity of the person who pulled down the blinds and locked the door, and (3) as to the amount of money Alex had.

It is only by eliminating or explaining away these discrepancies that you can find a corroborating residuum.

Having got rid of the contradictory portions of the evidence, is a judge at liberty to say with reference to the balance: Whether these incriminating preliminaries described by Joe are relevant and prove that the prisoner did this thing, on this particular occasion, mentioned by Alex? That does not seem to me to satisfy the statute. To be admissible as corroboration within the statute, the evidence ought, on its face, to shew that it is relevant to the charge.

Cole v. *Manning* (1877), 2 Q. B. D. 611, which is the strongest case for the prosecution, is, I think, distinguishable. The mutualities in the *Manning* case were relevant to the issue to be determined in that case. They went to shew the relationship between the man and the woman existing prior to the begetting of the child.

The statement taken as a whole is merely evidence of a collateral fact, and therefore, if allowed to go to the jury under the guise of corroboration, would have a tendency to excite prejudice and mislead. For that reason I think it was the duty of the judge to reject it: see *Rex* v. *Ellis* (1910), 2 K.B. 746.

In a criminal case, a judge cannot be too strict in confining the evidence to the issue. An indictment is intended to inform a prisoner as to the specific charge to be brought against him; therefore, the admission of any evidence of facts unconnected with that charge, and acts relating to acts alleged to have been done at a different time would be open to the objection of taking him by surprise.

The second question in my opinion should be answered in the affirmative, but on reading the depositions I am not satisfied that there is any corroboration of the testimony of Alex.

Dealing with the first of these two points, I think the accused is entitled to be acquitted.

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The third question, which I would answer in the affirmative, raises a point of importance in practice. It is highly desirable in the administration of criminal justice that one case should, if possible, be disposed of before another is entered upon, but if for reasons which appear proper to the judge at the time, he decides to do what was done in this case, I am not prepared to say that the verdict cannot stand. Each case must be decided upon its own circumstances. In the present instance, we have not before us the evidence taken in the first case. Here we have a judicial officer certifying to us that he, in deciding this case, was not affected by the evidence on the case first heard. In my opinion that certificate was unnecessary, but its insertion (in lieu of the word "thereupon") would have made a difference in the result of *Hamilton* v. *Walker* (1892),

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2 Q.B. 25. The report of that case bears out the proposition that I have stated above, *viz.*: where there has been evidence adduced on a second charge before the first charge is finally disposed of, that is not of itself ground for setting aside the first conviction.

On the fourth point, I am of opinion that the judge made a mistake and that there has been a mistrial; the evidence of Farron should not have been listened to.

The general rule is stated by the Judical Committee in *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65.

The difficulty in the case of *Rex* v. *Bond* (1906), 2 K.B. 389, where a second argument was deemed necessary, was to

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decide whether a particular piece of evidence fell within the rule or not.

The Court of Criminal Appeal in *Rex* v. *Fisher* (1910), 1 K.B. 149, dealt with the same principle in a case of false pretences, and it was held that the evidence ought to have been rejected.

My answer to the fourth question would entitle the prisoner to a new trial.

MARTIN, J.A.: With respect to the first question reserved for us, the objection is taken at the outset that there can in any event be no corroboration under section 16, sub-section 2 of the Canada Evidence Act, by a child of tender years who does not understand the nature of an oath. In my opinion, there is nothing to support such a view. All that the second sub-section declares is that "no case shall be decided upon such

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evidence alone," and such evidence must be corroborated by some other "material evidence." There is, in these words, no suggestion that the "material evidence" may not be given by a witness whose evidence, as declared by the preceding sub-section, "may be received though not given on oath," subject to the opinion of the presiding judge. The limitation respecting corroboration clearly does not extend to the secondary witness.

I am further of the opinion that the learned County judge was right in finding that there was "material evidence"

corroborating that of Alex Ashford, the complainant, and it is to be found in the testimony of his little brother Joe, aged six years. Before considering it, I draw attention to the difference in language between said sub-section 2 and the corresponding section 1,003, of the Criminal Code, which latter seems to go further and require a greater degree of corroboration, providing that the evidence of the prosecution must be "corroborated by some other material evidence in support thereof, implicating the accused." The words "in support thereof, implicating the accused" are not in sub-section 2, which clearly only requires some degree of corroboration, and the fact that there are discrepancies, as there almost always are in every sort of evidence, does not destroy the corroboration: *Rex* v. *Good* (1909), 2 Cr. App. R. 278; *Rex* v. *Hedges* (1909), 3 Cr. App. R. 262; and *Rex* v. *Armstrong* (1907), 15 O.L.R. 47, *per* Meredith, J.A. at p. 49, a decision on section 1,003. The case most in point, and strongly in favour of the Crown's contention herein, is *Cole* v. *Manning* (1877), 2 Q.B.D. 611, a decision on the Bastardy Laws Amendment Act 1872 (35-6 Vict., Cap. 65, Sec. 3) which requires the evidence of the mother to "be corroborated in some other material particular by other evidence," etc., which language is essentially the same as that in sub-section 2. There, evidence of the complainant's parents of undue personal intimacy long before the child could have been begotten, was held by the Queen's Bench Division to be sufficient corroboration, Mellor, J. remarking, "Evidence of that kind shews at least a probability that the statement of the mother is true," and the case was remitted to the magistrate to weigh that evidence. In considering this decision, Osler, J.A., in *Green* v. *McLeod* (1896), 23 A.R. 676 at p. 679, observes that "the evidence which was held to be sufficient for that purpose was, in the strictest sense, evidence shewing merely a probability that the statement of the plaintiff was true."

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In civil cases, the principle as embodied in the Ontario Evidence Act has been recently discussed in *Thompson* v. *Coulter* (1903), 34 S.C.R. 261, by Mr. Justice Killam in delivering the judgment of the Court, and he points out at p. 263, that

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"Unless it supports that case, it cannot properly be said to 'corroborate.' A mere scintilla is not sufficient. At the same time the corroborating evidence need not be sufficient in itself to establish the case. The direct testimony of a second witness is unnecessary; the corroboration may be afforded by circumstances."

In considering the question of corroboration, it is to be borne in mind that it is just as much open to the jury (or judge acting as such) to believe a part only of the testimony of a witness offered in corroboration as of a main witness, and they are just as much at liberty, in considering credibility, to make all proper allowances for lapses of memory or the mental limitations of tender years, or the presence or absence of bias or other undue influence in the one case as in the other. And this is peculiarly a case where these principles should not be lost sight of, because the learned trial judge was of the opinion that the complainant, Alex Ashford, had been tampered with concerning his testimony, as appears by his strong observations concerning his demeanour as follows:

"That boy gave his evidence in a very unwilling way to the Crown prosecutor; whatever he said in reply to the questions of the Crown prosecutor had to be dragged out of him. He was exceedingly adverse and stubborn. There was, however, a notable difference in his demeanour as a witness when he was taken in hand by counsel for the accused; and having this circumstance in mind, I cannot but attach the greatest importance to the admissions made by him which were unfavourable to the accused because, beyond any doubt, he intended the whole tenor of his evidence and manner to be favourable to the accused."

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In such circumstances, his statements, for example, that there was nobody with him at the time, and that he saw nobody outside when he went into the house, might very properly be disbelieved either as being untrue or forgotten, or that he had not chanced to see his little brother just at that moment, who, however, positively states that he saw Alex going in and "I had to wait by the well till he came out." It is a perfectly legitimate inference to draw that the boys are speaking of the same occasion, because Alex deposes that this was the only time that the accused ever asked him "to do anything nasty." Now, though Joe cannot, as might be expected in a child of his years, be at all exact as to the date of this occurrence, yet he testifies unmistakably and positively to these weighty facts, *viz.*: that he saw his brother go into the Hindoo's (accused's)

house; that the Hindoo was in there with him; that the door was locked; that the blinds were drawn down, and that after Alex came out he had some money with him, though he had none when he went in. The discrepancies as to who actually pulled down the blinds and locked the door, and the amount of money, would more or less weaken the effect of his testimony, depending upon the amount of reliance that might be placed upon portions of that of Alex, but at the worst it is simply a question of degree for the jury to weigh and pass upon. The principal facts that he deposes to are exactly of that sinister nature which would surround the accomplishment of a crime of this character. In my opinion, I have no hesitation in saying that if this had been a jury trial at the assizes and I had been presiding, I should not have felt justified in withdrawing the case from the jury, and consequently I am of the opinion that it was open to the learned trial judge, acting as a jury, to reach the conclusion that he did reach upon the evidence before him.

The second question presents no difficulty, and should be answered in the affirmative. The corroborating evidence might, for example, be supplied by the accused himself should he elect to go into the witness box.

MARTIN, J.A.

