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, EDITOR

AND

EDMUND CUMMING SENKLER, K. C., REPORTER

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1914.

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.
THE HON. ALBERT EDWARD McPHILLIPS.

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.
THE HON. WILLIAM ALEXANDER MACDONALD.

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. 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
HIS HON. GEORGE HERBERT THOMPSON, - - - - - East Kootenay
HIS HON. SAMUEL DAVIES SCHULTZ, - - - - - - - Vancouver

ATTORNEY-GENERAL:

THE HON. WILLIAM JOHN BOWSER, K. C.

MEMORANDA

On the 20th of September, 1913, the Honourable Albert Edward McPhillips, one of His Majesty's Counsel learned in the law, was appointed a Justice of the Court of Appeal.

On the 24th of September, 1913, William Alexander Macdonald, one of His Majesty's Counsel learned in the law, was appointed a Puisne Judge of the Supreme Court of British Columbia.

On the 4th of December, 1913, Samuel Davies Schultz, Barrister-at-Law, was appointed a Judge of the County Court of Vancouver, and a Local Judge of the Supreme Court of British Columbia.

TABLE OF CASES REPORTED

IN THIS VOLUME

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TABLE OF CASES CITED

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RULES OF COURT.

Notice is hereby given that, under the provisions of the "Supreme Court Act," the Lieutenant-Governor in Council has been pleased to amend Rule 8 of Order LVIII., being marginal Rule 872 of the "Supreme Court Rules, 1906," by striking out the last eleven words of the said Rule and substituting therefor the following: "twelve copies of the Appeal-book, if printed; if written, six copies."

By Command.

HENRY ESSON YOUNG,
Provincial Secretary.

Provincial Secretary's Office,
Victoria, B.C., 19th December, 1913.

REPORTS OF CASES

DECIDED IN THE

COURT OF APPEAL, SUPREME AND COUNTY COURTS

OF

BRITISH COLUMBIA,

TOGETHER WITH SOME

CASES IN ADMIRALTY

HATCH v. POWELL RIVER PAPER COMPANY, LIMITED.

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1913

Jan. 7.

HATCH v. POWELL RIVER PAPER CO.

Master and servant—Workman injured in the course of his employment—Negligent system—Contributory negligence—Self-balancing lifts—Trap.

In this case, on the facts set out in the statement following, it was *Held*, on appeal (IRVING, J.A. *dubitante*, and MARTIN, J.A. dissenting), that the verdict of the jury should be sustained and the appeal dismissed.

APPEAL from the judgment of MORRISON, J., entered up on the verdict of a jury on the 31st of July, 1912, giving the plaintiff $5,000 damages for injuries sustained by him while in the employment of defendant Company, through, as alleged, their negligence. The action was tried in May, 1912. Plaintiff was a carpenter foreman on a building of the defendants then in course of erection. Connected with the structure was a square scaffold containing two lifts for taking up building material. These lifts were of the character known as balancing lifts, one being up while the other was down, and controlled by a brake or clutch worked by the motorman's foot, so that the ascending or descending lift could be stopped at the desired floor. When

Statement

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Statement

the lifts were not in use, they remained at the last stopping place, and balanced each other there by their own weights. Inside the scaffolding, and between the two lifts, was a staircase for the use of the workmen, who were forbidden to use the lifts. Plaintiff was at the top of the building on the occasion of the accident, and was about to come down, when he stepped on the lift, which had been left level with the top floor. His companion also stepped on the lift, intending to pass across it and reach the stairway. Their combined weight disturbed the balance of the lift and they went down, plaintiff being seriously injured, his companion only slightly hurt. There was evidence that plaintiff knew of the rule forbidding the use of the lift by workmen for passenger purposes, and that there was a notice on the bottom floor to that effect, but no notice at any other place.

The appeal was argued at Vancouver on the 21st of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellants: We say there was no case to go to the jury, and in any event we say that the verdict was unreasonable and perverse. We also submit that there was contributory negligence. When machinery or ways are supplied for a specific purpose, a person using it for his own or other purposes does so at his own risk. The instructions here were against the use of these lifts by workmen, and a notice was posted up to that effect.

Argument

A. H. MacNeill, K.C., for respondent: It was a negligent system to have these lifts in balance. They became a trap, and there should have been a contrivance to prevent their being so. As to the charge of contributory negligence, that was a question of fact, and the jury have found against the defendants on that point. The condition of the lift on this particular occasion was an invitation to plaintiff to use it. Defendants are liable at common law for maintaining a defective or dangerous system, and it is submitted that this lift was both.

Bodwell, in reply: Plaintiff knew it was not a place to walk on, but he took a chance.

Cur. adv. vult.

7th January, 1913.

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MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I am unable to say that the jury has come to a wrong conclusion or, at all events, that there was not evidence upon which they could reasonably find as they did. In this case there was no question of negligence of a fellow servant. The lift was allowed to stand unlocked at one of the platforms where persons who had the right to enter would enter it, or alight from it. True, the plaintiff had no right to ride on the lift; he did not intend to do so on the occasion in question, but stepped on the lift intending to walk across it as the most convenient way of reaching the stairs. It was not unreasonable that he should do so. Left as it was, it seems to me the lift was a trap, and that the defendants were not improperly held liable by the jury's verdict.

IRVING, J.A.

IRVING, J.A.: Insofar as the verdict that the plaintiff was not guilty of contributory negligence is concerned, the appeal raises no difficulty, assuming that there was a case to go to the jury at all; there was evidence both ways, and I do not think we can interfere, although I do not wish to be taken as agreeing with the verdict.

As to whether there was any case to go to the jury, I have grave doubt. In the first place, it is to be observed that the plaintiff had no intention of descending by means of the lift. Could any one reasonably anticipate that the plaintiff would make a bridge or a stepping stone of the lift so as to cross from the platform to reach the ladder by climbing through a hole in the barrier which surrounded the ladder when there was a direct way to the ladder? There is a class of cases —*Pearson* v. *Cox* (1877), 2 C.P.D. 369; *Wood* v. *Canadian Pacific Railway Co.* (1899), 30 S.C.R. 110; *Clinton* v. *J. Lyons & Company, Limited* (1912), 3 K.B. 198, in which nonsuits have been granted on the ground that the defendant had no reason to anticipate that an accident would occur in the way it did—that is to say, that the circumstances were such that no duty was placed upon the defendants to guard against such a mishap; and there is another class of cases where the defendant is entitled to a "direction" from the judge where the accident is brought about by the folly and recklessness of the plaintiff

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and not the carelessness of the company: see Cairns, L.C. in *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155 at p. 1,166. This case seems to me to come close to both of the classes of cases, and had the learned trial judge refused on either of these grounds to let the case go to the jury, I would have supported that decision; but as he came to a different conclusion I can only say I doubt, but I am not prepared to overrule. When in doubt one must uphold the judgment appealed from.

I would, therefore, dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I am of opinion that the case should have been withdrawn from the jury.

GALLIHER, J.A.: I think the learned trial judge was right in allowing the case to go to the jury. At the hearing of the appeal we decided that the defence of common employment was not open, as that defence was withdrawn. Under the circumstances of this case, as disclosed in the evidence, I cannot hold that the finding of the jury that there was no contributory negligence on the part of the plaintiff is perverse.

GALLIHER, J.A.

I regard the leaving of the hoist at the level of a platform (where men might and did go in the course of their employment) unguarded in any way, and at the time in question uncontrolled from below, and upon which only a slight weight was necessary to cause its descent, as nothing more or less than a trap. The plaintiff stepped upon it thoughtlessly and could not be said to be using it in disobedience of any order.

In my opinion the Company were rightly held liable, and the appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Taylor, Harvey, Baird, Grant & Stockton.*

Solicitors for respondent: *MacNeill, Bird, Macdonald & Bayfield.*

REX v. HARVIE.

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REX v. HARVIE

Criminal law—Bail, estreatment of—Appeal from order directing estreatment—Jurisdiction of Court of Appeal—Extradition—Criminal cause or matter.

Following the decision in *In re Tiderington* (1912), 17 B.C. 81, no appeal lies to the Court of Appeal from an order made in the County Court Judge's Criminal Court ordering the forfeiture of bail for the non-appearance of an accused person in an extradition proceeding.

Per IRVING, J.A.: As the order estreating the bail bond was made in the County Court Judge's Criminal Court, the proper course for the applicant to take was to either apply to the County Court judge to discharge the order as improvidently made, or move to have it quashed on *certiorari* proceedings.

APPEAL from an order made by MCINNES, Co.J. at Vancouver on the 26th of July, 1912, estreating a bail bond for non-appearance of the accused in an extradition proceeding.

Statement

The appeal was argued at Vancouver on the 27th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Kappele, for appellant.
McKay, for the Crowr

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: This is an appeal from an order of MCINNES, Co. J. intituled: "In the County Court Judge's Criminal Court, estreating the bail bond of the appellants, which had been certified by a police magistrate to be forfeited by the non-appearance before him of one Captain Graham Harvie at the time fixed for the hearing in extradition proceedings then pending against the said Harvie."

MACDONALD, C.J.A.

The preliminary objection was taken that there is no appeal from such an order to the Court of Appeal. I am of opinion that this objection must be sustained. All the proceedings down to and including the order of estreat were in a criminal cause or matter, and were taken and had in criminal Courts,

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namely, the magistrate's Court and the County Court Judge's Criminal Court. Neither the Criminal Code nor the Fugitive Offenders Act, nor other Federal legislation, gives a right of appeal in cases like the present. If such right exists, it is given by the Court of Appeal Act, which does not extend to criminal causes. That extradition is a criminal cause or matter has already been decided by this Court in *In re Tiderington* (1912), 17 B.C. 81.

Re Talbot's Bail (1892), 23 Ont. 65, decides only that the process of execution after estreat is not invalid because issued out of a civil Court. Reading the sections of the Code relating to the estreatment of bail and execution thereunder, which in the event of *nulla bona* authorizes the taking of the body of the debtor, I should hold that it would not be irregular to let even the process in execution issue out of a criminal Court. It is, however, only necessary here to say that it is nothing in connection with the process of execution that is complained of, but the proceedings leading up to and including the order of estreatment, all of which were in a criminal Court. That being so, I think an appeal does not lie to this Court in virtue of the provisions of statutes which authorize appeals in civil cases.

MACDONALD, C.J.A.

The Queen v. *Creelman* (1893), 25 N.S. 404, was relied on by Mr. *Kappele* as an instance of an appeal to the Court *en banc* in a case like the present, but that was not an appeal at all, but a review by the Court of its own process. It was a case like *In re Robert Evan Sproule* (1886), 12 S.C.R. 140. The same remark applies to the Manitoba case of *Regina* v. *Starkey* (1891), 7 Man. L.R. 489.

I would quash the appeal.

IRVING, J.A.: This is an appeal from the order of MCINNES, Co.J. estreating a bail bond given to secure the appearance of one Harvie—a fugitive arrested under the Fugitive Offenders Act, Revised Statutes of Canada, chapter 154, after an adjournment of the extradition proceedings, which were had before the Vancouver police magistrate.

IRVING, J.A.

By section 11 of the Act it is provided:

"A fugitive, when apprehended, shall be brought before a magistrate, who, subject to the provisions of this Act, shall hear the case in the same

manner and have the same jurisdiction and powers, as nearly as may be, including the power to remand and admit to bail, as if the fugitive was charged with an offence committed within his jurisdiction."

On the 25th of February, 1912, Harvie, with two sureties, Jones and Richardson, entered into a recognizance in large sums, to be levied on their several goods and chattels, if he, the said Harvie, failed in the condition following. The condition recited the fact that the accused was charged, and that the examination of the witnesses had been adjourned until the 4th of March, and then went on to provide that Harvie should "appear on the 4th of March," "and on each adjournment thereof until the final disposition of this case . . . . to answer further to the charge and to be dealt with according to law."

After these recognizances had been entered into, numerous remands were made, sometimes on the application of the Crown, sometimes on the prisoner's application; and on one occasion at any rate, he was remanded by the police magistrate for a period longer than seven days. As to remanding beyond statutory period when on bail, see Halsbury's Laws of England, Vol. 9, p. 319, note (*e*). This remand, we are informed by the magistrate, was made with the consent of prisoner's counsel. The prisoner's counsel denies that he ever gave any consent. It seems to me we must accept the magistrate's statement: *Rex* v. *Bole* (1905), 9 C.C.C. 500. The proceedings seem to have been conducted in a happy-go-lucky way, the prisoner not appearing in Court, on the various remands, and finally it was learned that he had gone to England.

IRVING, J.A.

On the 25th of June, 1912, the police magistrate indorsed the following certificate on the recognizance:

"I hereby certify that the said Captain Graham Harvie has not appeared at the time and place in the within condition mentioned, but therein has made default, by reason whereof the within written recognizance is forfeited.

"H. C. Shaw,
"Police Magistrate."

"June 25th, 1912.

Mr. *Kappele* appeared and opposed the action of the magistrate, who at that time appeared to think that he had the power to estreat the bail. Later on, application was made to the clerk of the County Court Judge's Criminal Court, who signed the list of forfeited recognizances, and afterwards application was

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made to McINNES, Co.J., who made the order now appealed from. The sureties had no notice of the application to the County Court judge.

The grounds of appeal are:

"(a) That no notice of application to the said County Court judge was given to either F. M. Richardson or Walter Jones, the bondmen above mentioned, or to their solicitor.

"(b) The said recognizance should not have been declared forfeited and estreated as the said Graham Harvie was released from his recognizance by the action of Magistrate Shaw, before whom the said Graham Harvie appeared, in adjourning the action against the said Graham Harvie for a period longer than that permitted by the provisions of the Fugitive Offenders Act, under which the said Graham Harvie was apprehended."

In this case the recognizance is for something to be done in the magistrate's Court. His certificate shews that this something was not done. By section 1,097 (2) this certificate is *prima facie* evidence of non-compliance with the condition. If that certificate is to be reviewed, such review, in my opinion, must be brought about by *certiorari*.