The third question should, I think be answered in the negative. The effect of the course adopted was, I think, not according to law, and a "substantial wrong or miscarriage was thereby occasioned" to the accused within the spirit of section 1,019 of the Code. The exact point submitted to us was raised before the Supreme Court of Nova Scotia in *Reg.* v. *McBerny* (1897), 3 C.C.C. 339, and the six judges who sat were unanimous in holding that in the County Judges' Criminal Court, in the exercise, under Part XVIII. of the jurisdiction of "Speedy Trials of Indictable Offences," it is an unlawful proceeding, prejudicial to the accused, to put him on his trial on one charge before a verdict is reached on another and prior one. In other words, and for example, it is just as objectionable in principle that there should be concurrent trials of the same accused before such a statutory court of record as before a court of assize, in which such a procedure

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is absolutely unknown, for obvious and various good reasons. I have considered with care the judgments of the Nova Scotia Court, and am of the opinion that, though in strictness we are not bound by them, yet we should follow them, first, because of the reasoning in them, and second, as I have already said in *Rex* v. *Nar Singh* (1909), 14 B.C. 192, that it is most desirable, particularly in criminal cases, that "the interpretation of Federal legislation should be the same in all parts of the Dominion."

The prisoner's counsel very properly drew our attention to the later decision of the Ontario Court of Appeal in *Rex* v. *Bullock* (1903), 8 C.C.C. 8, wherein that Court refused to grant a new trial in similar circumstances because the County Court judge had said, in the case stated, "that he came to his finding in the first case before hearing the second . . . " (p. 11), thus following the decision of Wills and Kennedy, JJ. in the Queen's Bench Division in *Reg.* v. *Fry* (1898), 19 Cox, C.C. 135, which was a conviction by justices at petty sessions, wherein the decision in *Hamilton* v. *Walker* (1892), which (as Wills, J. points out) is best reported in 56 J.P. 583, was distinguished, it being also a conviction by justices at petty sessions. With respect to *Rex* v. *Bullock,* I observe first that, strangely enough, the prior decision of the Nova Scotia Court in *Reg.* v. *McBerny* was not even mentioned by the majority of the Court and is only noted in a list of cases at the end of Mr. Justice Garrow's judgment. Second, that the important point was not taken there which is taken here, *viz.:* that this Court of Appeal (like the same Court in Ontario) has no power to receive any evidence to shew what operated on the judge's mind in the speedy trial, as he was in matters of fact, unlike the justices at petty sessions in the English cases, exercising the jurisdiction and discharging the functions of a jury as well as judge, and that his mind on matters of fact could no more be exposed to this Court in this respect than could that of a jury at the assizes. I am of the opinion that this contention is sound, and it receives support from the judgment of DRAKE, J. in *Rex* v. *Sing* (1902), 9 B.C. 254 at p. 256, 6 C.C.C. 156, wherein he said, after distinguishing *Reg.* v. *McBerny* and applying *Reg.* v. *Fry:*

MARTIN, J.A.

"I think that a distinction can be drawn between trial of an indictment and a hearing before a justice. Under the Code, a trial before the County Court judge is in all respects governed by the same principles as a trial at the assizes, and evidence is not admissible to shew what operated on the judge's mind with reference to the conduct of the trial."

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But, even if we were at liberty to receive such evidence, it would not bring this case within the principle of the decisions respecting justices, because his Honour does not even suggest that he had made up his mind on the first trial before beginning the second.

The fourth question should, in my opinion, be answered in the negative, this case on the facts being clearly distinguishable in principle from the decision in *Rex* v. *Bond* (1906), 2 K.B. 389, the leading case on the subject. This is quite apart from the fact that the learned trial judge admitted the evidence on a wrong ground "as tending to shew the nature of the accused," though of course this would not permit its being receivable if it were so otherwise.

MARTIN, J.A.

The result is that there should be a new trial.

GALLIHER, J.A.

GALLIHER, J.A. concurred in the reasons for judgment of MARTIN, J.A.

New trial ordered.

LAMPMAN, CO. J.

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Oct. 27.

GOODACRE v. SIMPSON

GOODACRE & SONS v. SIMPSON.

Statute of Limitations—Payment on account—Appropriation of fund—Promise sufficient to take debt out of statute.

A debt collector having accounts placed in his hands by both plaintiffs and defendant for collection, applied to the defendant for payment of his account which was statute-barred. Defendant stated that plaintiffs would never press him for payment, but on the collector insisting, defendant instructed him to hand over to plaintiffs some of the money collected for defendant. The collector accordingly paid in $11.65.

Held, affirming the judgment of LAMPMAN, Co.J. at the trial, that from the instructions of defendant to the collector to pay to plaintiffs some of the moneys collected for him (defendant) could be inferred a promise to pay sufficient to take the debt out of the statute, and was not an appropriation of a particular fund.

Statement

APPEAL from the judgment of LAMPMAN, Co.J. in an action tried by him at Victoria on the 10th of January, 1910. The facts are sufficiently stated in the headnote.

Kemp, for plaintiffs.
Moore, for defendant.

7th April, 1910.

LAMPMAN, CO. J.

LAMPMAN, Co. J.: The question to be decided is whether or not a payment on account made by the defendant took the case out of the Statute of Limitations. The plaintiffs placed in the hands of a collecting agency an account against defendant which was statute-barred. The defendant had placed in the hands of the same agency for collection a number of small accounts aggregating an amount much less than the plaintiffs' account against him. Stubington, the collector, in his capacity as agent for collection for plaintiffs, saw the defendant and asked for payment; defendant told him that the old man (Goodacre) would never press him, but Stubington was not to be put off in that way, and told defendant he should make an effort to pay, whereupon defendant told him that as he (Stubington) was collecting for him (defendant), he could turn some over to

Goodacre. Acting on this instruction, Stubington, when he collected some money for defendant, paid $11.65 of it to plaintiffs, and the question is whether that payment was made under such circumstances that there can be implied from it a promise to pay the debt. Simpson denies any conversation such as Stubington alleges he had with him, but I have no hesitation in accepting Stubington's statement, and finding as a fact that Simpson authorized him to pay out of moneys collected something to plaintiffs. Mr. *Moore* contends that there was a limited authority to pay, and that the circumstances indicated no intention of paying, and are like those of *Routledge* v. *Ramsay* (1838), 8 A. & E. 221. The authorities are quite clear that no promise to pay will be inferred if there is anything said at the time of acknowledgment or part payment to indicate that the debtor has no intention of paying, as, for example, where he pays $5 on account and accompanies the payment with a statement that he will not pay the balance. But here there is nothing in the statement, "the old man will never press it," to indicate no intention of paying—it is tantamount to an acknowledgment of the debt with the expression of a hope that he will not have to pay it. The circumstances here differ greatly from those in *Routledge* v. *Ramsay, supra,* in which the debtor sent the creditor a bundle of accounts and told him to collect them and pay himself out of them. If Stubington were acting only for Goodacre, *Routledge* v. *Ramsay* would apply. Suppose that when Stubington asked defendant for money, defendant had said, "I have $11.65 in the bank; come along and I will draw it and pay it to you," and had done so, would not those circumstances imply a promise to pay? And they are in effect very much the same as those that took place here.

LAMPMAN, CO. J.

I think I am warranted in inferring a promise to pay. Judgment for the plaintiffs for $141.36.

The appeal was argued at Victoria on the 25th of October, 1910, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

Harold Robertson, for appellant (defendant): The debt collector, in making the demand, was plaintiffs' agent, and as

Argument

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such received on behalf of the plaintiffs the statement of defendant that he would not be pressed by plaintiffs. As to part payment before or after the debt is statute-barred: see *Cornforth* v. *Smithard* (1859), 5 H. & N. 13. It is for the plaintiffs to shew that the defendant intended to pay, or whether the remark made by the defendant at the time of demand constituted a promise to pay. There is no new promise here; there was simply a permission given, or a statement made that there would be a particular amount paid out of a particular fund, and that is as far as the defendant can be bound. He cited *Routledge* v. *Ramsay* (1838), 3 N. & P. 319; *Whippy* v. *Hillary* (1832), 3 B. & Ad. 399.

Argument

Aikman, for respondents (plaintiffs): There was no limitation in defendant's remark to the collector, except that if he collected enough money on behalf of defendant, he could pay plaintiffs' claim out of it. It was purely a payment on account, and he made the collector his agent to pay plaintiffs. *Routledge* v. *Ramsay, supra,* is based on an assignment of a definite fund, and is not applicable here.

Robertson, in reply.

Cur. adv. vult.

27th October, 1910.

MACDONALD, C.J.A.

MACDONALD, C.J.A. was of opinion that the appeal should be allowed.

MARTIN, J.A.

MARTIN, J.A.: I agree with the judgment my brother GALLIHER is about to read. The case is an unusual one because of the dual agency, and I am unable to take the view on the facts that there was an intention to restrict the payment to the proceeds of a particular fund.

GALLIHER, J.A.

GALLIHER, J.A.: There are no express words used which would place it beyond doubt either that there was a promise to pay the debt or that only certain moneys out of a certain fund were to be used, and I am not free from doubt upon the point; but considering the fact that the learned County Court judge had the advantage of having the witnesses before him and that

his notes of the case as before us are a condensation of the evidence, I am not prepared to say that he came to a wrong conclusion in drawing the inference, from the unusual state of facts before him, that there was a promise to pay.

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Solicitor for appellant: *H. W. R. Moore.*
Solicitor for respondent: *Claude Kemp.*

WOODFORD v. HENDERSON.

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WOODFORD v. HENDERSON

Practice—Appeal—Motion, without notice, to adduce fresh evidence on appeal—Grounds on which indulgence will be granted.

A party moving the Court of Appeal for leave to adduce fresh evidence, must give notice and serve affidavits in support.

Held, in this instance, that, the party having knowledge of a fraud, and not having been reasonably diligent in exposing it at the time, he should not be assisted in doing so on appeal. A strong and clear case must be made out in order to gain such an indulgence.

MOTION for leave to give evidence not given at the trial. Heard at Vancouver on the 19th and 22nd of April, 1910, by MACDONALD, C.J.A., IRVING and MARTIN, JJ.A. Statement

Sir C. H. Tupper, K.C., for appellant, moved to submit further evidence on appeal. The judge had a view of the *locus,* but had been deceived by what the plaintiff had done.

Woodworth, for respondent, objected. There has been no notice of motion served, or affidavits in support. Argument

Tupper: We can get the affidavits, or have the witnesses here if necessary.

Per curiam: You must have served your notice and affidavits before the Court will hear you. As you have not got them, you must pay the costs of the adjournment of to-day's hearing. You

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may serve notice to-day for Friday, the 22nd instant, and serve affidavits.

22nd April, 1910.

Tupper now moved on notice, for leave to submit evidence obtained since the trial and read affidavits in support.

Woodworth, contra: This cannot be done now, especially when appeal has been called on. He referred to *Marino* v. *Sproat* (1902), 9 B.C. 335; *Dicks* v. *Brooks* (1880), 13 Ch. D. 652; *Exchange Bank* v. *Billinghurst* (1880), W.N. 10.

Tupper, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The application cannot be granted. Here the party complaining knew when the judge visited the *locus* that certain stumps had been covered up and concealed in the land-clearing operations. If a party has notice of a fraud, he should prepare himself to expose it.

IRVING, J.A.

IRVING, J.A.: I am not prepared to dissent, although I have considerable doubt.

MARTIN, J.A.

MARTIN, J.A.: The Court will not lightly grant these applications. A strong and clear case must be made out; here a weak case is submitted, which it would be dangerous to grant. The defendant did not shew diligence in investigating the facts when he had the opportunity before, and when the judge went out there. The application has no merits.

Motion dismissed.

CLANCY v. GRAND TRUNK PACIFIC RAILWAY CO.

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Contract—Security for performance of—Pledging of contractor's plant and materials as security—What constitutes plant and materials for the work—Articles not deemed for the work—Claim under bills of sale given by contractor—Necessity for registration.

Defendants seized certain property of F. who had contracted with them to do certain railway construction work. Under this contract F. agreed that all the plant, materials, etc., provided by him for the work should be, until the completion of the work, the property of the defendants, but that upon completion of the work, all of such plant and materials as should not have been used and converted should be delivered up to F. Plaintiff based his claim to ownership of the seized property upon two absolute bills of sale by F. made and registered within a month of each other.

Held, that the contract did not come within the operation of the Bills of Sale Act so as to require registration, but that the true intent and meaning of the section in the contract making the provision in question was that the plant, materials, etc., were to be retained by defendants as security for the fulfilment of the contract, and as at the time of making the contract it would not have been possible to identify the plant, materials, etc., they could not be considered articles capable of "complete transfer and delivery" within the meaning of the Bills of Sale Act, but

Held, that plaintiff could recover the value of any goods seized which had not been provided by F. for the work; but that kitchen supplies and utensils were not plant, materials or other things provided for the work.

ACTION for damages for wrongful conversion of chattels, tried by GREGORY, J. at Vancouver during January, 1910.

Statement

C. B. Macneill, K.C., for plaintiff.

L. G. McPhillips, K.C., for defendant Company.

27th April, 1910.

GREGORY, J.: Action by plaintiff for damages for wrongful conversion and malicious prosecution. The plaintiff made no serious attempt to prove any damages arising out of the prosecution complained of, or that there was any malice or want of probable cause, etc., and I have no hesitation in dismissing that branch of the action.

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The plaintiff claims ownership of certain goods seized by the defendants, and bases his title upon two absolute bills of sale, dated 3rd of September and 2nd of October, 1909, and registered respectively on the 7th of September and 6th of October. The affidavit of the witness to the first bill of sale states that the maker (one Ferguson) resides at the City of Vancouver, B. C., and the affidavit to the second states that he resides at the Woods Hotel, Vancouver, B. C. The defendants contend that this is an insufficient compliance with the Act requiring a description of the maker's residence or place of business and occupation to be set out by affidavit.

The defendants set up that the property in question is its property, and by an amendment made at the trial by consent, set up a contract made between Ferguson and the defendants, dated 7th May, 1909, whereby Ferguson agreed to perform certain work for the defendants, and one of the terms of the contract was that all the plant, material, etc., provided by Ferguson for the work was to become and be the property of the defendants, etc. Defendants claim that the property in dispute was so provided, and so became its property.

The plaintiff contends that the contract between Ferguson and the defendants, so far as it affected the property in dispute, was a bill of sale and should have been registered under the Bills of Sale Act, B. C. Stats. 1905, chapter 8, and not having been so registered the defendant has no right under it as against the plaintiff.

GREGORY, J.

Ferguson's contract was to build the substructure for a certain number of bridges on the defendant Company's right of way. The plant, or a greater portion of it, was taken to the scene of operations and the work commenced. A dispute arose between the Company and Ferguson as to the manner in which concrete should be laid, which resulted in a cessation of work. The plaintiff took possession of the property, but before he was able to remove it, possession was taken from him by the defendant Company under the following clauses in their contract before referred to:

"10. All machinery and other plant, materials and things whatsoever provided by the contractor, for the works hereby contracted for, shall

from the time of their being so provided become, and until the final completion of said work, be the property of the Company for the purpose of the said works, and the same shall on no account be taken away, or used or disposed of except for the purposes of the said works, without the consent in writing of the engineer, and the Company shall not be answerable for any loss or damage whatsoever which may happen to machinery or other plant, materials or things: provided always, that upon the completion of the works and upon payment by the contractor of all such moneys, if any, as shall be due from him to the Company, such of the said machinery and other plant, materials and things as shall not have been used and converted in the works and shall remain undisposed of, shall, upon demand, be delivered up to the contractor,

"11. Should the contractor wilfully or persistently violate any of the covenants of this agreement or make default or delay in diligently continuing to execute or advance the works to the satisfaction of the engineer, and such defaults or delay shall continue for six days after notice in writing shall have been given by the engineer to the contractor requiring him to put an end to such default or delay, or in case the contractor shall become insolvent, or make an assignment for the benefit of creditors, or neglect either personally or by a skilful and competent agent to superintend the works, then in any of such cases the Company may take the work out of the hands of the contractor and employ such means as it may see fit to complete the work, and the contractor shall have no claim for damages or for any further payment in respect of the work performed, but shall nevertheless remain liable for all loss or damage which may be suffered by reason of the non-completion by him of the works; and all materials and things whatsoever, and all horses, machinery and other plant provided by him for the purposes of the works, shall remain and be considered as the property of the Company."

The plaintiff contends that these clauses create either (a) an authority or licence to take possession of personal chattels as security for a debt; or (b) an agreement by which a right in equity to personal chattels or to a charge or security thereon is conferred, within the interpretation (section 3) of the expression "Bill of Sale." GREGORY, J.

But the only case cited by him where the writing in question bears any resemblance to that before the Court, and was held to be a bill of sale, is *Climpson* v. *Coles* (1889), 23 Q.B.D. 465 where the Divisional Court, consisting of Denman and Stephen, JJ., held that a mortgage deed containing a material clause somewhat similar to that before the Court, was also a bill of sale and required to be registered, but upon the distinct ground that it contained a proviso that upon default in payment of the mortgage debt, the mortgagor should have the right to sell the

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building material, which right might be exercised independently of the right also given to enter upon the premises and seize the building materials in case the mortgagor did not proceed with the completion of the building then in course of erection.

The case does not pretend to in any way affect *Brown* v. *Bateman* (1867), L.R. 2 C.P. 272; *Blake* v. *Izard* (1867), 16 W.R. 108; *Reeves* v. *Barlow* (1884), 12 Q. B. D. 436, relied on by the defendants, the two latter of which distinctly hold that the interest is a legal and not an equitable one; see Bowen, L.J. in *Reeves* v. *Barlow, supra,* at pp. 441, 442:

"Whatever right is conferred by the clause of the building agreement ..... is not a right in equity at all but a right at law. Down to the time when the building materials were brought on the landlord's premises there was no contract relating to any specific goods at all, nor anything which could be subject to a decree for specific performance. The contract was only to apply to goods when brought upon the premises, and until this happened there was no right or interest in equity to any goods at all. Upon the other hand, the moment the goods were brought upon the premises the property in them passed in law, and nothing was left upon which any equity as distinct from law could attach. No further performance of the contract was necessary, nor could be enforced. The builder's agreement accordingly was at no time an equitable assignment of anything, but a mere legal contract that, upon the happening of a particular event (in the present case the providing of the plant, &c.), the property in law should pass in certain chattels which that event itself would identify without the necessity of any further act on the part of anybody, and which could not be identified before."

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See also *Ex parte Hubbard* (1886), 17 Q. B. D. 690, where Fry, L.J., draws the distinction between "a right in equity" and "equitable relief" in respect of a right in law.

The defendants also relied on *Manchester, Sheffield, and Lincolnshire Railway Co.* v. *North Central Wagon Company* (1888), 13 App. Cas. 554; *Ramsay* v. *Margrett* (1894), 2. Q.B. 18; *Ex parte Collins* (1902), 1 K.B. 555.