Section 1,097 provides for the transmission of the recognizance to the proper officer. In this Province the proper officer is the clerk of the County Court having jurisdiction at the place where the recognizance was taken. After that has been done, the matter becomes the collection of a debt due to the Crown. It is to be enforced and collected in the same manner and subject to the same conditions as any fines, forfeitures or amercements imposed by or forfeited by such Court—section 1,099.

IRVING, J.A.

The roll having been made out by the clerk, is by him (section 1,105) transmitted to the sheriff with a writ of *fi. fa.* and *capias,* form 74—a conditional writ, if one may use that expression. The form contemplates a day being named as return day, whereon the person named therein can appear and raise any point he likes. By section 1,109 provision is made for hearing the case on the return day by the judge, and, by section 1,110, the judge is authorized to relieve in the case of hardship. The procedure is very much the same as that laid down in 1822 by 3 Geo. IV., chapter 46, sections 1,109 and 1,110 being reproductions of sections 5 and 6 respectively. In the present case, the officer in charge of the collection of this recognizance was not satisfied that the clerk's list was in itself sufficient, but applied

to the judge for an order. The same course was followed in *Reg.* v. *The Justices of the West Riding* (1837), 7 A. & E. 583, a *certiorari* case, and although it was there contended that the making of this order was mere surplusage, in that it only confirmed what the clerk was bound to do, the Court set it aside. The order in this case declares the recognizances estreated, and directs that an unconditional writ of *fi. fa.* and *capias* be issued instead of a writ in the form 74.

On the question of jurisdiction, I think the statutory provision in subsection 2 of section 1,099, directing the County Court to enforce and collect the recognizance in the same manner as any other fines in the same Court would give the person aggrieved an appeal to this Court under the Provincial Court of Appeal Act from any order made by a judge of the County Court; but as the order of the 26th of July, 1912, was made in the County Court Judge's Criminal Court, the appellant's proper course is either to apply to the County Court judge himself to discharge the order as improvidently made, or to have it quashed on *certiorari* proceedings. No jurisdiction has been given to this Court to deal with an order by a judge of the Criminal Court.

IRVING, J.A.

MARTIN, J.A. concurred in the conclusions of MACDONALD, C.J.A.

MARTIN, J.A.

Appeal quashed.

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LAURSEN v. McKINNON.

Practice—Appeal—Notice of—Power of Court to extend time—Court of Appeal Act, R.S.B.C. 1911, Cap. 51, Secs. 15 and 25—Judgment—Final —Interlocutory—When perfected.

LAURSEN v. McKINNON

In an action for damages for trespass, the trial judge found damages, and referred the question to the registrar to take enquiries and assess the amount. The judgment was given on the 30th of March, and the report of the registrar some time later. Notice of appeal was given on the 3rd of July.

Held, IRVING, J.A. dissenting, that the judgment was final when referred to the registrar, and that the act of inserting the amount of damages was not necessary to complete the judgment.

Held, further, that where the notice of appeal had not been given within the statutory period, the Court had no power to extend the time.

Statement

APPEAL from the judgment of GREGORY, J. in an action for damages for trespass, tried by him at Vancouver. The learned judge found damages and referred the case to the registrar to assess the amount. The appeal was argued only on the points: (1) of the jurisdiction of the Court of Appeal to extend the time for giving notice of appeal, and (2) whether in the circumstances here, the judgment appealed from was final or interlocutory. The facts on which the appeal turned are summarized in the headnote.

The appeal was argued at Vancouver on the 6th of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Bodwell, K.C., and *Ritchie, K.C.*, for appellant.

L. G. McPhillips, K.C., for respondent, took the preliminary objection that the notice of appeal was out of time. The judgment was given on the 30th of March, and the notice of appeal was given on the 3rd of July, clearly beyond the time. See section 15, chapter 51, Revised Statutes of British Columbia, 1911. We rely on *Sung* v. *Lung* (1901), 8 B.C. 423. From 1888 until 1896 the Court had power, under the rules, to extend the time. But we say that subsection (5) of section 15, namely,

that the giving of the notice of appeal, shall be deemed to be the bringing of the appeal, governs. The judgment having been perfected on the 30th of March, *ergo* the 30th of June would be the last day on which notice of appeal could be given. While section 25, which gives power to enlarge or abridge the time for taking any proceeding, would appear at first reading to conflict with subsection (5) of section 15, yet we submit it refers to any matter or proceeding already properly before the Court, and it does not conflict with *Sung* v. *Lung, supra,* as the section was in force at the time *Sung* v. *Lung* was decided. See also *Cowan* v. *Macaulay* (1897), 5 B.C. 495. As to final judgment, see *Crown Life Insurance Co.* v. *Skinner* (1911), 44 S.C.R. 616. Here there was nothing reserved by the trial judge to be done by him in order to make the judgment final: *Ex parte Moore* (1885), 14 Q.B.D. 627. Reference was also made to *Banks* v. *Woodworth* (1900), 7 B.C. 385; *Jordan* v. *McMillan* (1901), 8 B.C. 27; *Belcher* v. *McDonald* (1902), 9 B.C. 377; *Re Ibex Company* (1903), *ib.* 557. Even if it could be said that they were in time as to the registrar's report assessing the damages, being the act completing the judgment, they are, therefore, confined to that particular question.

Bodwell, K.C., contra: As to whether this Court has power to extend the time, see *Hamilton* v. *Baker* (1889), 14 App. Cas. 209 at pp. 221-2. The *Sung* v. *Lung* case has been challenged every time it has been cited. The Court must give some reasonable meaning to the words "other proceeding" in section 25, and under this section the Court has power to enlarge or abridge the time for the taking of any proceeding, and surely the giving of notice of appeal is "taking" a proceeding. Appeals are not taken under the rules of Court, but under the statute, and the rules are made to apply.

Argument

Ritchie, K.C., on the same side.

[*Per curiam*: We are not to be taken in listening to you now as abandoning the rule as to one counsel only being heard on one point.]

Ritchie: Thank you, my lords. As to this being a final judgment, this is a common law action for damages for trespass, and the judge, instead of hearing the evidence, referred the matter

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to the registrar to take enquiries and report. Now, surely, that judgment was not completed until the item left blank for the amount to be found as damages is filled in. The perfecting of the judgment is the registrar's report on the reference to him; there is only one trial, and one judgment, and while there is something remaining to be done, the judgment is not final. The judgment is to be "signed, entered or otherwise perfected": see Annual Practice, 1913, pp. 1,400 and 2,208.

[The merits were not argued until this point was decided.]

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: The notice of appeal not having been given within the statutory period, an application was made to us to extend time. The preliminary objection was taken to the jurisdiction of this Court to do so, and the authorities, or supposed authorities, for and against the objection were exhaustively searched and cited to us. Up to the end of 1897, it is quite clear that the Court claimed and exercised the power and jurisdiction to extend the time in cases like the present, where reasonable excuse was offered, but in that year a change was made in the law, which, it is contended on the one side, did, and on the other did not, take away such jurisdiction. Since that change no case has been found reported or unreported in which the Court has extended the time where the notice of appeal had not been given within the statutory period. Unhappily, there is a difference of opinion as to what was decided by the Full Court, particularly in the first cases which came before it after the said change, namely, *Carroll* v. *C.P.R.*, unreported, and *Clabon* v. *Lawry* (1898), 2 M.M.C. 38. These cases were decided fourteen years ago, and were supposed to have decided, *inter alia,* that the Court had no jurisdiction after the change aforesaid to extend the time within which the notice of appeal should be given. It is now argued that the subsequent cases, if they do in fact shew that the Court decided the question as above suggested, and were not in fact disposed of on other grounds, were decided under the misapprehension that *Carroll* v. *C.P.R.* and *Clabon* v. *Lawry* settled the question. Mr. *McPhillips* referred us to the unreported case of *Martin* v. *Brown,* decided by the

MACDONALD, C.J.A.

Full Court in June, 1905. The Court was composed of IRVING, MARTIN and DUFF, JJ. I have had the advantage of seeing the notes of that case of my brothers IRVING and MARTIN, JJ. IRVING, J.'s note is very short, and does not assist me except to this extent that it is not inconsistent with the much fuller note of MARTIN, J. So far as it relates to the question before us, MARTIN, J.'s note is as follows:

"*McPhillips, K.C.*: Then I ask for an extension of time to appeal, that this important question should be determined by a Full Bench, as intimated by this Court. It has never been suggested that the two sections *re* extending time should be read together.

"MARTIN, J.: Yes it has. I made that argument myself in *Clabon* v. *Lawry*, 2 M.M.C. 38.

"DUFF, J.: Though there may be doubts in the minds of some of us, at least as to the soundness of the original decision, yet it has been so held repeatedly, and after the rulings the Legislature has enacted the same sections, which concludes the matter; it is not now open to argument.

"MARTIN, J. reads the extract from *Noble* v. *Blanchard* as expressing his views.

"*Per curiam*: No leave to appeal can be granted under the circumstances. There is no jurisdiction: prior decisions on the point should not be opened up."

The sections of the Act above referred to were sections 11 and 12 of the statutes of 1897, chapter 8. Section 11 standing alone would clearly give jurisdiction to the Court to extend time in a case like the present; but section 12, so the contention is, was held to modify section 11 so as to limit the power of extension to time other than the statutory time within which the notice of appeal must be given. Whether that is the right construction or not it is, I think, now too late to enquire, particularly in view of the decision in *Martin* v. *Brown, supra.*

MACDONALD, C.J.A.

I do not think it would be seemly on my part to infer from the absence of reference, in judges' notebooks, to a particular discussion that such a discussion had not in fact taken place before them, and that when subsequently they gave decisions on the assumption that such discussion had taken place, and that they had decided the question in issue, they had forgotten that they had not in fact decided what they believed, or were led to believe, they had decided. It was argued that an interpretation of the said sections was not called for in either *Carroll* v. *C.P.R.* or *Clabon* v. *Lawry*. As to the former, it was said with

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truth that notice had been given in time, but for the wrong sittings. The Court held that the notice had lapsed, or must be deemed to have been abandoned. That being so, what was more natural than that counsel for appellant should ask for an extension of time to give a fresh notice, and that the Court should then express its opinion that said section 12 precluded it from acceding to the request. It is a question of fact as to whether the Court in the said two cases construed sections 11 and 12 or not. There is no evidence either way except the negative inference which might be drawn from the absence of reference to it in the notebooks of the judges, and to my mind the much stronger affirmative inference to be drawn from the fact that during a long course of years some of those judges, and other judges, have repeatedly acted on the assumption that the question had been so considered and determined.

It was not seriously argued, if it could be stated as a fact that the point had been decided as it was thought to have been fourteen years ago, that nevertheless this Court would be justified in re-opening it now and reviewing the correctness of the decision. To say that a Court ought not to perpetuate error is to give voice to a very pleasing and right-sounding abstraction. The Court ought not to perpetuate error, but this maxim is controlled by a very salutory rule that constructions which have long been accepted, though their correctness may be open to doubt, should not, save possibly by a higher Court, be disturbed to the confusion of those who are accustomed to rely upon such constructions. There are exceptions to this rule, but this, in my opinion, is not one of them.

MACDONALD, C.J.A.

The hardship of depriving appellant of his right to appeal was suggested, but I would point out that he deprived himself of that right. The statute gave him the right, and limited the time within which he might exercise it. He lost it by the carelessness of himself or his agent. What he now asks for is an indulgence. The argument of hardship is perhaps weaker in this case than in almost any other, because in most other cases where Courts have been thought to have placed a wrong construction upon a statute, a positive right has been interfered with. The case of *Hamilton* v. *Baker* (1888), 58 L.J., Adm. 57, has

been called to my attention. There, the House of Lords, while reversing the lower Courts, recognized the gravity of interfering with a long standing construction of a statute, and it was not there suggested that any of the lower Courts, certainly not those of concurrent jurisdiction, ought to have refused to follow the earlier decision.

It is further to be noticed that since *Martin* v. *Brown* and a number of other cases of the same kind were decided, the Court of Appeal Act, 1907, chapter 10, British Columbia statutes, was passed, embodying practically without change the sections above referred to. While I do not attach undue importance to this, yet Courts have ever regarded the re-enactment of a statute which has been judicially construed as an adoption of the construction, or if not that, then a circumstance to be given some weight to. I think, therefore, the Court ought not at this late day to reopen the matter, but should leave it to be dealt with by the Legislature, if it should think a change desirable.

MACDONALD, C.J.A.

I would, therefore, sustain the preliminary objection.

I may add that the only other point argued which, if decided in appellant's favour, would enable the Court to deal with the appeal on the merits, was that the notice was given in time, having regard to the fact that the final judgment was to be perfected by the insertion of the amount of damages to be ascertained by the registrar. It was argued that time would run from that date and not from the date of the judgment itself. I am of the opinion, which I entertained at the close of the argument, that this contention is not sound.

The appeal should be quashed.

IRVING, J.A.: This case—I speak of the jurisdiction of this Court to extend the time for appealing after the time limited has expired—has been argued before us at great length, and has been fully discussed among ourselves since that argument.

IRVING, J.A.

I understand that the other members of the Bench have arrived at the conclusion that we cannot exercise that jurisdiction, or that we are precluded from exercising that jurisdiction. In those circumstances, and in view of the course taken by the judges, of whom I was one, in *Martin* v. *Brown,* as set out in

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Mr. Justice MARTIN's notes, to which notes I have had my attention drawn since the argument of this case, I see little or no advantage in my going through the cases, either to controvert the conclusion at which the other members of the Court have arrived —or to suggest that the point should be re-opened. It will be sufficient to say that, with deference, I do not agree with their conclusion on this point.