It appears to me that the true intent and meaning of paragraph 10 of the contract is that the plant, etc., was to be retained by the defendant Company as security for the performance by Ferguson of his contract. At the time it was made there was no debt to which it could refer, nor does the contract itself suggest any debt present or future.

It seems to me, therefore, that it does not fall within either of the clauses suggested by plaintiff's counsel. But even if it

did, it would also have to come within the interpretation of the expression "personal chattels": see *Brantom* v. *Griffits* (1876), 1 C.P.D. 349; *Thomas* v. *Kelly* (1888), 13 App. Cas. 506; and *Traves* v. *Forrest* (1909), 42 S.C.R. 514, which hold that the Bills of Sale Act only applies to things which at the moment when the bill is given, and the provisions of the Act are to be applied to it, might be delivered to the assignee, and are not, but are left to the enjoyment of the assignor. *Thomas* v. *Kelly, supra,* was decided by the House of Lords under the English Act of 1878, which with the exception of one word is identical with the British Columbia statute. The English Act, in the definition of "personal chattels," requires them to be "capable of complete transfer *by* delivery," while our Act reads "transfer *and* delivery."

Since in the nature of things it was impossible at the time of the execution of the contract to identify "the plant, material and things" to be provided under it, how could they then be capable of "complete transfer and delivery," and if not, the agreement does not come within the Act, for it is only a bill of sale of such articles that the Act requires to be registered. The defendants therefore are entitled to "all machinery, and other plant, materials and things whatsoever, provided by Ferguson for the works."

But it is contended by the plaintiff that the defendants put an end to the contract and can therefore claim nothing under it; GREGORY, J.
and the ground for this contention is that the chief engineer insisted that the concrete for the piers at Zenardi Rapids should be deposited in position dry, that is, not under water.

Ferguson carried on his preliminary discussion with the defendant's bridge engineer, Mr. Le Grand, at Montreal, who plaintiff says (before the contract was executed) shewed him a notation on the Zenardi Rapids plan indicating that the concrete there could be deposited in position under water. The contract was subsequently executed, but the Zenardi Rapids plans initialled by Ferguson at the time had no such notation. Ferguson says he did not notice this omission until some weeks afterwards, but when he again saw Le Grande in Winnipeg he promised to see that the notation was put on the plans sent out

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to the work, and that the resident engineer there should be notified. This was not done and apparently Ferguson never made any complaint, but proceeded with his preparatory work, always, however, claiming to the assistant resident engineer that he had Le Grand's promise, etc. In July, the resident engineer, Van Arsdal, wrote to the chief engineer, Keliher, suggesting some alterations in the plans. Ferguson had asked for a ruling from Keliher, and Van Arsdal in his letter stated:

"Our specifications call for all concrete to be placed dry. This will be very difficult and expensive below low water ..... and I assume you will allow placing the concrete on foundations in water. Kindly advise me if this is not permissible."

Keliher replied and, *inter alia,* says:

"It will not be absolutely necessary for you to deposit the lower portion of these piers and abutments dry, but you must take exceedingly painstaking care to see there is no segregation of stone, etc., as the material is being deposited under water."

This letter was communicated to Ferguson by Van Arsdal's assistant without any instructions from him to do so. The witnesses are not very explicit and do not agree as to the difference in the cost of the two methods of depositing the concrete, but it would amount to some thousands of dollars at least. Ferguson never got to the point of depositing the concrete. The chief engineer visited the work about the 1st of September, and gave explicit instructions that the concrete should be deposited dry, as required by the specifications. Ferguson followed him

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to Vancouver and on to Winnipeg, endeavouring to get him to authorize wet concrete, but without success. At Prince Rupert Ferguson told Keliher he would go out to the work, and if he could study out any proper way that he could cofferdam it and do the work he would do it, but if not, he would have to quit. The specifications, paragraphs 10 and 15, unquestionably describe the manner in which the concrete is to be laid, and these specifications cannot be carried out under water. The plaintiff contends that they refer only to concrete placed above water, while the defendants' engineers always contended and still insist they refer to all concrete, and in order to carry it out below water, cofferdams and pumps must be used. The paragraphs themselves contain no restrictive words, nor on the other hand are they explicitly made applicable to both classes of work.

The contract, paragraph 3, provides that the contractor "shall ..... execute ..... in the most thorough, workmanlike and substantial manner in accordance with the specifications ..... and the plans, profiles, and drawings, prepared and to be prepared for the purposes of the work," etc.

From the facts above set out plaintiff claims that (a) there was a distinct collateral agreement with Le Grand; (b) one of the plans prepared for the work indicated that the cement was to be deposited under water, and in any case Keliher's letter to Van Arsdal authorized it; (c) Keliher's insistance upon dry cement was such a departure from the contract as to put an end to it, and the defendants cannot now claim under it.

The answer to this claim seems to be that Le Grand had no authority to make any contract binding upon the defendants (assuming it to be such a contract as might exist concurrently with the contract duly executed by it), nor had he any authority to interpret either the contract plans or specifications, and in addition, paragraph 27 of the contract provides that the express contract, covenants and agreements therein contained shall be the only contract, covenants and agreements upon which any rights against it are to be found.

To permit Ferguson to select any plan and insist upon working according to it, simply because it had been prepared, etc., would enable him to select any defective or abandoned plan, and would take away from the chief engineer the direction and supervision of the work expressly given to him by the terms of the contract. Keliher's letter to Van Arsdal was nothing more than a letter from the chief to his assistant engineer, giving his assistant discretion not to insist upon the concrete being deposited dry, and was in no sense a "written direction" to the contractor as mentioned in paragraph 7 of the contract. If Ferguson has solemnly contracted to do anything, however impossible it may turn out to be, whatever hardship it may work upon him, or however surprised he may be as to its effect, he has only himself to blame if he enters upon the work and continues it without taking prompt steps to have the contract rectified. In the present case he might have complied with the chief engineer's instructions and claimed from the Company any additional moneys he was entitled to, but instead he abandoned his work

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and telegraphed the plaintiff to protect himself, meaning to take possession of the plant, etc.

In any case he was hopelessly in default before he was in a position to place any concrete either wet or dry. The time for the concrete work at Zenardi Rapids expired on the 15th of August, and on the 1st of September he practically had not commenced it, and by his telegram to the plaintiff he abandoned it.

The contract provides, paragraph 3, that the work was to be performed in every respect to the satisfaction and approval of the chief engineer. By paragraph 6, the contractor was in all things to conform to the instructions of the engineer—all work was to be subject to his approval. By paragraph 7 the engineer was at liberty at any time to make any change he might deem expedient in anything connected with the work. By paragraph 8 the engineer was to be sole judge of work and material, and his decision on all questions in dispute with regard to work or material should be final. Paragraph 22 provides that in order to prevent disputes or misunderstandings in relation to any of the stipulations and provisions in the agreement or the true intent or meaning thereof or the manner of performance thereof . . . . and for the speedy settlement of such as may occur, the engineer is appointed sole umpire, to decide all such questions and matters, including any arising regarding the amount and quantity, character and kind of work performed; and his decision shall be final, binding and conclusive on both parties, except in the case of actual fraud.

GREGORY, J.

A great many cases were cited by counsel, but it seems unnecessary to refer to them, as the question is one of interpretation or construction, and in each case the Court must be governed by the terms of the document before it.

It is also unnecessary to deal with the defendants' contention that the bills of sale of the plaintiff are void on the ground (a) that the affidavits of the attesting witness does not truly set forth the residence of the maker and does not describe it all; (b) that they were in reality subject to a defeasance and never intended to be absolute. I have no doubt that both bills of sale were intended as a security and not as an absolute sale, but section 8

of the Bills of Sale in such cases only makes the registration void; and as to the defect of want of description, etc., of the residence of the maker, section 7 only makes such bill of sale void against the classes of persons therein named, and the defendants do not appear to come within any of those classes.

The result of the foregoing conclusions is that the plaintiff is entitled to the value of any goods seized by the defendants which had not been provided by Ferguson for the works contracted for. To come within those terms it appears to me that they must have reached the field of Ferguson's operations, that is, a point beyond which they would be handled by Ferguson's men only. Everything taken seems to have reached that area, but the kitchen supplies and utensils do not appear to me to be either plant, materials or things provided for the work within the true meaning of paragraph 10 of the contract, or the purposes of the works within paragraph 11.

GREGORY, J.

I have not overlooked the fact that both Ferguson and Young swore that all the goods bought were for the purposes of the work, but it seems to me that the last clause of paragraph 10 shews the nature of the plant, materials and things referred to, to mean such things as could be used and converted in the works; kitchen supplies and utensils hardly come within this description. I am, however, willing to hear further argument upon this point if desired, as well as upon the question of costs.

Judgment accordingly.

[On the matter being subsequently spoken to, plaintiff was given costs of the action, although the plaintiffs succeeded in obtaining only a small portion of the amount claimed. No change was made in the ruling as to plant and material.]

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CHARMER v. BERMUDA

SS. CHARMER v. SS. BERMUDA.

Admiralty law—Collision—Articles 18 to 28—Navigation in narrow channel—Tug with scow v. steamship—Departure from regulations justified—Signals—Evidence.

Though a narrow channel may properly be entered by means of any other recognized and navigable channel, yet the circumstances may be such (as here) as to require the entering ship to be prepared to take precautions to clear other vessels.

Held, on the facts, that an outgoing steamship in Vancouver Narrows had not fully discharged this duty as regards a tug with scow entering the Narrows.

Held, further, on the facts, that, as a matter of prudent navigation, the tug with scow was justified, under Articles 25 and 27, in her course of conduct though it was a departure from the strict letter of the regulations.

Observations upon the necessity of giving the proper signals to convey timely information.

Failure to call the quartermaster on duty as a witness animadverted upon.

Statement

ACTION by the owners of the steamer Charmer for damages sustained by the Charmer in a collision with the steamer Bermuda in Vancouver harbour. The action was tried at Victoria on the 8th and 9th of December, 1909, by MARTIN, Lo. J.A. for British Columbia, assisted by two assessors, Captain John Franklin Parry, R. N., and Commander Philip C. Musgrave of the Canadian Government Ship Lillooet.

Bodwell, K.C., and *McMullen*, for the Charmer.
Robinson, for the Bermuda.

1st August, 1910.

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MARTIN, Lo. J.A.: In this action the owners of the steamship Charmer (Master, R. A. Hunter) seek to recover damages from the owners of the tug Bermuda (Master, R. R. Clark) because of a collision which occurred between the two vessels about 12 or 15 minutes after one o'clock in the afternoon of the 3rd of December, 1908, in the First Narrows at the entrance to Van-

couver harbour. The day was clear and calm, with a flood tide of about two knots.

For the better understanding of this judgment, I pause here to note that the said First Narrows were held by me to be a narrow channel, under Article 25, in *Bryce* v. *Canadian Pacific Ry. Co.* (1907-8), 13 B.C. 96, 446, which decision was ultimately confirmed by the Privy Council on the 30th of July, 1909, but as, for some unexplained reason, the judgment of their Lordships has not yet been fully reported, though of wide general interest and of assistance in this case, I think it advisable to append it as a note hereto.

The Bermuda had a large barge, containing 510 tons of coal, secured to her port bow, projecting forward, and came up the channel towards Brockton Point on her proper course, *viz.:* a little south of mid-channel, at a speed of about three knots, or with the tide, five knots over the ground. The Charmer left her wharf in Vancouver harbour two minutes after one by her time, and in entering the Narrows between Burnaby Shoal and Brockton Point, on a course northwest by north half north, so as to cross mid-channel and go out on the north side of the Narrows, she admittedly got a little too near the kelp on Burnaby Shoal for safety, upon which, as her master says, he hauled off to port and "ran a little bit to get clear of it and then straightened up again . . . . the same as before." The Bermuda was first sighted about three cables distant and bearing about two points off the Charmer's port bow, the Charmer's speed being about nine knots, or seven over the ground. At this juncture sound signals were necessary according to Article 28, but a strange and embarrasing dispute here arose (doubtless owing to an intervening tug, the Edith) regarding the signals blown by the respective vessels, the Charmer contending that she blew one blast for the Bermuda, and the Bermuda answered with two blasts, a cross signal; but the weight of evidence supports the contrary contention of the Bermuda that she blew two blasts and the Charmer answered with one, which I find to be the fact. This unfortunate mistake of the Charmer's master about the signals is also important in shewing not only that he was confused on the point, but that he had the intention of directing the Charmer's course contrary to that course which she actually

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signalled, and consequently it becomes very difficult to place reliance upon his evidence as regards her course after the signals, or upon the means he took to avoid the collision, or his opinion as to the relative position and courses of the two vessels. In such circumstances it is hard to say what his exact intentions were, seeing that his mind was working on the very important erroneous assumption that he had blown two blasts instead of one. His contention is that after the Bermuda blew her two blasts, the Charmer put her helm hard astarboard and began to swing to port, and continued so to swing till the time of the collision, and that if the Bermuda had continued on her port course, pursuant to signals, after the Charmer began to swing there would have been no collision, but that it was caused by the Bermuda again changing her course from port to starboard when about 60 to 70 yards distant from the Charmer. Both vessels towards the last reversed their engines, but too late to avoid the collision, the corner of the scow striking the Charmer on her starboard side about 40 or 50 feet from her stem. The reversal of the Bermuda's engine necessarily had the effect of bringing her back to her original course. Just before the moment of impact the Bermuda properly went ahead (to avoid swinging cross-wise to the channel), on the chances of reducing the target and sliding past, in which she was nearly successful, but not quite. The Charmer's master admits that after he blew his whistle for the Bermuda he shifted his helm a little to port so as to swing off to starboard, but contends that the Charmer did not have time to swing before the Bermuda blew. Here is clearly where serious difficulty first arose, because in the first place there is the error about the Bermuda's whistle, which was, I find, blown first, and in the second place the Charmer's master underrated, and in his evidence unduly minimized the effect of porting his helm in the flood tide. I am advised by the assessors that if the Charmer had continued under a port helm as indicated by her one blast (in reply to the Bermuda's two blasts), she would undoubtedly have run clear of any possibility of collision. When her helm was eventually put to starboard, having regard to the swinging of the ship under port helm augmented by the flood tide on her port bow, it was too late to

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turn within a sufficiently small circle to avoid the Bermuda.

I am further advised by the assessors that seeing that the Bermuda was on her proper course (a little to the south of mid-channel) in a narrow channel, and having a very unhandy scow much longer than herself secured to her port side and heavily laden with 510 tons of coal, and being on a correct course to clear Burnaby Shoal and proceed up harbour, she, in view of her unwieldy tow and the proximity of Burnaby Shoal, with a flood tide of two knots, was, in the circumstances, precluded, as a matter of prudent navigation, from either using the channel between Burnaby Shoal and Brockton Point, or altering her course to starboard. Therefore her action in blowing two blasts and then starboarding her helm was justified, and the above specified indecisive action of the Charmer after said signal was given justified the Bermuda in reversing her engines at the time she did.

I am further advised that while the channel between Burnaby Shoal and Brockton Point, leading somewhat sharply into the Narrows, is a recognized and navigable channel for light draught vessels of moderate dimensions, and was proper at that time for the Charmer to use (though not so now since the regulations of July 17th, 1909, passed subsequently to the collision), yet it is of such a nature that in using it to enter the Narrows, especially on a flood tide, as here, it is necessary to be prepared to take precautions to clear incoming vessels.

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With respect to the signals, it seems desirable to observe that the Charmer should have promptly blown two blasts to indicate her change of course to port, because the failure to do so withheld information from the Bermuda of the Charmer's change of course which would have been more valuable than the master of the Bermuda appears to have appreciated, according to his evidence, it being not quite clear what he means to convey by the statement that he was not "confused by the omission."

I am entirely in accord with the advice of the assessors, and the case appears to me to be eminently one to be decided by practical seamanship. It is also to be noted that neither ship gave the prescribed signal for going astern, though neither ship alleges that it was affected by that oversight. The omission of

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the plaintiff to call the quartermaster who was on duty in the Charmer at the time of the collision, whose evidence would have been of great value to this Court, is something which was not satisfactorily explained, and is to be regretted.

With regard to the alleged custom of vessels in the Narrows, it is not necessary, in view of the foregoing, that I should consider that matter, because, apart from it, the Charmer in my opinion must, in all the circumstances, be held to be solely responsible for the collision.

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There will be judgment for the Bermuda on the claim and counterclaim, with the usual reference to the Registrar, and merchants if necessary, to assess damages.

Judgment for defendant.

[Note.—Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of *The Canadian Pacific Railway Company* v. *Robert Henderson Bryce*, deceased (now represented by his executor, William Henry Johnson), and others, from the Supreme Court of British Columbia; delivered the 30th July, 1909.]

Present at the hearing: Lord Macnaghten, Lord Collins, Lord Gorell, Sir Arthur Wilson.

Nautical Assessors: Admiral Sir Archibald L. Douglas, G.C.V.O., K.C.B.; Commander W. F. Caborne, C.B., R.N.R.

[Delivered by Lord Gorell.]

The appellants in this case are the Canadian Pacific Railway Company, the owners of the steamship Princess Victoria which came into collision about or near the Parthia Shoal off Brockton Point near Vancouver at about 2.20 p.m. on the 21st July, 1906, with the steamer Chehalis, and in consequence the latter vessel sank, and some of her passengers and crew were drowned. Six actions were afterwards brought in the Supreme Court of British Columbia against the appellants by certain passengers and members of the crew of the Chehalis or their personal representatives to recover damages for loss of life and personal injuries and loss of effects, on the alleged ground that the collision was caused by the negligent navigation of the Princess Victoria.

The appellants denied that the collision was caused or contributed to by any negligence in the navigation of the Princess Victoria.

The actions were consolidated and tried in February, 1907, before Mr. Justice Martin, the local Judge in Admiralty for British Columbia, assisted by two nautical assessors, and on the 22nd May, 1907, the learned judge, after a very long trial, held, with the concurrence of the assessors,

that the collision was caused solely by the negligent navigation of the Chehalis, and he dismissed all the actions with costs.