Then, ought we to accede to Mr. *Ritchie's* alternative argument that the judgment, being a judgment under Order XXXVI., rule 57, is not perfected until the calculation is ascertained by the officer of the Court appointed for that purpose, and that, therefore, he is in time? Order XXXVI., rule 57, contemplates the drawing up of an order, and later on an entering of judgment and otherwise as upon the finding of a jury upon a writ of inquiry. The writ of inquiry was a judicial writ, and it issued after an interlocutory judgment for damages. That interlocutory judgment was final as to the right to recover and interlocutory only as to the amount: see Encyclopædia of the Laws of England, Vol. 6, p. 504, article "Writ of Inquiry," by Mr. Francis Stringer, of the Central office. In the forms of judgment, Appendix F to the English rules, a form of judgment is given for Order XXXVI., rule 57. The form speaks of the plaintiff having "obtained interlocutory judgment for damages to be assessed," etc., Yearly Practice, 1912, Vol. 2, p. 1,983; Annual Practice, 1912, Vol. 2, p. 97. This rule 57 is an old rule of practice, dating back to the Common Law Procedure, 1852. The judgment in the leading text book on Pleading—Stephen, 6th Ed., published in 1860, was called (p. 98) an interlocutory judgment. A precise definition of the meaning of "final" and "interlocutory" judgments cannot be given: *In re Lewis, Lewis* v. *Williams* (1886), 31 Ch. D. 623, *per* Chitty, J. at p. 627. A judgment or order may be final within one rule, but not so within another: see *In re Lewis, supra*; *Pheysey* v. *Pheysey* (1879), 12 Ch. D. 305; *In re Crosley, Munns* v. *Burn* (1887), 34 Ch. D. 664; and see the note to the report of *In re Croasdell and Cammell, Laird & Co., Limited* (1906), 2 K.B. 569 at p. 570.

IRVING, J.A.

For the purpose of giving notice of appeal this order seems to me not to be a final order until the registrar hands it to the per-

son entitled to the damages, and after that entered. That seems to me to be the "perfecting" of the order. It seems plainer if we consider what the actual practice is. Until the registrar completes the calculation entrusted to him, the trial of the action is going on. I think if the registrar, in the course of working out the direction of the trial judge, found that it was not substantially a matter of calculation, and so advised the judge, the case would still be in the hands of the judge, and he, in my opinion, would have jurisdiction to set aside the direction he had given and go into the matter himself, or to refer it to a referee under another section. I do not think there can be any doubt of that, notwithstanding the fact that the judge's direction or order had been passed and entered—if entering is necessary; and I would be disposed to think he could do that even after the fifteen days limited for appealing from an interlocutory order had expired. I am, therefore, convinced that the trial is still going on. I would hold that the time for appealing did not expire until the judgment was entered upon the registrar's calculation.

IRVING, J.A.

MARTIN, and GALLIHER, JJ.A. concurred in the reasons of MACDONALD, C.J.A.

MARTIN, J.A.
GALLIHER, J.A.

Objection sustained, Irving, J.A. dissenting.

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REX v. DEAN.

REX v. DEAN.

Criminal law—Habeas corpus—Intimation by Crown that a bill of indictment would not be preferred at the then assizes—Effect of as to traversing the case—Right of accused.

The applicant was extradited to Canada on account of stealing a large sum of money from the Bank of Montreal at New Westminster. He had a preliminary hearing before the magistrate and was committed, in September, 1912, to the gaol at New Westminster, until discharged by due process of law. The assizes for the County of Westminster were held in the month of October following. During the assizes an application was made to the presiding judge regarding the position taken by the Crown that it did not propose to prefer a bill of indictment to the grand jury against the accused at the said assizes. On this application it was contended by the Crown that in effect an order was made by the judge traversing the case to the next assizes. This was disputed on behalf of the accused. The present application was for the discharge of the accused on the ground that the warrant of commitment lapsed at the end of the assizes, and that the Crown had obtained no traverse of the proceedings to the next assizes.

Held, that the warrant of commitment was still valid and subsisting, and that the only application which the prisoner could make in the circumstances was for an order to be released on bail.

Statement

APPLICATION for a writ of *habeas corpus* discharging the accused from custody on the ground that the warrant of commitment under which he was held had lapsed. Heard by GREGORY, J. at Victoria on the 20th of January, 1913.

A. S. Johnston, in support of the application.
Maclean, K. C., for the Crown, *contra.*

21st January, 1913.

Judgment

GREGORY, J.: Application to make absolute an order *nisi* for a writ of *habeas corpus*. The prisoner alleges that he was committed for trial on the 5th of September, 1912, and that he was not tried or indicted at the next following Court of Assize, and that no application to traverse or postpone was made by the Crown, and he claims that in such circumstances he is entitled to be discharged from custody.

The Crown disputes the statement that no postponement was ordered. The stenographic copy of the proceedings before

MURPHY, J., made by the official stenographer, and the official record of the proceedings by the clerk of the assize Court, shew clearly that the matter was discussed at least, and the opinion expressed by MURPHY, J. that the Crown had the right to a traverse at the first assize. Mr. Justice MURPHY's recollection, as expressed in his letter to me, is that no order was actually made. I do not think it is necessary for me to come to any conclusion as to whether an order was actually made or not.

The question to be decided here is: Is the prisoner entitled to be discharged from custody? He has been regularly committed and is held under a warrant of commitment according to form 22 of the Criminal Code, which directs the gaoler to "safely keep him until he shall be thence delivered *by due course of law.*" Prisoner's counsel has referred me to a number of authorities, but they for the most part deal with the question of the material necessary to be laid before the Court in order to obtain an order postponing a trial. He has not produced a single authority, or even reference, to shew that in such circumstances as he alleges exist in the present case, the accused is entitled to be discharged from custody. He is charged with the theft from the Bank of Montreal of the sum of $200,000, and I do not feel that it is my duty to be astute or diligent to find a means of giving him his freedom without a trial.

Judgment

The *Habeas Corpus* Act provides by section VII., as reprinted in the Revised Statutes of British Columbia, 1897, that in case a prisoner is not indicted at the first Court of Assize after his committal, he shall be entitled to be set at liberty *upon bail,* unless it appears to the Court upon oath that the witnesses for the Crown could not be procured; and if not brought to trial at the second assize, he shall be *discharged* from his imprisonment. I see nothing in this Act entitling the accused to at present do more than make an application for bail. If the Crown does not proceed at the next assize, and obtain a postponement, he might then be entitled to his discharge, but that is not the present case, and I make no ruling on that point.

The order *nisi* will be discharged.

Application refused.

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REX v. CRAWFORD.

REX
v.
CRAWFORD

Criminal law—Case stated by magistrate—Right of magistrate to take a view of the locus—Criminal Code, section 1,014.

Accused was charged with obtaining a cheque for $500 unlawfully, in that he sold a particular town lot for a certain sum, but on inspection the purchaser discovered that the lot actually sold was a different lot. The evidence for the prosecution and defence was closed and argument thereon was being proceeded with, when the question arose as to the necessity of a view of the lot by the Court. It being doubtful whether there was power to hold such view, the learned magistrate submitted a case for the opinion of the Court of Appeal.

Held, that there was no authority, statutory or otherwise, empowering the magistrate to take a view.

CASE STATED by the police magistrate for the City of Vancouver, for the opinion of the Court of Appeal, as follows:

"(1) James Roy Crawford was charged at the Police Court in the City of Vancouver on the 17th of April, 1912, upon information and complaint as follows:

" 'That he, James Roy Crawford by false pretences did cause and induce the informant Silas Fader to make and execute a certain valuable security to wit: a cheque on the Royal Bank of Canada (New Westminster Branch) in favour of J. R. Crawford for the sum of $500 with intent thereby then and there to injure Silas Fader contrary to the form of the statute, in such case made and provided.

" 'That the charge was subsequently amended to read as follows:

" 'That the said J. R. Crawford on the 2nd of April, 1912, with intent to defraud one Silas Fader by a false pretence caused the said Silas Fader to execute a valuable security knowing the said pretence to be false.'

Statement

"The accused elected to be tried summarily before me under Part XVI. of the Criminal Code.

"Witnesses were produced by the Crown who stated that the accused had represented to the informant that he had a certain parcel of land for sale in the District of Burnaby, in the Province of British Columbia, and that the informant, with the witnesses, went with the accused to see the property, when the accused, instead of shewing him the property which he had for sale, shewed him another piece of property on the opposite side of the road, much more valuable.

"(3) The informant took the accused's word for the fact that the land he had for sale was the land pointed out by him, and paid $500 on account of the purchase price of the same. Subsequently it transpired that the land which was actually sold was not that pointed out by the accused, and was full of ravines and other natural disadvantages.

"(4) The accused on the other hand produced witnesses who stated that the land which he pointed out was the land which he, in fact, had for sale.

"(5) I reserved decision on the facts of the case, and before my decision was given, the counsel for the accused applied to me to view the land in question before rendering a decision. It appeared to me that it would assist me materially in deciding the matter if I could see the property, and view the roads and paths referred to by the different witnesses on either side.

"(6) Counsel for the Crown argued that my powers being statutory only, I have no authority to view the land.

"(7) Being in doubt as to my right to view these premises acting as I am as a police magistrate, I reserve decision on the point for your Lordships.

"(8) Have I, while trying an indictable offence summarily under Part XVI. of the Criminal Code, the right to take a view?" Statement

The case was heard at Vancouver on the 27th of November, 1912, by MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

J. K. Kennedy, for the magistrate.
D. W. F. McDonald, for the accused.

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: The police magistrate for the City of Vancouver submitted for the opinion of this Court a question which may be shortly stated as follows: Had he, while trying an indictable offence summarily, under Part XVI. of the Criminal Code, the right to take a view of the lots in respect of one of which the alleged fraud was committed? The right to do so was contested by the learned counsel for the Crown, so that no question of consent arises here. I am of the opinion that the magistrate had no such right, and would, therefore, answer the question in the negative.

MACDONALD, C.J.A.

IRVING, J.A.: The police magistrate, sitting under Part XVI. of the Code, has reserved, under section 1,014, the question as to his right, when trying an indictable offence under Part XVI., to take a view. The Queen's Bench Division, Armour, C.J., Falconbridge and Street, JJ. in the case of *Reg.* v. *Petrie* (1890), 20 Ont. 317, decided that there was no authority for a judge exercising jurisdiction under the Speedy Trials Act to take a view.

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At common law there was no power enabling the Court of Assize to order a view, except by consent; even in civil cases a view could not be ordered except by mutual consent until, by 4 & 5 Anne, chapter 16, section 8, a view was provided for. The right to order a view in criminal cases was conferred by 6 Geo. IV., chapter 50, section 23, the Juries Act, 1825, on "any of the Courts of Record at Westminster, or in the Counties Palatine, or great sessions in Wales."

In 1847, Greaves, who wrote the 4th edition (1865) of Russell on Crimes, "the most authoritative text book on crimes," *per* O'Hagan, J., in *Reg.* v. *Fanning* (1866), 17 Ir. C.L. 289 at p. 305, on an application by the prisoner's counsel for a view, said: "It may be doubtful, according to the authorities, whether, in a criminal case at the assizes, there can be a view except by the consent of the prosecutor": see *Regina* v. *Whalley* (1847),

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2 C. & K. 376, but the Court seems to have considered there was jurisdiction at common law to allow the view: see Odgers on Evidence, 1911, p. 384. I must say this decision seems to be opposed to the authorities, which are set out in the note to *Regina* v. *Whalley, supra.*

I am unable to find any authority, statutory or otherwise, enabling the judge to take a view, and as the jury could not in criminal cases take a view except by consent, I do not see how a judge sitting as judge and jury can take a view without statutory authority.

In my opinion the case should be answered in the negative.

MARTIN, J.A.: In my opinion, the question reserved should be answered in the negative. The statute, in terms (section 958), only empowers the Court to "direct that the jury shall have a view of any place, thing or person"; there is nothing

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authorizing a judge or magistrate to do the same. No case has been cited to us on the exact point raised, nor have I been able to discover one after a diligent search. I therefore think it would not be prudent or safe to sanction a proceeding which is not in accord with the established course of criminal justice.

GALLIHER, J.A.

GALLIHER, J.A. concurred in the reasons of IRVING, J.A.

Question answered in the negative.

REX v. CHEW DEB.

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REX
v.
CHEW DEB

Criminal law—Writ of prohibition—Prosecution closing case—Objection by counsel that no proof of offence—Selling liquor to an Indian—Withdrawal of charge—New information for same offence—Criminal Code, Secs. 720, 726.

Defendant was charged with selling liquor to an Indian. The prosecution offered all the evidence it had and closed its case. Defendant's counsel objected that no evidence had been given that the liquor was supplied to an Indian. The magistrate allowed the informant to withdraw the charge and lay a new information for the same offence, and convicted the defendant. Application was made for a writ of prohibition to be issued against the magistrate prohibiting him from signing a warrant of commitment against the defendant.

Held, that the magistrate should have dismissed the charge and granted a certificate of dismissal, or convicted the defendant. There is no provision for withdrawing summary proceedings once started.

Statement

APPLICATION for writ of prohibition heard by GREGORY, J. at Victoria on the 27th of January, 1913.

Aikman, for accused.
Lowe, for the magistrate.

29th January, 1913.

Judgment

GREGORY, J.: This is an application for a writ of prohibition to be issued against the magistrate prohibiting him from signing a warrant of conviction against the said Chew Deb. The ground of the application is that the said Chew Deb has already been tried on the said charge. It appears that an information was laid against the accused for supplying liquor to an Indian, and on the return thereof the prosecution offered all the evidence it had to offer and closed its case. It was then objected by counsel on behalf of the accused that he could not be convicted, as no evidence had been offered to shew that the person receiving the liquor was an Indian. The magistrate thereupon reserved his decision, and remanded the case to the 20th of December, 1912. On the 20th of December, the complainant asked permission to withdraw the charge. It was accordingly done, the accused man consenting. A new information was then

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laid for the identical offence, evidence taken, and a conviction secured, and it is to prevent the signing of the warrant for such conviction that the present proceedings are taken. I have no hesitation in saying that I think the magistrate's action was wrong. If the evidence for the prosecution was not sufficient at the close of the case, it was his clear duty then to dismiss the charge and grant a certificate of such dismissal, as provided for by the Criminal Code; or, if in his opinion it was sufficient, he should have convicted. Counsel for Chew Deb contended that there is no provision whatever for withdrawing summary proceedings once started, and that sections 720 and 726 of the Code shew that the magistrate must hear and determine the matter, subject, of course, to the right of adjournment. This contention is, in my opinion, sound. The magistrate, I consider, has no more jurisdiction to permit the proceedings to be withdrawn at the close of the case for the prosecution than has a judge at the assizes to permit the Crown to discontinue at the end of its case, with the intention of starting afresh.