On appeal to the Full Court of the Supreme Court of British Columbia, sitting without assessors, it was held by a majority of the judges that the Princess Victoria was to blame for the collision, and damages and costs were awarded to all the plaintiffs except the plaintiff Cyril James Eldridge House, the master of the Chehalis, whose appeal was dismissed.

The Chief Justice held that the Princess Victoria was solely to blame. Clement, J., held both ships to blame, and Irving, J., held the Chehalis was solely to blame. House's appeal failed, because he was responsible for the navigation of the Chehalis, and the result of the judgments was that he could not recover, and he has not appealed against this decision.

The facts are simple, and it is difficult to understand why the trial should have lasted so long as it did.

The Princess Victoria, a twin-screw steamship of 1,943 tons gross register, left the wharf on the south side of Vancouver harbour bound to Victoria, with passengers, mails, and baggage, and a crew of about 100 hands, at about 2.5 p.m. on the day of the collision. The weather was fine and clear. A strong tide about two hours' flood was setting to the eastward through the Narrows of Burrard Inlet. The Princess Victoria proceeded at a speed of about 14 knots through the water, between Burnaby Shoal and Brockton Point, and rounded the point under starboard helm so as to straighten down the Narrows.

The Chehalis was a small screw tug of about 54 tons register, with a crew of six hands, House being her master. She left the wharf at Vancouver about 1.20 p.m. with passengers, and, after crossing to North Vancouver and picking up some more passengers, left that place at about 2.5 p.m., bound to the westward through the Narrows for Blunden Harbour. House was in charge, and was at the wheel in a closed wheelhouse, steering, giving such orders as were required, attending to the whistle and keeping the look-out. There was no one else on the look-out. The Chehalis proceeded at about nine knots through the water down the inlet, being steered by the land and not by any compass course.

The appellants' case was that, after rounding the point, the Princess Victoria was steadied so as to pass to the northward of a steam launch and to the southward of the Chehalis, which was then proceeding on the starboard bow of the Princess Victoria some distance off on a course nearly parallel to that of the Princess Victoria; that two blasts were then sounded on the Princess Victoria to indicate that she was intending to pass to the southward of the Chehalis, but that the Chehalis suddenly came off to port towards the Princess Victoria, causing risk of collision; that thereupon both engines of the Princess Victoria were put full speed astern, and her helm hard-a-starboard, and that the Chehalis came rapidly to the southward, and, although she ported at the last moment, she struck the starboard bow of the Princess Victoria and afterwards sank, and seven persons were drowned.

Broadly stated, the case on the other side was that the Chehalis was proceeding on her course out of the Narrows, and that, after she had

passed Brockton Point, her master heard a whistle behind him, and on looking through a stern window in his wheelhouse, saw the Princess Victoria coming down on him, that he saw she was coming right into him, and that he threw his helm hard-a-port and gave a short blast of the whistle, but that in a few seconds the Princess Victoria struck his vessel.

The main question in the case was purely one of facts *viz.:* whether the Chehalis starboarded or was improperly allowed to swing over to port across the course of the Princess Victoria, or whether the latter vessel came too close to the Chehalis and ran into her, or was allowed to be sheered into her by the tide.

The learned judge who tried the case and saw the witnesses accepted the account of the officers of the Princess Victoria as being substantially correct. He found that, beyond doubt, there was ample room for her to have passed between the launch and the Chehalis, and in the course of his judgment said,

"I am satisfied that the officers in the pilot house of the Princess did keep a proper and continuous look-out and that at the time the two blasts were blown she, having just then freed herself from the anticipation of any danger from the launch close to her port bow, which had caused a momentary but immaterial deviation from her course, was steadied on a course W. by N. ½ N., within a quarter of a point, so as to just clear Prospect Point and take her straight down the Narrows, which course was, roughly, parallel to that of the Chehalis. Had these respective courses and speeds been maintained, there was at that time no reason to anticipate any danger of collision, though the courses would probably have ultimately converged. . . . But I find that while said blasts were being blown, or immediately thereafter, the Chehalis suddenly altered her course at least three to four points from west to southward, thus bringing herself across the bows of the Princess. . . . I have very little, if any, doubt that it was owing to the fact that Captain House, as he admits, only kept a look-out ahead, and I believe he was startled when he heard the signal and made a wrong movement of his wheel at a critical moment in the strong tide. There must have been something of the kind, for House did not take the position that he was thrown out of his course by an unforeseen eddy or current or otherwise."

The learned judge further held that the Princess Victoria had not committed a breach of any of the regulations for preventing collisions in Canadian waters, which are similar to those made under the Imperial Act, though the statutory section is different (*cf.* section 916 of Revised Statutes of Canada, 1906, chap. 113, and section 419 (4) of the Merchant Shipping Act, 1894). In particular upon the point which appears to have been much discussed, that is to say, whether the Princess Victoria had broken Article 25 of the regulations—the narrow channel rule—he stated that, having regard to the relative positions of the three vessels after the Princess Victoria had rounded the point, the mid-channel course which she took was the only proper one for her to take as a matter of good seamanship, as he was advised, consistent with her own safety, and it would have been unreasonable to expect her to have gone to the north of the Chehalis, already on the northerly course, and under her stern.

On the appeal to the Full Court the Chief Justice differed from the finding of fact by Martin, J., that the Chehalis altered her course across the bows of the Princess Victoria, and he considered that that vessel

was to blame under Articles 22, 23, 24 and 25 of the regulations. Clement, J., held that he could not, having due regard to the principles which should guide an appellate tribunal in reviewing a judgment as to matters of fact, say that the learned judge was wrong in finding Captain House to blame, *i.e.*, guilty of contributory negligence; but he held that the Princess Victoria had broken Article 25, and that that was "the larger inducing cause of the catastrophe." Irving, J., supported the judgment on all grounds.

There are two different matters to consider in this case. The first is, what were the facts, and the second, upon the facts, whether either or both of the vessels were to blame?

Their Lordships consider that the facts appear to have been very fully and carefully investigated by Martin, J., with the assistance of assessors, and that no adequate ground has been shewn for an appellate court to take a different view of the facts from that taken by the learned judge. He had the great advantage of seeing and hearing the witnesses, and unless it could be shewn that he had taken a mistaken or erroneous view of the facts, or acted under some misapprehension, or clearly came to an unreasonable decision about the facts, he should not, in accordance with well recognized principles, be overruled on matters of fact which depended mainly upon the credibility of the witnesses.

An examination of the evidence in this case shews that, not only was the learned judge entitled to come to the conclusions of fact at which he arrived, but that the weight of the evidence is in favour of those conclusions, and that the real cause of this unfortunate collision was that there was no adequate look-out kept on board the Chehalis, and that her master was unaware of the presence of the Princess Victoria until she was about to pass him, and improperly put his helm to starboard, or allowed his vessel, which had just entered the part of the Narrows where he began to feel the full effect of the tide, to fall off her course towards the Princess Victoria. Broadly speaking, there can hardly be the least doubt that, if House had seen and been aware of the presence of the Princess Victoria, the collision would never have happened. It seems almost incomprehensible that he should not have noticed her even before she rounded, and as she was rounding the point, unless he never looked anywhere except straight ahead of his vessel.

The finding of the learned judge upon this point really makes an end of the case, but it is desirable to deal briefly with the other points made on this appeal.

It was urged that the Princess Victoria broke Articles 22, 24, 25 and 28.

Article 22 is the crossing rule, and Article 24 is the overtaking rule. The 24th Article is that which was applicable, for the Princess Victoria was an overtaking ship, but the charge is disposed of by the finding that there was ample room for the Princess Victoria to pass the Chehalis, and that there would have been no collision but for the improper action of the Chehalis and her breach of Article 21, according to which she was bound to keep her course and speed.

Article 25 is the narrow channel rule, which provides that "in narrow channels every steam vessel shall, where it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel."

The collision took place somewhere about midway across the channel, which their Lordships consider has been correctly stated to be a narrow channel within the meaning of the Article. Then the configuration of the locality and the circumstances with regard to tide, etc., have to be considered. The learned trial judge held that the course taken by the Princess Victoria was justified by the circumstances, but the Chief Justice and Clement, J., appear to have considered that she should have gone outside the Burnaby Shoal, or at any rate under the stern of the Chehalis.

The Princess Victoria appears to have followed the usual course in passing through the narrow channel between the Burnaby Shoal and Brockton Point, and to have rounded the Point in a proper course to prevent herself from being swept out by the very strong tide which she would have had on her port broadside, if she had attempted to pass directly across to the north side of the channel leading outwards, and a similar effect would have been produced upon her if, having regard to the position of the vessel, she had proceeded to attempt to pass under the stern of the Chehalis.

Their Lordships are advised by the experienced assessors who have assisted them on this appeal that the Princess Victoria pursued a proper course having regard to the locality and tide, and was, in the circumstances, justified, as a matter of good seamanship, in taking the mid-channel course between the two other vessels, and therefore they do not agree with the views expressd on this point by the majority of the Full Court. They further do not consider that the course pursued by the Princess Victoria can be held to have caused or contributed to the collision, which was solely brought about by the improper action of the Chehalis.

With regard to Article 28 the point made under it against the Princess Victoria was that she did not sound her whistle when she began to round the point, and improperly failed to indicate by whistle signals the course she was taking. There does not seem to have been much, if any, argument on these points in the Courts below. It is to be noticed that when proceeding to round the point, the Princess Victoria was acting in the ordinary course of navigation, and that it has been but faintly suggested that she did anything wrong at a later time with regard to her whistle. A breach of the Article does not seem to their Lordships to be made out in the circumstances.