The man has been put upon his trial; he has been in jeopardy, and it is one of the best, most sacred and well-established rules of English jurisprudence that he shall not be put in this position twice for the same offence. In the present case, the prosecution had closed its case; counsel for the defence insisted upon a decision, as he had a right to do, and the magistrate should not afterwards, in the absence of counsel, have asked the accused to consent to what his counsel would certainly have refused.

Judgment

Although it appears that the accused has some understanding of English, I do not think it at all likely that he understood that fresh proceedings would be immediately started for the same offence, and in the circumstances I do not think that such fresh proceedings can be carried any further.

With great respect, I cannot follow the decision in *Ex parte Wyman* (1899), 5 Can. Cr. Cas. 58. It is to be noted that Landry, J. gave a dissenting judgment in that case, and it does not appear that section 42 of chapter 178, Revised Statutes of Canada, 1886, which is identical with section 720 of the present Criminal Code, was drawn to the attention of the Court. That section

enacts that the parties being present, the "justice shall proceed to hear and determine," etc. As Erle, C.J. says in *Bradshaw* v. *Vaughton* (1860), 30 L.J., C.P. 93 at p. 96:

"The informant cannot withdraw, and the defendant has a right to a decision; and if the informant says he withdraws, the case is heard and the information is dismissed."

In the circumstances of this case I do not think the defendant should be in any way prejudiced by his consent to the withdrawal; it was given in the absence of his counsel; he is a Chinaman, and might easily have misunderstood it—in fact, it does not appear that he was told that fresh proceedings were to be started.

Judgment

There will be an order absolute as asked for, but there will be no order as to costs. The magistrate, beyond doubt, acted honestly, and he has facilitated the present application.

Order accordingly.

ANDREWS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Railways—Injury to person walking on track—Leave and licence to public—Negligence—Contributory negligence—Trespassing on track—Railway Act, R.S.C. 1906, Cap. 37, Sec. 408.

Plaintiff, while walking on the defendant Company's track, was overtaken by a car and injured. The evidence was that this portion of the line was used, to the knowledge of the Company, by the public in going to and coming from the station. The day on which the accident occurred was windy, thus lessening, if not preventing a person so walking from hearing the whistle.

Held, affirming the verdict of the jury awarding the plaintiff damages, that he was on the line by the leave and licence of the Company, and, further, that on the evidence, the motorman could, by reasonable care, have avoided the accident.

Statement

APPEAL by defendant Company from the judgment of HUNTER, C.J.B.C. entered up on the verdict of a jury in favour

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of the plaintiff in an action for damages sustained by having been run down by one of the defendant Company's cars.

The appeal was argued at Vancouver on the 13th and 14th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

L. G. McPhillips, K.C., for appellant Company: There is no evidence from which the jury could find that this was a roadway for the public, or that we were bound to protect the public who ventured on it. Plaintiff was simply a trespasser and therefore not entitled to recover damages. Even if he had a right to be on the track, apart from the provisions of the Dominion Railway Act, he was negligent himself, because he must have known that cars were running all the time, and further, the day was stormy, when he should have been all the more watchful of approaching cars.

Ritchie, K.C., and *Haney,* for the respondent: We base our position on *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361 at p. 370. There was a clear finding that this man was not a trespasser: see *Lowery* v. *Walker, ib.* 10.

[MACDONALD, C.J.A.: This appears to be a case where the questions put to the jury would have been of great assistance if they had been answered. I think it should be impressed upon a jury that it is their duty to assist the judge by answering questions. Of course it will ultimately lead to legislation, whereby questions will have to be answered.

Argument

MARTIN, J.A.: Unfortunately, it is often impressed unduly upon the jury that they need not answer questions, but it should be shewn that the questions not only are of assistance in deciding a case, but that they tend to prevent useless and expensive litigation.]

In any event, even if plaintiff can be considered a trespasser, there must be reasonable care taken by the Company if people are accustomed to using or travelling on the right of way.

[MACDONALD, C.J.A.: Is it not rather a circumstance against there being any licence that the statute says you shall not be there at all?]

Where the Company for years actually had a platform for people to get on and off the cars, can the Company be now heard

to say that the public shall not go there? There was no fence, an omission in itself constituting an invitation to go there. The act of the motorman in whistling shewed that he had the plaintiff in view.

McPhillips, in reply.

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: I would dismiss the appeal. There is evidence that the public were allowed to walk over the portion of the defendants' tramway line in question in going to and coming from the Company's station. The plaintiff was, therefore, where he was, by the leave and licence of the defendants. Even if the plaintiff was guilty of negligence, as to which there is no finding by the jury, the motorman could, by exercising reasonable care, have avoided running him down. The defendants owe a duty to the plaintiff to exercise such care, and are responsible for the nonfulfilment of it.

MACDONALD, C.J.A.

IRVING, J.A.: By section 408 of the Railway Act, chapter 37, walking upon the railway track is forbidden. Notwithstanding that section, people do walk upon the railway track in the vicinity of the scene of this accident—scores of people do it—everybody does it. On Sundays it is a promenade for young ladies and their beaux.

In these circumstances I think the defendant Company ought to take care not to run these people down, if the Company's servants are aware of their presence on the track. If people are run down when the Company could by reasonable care avoid doing so, I can see no reason why those injured should not be at liberty to succeed in an action for damages. In the case before us there was evidence from which the jury might infer want of care on the part of the defendants' servants.

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The *Grand Trunk Railway Company* v. *Anderson* (1898), 28 S.C.R. 541, was relied on by the Company. There the man was killed in walking through a storm on the railway track, and both the Divisional Court and the Court of Appeal for Ontario thought the action could be maintained. The Supreme Court of Canada, Taschereau and King, JJ. dissenting, thought

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the action would not lie. In that case it would appear that the storm blinded the engine driver and the servants of the Company had no knowledge of the man's presence on the track, because the whistle was not sounded, nor was the bell rung until the engine had struck McKenzie. Then, too, in that case, the track was completely surrounded and guarded by a fence, so that in *Anderson* v. *Grand Trunk R.W. Co.* (1897), 24 A.R. 672, the plaintiff's case depended entirely upon proof of the accident having been caused by breach of a duty cast upon the defendants by reason of some permitted practice on their part, involving invitation or permission by the company to persons to walk on their track: see the judgment of Osler, J. at p. 675.

Here the evidence is very different. In this case the evidence was that the servants of the Company saw the man on the track and that the user of the track was so general that I think knowledge of it must be imputed to the Company. I quite agree that it is not sufficient, to bind the Company, to shew that some servant of the Company had a knowledge of the practice, but here is evidence that the track was used as a promenade. If the Company neglects to provide fences, or to prosecute offenders, they ought to run their trams—on Sundays particularly—with a due regard to those whom they are encouraging to come on their premises. *Cooke* v. *Midland Great Western Railway of Ireland* (1909), A.C. 229, turned on leave and licence.

IRVING, J.A.

In *Degg* v. *Midland Railway Co.* (1857), 1 H. & N. 773, Bramwell, B., in delivering the judgment of the Court, at p. 780 said:

> "We desire not to be understood as laying down any general proposition that a wrongdoer never can maintain an action. If a man commits a trespass to land, the occupier is not justified in shooting him, and probably if the occupier were sporting or firing at a mark on his land, and saw a trespasser, and fired carelessly and hurt him, an action would lie."

This seems very like the principle in *Davies* v. *Mann* (1842), 10 M. & W. 546, 12 L.J., Ex. 10.

And at p. 781:

> "Some acts are absolutely and intrinsically wrong, where they directly and necessarily do an injury, as a blow; others only so from their probable consequences. There is no absolute or intrinsic negligence; it is always relative to some circumstances of time, place, or person."

Had I been giving the verdict, I think I should have found the plaintiff guilty of contributory negligence, but, as was pointed out in the Exchequer Chamber in *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311 at p. 313, that question is for the jury, and the judge would not have been right in nonsuiting.

You require very clear evidence before you can take the case away from the jury on the ground of the plaintiff's own negligence: *Toronto Railway* v. *King* (1908), A.C. 260. The Judicial Committee avoided this question in *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361 at p. 366. That case was decided on the ground that Barnett was a trespasser. Whether a person is or is not a trespasser is a question of fact—the jury has found in this case that the plaintiff ought not to be treated as a trespasser, and so, there being no objection to the sufficiency of the charge to enable the jury to determine the question of trespasser or no trespasser, the verdict and judgment must stand, as there was evidence from which the jury might infer negligence.

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A. agreed in the conclusions of MACDONALD, C.J.A.

MARTIN, J.A.

Appeal dismissed.

Solicitors for appellant Company: *McPhillips & Wood.*
Solicitors for respondent: *Haney & Hill.*

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BEAVIS v. TOWNSHIP OF LANGLEY

BEAVIS v. TOWNSHIP OF LANGLEY AND JENNY STEWART.

Municipal law—Assessment and taxes—Tax sale—Action to set aside—Onus—Certificate of title—Pleading—Want of authority to sell—Particulars.

Where it appears that one who holds a certificate of title to land has obtained it upon a sale and conveyance for taxes, the burden is upon the certificate holder to establish the regularity of the tax sale.

Kirk v. *Kirkland et al.* (1890), 7 B.C. 12, affirmed in *Johnson* v. *Kirk* (1900), 30 S.C.R. 344, and *Turner* v. *Municipality of Surrey* (1911), 16 B.C. 79, 349, followed.

Semble, that the plaintiff, in his statement of claim, instead of setting up the tax sale and alleging that it was made without authority, should have simply set out his title and alleged that the purchaser at the tax sale (a defendant) had wrongfully taken possession of his property.

Held, however, that the plaintiff, having alleged the tax sale and its invalidity and asked for a declaration accordingly, was not bound to furnish particulars of the defects in the authority of the municipality to sell.

Order of MORRISON, J. reversed.

APPEAL by plaintiff from an order of MORRISON, J. at chambers. The statement of claim alleged that Thomas Nelson was the registered owner of the land in question, subject to a mortgage to the defendant Jenny Stewart and Eliza Coffey; that Nelson had executed a conveyance of the property to the plaintiff; that, prior to such conveyance, the defendants the Corporation of the Township of Langley, without any power or authority, purported to convey the property to the defendant Jenny Stewart for taxes wrongfully alleged to be due and unpaid; and that the reeve and clerk of the Corporation had executed a conveyance to the defendant Jenny Stewart of the said property, purporting to be under and by virtue of the alleged sale, such conveyance being executed by the reeve and clerk without any power or authority. The plaintiff claimed an injunction restraining the defendants from dealing with the property, and a declaration that the alleged tax sale was null and void, and that the plaintiff was entitled to have his con-

Statement

veyance from Thomas Nelson registered, and to redeem the mortgage.

The statement of defence of the defendant Jenny Stewart alleged that the sale to her of the property in question was duly made for taxes lawfully due and payable, and duly charged against the property; that such sale was made by virtue of authority vested in the Corporation; that the conveyance to the defendant Jenny Stewart from the Corporation was duly registered in the land registry office; and that she held a certificate of title to the property. The defendant Jenny Stewart, subsequent to the delivery of her defence, obtained an order from MORRISON, J. requiring the plaintiff to furnish her with particulars of the defects in the authority of the Corporation to sell and convey the land. The plaintiff appealed from this order.

Statement

The appeal was argued at Victoria on the 10th of January, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Ritchie, K.C., for appellant.

[MACDONALD, C.J.A. referred to *Turner* v. *Municipality of Surrey* (1911), 16 B.C. 79, 349.

IRVING, J.A. referred to *Kirk* v. *Kirkland et al.* (1899), 7 B.C. 12, affirmed in *Johnson* v. *Kirk* (1900), 30 S.C.R. 344.]

Mayers, for the respondent Jenny Stewart: *Turner* v. *Municipality of Surrey* is distinguishable, because there the only party defendant was the municipality, and the facts in relation to the tax sale were peculiarly within their knowledge. The fact that the defendant Stewart has a certificate of title, which is *prima facie* evidence of title, puts the burden of shewing defects in such title upon the plaintiff. Convenience is greatly in favour of requiring particulars of the defect upon which the plaintiff really relies. The furnishing of such may obviate the necessity for an adjournment of the trial.

Argument

Per curiam: It was bad pleading for the plaintiff to set up the tax sale and allege that it was made without authority. He should have simply set out his title and alleged that the defendant Stewart had taken possession of his property; but the authority of *Kirk* v. *Kirkland et al.* is clear that, although the

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defendant Stewart has a certificate of title, when it is made to appear that such certificate was obtained upon a tax sale, this put the burden upon her of establishing the regularity of the tax sale. The case is not distinguishable from *Turner* v. *Municipality of Surrey*.

The appeal will be allowed and the order for particulars set aside.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Bodwell & Lawson.*

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Jan. 16.

REX v. CAMPBELL

REX v. CAMPBELL.

Criminal law—Statute, construction of—Liquor Licence Act, R.S.B.C. 1911, Cap. 142, Sec. 22—"One act of vending," what constitutes?

Section 22 of the Liquor Licence Act authorizes the superintendent of police to issue hotel licences empowering the licensee to vend liquor by retail in quantities not exceeding one imperial quart in any one act of vending to any one person. The accused in this case sold a quantity of liquor to the one person, who was said to be purchasing for others. The bottles were placed upon the counter, and the price of each quart was "rung up" on the cash register separately.

Held, affirming the finding of GREGORY, J., that there had been an infringement of the statute, and that the conviction had by the magistrate should be sustained.

Statement

APPEAL from the judgment of GREGORY, J. on a motion to him, heard at Victoria on the 11th of November, 1912, to quash a conviction for an infraction of the Liquor Licence Act, as stated in the headnote.

Aikman, for the motion.
Moresby, for the Crown, *contra.*

12th November, 1912.

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REX v. CAMPBELL

GREGORY, J.: Motion to make absolute a rule *nisi* for a writ of *certiorari* to bring up and quash a conviction. The grounds urged are: (1) neither the information nor the conviction describe any offence known to the law; and (2) the evidence does not warrant a conviction. As to the second objection, it is only necessary to say that there was some evidence on which the magistrate could make the finding he did, and this is not a proper method of attempting to review a magistrate's finding of fact, even if I disagreed with it.

As to the first objection, it is urged that the Liquor Licence Act does not prohibit the offence alleged to have been committed. It certainly does not in the exact words in which it is described in the information, but I think it does nevertheless prohibit the offence for which Campbell has been convicted, which is, in short, selling liquor in a manner not authorized by his licence. Section 22 of the Act authorizes the superintendent of Provincial police to issue hotel licences empowering the licensee to vend liquor by retail in quantities not exceeding one imperial quart in any one act of vending. That is the licence Campbell had, and the only licence he could have had. Therefore, he was only licensed to sell liquor in that way, for section 66 of the Act prohibits any person from vending in any manner whatsoever any liquor without first having obtained a licence authorizing him so to do. It seems to me that this section contains all the prohibition necessary, and that Campbell cannot complain because in the information he is furnished with the particulars which he, being a licensee, might reasonably ask for if proceeded against for selling liquor without a licence. As a matter of fact he had no licence to sell liquor in the manner in which the magistrate has found he did, and he has been convicted of it, and I do not see how I can make the rule absolute herein. It will therefore be discharged.

GREGORY, J.

The appeal was argued at Victoria on the 16th of January, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

Aikman, in support of the appeal: There is no evidence to support the conviction, because it is not shewn that all these

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sales, which we submit were separate sales, were "rung up" on the cash register at the same time. The statute makes no provision as to the time which must elapse between the sales.

Moresby, for the Crown, was not called upon.

REX v. CAMPBELL

IRVING, J.A.: We do not wish to hear you, Mr. *Moresby.* The one act of vending in excess of a quart seems to me to be plainly established.

Oscar Rudensgold says in answer to the question, "Who paid for all the liquor?: I put down all the money." "How much did you buy? I cannot say exactly what it was, $12.50 for whiskey." "Can you state what whiskey it was?" Then he gives it: "Three bottles of King George, one of Joe Seagram, one Dry Gin," and so on; but he adds: "there were different parties to have it."

IRVING, J.A.

That, it seems to me, would justify the magistrate in coming to the conclusion that there was one vending of more than a quart. But if there could be any doubt about it, Mr. *Aikman* effectually put that doubt out of the question when he asked this question: "As a matter of fact, didn't you make these purchases bottle by bottle?" Here the witness will not say that he did, but says this—leaving it to the Court, practically: "I put the money down on the bar and told the bartender that I wanted so many bottles, and I left the money on the bar for him to collect the money for it, and the bottles were packed in the boxes." That seems to me to be one transaction by one person buying for a number of other persons. The appeal must be dismissed.

MARTIN, J.A.

MARTIN, J.A.: I agree. This was a clumsy and unsuccessful attempt to evade the statute.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

Appeal dismissed and conviction sustained.

Solicitor for appellant: *J. A. Aikman.*
Solicitor for respondent: *Wm. C. Moresby.*

ARBUTHNOT v. THE CORPORATION OF THE CITY OF VICTORIA.

COURT OF APPEAL

1913

Jan. 7.

ARBUTHNOT v. CITY OF VICTORIA

Municipal law—Local improvement—Limitation of time within which to bring action to contest—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 512, 513 and 514.

Where a local improvement by-law is passed, making a general assessment for the cost of the work, but the payment of which is spread over a number of years, any action by a ratepayer contesting the work, or complaining of its non-completion, must be brought within six months after the cause of action arose.

Judgment of HUNTER, C.J.B.C. affirmed, MARTIN, J.A. dissenting.

APPEAL by plaintiff from an order by HUNTER, C.J.B.C. at Victoria on the 26th of June, 1912, in an action for a declaration that certain local improvement work had not been completed, or in the alternative, for a mandatory injunction directing the municipal authorities to continue the work to completion. The two by-laws necessary in local improvement works were passed, the one authorizing the work and the other making the assessment. The first was passed in May, 1907, and the second in March, 1908. There was a question whether the work had been actually finished, but as to that the municipality raised and pleaded sections 512, 513 and 514 of the Municipal Act, dealing generally with the limitation of actions against municipalities, and sections 209 and 212 as to the time within and procedure by which proceedings must be taken to quash a by-law. The learned Chief Justice struck out certain paragraphs of the statement of claim and held that, with the exception of the possible liability of the defendant Corporation to put the street in repair, sections 512, 513 and 514 of the Municipal Act constituted a good defence. Plaintiff submitted that the assessment of the property each year constituted a fresh cause of action, but the municipality submitted that the assessment, although spread over a number of years, was one complete act.

Statement

The appeal was argued at Vancouver on the 6th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

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ARBUTHNOT v. CITY OF VICTORIA

Harold Robertson, for appellant: We submit that we were not barred by the limitation clauses, 512, 513, 514, of the Municipal Act. The City is not entitled to make assessments *in futuro.*

McDiarmid, for respondent Corporation: We submit that everything which could constitute a cause of action took place in 1908, when the by-law was passed. The assessment is an entire assessment, and was made under that by-law. They are now barred by statute: see *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513.

Argument

Robertson, in reply: Every additional act done by the Corporation creates a fresh cause of action. We say that the assessment each year is a separate act, giving a cause of action.

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: This case comes before the Court in the form of what is in effect a stated case based upon the statement of claim and paragraphs 7, 8, 9, 10 and 11 of the statement of defence. We have, therefore, to assume for the purposes of this submission that the facts are as therein stated, save as affected by laches, that being excepted from the submission. Such facts may be summarized briefly to be that

"By-law No. 509 is null and void and *ultra vires* of the Council in that it does not ascertain and determine the said works and improvements, and that no plan, description or specification of the proposed works was ever prepared, and that the defendant purported to pass the same on an untrue and false statement of facts and that the same is uncertain."

MACDONALD, C.J.A.

The by-law referred to is known as the Richardson Street Improvement By-law, and was passed on the 13th of May, 1907.

Paragraph 11 of the statement of claim then recites that

"On the 16th day of March, 1908, the defendant purported to pass a by-law to be known as the Richardson Street Improvement Assessment By-Law, 1908,"

and that this by-law purports to assess the plaintiff's land in the sum of $536, under the authority of said by-law 509.

The defendant contends that the action was not maintainable because of sections 512 and 513 of the Municipal Act, which provide that all actions against a municipality for the unlawful doing of anything purporting to have been done by such municipality under the powers conferred by any Act of the Legisla-

ture, and which might have been lawfully done by such municipality if acting in the manner prescribed by law, shall be commenced within six months as to one section and one year as to the other, from the time the cause of action arose. It is unnecessary to distinguish in this case, because the action was commenced more than a year after the cause of action set forth in the said paragraph of the statement of claim arose, if my view of the case is the correct one.

The relief prayed for at the end of the statement of claim so far as it affects this case, is an injunction restraining defendant from assessing or charging the plaintiff's lands under said assessment by-law, and in the alternative, that the defendant be ordered to pay and relieve the plaintiff from said assessment.

The order appealed from strikes out the plaintiff's whole statement of claim, and gives leave to amend as the plaintiff may be advised. There were no reasons for judgment, but I take it that the learned Chief Justice came to the conclusion that the action was barred by reason of the sections of the Municipal Act above referred to.

While the by-law, No. 509, is to be assumed to be null and void as stated, yet it is to be so because of the informalities above recited, and the untrue and false statement of facts upon which it is alleged to have been based. Subject to the determination of any question of fraud which may be affected by laches, I think that said sections of the Act are a bar to the relief claimed. It was contended on behalf of the plaintiff, and this was the real reason for the submission, that the assessment was to be made from year to year, but I cannot agree with that. I think the assessment was made once and for all by the assessment by-law; the fact that it is to be levied and collected from year to year makes no difference insofar as the question submitted to the Court is concerned.

MACDONALD, C.J.A.

I would, therefore, dismiss the appeal.

I will only add that I do not understand why the whole statement of claim should have been ordered struck out. The submission shews that only the paragraphs above mentioned were to be passed upon by the Court. It is, however, a matter of no great consequence, as the plaintiff was given leave to amend as he might be advised.

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IRVING, J.A.: I would dismiss the appeal on the ground that the assessment was made once and for all when the by-law, No. 552, was passed on the 16th of March, 1908. The fact that the "amount of the rate assessed as aforesaid" was payable in ten instalments makes no difference. The imposition of the assessment was the "cause of action," and the plaintiff ought to have brought his action within the time limited by section 513.

In my opinion the form of the order appealed from was in the discretion of the learned Chief Justice.

MARTIN, J.A.

MARTIN, J.A.: On the unusual wording of this by-law, at least, I think the appeal should be allowed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Robertson & Heisterman.*
Solicitor for respondent: *F. A. McDiarmid.*

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Jan. 17.

BANCROFT v. RICHARDS

BANCROFT v. RICHARDS.

Landlord and tenant—Distress—Replevin—Sale—Bailiff withdrawn before sale or replevin proceedings—Poundage—Right of bailiff to claim—Distress Act, R.S.B.C. 1911, Cap. 65, Secs. 7 and 21.

Where a landlord distrains for rent, and a settlement is effected without proceeding to replevin or sale, the bailiff is, under section 21 of the Distress Act, entitled only to charge for levying the distress and for the man in possession.

Decision of LAMPMAN, Co.J. affirmed.

APPEAL from the judgment of LAMPMAN, Co. J. The plaintiff (respondent) is a shop keeper in the City of Victoria, and the defendant (appellant) is the sheriff for the County of Victoria. [*Greenwood* v. *Bancroft* (1912), 17 B.C. 151.]

Statement

The defendant was handed a warrant to distrain on the goods and chattels of the plaintiff for rent due, $3,000, and proceeded, as bailiff, to execute the same in due course of law. He distrained after having demanded payment, which was refused,

and was proceeding to make the necessary inventory of the goods and chattels distrained. On the request of the plaintiff not to continue making the inventory until he had seen his solicitor with a view to settlement, defendant refrained from continuing to take the inventory. After having been in possession for the day, during which time negotiations for payment took place, the amount of rent due was paid to the landlord by plaintiff's solicitor, and the sum of $2 for levying distress, and $2 for the man left in possession was tendered to defendant. Defendant refused to accept said amount, or to withdraw from possession unless paid poundage or commission according to the statute in that behalf. Plaintiff's solicitor, under protest, thereupon paid the amount claimed for poundage or commission. Delivery of the goods and chattels was then made by defendant to the plaintiff, who commenced proceedings for its repayment. Bancroft gave a receipt for the delivery up of the goods distrained. Statement

The action came on for hearing at Victoria on the 11th of September, 1912, before LAMPMAN, Co. J., who gave judgment for the plaintiff, with costs.

From this judgment defendant appealed, and the appeal was argued at Victoria on the 17th of January, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

Bass, for appellant: We submit that there was only one of two courses open to the tenant to recover possession. He must either (1) replevy (section 7 of the Distress Act, chapter 65, Revised Statutes of British Columbia, 1911), within five days, or (2) the sale must proceed. He cannot replevy unless the distress is wrongful, or that he does not owe the money. He admitted the debt, and he did not object to the distress. The bailiff cannot proceed to take the necessary steps to make a sale until five days have elapsed. The tenant at once entered into negotiations for a settlement, and settled by paying the full amount due the same day. We therefore submit that a sale has been effected to him of the goods distrained, and he has thereby contracted himself out of the statute so as to prevent his setting up that we have been wrongfully paid. Argument

Aikman, for the respondent, was not called upon.

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IRVING, J.A.

IRVING, J.A.: I think this appeal must be dismissed. The sheriff, the defendant in this action, seems to have been impressed with the idea that he, as a bailiff, is entitled to something in the nature of poundage, payable to a sheriff. That is a misunderstanding of his position. His rights here, as bailiff, are governed entirely by the Act we have before us, chapter 65. That statute prescribed certain things for which he shall be entitled to make certain charges. Section 21 of the statute declares that he shall not be paid for anything mentioned in the schedule unless actual performance shall have been made. He contends that he made a sale of the property because he was withdrawn. Now, in my opinion, that does not amount to a sale within the meaning of the schedule, and he is not entitled to charge for it. The only things that he is entitled to charge are these two items: the fee for levying (varying with the amount), and the man in possession. I do not think there is any fee provided for his going out of possession.

MARTIN, J.A.

MARTIN, J.A.: I concur. It does seem somewhat strange that all this large sum of money could be recovered for a charge of three or four dollars. I think the sheriff would have a very strong case to have the schedule revised, to meet this sort of thing, or else he should have a distinct understanding on every seizure that he should receive something more, because that is surely not a proper remuneration, $2 for possession, where a corporation labourer gets $3 per day. However, the question is really not for us. I only mention that to shew that I am not leaving it out of consideration.

GALLIHER, J.A.

GALLIHER, J.A. : I agree that the appeal must be dismissed.

IRVING, J.A.

IRVING, J.A.: I would add as a foot note to what I have already said, namely, that it is a matter for the Legislature to remedy.

Appeal dismissed.

Solicitors for appellant: *Bass & Bullock-Webster.*
Solicitors for respondent: *Aikman & Austin.*

BRADSHAW *ET AL.* v. SAUCERMAN *ET AL.*

MACAULAY, J.

1912

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1913

Jan. 7.

BRADSHAW v. SAUCERMAN

Yukon Territory—Mining law—Mechanics' liens—"Ownership," what constitutes in mining claims—Description in claim for lien of work in respect of which lien is sought—Material for mining operations, subsequently sold and used for other purposes.

A mortgagee is not an "owner" entitled to be named by a lien claimant when filing his claim for lien. He may be brought in by subsequent proceedings, *e.g.*, as here, by originating summons.

A statement in a claim for lien that it is "for wages for work and labour done and performed on and in respect of said [mining] claims," with the amount due and date of employment is a sufficient statement under section 7 (*b*) of the Miners' Lien Ordinance.

Where labourers working on a mining claim cut certain timber as part of their regular work, but which timber was subsequently diverted to purposes other than for the mining claims, such work is work done in connection with the mining claims, and such subsequent diversion does not affect the rights of lien claimants.