The conclusion at which their Lordships have arrived is that the decision of Martin, J., was right and should be affirmed. It would seem from the order of the Full Court that some dealings have taken place between the appellants and the plaintiffs William James Crawford and Ruby Crawford with regard to withdrawing the appeal of these plaintiffs to that Court, and any arrangement between the parties should remain unaffected by His Majesty's order.

Their Lordships will therefore humbly advise His Majesty to allow the appeal, to set aside the judgment of the Full Court dated the 18th of February, 1908, except so far as it relates to House, to restore the judgment of Martin, J., dated the 22nd of May, 1907, and to order that the present respondents do pay to the present appellants their costs of the appeals to the Full Court, but that His Majesty's order be without prejudice to any arrangement which may have been made between the appellants and the said William James Crawford and Ruby Crawford.

The respondents who have contested this appeal must pay the appellants' costs thereof.

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada.

GRANICK v. BRITISH COLUMBIA SUGAR REFINERY COMPANY (p. 198).—Affirmed by Supreme Court of Canada, 23rd December, 1910. See 44 S.C.R. 105.

MCDONALD v. VANCOUVER, VICTORIA AND EASTERN RAILWAY AND NAVIGATION COMPANY (p. 315).—Reversed by Supreme Court of Canada, 9th December, 1910. See 44 S.C.R. 65.

SISTERS OF CHARITY ASSESSMENT, *In re* (p. 344).—Affirmed by Supreme Court of Canada, 21st November, 1910. See 44. S.C.R. 29.

Cases reported in 14 B.C., and since the issue of that volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council.

ANGUS AND SHAUGHNESSY AND THE COLUMBIA AND WESTERN RAILWAY COMPANY v. HEINZE (p. 157).—Affirmed by Supreme Court of Canada, 13th December, 1909. See 43 S.C.R. 416.

FOREST v. SMITH AND TRAVES (p. 183).—Affirmed by Supreme Court of Canada, 20th October, 1909. See 42 S.C.R. 514.

JONES AND JONES v. THE NORTH VANCOUVER LAND AND IMPROVEMENT COMPANY, LIMITED LIABILITY (p. 285).—Affirmed by the Judicial Committee of the Privy Council, 18th March, 1910. See (1910), A.C. 317.

WHITE AND WHITE v. VICTORIA LUMBER AND MANUFACTURING COMPANY (p. 367).—Reversed by the Judicial Committee of the Privy Council, 29th July, 1910. See (1910), A.C. 606.

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trial—Dying declaration—Reply of counsel—Interpreter, competency or unfitness of.] The abolition of commissions of assize is within the competence of the Provincial Legislature, the reading of the commission not being "procedure" within the meaning of section 91, sub-section (27) of the B. N.A. Act. In a trial for murder, counsel for the Crown in opening the case, directed the attention of the jury to the blood-stained clothing of one of the prisoners. It developed later in the trial that the witness capable of proving the ownership of the clothing was the wife of the prisoner in question, and she was not examined. The subject was not brought to the attention of the jury in any other way, nor did the trial judge refer to it in his summing up; nor was the charge objected to by either side. *Held* (IRVING, J.A., dissenting), that the counsel for the Crown should not have in his opening indicated evidence of such gravity which he subsequently was unable to submit to the Court and jury, and that omission by the trial judge to advise the jury to ignore the remarks of counsel was non-direction, causing a substantial wrong within the meaning of section 1,019 of the Code so as to entitle the accused to a new trial. The injured woman said to another Indian woman "Fellows hurt me and make me die," and to her father she said "I am going to die, hurry up and get the priest"; "Sure, I am going to die, hurry up and get the priest for me." *Held*, that this was sufficient indication of apprehension of imminent death and hopelessness of recovery to be admitted in evidence as a dying declaration. A "reply" of a Crown counsel under section 944 is not restricted to answering matters dealt with by the prisoner's counsel. Where a witness, who is being examined through an interpreter, voluntarily makes a statement incriminating the accused, but which statement is included in other evidence subsequently admitted, the accused is not necessarily prejudiced thereby. *Held*, on the facts (MARTIN, J.A., dissenting), that the objections taken to the interpreter and his competency were not well founded. *Held*, on the facts, and taking the judge's charge as a whole, that there had been no misdirection to the jury as regards the question of doubt. REX v. WALKER AND CHINLEY. **100**

8.——*Stealing and receiving—Possession of property recently stolen—Onus on party in possession.*] Where a person is found in possession of stolen property, recently after the theft has been committed, an onus is cast upon him to account for such possession, and in the absence of a satisfactory explanation it is reasonably to be presumed that he came by the property dishonestly. Where, therefore, chickens had been stolen, and were some hours afterwards found in the accused's shop, and no clear account was given of how they came to be there:—*Held*, that a conviction for receiving stolen property was right. REX v. LUM MAN BOW AND HONG. - - - - - - **22**

CROWN LANDS — *Military reserve—Order in Council—Licence from Crown to use lands as public park—Lease of part of park for industrial purposes—Foreshore—Tidal lands—Mistake—Waiver — Priorities Breach of trust—Ordnance and Admiralty Lands Act, R.S.C. 1886, Cap. 55.*] On the 8th of June, 1887, a portion of land near the City of Vancouver, and known as Stanley Park, was handed over to the municipality for an indefinite period for use as a public park. The land, which had been an Imperial military reserve, had been transferred to the Dominion on the 7th of March, 1884. The City's petition, presented in 1886 to the Dominion, asked for "that portion of land [described as within the City limits] known as the Dominion Government military reserve near the First Narrows . . . bounded on the west by English Bay and on the east by Burrard Inlet." Adjacent to the peninsula known as Stanley Park, and within Vancouver Harbour, is a small island, and there was some evidence that at certain stages of the tide during the year, there was bare land between the island and the peninsula. Shortly prior to the 8th of June above mentioned, the City's boundaries, by an amendment to the charter, were stated so as to extend down to low water mark. It was contended for the City that this made the island a portion of the park. But in all charts and maps the land was shewn as an island. The City assumed to use the island as a portion of the park, and built out to it a foot-bridge, which afterwards was allowed to fall into disuse and decay. Plaintiffs' predecessor, in 1898, applied for a lease of the island, and although the City was notified of such application, no reply was given until when, in February, 1899, an order was passed authorizing the Minister of Militia to grant a lease for 25 years, the City protested and asserted a right to possession of the island under the terms of the order of the 8th of June, 1887.

reach, easily have stopped the machine; also, the machine being open at the top, the accumulation was readily observable and removable with a stick before the shingles became wedged. *Held*, that the defendants had not been guilty of any negligence, and that therefore the plaintiff could not recover. There was no misdirection or non-direction in this instance in not submitting questions to the jury. GUTHRIE v. W. F. HUNTTING LUMBER COMPANY, LIMITED. - - - - **471**

8.——*Street car conductor—Scope of authority—Onus of proof of—Transfer of passenger at dangerous place—Non-direction.*] Owing to fog disarranging the schedule time of defendant Company's cars, they were not running on time. That which the plaintiff was riding in stopped on a bridge. There was another car immediately ahead which, in due course, would take plaintiff to her destination before that in which plaintiff was. The conductor asked or told her and another passenger to transfer to that car, and in doing so, she was injured by falling on the bridge in the darkness. *Held*, that, in the absence of evidence to the contrary, it must be assumed that the conductor had authority to use his judgment in the circumstances to forward the passengers to their destination. The question of the scope of the conductor's authority having been twice brought to the notice of the judge during the trial, yet he did not direct the jury on that point, and the case having been allowed to go to them without direction, and no objection taken to the charge on that account:—*Held*, that this brought the case within *Scott v. Fernie* (1904), 11 B.C. 91, and therefore the effect of what was done was that the issues submitted were accepted on both sides as the only issues on which the jury was asked to pass. SCHNELL v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - **378**