Per IRVING, J.A., following *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373, and *Gillies* v. *Allan* (1910), *ib.* 375, no appeal lies where the amount found to be due is less than $500.

APPEAL from a judgment of MACAULAY, J., of the Territorial Court of the Yukon Territory, in an action tried by him at Dawson in March, 1912.

The Act providing for a Court *en banc* in the Yukon Territory having been repealed by chapter 56, 3 George V., Statutes of Canada, the Court of Appeal of British Columbia is now constituted a Court of Appeal from judgments of the Territorial Court of the Yukon Territory.

Section 46, subsection 2, is as follows:

"That an appeal shall lie, from any final judgment of the Territorial Court, to the judges of the said Court of Appeal (British Columbia) sitting together as a Full Court, where the matter in controversy amounts to the value or sum of $500 or upwards, or where the title to real estate, or some interest therein, is in question."

Statement

The plaintiffs claimed a lien upon the mining claims of the defendants, under the provisions of the Miners' Lien Ordinance, in respect of work done, and services performed by them, in the aggregate amounting to $7,716.35. Three of the claims of the workmen were for less than $500 each.

The appellants, James E. Lilly & Company, were mortgagees, whose mortgages were registered prior to the time of the work

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being done by the plaintiffs. The Ordinance provides that liens shall take effect as against mortgagees whose claims are so registered, subsequent to the passing of the Ordinance, to the extent of an undivided half interest in the property to be charged. The appellants were not named in the claim of lien filed as "owners," but were made parties to an originating summons and appeared upon the return of the summons. At the trial the appellants took the grounds which were subsequently taken upon appeal: (1) that they, being mortgagees, were "owners" within the meaning of subsection 2 of section 1 of the Ordinance, and that their names should have been inserted in the lien filed in the office of the Mining Recorder, and that the failure to do so rendered the lien void as against them; (2) that the particulars of the work done, the residence of the parties, and the description of the property to be charged were insufficient; (3) that a part of the work done, in respect of which the lien was claimed, was the sawing of lumber which was not used upon the claims, but was sold, and as to this there could be no lien.

Statement

Judgment was given in the Territorial Court holding that it was not necessary that the mortgagees should be named as "owners" in the lien, that it was sufficient that they be brought in by the subsequent proceedings, as was done; that the particulars of the work done and the other particulars were sufficient; and that there was no evidence to shew that the claimants, when performing the work of cutting the lumber, were aware that any of it was to be used for other than the purposes of the mine, and a subsequent diversion could not affect them. From this judgment James E. Lilly & Company appealed.

Bell, for plaintiffs.
Tabor, for defendants, J. E. Lilly & Company.
Defendants Saucerman and Davin appeared in person.
Defendant Duggan did not appear.

30th March, 1912.

MACAULAY, J.

MACAULAY, J.: This is an application by way of originating summons under the Miners' Lien Ordinance to enforce a lien for work and labour performed by the plaintiffs for, and upon the credit of, the defendant George W. Saucerman, against creek placer mining claims numbers 5, 35, 37, 39, 41, 45, 47, 48, 52,

53, 55, 56, 57, 59, 61, 63, 64, 65, 97, 98, 99, 100, 101, all below Discovery on Thistle creek, and Discovery claim, and numbers 1, 2, 3, 4 and 5 above Discovery on Statue gulch, a tributary of Thistle creek on the left limit below Discovery, in the Yukon Territory, the mines, dumps of pay dirt, the minerals and ores produced therefrom and upon the appurtenances thereto, the lands occupied thereby and enjoyed therewith, and the flumes, water rights, syphons, piping, monitors, sawmill plant, and the machinery and chattels upon said lands and mining claims; the said defendant Saucerman being a part owner of the said claims, and also the holder of an option to purchase the interests of his co-defendants, Henry A. Duggan and Thomas Davin, which option was duly registered in the office of the Gold Commissioner at Dawson and was in force at the date of the commencement of these proceedings; there also having been a partnership entered into between the defendant owners, other than the mortgagee, for the working of the said claims, and a grouping certificate duly obtained and filed in the office of the Gold Commissioner of the Yukon Territory, under the provisions of the Placer Mining Act of the Yukon Territory, and a further grouping certificate dated the 28th of June, 1911, under the provisions of the said Act, and filed in the office of the Gold Commissioner of the Yukon Territory on the 29th of June, 1911, which said grouping certificate is still in force. Consequently, although the work performed by the plaintiffs was not performed upon all of the above mentioned mining claims, still, if the lien of the plaintiffs should prevail, it will apply to all the said claims by virtue of the said grouping certificates.

MACAULAY, J.

The last day's labour for which the wages are claimed was performed on or about the 27th of August, 1911, and the claim for lien was duly registered in the office of the Gold Commissioner at Dawson on the 9th of September, 1911, within 30 days after the performance of the last day's labour for which wages are claimed. A certificate of proceedings was duly obtained from this Court on the 26th of October, 1911, and an originating summons obtained from this Court on the said 26th of October, 1911, within the time prescribed by section 12 of the Miners' Lien Ordinance, and proper service of all proceedings

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effected upon the defendant George W. Saucerman and the defendant T. D. Davin and also the mortgagees J. E. Lilly & Company.

The defendant H. A. Duggan was not served with the originating summons, or any of the proceedings, as required by the provisions of the Act; consequently no lien, in any event, can attach to any interest he may have in any of the above-mentioned properties.

There is no contest between the plaintiffs and the defendant George W. Saucerman, who admits the amounts due to the plaintiffs as claimed, and the time checks given by Saucerman to the respective plaintiffs and produced and filed as exhibit "I" in these proceedings, verify the claims made by the respective plaintiffs against him.

The defendants J. E. Lilly & Company, mortgagees, oppose the said liens, however, on grounds of irregularity, and argue, through their counsel, that the said lien is invalid on the following, amongst other, grounds:

"(1) That the lien does not say that Thistle creek or Statue gulch are in the Yukon Territory; (2) that lien is contradictory, as it refers to claims as belonging to defendant Saucerman exclusively in operative part; (3) that lien does not shew that money is due or to become due as required by Ordinance; (4) that it does not shew the work done or wood furnished as required by Ordinance; (5) that it does not shew the nature of the work done, and (6) that it does not shew that there is anything due, or to become due, as required by the Ordinance."

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Further, that part of the work performed was in cutting logs and sawing lumber, some of which lumber was not used in connection with the mining operations, but sold to individuals not connected with the said mining operations, and that no lien should attach for such work performed by any of the plaintiffs where the product of such work was not applied towards, or used in connection with the said mining operations.

It was argued by counsel that when a statute gives a privilege in favour of the creditor, the creditor must bring himself strictly within its terms, and, under the Miners' Lien Ordinance, a special privilege being granted to the plaintiffs, they must bring themselves strictly within the terms of the statute, and any irregularity in their proceedings is fatal to their claim. Authorities were cited by counsel to shew that in actions for liens the

plaintiffs are compelled to conform strictly to the terms of the statute; otherwise their actions would fail. It is not necessary for me to cite the authorities produced by counsel in support of his contention, because I in no way disagree with his contention, and unless the plaintiffs have brought themselves strictly within the terms of the Miners' Lien Ordinance, under which they are proceeding, I am of opinion that their action must fail.

Now, let us examine the first objection.

The plaintiffs claim a lien for wages due by George W. Saucerman, H. A. Duggan and T. D. Davin, " of Thistle creek, in the Yukon Territory, owners of the mining claims hereinafter enumerated and situate in the Thistle Creek Mining Division of the Dawson Mining District." The claims are then enumerated and described as "all below Discovery on Thistle creek and Discovery claim and numbers 1, 2, 3, 4 and 5 above Discovery on Statue gulch, a tributary on left limit of Thistle creek, below Discovery."

In my opinion this objection cannot prevail, as it is impossible to be misled as to the whereabouts of Thistle creek or Statue gulch, as the defendants are spoken of as being residents of "Thistle creek in the Yukon Territory, owners of the mining claims situated in the Thistle Creek Mining Division of the Dawson Mining District." It is impossible, in my opinion, that any one reading the lien could be misled, or could conclude that the said creek or gulch could be situated elsewhere than in the Yukon Territory.

The second objection: That the lien is contradictory, as it refers to claims as Saucerman's exclusively in operative part. I am of opinion that this objection could not prevail, as Saucerman is described in the grouping certificate as the owner under his agreement of purchase from his co-defendants Duggan and Davin (he was in control of the said mining properties); and that such description of Saucerman is not contrary to the provisions of the said Miners' Lien Ordinance.

I will now examine the third objection, that the lien does not shew that money is due or to become due as required by the Ordinance.

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The claim of lien itself states that it is "for wages due by George W. Saucerman, H. A. Duggan and T. D. Davin, for work and labour done and performed on or in respect of the claims above enumerated, for, and upon the credit of, the said George W. Saucerman." That the work so performed by the said claimants in each case was performed within the times mentioned in the said lien, as is more fully shewn by the claimants' time checks; and describes the amount claimed in each case. The time checks verify the statements of the claimants in each particular case. The claim of lien further states that "there was no period of credit agreed on with any of the claimants."

Although the lien in this respect might have been more happily framed, I am of opinion that the plaintiffs, in regard to objection number 3, have strictly complied with the terms of the statute.

Objection number 4: The lien states in each particular case that the claim is for wages for work and labour done and performed on and in respect of the mining claims mentioned in said lien, and the evidence in the case shews that this is a fact. I believe this is a sufficient description of the work performed to comply with the provisions of the statute. There is a multitudinous variety of work to be performed by a miner or labourer working upon a mining claim, and I do not think it was ever intended by the framers of this Act that in claiming a lien it was necessary for the miner to describe minutely the different kinds of work performed by him upon the said claim; and, in my opinion, the statement that it was "for work and labour done and performed on and in respect of the claims enumerated" was a sufficient description. There was no wood furnished by the workmen, nor is any such a claim made by them under their lien.

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Objection number 5: That it does not shew the nature of the work done. The view expressed by men in regard to objection number 4 applies to this objection.

Objection number 6: That there is nothing to shew that there is anything due, or to become due. I have already expressed my view in regard to this objection; and, in regard to all the objections raised, I find that the plaintiffs have brought themselves strictly within the terms of the statute, and upon examin-

ing the lien filed as a whole, and reading it as a whole document, I am of opinion that no other conclusion can be arrived at than that the plaintiffs have strictly brought themselves within the terms of the statute.

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In regard to the further objection, that all the lumber produced from the logs cut and sawn on the property was not used in connection with the mining operations, the evidence shews that only a small portion of this lumber was disposed of by the defendant Saucerman to persons other than those connected with the said mines or mining operations, and in the instances where such lumber was so sold it was for the purpose of obliging his neighbours, there being no other saw mill in that district; and, furthermore, there is no evidence offered to shew that the plaintiffs, when performing the work of cutting logs and assisting in having them manufactured into lumber, were aware that any of this lumber was to be used otherwise than in connection with the said mining operations; and even if Saucerman did divert some of that lumber, under the circumstances, in my opinion, such diversion could not affect the rights of the plaintiffs, who are not shewn to have had any knowledge other than that the said lumber so obtained from the sawing of the logs was to be used in connection with the mining operations being carried on, and about to be carried on, upon the said mining property.

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It was further objected to by counsel that J. E. Lilly & Company were not made parties to the lien. I am of opinion that it was not necessary for Lilly & Company, the mortgagees, to have been made parties to the lien in the first instance, as it was proper to file the lien against the owner, or supposed owner, of the property in the first place, and then, after a due examination of the records in the office of the Gold Commissioner, all parties interested should be notified, and Lilly & Company were duly notified and made parties to the action in the originating summons. This, I believe, was the proper course to have been followed.

In regard to the claim of the plaintiff M. McKenzie for $246.50, for services performed as a cook, said claim must be disallowed, as it is of such a nature as not to be contemplated as

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coming within the provisions of the Miners' Lien Ordinance: see *Davis* v. *Crown Point Mining Co.* (1901), 3 O.L.R. 69, which case has been followed in all mining lien cases that have been before the Courts in this Territory.

In regard to the other plaintiffs, in my opinion they have clearly established a right to their lien for the amounts claimed by them, except as to the interest of the defendant Duggan, who was not served with the proceedings. Consequently, the said lien will not attach to whatever interest the defendant Duggan may have in the said claims.

There is no dispute as to the validity of the mortgages held by the defendants J. E. Lilly & Company. Consequently, the said lien of the plaintiffs shall only take priority over the said mortgages on the said property described in the said lien as to an undivided one-half interest in said mining claims, the appurtenances thereto, the lands occupied thereby or enjoyed therewith, and the machinery and chattels upon such lands, and as to one-half of the output from the said mining claims. The said J. E. Lilly & Company having entered into possession of the said premises under their said mortgages and obtained a certain amount of gold dust will, therefore, be obliged to account for one-half of the gold dust so obtained.

There will, therefore, be judgment for the plaintiffs, other than the plaintiff McKenzie, for the amounts claimed by them respectively in the said lien, together with the costs of and incidental to registering the lien, as well as the costs of the action.

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If the said claims of the plaintiffs are not satisfied within one month from the date of the judgment, I direct a sale of the estate and interest charged with the lien; also any wood, machinery and chattels so charged, to satisfy the said claims. If such sale is found necessary, further directions as to the time and manner of the sale shall be given upon application to the Court. There will also be a personal judgment against the defendant Saucerman for the full amount of all the plaintiffs' claims and costs.

The appeal was argued at Vancouver on the 5th and 6th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Pattullo, K.C., for appellants: We submit that it was necessary to register or name the interest of the mortgagees. The Ordinance itself, section 7, contains a mandate that the claim of lien should name the owner of any property, and as a mortgagee has a property interest, he is in exactly the same position as an owner, in a claim for a lien.

[IRVING, J.A.: Lilly & Co. seem to be named: see page 3 of the appeal book.

MACDONALD, C.J.A.: Does not that destroy that much of your argument as to Lilly & Co. not being named?]

I nevertheless raise the point that they have not been named. However, Lilly & Co. went into possession in September. Then the work done has not been sufficiently described. It should have been specifically set out.

[*Per curiam*: The term "working" a claim has acquired an established meaning in a long line of cases. We are not with you on that point.]

Then, it is submitted that the wood cut and afterwards used for other purposes cannot be said to be work done upon or for the use or benefit of the claims. We say further, that priority of liens is obtained only for liens filed in compliance with the provisions of the Ordinance.

Charles Macdonald [of the Yukon Bar], for the respondents: While the term "owner," as defined by the interpretation clause, is a comprehensive one, the contention is that the whole Ordinance shews that it means the owner who has had contractual relations with the wage earners, or persons who assert the lien.

Argument

Section 5 provides that the lien shall attach upon the estate or interest of the owner. If owner means mortgagee, then the interest of the mortgagee may be destroyed. The interests of the mortgagee are set out and defined by section 6, and he is protected as mortgagee to the extent of an undivided one-half interest.

Section 14 provides that notice to parties interested may be given before the matters in question are disposed of. This, it is argued, includes mortgagees. And there is the further clause that the Court shall, upon the trial, determine and fix the liability of the "owner" for wages due to the claimant. Mort-

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gagees are there expressly excluded from the term "owner," as no liability for wages exists as against them unless the work was done on their credit.

Under the lien Acts of this and other Provinces mortgagees are not owners: *Bank of Montreal* v. *Haffner* (1881), 29 Gr. 319, (1884), 10 A. R. 592 at pp. 596-9; *Cole* v. *Hall* (1889), 13 Pr. 100; *Coughlan* v. *National Construction Co., McLean* v. *Loo Gee Wing* (1909), 14 B.C. 339.

As to three of the respondents there is no appeal, the amounts claimed by them individually being less than $500, and no interest in land is called in question: *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373; *Gillies* v. *Allan* (1910), *ib.* 375.

As to the sufficiency of the particulars: *Crerar* v. *Canadian Pacific R.W. Co.* (1903), 5 O.L.R. 383; *Barrington* v. *Martin* (1908), 16 O.L.R. 635.

The learned trial judge has found that only a small quantity of lumber was sold, and that the lien holders had no knowledge that it was to be sold.

Argument

Pattullo, in reply: The claim for lien shall state the work done in respect of which a lien is sought, which means that particulars of the work shall be given. As to the question of appeal, the interest of an owner in the Yukon can be taken to be the same as in British Columbia: *Stussi* v. *Brown* (1897), 5 B.C. 380. In the Yukon the placer miner gets nothing but the minerals; his grant specifically excludes any interest in the land: *Wells* v. *Petty* (1897), *ib.* 353.

Cur. adv. vult.

7th January, 1913.

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MACDONALD, C.J.A.: The grounds of appeal relied on by the appellants' counsel were (1) that the claim of lien did not name the mortgagees, J. E. Lilly & Company, as owners; (2) that it did not sufficiently describe the work done, and (3) that all the wood cut by the workmen was not used on the mining claims.

Before dealing with the first objection, which is that upon which most of the argument turned, I shall deal shortly with the other two.

I entirely agree with the learned judge's conclusion on the third ground mentioned above. I do not think workmen are to

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be deprived of their rights because of circumstances beyond their control. At the time the wood was cut or manufactured, it was, or appeared to them to be intended for use on the mining claims in question here, and a subsequent diversion of part of it by the owner could not, in my opinion, divest them of their rights.

On the second ground I entertain grave doubt. As to the sufficiency of the description of the work done, it may be that the inferences to be drawn from the whole document (the claim of lien) sustain the learned judge's finding, and as my learned brothers are agreed that they do, I do not dissent. I would like to add, however, that a better statement of the work done was practicable and desirable. It is only reasonable that the claimant should state the general character of the work he claims to have done, so as to shew that it was such as falls within the purview of the Ordinance. This case very well illustrates the desirability of this since one of the claimants was a cook, and joined in the claim of lien without the character of his claim being disclosed. It was disallowed, and rightly so: *Davis* v. *Crown Point Mining Co.* (1901), 3 O.L.R. 69.

There remains, then, the first ground of appeal, which Mr. *Pattullo,* appellants' counsel, frankly stated was the substantial one. Shortly stated it is this: Is a mortgagee whose mortgage was registered prior to the work done and wood supplied, and who was not in possession when the same was done and supplied, and who had not contracted for, or been in any way privy to the hiring of the men, an "owner" within the meaning of that expression as used in the said Ordinance? As defined in the interpretation clause, the expression "includes a person having any estate or interest in the mine," etc. The Ordinance was apparently framed as a rough and ready measure designed to meet conditions in a new mining district. It was not prepared with that care and elaborateness displayed in the framing of the lien laws in the several Provinces, but I think it ought to be read and construed in the light of the history of those laws and their progenitors, the lien laws of some of the United States. The underlying principle of those laws is that the lien attached by reason of a contract with the "owner." "The statute does not give a lien, but only a potential right of creating it": *per*

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Strong, J. in *Edmonds* v. *Tiernan* (1892), 21 S.C.R. 406 at p. 407. A claimant may not himself have had such a contract, but if not he must base his right to a lien upon that of some contractor. There may be several owners, each of whom may subject his interest in the property to liens, but in no case so far as I know has one owner been given the right to subject the interest of another to such liability without his concurrence. The nearest approach to such a thing is when, as for example in Ontario, and several other Provinces, lien holders are given priority over prior encumbrancers for the increased value accruing through the work done or material furnished, and in the Ordinance now under review, by which the lien holder is given priority over prior encumbrancers to the extent of a moiety of the property, irrespective of whether it has or has not been increased in value by the work done or material furnished. But these examples are in reality only a postponement in part of one encumbrancer to another.

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By the several Provincial lien Acts the definitions of "owner" are adopted in conformity to what was considered in *Bank of Montreal* v. *Haffner* (1881), 29 Gr. 319, to be the meaning attached to the expression "owner" by the United States Courts under lien Acts in which there was no definition of owner. I am not sure that Proudfoot, J. conveys altogether a correct impression of those decisions, because while in some of the State enactments owner was not defined, yet the owner was indicated as the person with whom the contract was made. The Miners' Lien Ordinance does not expressly indicate the owner in this way, and therefore *Bank of Montreal* v. *Haffner, supra,* and the United States cases referred to, are not of much assistance in the interpretation of this Ordinance. I rely more upon the fundamental principle underlying all mechanics' lien laws, which seems to have been borne in mind by the Legislatures which enacted them, that it is only the party who procures the work to be done, or the material to be supplied, or someone who concurs with him, whose estate or interest is to be charged. Having said this, it is important to look at the whole Ordinance in question to see whether or not the mortgagee was intended to be included in the expression "owner." Section 6 shews that as

between mortgagee and lien holder it is a matter of priority. Section 14 directs the judge to determine and fix the "liability of the owner or layman for wages due to the claimant," and the sections under the caption "encumbered mines," sections 20 to the end, referring, it is true, to mortgagees who were such before the passing of the Ordinance, yet using the term "owner," as I must assume, in the sense defined in the interpretation clause, repeatedly employ the expression "owner" in contradistinction to "mortgagee."

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To impose upon the miner the obligation, before filing a claim, to ascertain the names and addresses of all encumbrancers, would benefit no one. It is sufficient that he make the encumbrancers parties to the proceedings before the judge or lose his right to priority. Nor is there any reason to suppose that a departure from other like enactments was intended; that unusual obstacles were placed in the way of miners in that distant part of the country, namely, that they must ascertain and insert in their claims, before filing them, the names and addresses of all encumbrancers. The rights of such encumbrancers are amply protected without requiring such to be done. They must be made parties to the proceedings before the judge, and thus they will retain all their rights.

MACDONALD, C.J.A.

I would dismiss the appeal, with costs.

IRVING, J.A.: Section 2 of chapter 56 of the Yukon Amendment Act of 1912, passed 1st April, 1912, in conferring jurisdiction on this Court, authorizes an appeal where the matter in controversy amounts to $500 or upwards, or where the title to real estate, or some interest therein, is in question.

J. E. Lilly & Company (mortgagees of certain creek claims), being dissatisfied with the judgment by which the plaintiffs were declared entitled—under the Miners' Lien Ordinance, 1906—to a miner's lien for work on the said claims, has brought this appeal. The respective amounts found due to three men, namely, Bradshaw, Veale and Robertson, are less than $500. The first question is: Does an appeal lie from the judgments given in their favour?

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Gabriele v. *Jackson Mines, Limited* (1906), 15 B.C. 373, and *Gillies* v. *Allan* (1910), *ib.*, 375, turn on the wording of British Columbia statutes, but the principle established that a lien holder, or claimant, does not by joining in one summons (as required by the Ordinance, section 15) lose any advantage given to him by another section, or another Act, seems in point.

I would hold that as to these three men there is no appeal, under the second section of the Yukon Amendment Act, 1912, the matter in controversy being less than $500, unless, of course, the case comes within the words "where the title to real estate or some interest therein is in question." There is no "title" to real estate in question, but it is said the title to an interest in real estate is involved.

I have read the sections in the Yukon Placer Mining Act to which Mr. *Pattullo* has referred us, and I am not satisfied that the plaintiffs' proceedings to make the appellants' interest under their mortgages responsible for the wages can be regarded as bringing an "interest in land" into question.

Our Mining Act contains a provision that the interest in a claim shall be deemed a chattel interest equivalent to a lease for a year. There is no similar section in the Yukon Placer Mining Act, Revised Statutes of Canada, 1906, chapter 64.

I would, therefore, dismiss the appeal as against Bradshaw,

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Veale and Robertson.

As to the other six plaintiffs who are respondents to this appeal. In my opinion the objection taken to their claim of lien, namely, that by omitting the name of J. E. Lilly & Company as "owners," they had failed to satisfy the requirements of section 7 of the Miners' Lien Ordinance (1906) cannot prevail. Section 7 requires that the claim of lien shall state (a) the name and address of (X) the owner of the property to be charged, and (Y) also of the person for whom and upon whose credit the work was done, etc. For convenience I have labelled these two persons with the letters X and Y. In the interpretation clause "owner" is made to include X and Y, and all persons claiming under either X or Y if such rights are acquired after the work has been begun.

Now the appellants' case rests on this. "Owner" in section 7 means everybody falling within the definition given in the interpretation clause. If that contention is sound, why did not the draftsman say: "You shall mention in your claim every owner." That would bring in every person included in the definition. For some reason or other subsection (*a*) was made to read this way: "You shall state name and address of (X) the owner and also (Y) of the person upon whose credit the work is done." It looks as if the latter person (Y) would not be mentioned as owner. Or, in other words, as if "owner" in subsection (*a*) was not to receive the full meaning attributed to it in section 2. There is a canon of interpretation that all words if they be general and not express and precise, are to be restricted to the fitness of the matter. They are to be construed, too, as particular if the intention be particular, that is, they must be understood as used in reference to the subject-matter in the mind of the Legislature, and strictly limited to it: Maxwell on Statutes, 3rd Ed., 85.

The object in requiring the name of the owner (X) and the person (Y) for whom and upon whose credit the work was done, and a description of the property, was to give notice in the registry office. It would be sufficient for ordinary purposes if the names of persons primarily responsible were given. To require a complete list of names and addresses of every person interested in any way, shape or form in the property would make the Act unworkable. Again, the provisions of sections 4, 5 and 6, dealing with a mortgagee's liability seem to shew that mortgagees are distinguished from "owners." On the whole, I think the requirements of the Act were satisfied by inserting the names of Saucerman, Duggan and Davin as the owners.

The lien claimants claim "in respect of and for wages for work and labour done and performed in respect of the said claims by . . . . Royston (for example) between 10th July and 28th August amounting to $....." That seems to me to be a sufficient way of putting forward the claim. I arrive at that conclusion without regard to *Barrington* v. *Martin* (1908), 16 O.L.R. 635, which is a decision on a very different statute. In that Act there is an express provision that sub-

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stantial compliance shall be sufficient. If the sum claimed is larger than the claimant is truly entitled to, I do not think his claim should be rejected on that account. Compare *Scarfe* v. *Morgan* (1838), 4 M. & W. 270; 7 L.J., Ex. 324; *Dirks* v. *Richards* (1842), 4 Man. & G. 574; but it would be open for the claimant to establish at the time that he was entitled to a lien for some part of it. I quite agree with the opinion of DAVIE, C.J. in *Weller* v. *Shupe* (1897), 6 B.C. 58. The headnote to that case goes beyond the judgment. DRAKE and MCCOLL, JJ. gave their views based on the affidavit. There is no authority in the judgment for the statement put forward in the headnote that a claim of lien is bad because it embraces labour for which a lien can be had, as well as material as to which there is no lien. The result is that although Walkem, J. in *Knott* v. *Cline et al.* (1896), 5 B.C. 120, took a view different to that held by DAVIE, C.J. in *Weller* v. *Shupe, supra,* there is no binding authority one way or the other.

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It appears that 230,000 feet of lumber were cut for the mine, but it was afterwards sold or removed. It is conceded that for the cutting of this the men are entitled to a lien, but the claim for a lien for removing it to the mouth of the creek, after it had been determined not to use it in the mine, is objected to. That objection was not raised by notice of appeal and therefore cannot be dealt with.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A: I am of opinion that (1) A mortgagee is not by virtue of interpretation section 2 (*o*) an owner in the sense that he is required to be named as such in the claim of lien: section 7 (*a*). (2) The statement in the claim for lien that it is "for wages for work and labour done and performed on and in respect of said (*i.e.,* mining) claims," followed by the amounts set out in their respective time checks for wages, and giving the dates of employment, is a sufficient "statement" of "the work done" under said section 7, subsection (*b*). No one living in a mining country could, in my opinion, entertain any real doubt that the claimants were working as labourers on the mining claims specified, or "in respect to" them, as section 3 has it. No "particulars of the kind of work done" are required

to be set out as, *e.g.*, in *Smith* v. *McIntosh* (1893), 3 B.C. 26 at p. 28, a decision under the Mechanics' Lien Act of 1888, chapter 19, section 5 (*b*). The language of the Ordinance as to the lien is similar to that statute upon which *Anderson* v. *Godsal* (1900), 7 B.C. 404, 1 M.M.C. 416, was decided, wherein also it was held that a cook could not have a lien. (3) The ruling of the learned trial judge as to the lumber is the correct one, in view of Saucerman's evidence. It is not necessary to consider the other points in view of the above.