9.——*Workmen's Compensation Act, 1902, Sec. 6—Injury to servant—Award—Insolvency of employer—Enforcement of award against insurers—Liability—Determination of—Persona designata.*] The plaintiff, a workman employed by the defendant Mining Company was injured in November, 1907. In October, 1908, he obtained an award for compensation under the Workmen's Compensation Act, 1902. At the date of the award the Mining Company were insolvent and in the course of winding up. The plaintiff alleged that the defendants, the Casualty Company, were liable to indemnify the Mining Company against losses or liability under the award, and an order was asked for directing payment by the Casualty Company of the amount of the award into a chartered bank, pursuant to section 6 of the Act, and a judge of the Supreme Court granted the order, but it was set aside by the Full Court: (1909), 14 B.C. 256. A subsequent application by the plaintiff for an issue to determine the liability of the Casualty Company to indemnify the Mining Company was dismissed (1909), 14 B.C. 273. The plaintiff then brought this action for a declaration that he had a first charge upon the moneys which the Mining Company were entitled to receive from the Casualty Company, and for an order for payment pursuant to section 6. The defendants admitted that they had issued a policy which was valid and subsisting at the date of the plaintiff's injuries, by which they agreed to indemnify the Mining Company against loss for damages on account of bodily injuries suffered within the period of the policy by any employee. The trial judge (HUNTER, C.J.B.C.), dismissed the action on the ground that there was no privity of contract between the plaintiff and the Casualty Company, in other words, that the plaintiff had no status. *Held*, that the judgment should be affirmed. *Per* MACDONALD, C.J.A.: Unless section 6 gave the plaintiff a status to maintain the action, he had none; and it was not open to the plaintiff to ascertain the liability of the insurers to the Mining Company in an action such as this. The creation of the charge alone, without reference to that part of the section which gives a remedy for enforcing it, does not effect the subrogation mentioned in *Northern Employers' Mutual Indemnity Company, Limited* v. *Kniveton* (1902), 1 K.B. 880, 18 T.L.R. 504, and *Morris* v. *Northern Employers' Mutual Indemnity Company, Limited* (1902), 2 K.B. 165, 18 T.L.R. 635. Were it not for the decision of the Full Court in (1909), 14 B.C. 256, section 6 might be construed as intended not only to give the workman a charge on the insurance moneys, but also to provide the means of enforcing it, whether the insurers disputed their liability or not. *Per* IRVING, J.A.: The liability of the Casualty Company under section 6 can be determined only in an action by the liquidator of the Mining Company. *Per*

pality appealed. *Held*, on appeal, that if the Sisters were dissatisfied with the exemption thus voluntarily and generally made, they should have produced evidence at the time to shew that the exemption was not sufficient in the circumstances, as the onus is upon persons claiming the benefit of an exemption to produce evidence in support of it, and that the rule for a writ of *certiorari* should not have issued in this case. *Per* MARTIN, J.A. (*dubitante* as to onus), that as the Court of Revision was *functus* at the time of the issuance of the rule, a writ of *certiorari* would be inoperative and therefore useless. *In re* SISTERS OF CHARITY ASSESSMENT. - - - - - **344**

2.——*Highway— Non-repair — Defective sidewalk—Injury to pedestrian from—Nuisance of long standing amounting to misfeasance—Duty of corporation — Right of action—Vancouver Incorporation Act, 1900—Amendment, Cap. 63, 1909, Sec. 219.*] Plaintiff lost the sight of one eye by falling on a loose plank in a sidewalk, a spike from the end of the plank penetrating the eye, and the jury found negligence against the municipality and awarded the plaintiff damages. The municipality operated under a special charter, in which it was provided that every public street, road, square, lane, bridge and highway should be kept in repair by the Corporation. *Held*, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that under the provision in the charter for repair of highways, it was the intention of the Legislature that a person injured through an omission to repair should have a right of action. IRVING and MARTIN, JJ.A., took a different view. The Court being evenly divided, the appeal was dismissed. Remarks as to the Court of Appeal following or being bound by the decisions of the late Full Court. MCPHALEN V. THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - **367**

3.——*Licence, power to impose—Discrimination between vehicles drawn by horses used for hire and vehicles propelled by power—Vancouver Incorporation Act, 1900, B.C. Stat. Cap. 54, Sec. 125, Sub-Secs. 130, 131; 1909, Cap. 63, Sec. 5.*] Pursuant to sub-sections 130 and 131 of section 125 of the Vancouver Incorporation Act, 1900, empowering the council to regulate and licence owners and drivers of stage coaches, livery, feed and sale stables and of horses, drays, express waggons, carts, cabs, carriages, omnibuses, automobiles and other vehicles used for hire, the council passed a by-law imposing a licence for each vehicle drawn by one or two horses, $5 per annum; by more than two horses $10; and for each automobile or taxi-cab carrying up to seven passengers, $25; over seven passengers, $50 per annum. On an application for a writ of *certiorari* to bring up a conviction under the by-law on the ground that it made a discrimination between vehicles drawn by horses used for hire and other vehicles used for hire:—*Held*, that the conviction was valid. REX V. FORSHAW. - - - - - - - - - **322**

4.——*Local improvement—By-law consented to by property owners—Duty of council to perform work specified in the by-law—Right of owners to object to class of work being done—Action—Premature—New trial.*] The Corporation having, with the consent of the property owners interested, passed a by-law for the improvement of a thoroughfare by certain specified methods, departed from those methods and proceeded to construct the thoroughfare in another manner. The property owners to be assessed objected that this was not the class of work to which they had given their consent, and further, that it would not be as beneficial or permanent as the work originally proposed, and brought action to compel the Corporation to carry on the work in accordance with the by-law, or in the alternative to be relieved from the payment of any special rates which might be levied in respect of the work. IRVING, J., at the trial dismissed the action on the ground that the pleadings shewed no cause of action. *Held*, on appeal (MARTIN, J.A., dissenting) that, the Corporation having passed a by-law for the construction of a certain class of road, they were contravening the provisions of that by-law by constructing a different kind of road, that the property owners to be assessed had a right to object, and that their objection should be adjudicated upon. New trial ordered. ARBUTHNOT *et al.* V. THE CORPORATION OF THE CITY OF VICTORIA. - - - - - - - - - **209**

5.——*Municipal Elections Act, B.C. Stat. 1908, Cap. 14—Elector, qualification of—Authorized representatives of company —Application to restrict number of—Injunction—Certiorari — Mandamus.*] The authorized representative of an incorporated company is entitled, under the Municipal Elections Act, to vote at elections for

the thoroughfare in another manner. The property owners to be assessed objected that this was not the class of work to which they had given their consent, and further, that it would not be as beneficial or permanent as the work originally proposed, and brought action to compel the Corporation to carry on the work in accordance with the by-law, or in the alternative to be relieved from the payment of any special rates which might be levied in respect of the work. IRVING, J., at the trial dismissed the action on the ground that the pleadings shewed no cause of action. *Held*, on appeal (MARTIN, J.A., dissenting) that, the Corporation having passed a by-law for the construction of a certain class of road, they were contravening the provisions of that by-law by constructing a different kind of road, that the property owners to be assessed had a right to object, and that their objection should be adjudicated upon. New trial ordered. ABBUTHNOT *et al.* v. THE CORPORATION OF THE CITY OF VICTORIA. - - **209**

15.——*Parties—Action of tort against two defendants jointly—Joint tort feasors—Claim for damages—Order XVI.*] Plaintiff suing the defendant Corporations for damage to his land by reason of the construction by the municipal Corporation of certain embankments and obstructions and the building by the railway Company of a car barn whereby a watercourse on plaintiff's land was obstructed or its capacity diminished, and the water could not get away freely, the defendant municipal Corporation applied for an order directing the plaintiff to elect as to which of the defendants he should abandon and which he should proceed against. *Held*, that as the defendant Corporations were alleged to be joint tort feasors, they could properly be joined in one action. TIMMS v. THE CORPORATION OF THE CITY OF VANCOUVER AND THE BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LTD. - - - - - - - - **336**

16.——*Remission of action to County Court—County Courts Act, B.C. Stat. 1905, Cap. 14. Sec. 73.*] Defendant Pemberton as first mortgagee exercised his power of sale and realized some $2,950. From this he satisfied certain charges and liens. Plaintiff, a second mortgagee, sued for an account and distribution arising from the mortgage sale. Defendant applied under section 73 of the County Courts Act for an order remitting the action for trial to the County Court, the plaintiff's mortgage claim amounting to only $130. *Held*, refusing the application, that if the subject-matter was founded in contract, it was not a contract to which the defendant Pemberton was a party, but that the relief sought against him was on the ground that he was in reality a trustee having in his hands moneys which the plaintiff contended should be applied in satisfaction of her claim. SOPER v. PEMBERTON AND GODFERY. - - **69**

17.——*Taxation of costs by judge under Railway Act—Delegation of taxation by judge to taxing officer—Adoption of taxation by judge.*] Defendant Company proposing to expropriate certain lands of plaintiff, served notice to treat pursuant to section 193 of the Railway Act; but upon disagreement as to price, applied to a judge for the appointment of an arbitrator, under section 196, and also for a warrant of possession under sections 217 and 218. This application was refused because the notice to treat was not accompanied by the certificate of a disinterested surveyor under section 194. Thereupon the Company served a new notice, accompanied by a proper certificate, and at the same time served a notice abandoning and desisting from the first notice and all proceedings had thereon. Plaintiff treated this latter notice as given under section 207 and proceeded to tax costs as of an abandonment under sections 199 and 207. The costs were submitted to CLEMENT, J., the judge applied to, who directed that they be taxed by the registrar, and CLEMENT, J. adopted the taxation. At the trial, IRVING, J. came to the conclusion that the confirmation by the judge after preliminary taxation by his clerk, amounted to a taxation in fact by him, and on the merits was of opinion, that there was no abandonment, and dismissed the plaintiff's action. *Held*, on appeal, that the new notice to treat, being served at the same time as the abandonment of the first notice, was manifestly a continuation of the original proceedings, and did not come within section 207, an abandonment under which is one with the intentoin of wholly discontinuing and taking no further action. *Held*, further, that the subject was not *res judicata* by reason of the taxation by the judge or by the taxing officer on the judge's direction. *Semble*, *per* GALLIHER, J.A.: That it was competent for the judge to direct the taxation as he did and then adopt it as his own act, it not being the intention of the statute that the judge should perform the actual clerical work of taxation. ATWOOD v