Appeal should be dismissed.

Appeal dismissed.

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Master and servant—Common law action for death of servant—Judgment reversed by Court of Appeal—Application to Court of Appeal to assess damages under Workmen's Compensation Act, 1902, and refused—Subsequent application to trial judge.

In a common law action for damages for the death of a workman by reason of the negligence of the employers, plaintiffs recovered $1,500. This judgment having been reversed by the Court of Appeal, plaintiffs applied to that Court to assess the damages under the Workmen's Compensation Act, 1902, which application was refused [(1912), 17 B.C. 422]. On application to the trial judge, he assessed the damages at $1,500, and defendants appealed.

Held, that the judgment of the Court of Appeal placed the parties in the position which they occupied at the close of the common law action, if the trial judge had given the judgment which the Court of Appeal held he should have given, when the plaintiffs could have asked for an assessment under the Workmen's Compensation Act, 1902.

Held, further, that the accident in question was one arising out of and in the course of the employment of the deceased.

APPLICATION to the Court of Appeal to accept an award made by CLEMENT, J., in pursuance of an opinion expressed by the Court that the learned judge still had power to deal with the question of compensation under the Workmen's Compensa-

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tion Act, 1902, notwithstanding the fact that the learned judge had dismissed the action. The application arose out of an action brought by plaintiffs, under the Employers' Liability Act, for damages for injuries received in the defendants' service. They obtained a verdict which was set aside on appeal. Plaintiffs then moved for a reference back to the trial judge to assess the amount of compensation under the Workmen's Compensation Act, 1902. The Court of Appeal considered that, the action having been dismissed, there was no power to make any direction to the trial judge, or themselves assess the damages; but, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that there seemed to be no reason why such an application could not be made to the trial judge: see (1912), 17 B.C. 422.

Accordingly, such application was made.

L. G. McPhillips, K.C., for plaintiffs.

E. A. Lucas, for defendant Company.

24th June, 1912.

CLEMENT, J.: Acting upon what I take to be the opinion of the majority of the Court of Appeal, I entertain this application. There will be an award in favour of the plaintiffs for $1,500, and as to costs, I act upon the view upheld in *Cattermole* v. *Atlantic Transport Company* (1902), 1 K.B. 204, 71 L.J., K.B. 173, that I may, if I think the case a proper one in that regard, give the plaintiffs costs, with or without deduction, by awarding them such costs as they would have incurred had they limited themselves to proceedings under the Workmen's Compensation Act, less a deduction of extra costs occasioned to the defendants by reason of the plaintiffs proceeding by way of action instead of under the Workmen's Compensation Act.

CLEMENT, J.

The appeal was argued at Vancouver on the 16th of November, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

E. A. Lucas, for appellants: The judgment of the Court of Appeal dismissing the plaintiffs' action put an end thereto, and as "it was not determined in the action that the injury complained of was one for which the employer would have been liable to pay compensation" under the provisions of the Work-

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men's Compensation Act, the plaintiff had no status under sub-section 4, section 6 of the Workmen's Compensation Act. The trial judge was never intended to be empowered to entertain such an application as this, because he has assumed jurisdiction over the costs of the action, and where the Court of Appeal has decided the fate of the action, the successful party has, by statute, the costs of the action as well as of the appeal. Here the Court of Appeal and CLEMENT, J. have made conflicting orders as to the costs of this action. The action is at an end, and no further proceedings are competent to be taken except by way of higher appeal. It was determined by the final judgment in the action, that is the judgment of the Court of Appeal, that the accident to the plaintiff did not arise out of and in the course of his employment: see judgment of IRVING, J.A., and *Cribb* v. *Kynoch, Limited* (*No. 2*) (1908), 2 K.B. 551; *Edwards* v. *Godfrey* (1899), 2 Q.B. 333.

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L. G. McPhillips, K.C., for respondents: The Court of Appeal, in allowing the original appeal and dismissing the action, put the plaintiff in the same position in which he would have been had the trial judge dismissed his action, that is, he was then entitled to proceed with his application under sub-section 4, section 6 of the Workmen's Compensation Act. The finding of the Court of Appeal on the merits was not that the accident did not arise out of and in the course of the employment or from wilful negligence, etc., but merely a finding of contributory negligence at common law.

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A., and IRVING, J.A. concurred in the conclusions of GALLIHER, J.A.

MACDONALD, C.J.A.
IRVING, J.A.

GALLIHER, J.A.: This case comes before us by way of appeal from the judgment of CLEMENT, J., awarding the respondents $1,500 under the Workmen's Compensation Act, 1902. The action was tried at common law, and a verdict for $1,500 rendered in favour of the respondents by the learned trial judge. On appeal, this verdict was set aside by a majority of this Court. An application was then made to us to assess damages

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under the Workmen's Compensation Act, 1902, but this Court held that they had no jurisdiction to do so and dismissed the application, at the same time stating that they saw no reason why an application might not be made to the trial judge. This application was subsequently made, with the result above first stated.

Two objections were urged before us by Mr. *Lucas,* for the appellants. First, that after the action at common law had been disposed of, the plaintiff, not having then and there asked for assessment under the Workmen's Compensation Act, could not come in at a later date and do so, and cites *Cribb* v. *Kynoch, Limited,* (No. 2) (1908), 2 K.B. 551; *Edwards* v. *Godfrey* (1899), 2 Q.B. 333. Both of these were cases where the judgment at common law was against the plaintiffs, and they had the opportunity then and there to make the application to the trial judge, which they neglected to do, and subsequently tried to recover under the Workmen's Compensation Act, and it was held that plaintiffs could not succeed, as to entitle them to do so the procedure laid down in the Act must be strictly followed. In my opinion this case does not stand on the same footing.

Here, the judgment at common law at the trial was in favour of the plaintiffs, and although that judgment was reversed by this Court, the effect of that, as I view it, would be to place the parties back in the position they would have been at the trial if the trial judge had given the judgment which this Court held should have been given, when the plaintiffs would be entitled to ask for assessment under the Act.

GALLIHER, J.A.

What was subsequently done by this Court on the application to us to assess the damages does not alter the above position, as we made no order dealing with the matter other than to hold that we had no jurisdiction. I think this objection must fail.

Secondly, it was urged that the respondents could not recover in any event, as the accident which caused the death of the deceased was not an accident in the course of and arising out of his employment, and the judgment of IRVING, J.A., in which I concurred, is referred to.

As I understood that judgment, and as I still understand it, it is to the effect that the plaintiffs in the action could not

recover at common law, on the ground of contributory negligence of the deceased. But what would disentitle plaintiffs to recover at common law might in no way affect their rights to recover under the Workmen's Compensation Act.

In the case of *Harding* v. *Brynddu Colliery Company, Limited* (1911), 2 K.B. 747, 80 L.J., K.B. 1,052, it was held by a majority of the Court, Cozens-Hardy, M.R., and Kennedy, L.J. (Buckley, L.J. dissenting), that the accident arose out of and in the course of the employment, and that the defendants were entitled to compensation under the Act.

The facts there were, shortly, that a collier was employed to drill a hole from above into a stall below to allow gas to escape from the stall; that in the process of drilling he asked leave to go into the stall, which was blocked with boards, in order to ascertain the direction the drill was taking, and was forbidden to do so, but went in notwithstanding, and was overcome with gas and died. Buckley, L.J., in his dissenting judgment, says at p. 753 (1,055 of the Law Journal report):

"I want to add something lest this judgment should be misunderstood. The question is not whether the man in the course of his employment went to a forbidden place. If that be it, there may be simply serious and wilful misconduct, and he may be entitled to recover. The question is: Has the man done an act outside the sphere of his employment, or has he in doing an act within the sphere of his employment been guilty of serious and wilful misconduct. If it be the former, he is not entitled to recover; if it be the latter, he is."

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The learned Lord Justice held, in the case before him, that it fell within the former, disagreeing in that respect with the majority of the Court.

It seems to me, on the evidence, the case before us is clearly within the latter proposition. The deceased was employed as a fireman; the fuel was conveyed to the furnace by means of carriers operated by a belt, revolving on a pulley attached to the main driving shaft of the engine. Occasionally these carriers would clog, causing the belt to be thrown off, thus stopping the passage of the fuel for the purpose of keeping up steam. The chief engineer, whose duty it was to adjust this belt, and put it on under such circumstances, was temporarily absent on the day in question, and returned in time to see the deceased attempting to put on the belt, in the doing of which he met

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with the accident. Under these circumstances, the deceased, whose duty it was to keep up steam, finding his supply shut off, and the belt thrown off by the clogging of the carriers in the absence of the chief engineer, went to put on the belt. Surely the putting on of the belt for the purpose of starting the carriers to convey the fuel to the point where it would be utilized for the purpose of keeping up steam, the very purpose for which he was employed, was an act within the scope of his employment in the sense that it was incidental to it, and although his defined duty may not have included the adjusting of this belt, it was an act done in the interest of the master and in the furtherance of the work he was employed to do. In this respect it is distinguishable from the very recent case of *Barnes* v. *Nunnery Colliery Co.* (1912), 81 L.J., K.B. 213.

GALLIHER, J.A.

This objection, I think, also fails.

The appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for appellants: *Lucas & Lucas.*

Solicitors for respondents: *McPhillips & Wood.*

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HUNTER, C.J.B.C.

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RE FRY

Wills Act, Sec. 12—Substitutional gift—Intestacy—Legal estate effectually disposed of—Jus mariti excluded.

The testatrix by her will bequeathed the residue of her estate to trustees upon trust, after a life interest, to pay and divide it between two named sisters equally; there was a clause providing that in the event of either sister dying in the testatrix's lifetime leaving a child or children who should survive the testatrix, and being a son or sons should attain the age of twenty-one years, or being a daughter or daughters should attain that age or marry, such child or children should take the share which his, her or their parent would have taken if such parent had survived the testatrix; there then followed a clause of maintenance and advancement for the children "entitled in expectancy."

The husband of one of the two named sisters attested the will.

Held, that as to her share there was an intestacy.

Held, also, that as there was a complete disposition of the legal estate, and an intestacy only as to the beneficial interest, the *jus mariti* of the testatrix's surviving husband was excluded, and the undisposed of beneficial interest was held in trust for the next of kin.

PETITION under the Trustee Act for the determination of the construction of the will of Margaret E. Fry, of which the relevant provisions have been set out in the headnote, heard by HUNTER, C.J.B.C. at Victoria on the 29th and 30th of April, 1913. Statement

A. Maclean, for the trustees, stated the facts of the case and read the will.

Mayers, for the sister whose bequest was not nullified, contended that the present case was governed by *Aplin* v. *Stone* (1904), 1 Ch. 543. There is a broad distinction between cases of a life estate and remainder and those of substitutional gifts; in the first class, the interest of the remainderman is vested at the death of the testator, and only the possession is postponed, so that where the life estate ceases from whatever cause, the possession of the remainderman is accelerated; on the other hand, in the case of substitutional gifts, the interest of the Argument

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primary legatee is vested, subject to be divested when and only when a certain contingency happens, and it is only on the happening of that contingency that the secondary legatee acquires any interest at all. This is the case of a substitutional gift and, therefore, *In re Maybee* (1904), 8 O.L.R. 601, even if rightly decided, does not apply. The fact of the legatee's husband having attested the will renders the bequest "null and void." The contingency on which the interest of the substitutionary class, the children, are to take is the death of the legatee in the testatrix's lifetime. To hold that their interest can arise on any other contingency is to make a new will for the testatrix.

He further contended that in the event of its being held that there was an intestacy, the *jus mariti* was excluded by the disposition of the legal estate; it was only in the event of both the legal and equitable interest being undisposed of that the right of the husband attached; the fact of a disposition of the legal estate caused the property to retain its character of separate property: *In re Lambert Estate* (1888), 39 Ch. D. 626, Stirling, J. at p. 633.

Argument

Mann, for the infant children of the legatee whose bequest was nullified, adopted the same arguments.

Fell, K.C., for the adult children of the legatee whose bequest was nullified, contended that *Aplin* v. *Stone* was wrongly decided, and relied on *In re Clark* (1885), 31 Ch. D. 72.

HUNTER, C.J.B.C.: In my opinion, the cases have established a clear distinction between gifts in remainder after a life estate, and substitutionary gifts; in the former case, the failure of the life estate, from whatever cause, accelerates the gift in remainder; in the latter case, there is no interest to be accelerated, unless the exact contingency occurs. Any argument to be derived from imputing a supposititious intention to the testator is too frail to be relied on. Here it is contended that the testator would have desired the children of the legatee to take in the event of their mother's interest failing in her lifetime, but *non constat* that she would not have wished the whole estate to go to the other sister. Therefore, the pursuit of a supposed intention is too dangerous. The principle is laid down in *Aplin*

Judgment

v. *Stone* (1904), 1 Ch. 543, a decision directly in point, so that there is an intestacy as to the share of the sister whose husband attested the will. In that view it is also clear that the husband's right is excluded, on the ground that the *jus mariti* only attaches to property of which both the legal and beneficial ownership is undisposed of, and, therefore, there is a resulting trust for the next of kin.

Order accordingly.

THE BANK OF MONTREAL v. THE WESTHOLME LUMBER COMPANY, LIMITED.

Floating charge—Receiver and manager—Holder of a floating charge which has crystallized, whether affected by contracts of the mortgagor.

The defendant Company had entered into a contract with the Corporation of the City of Victoria for the construction of certain works. By one of the clauses of the contract the Corporation was empowered to determine the contract and complete the work, and by another clause the Corporation was given power upon such determination "to take possession of and use any of the materials, plant, etc., provided by the (defendant Company) for the purpose of the work." Subsequently to this contract the defendant Company gave to the plaintiff Bank a floating charge over all its property and assets. On the 11th of April, 1913, the defendant Company commenced an action against the Corporation to set aside the contract, or in the alternative for damages for its breach. On the 23rd of April, 1913, the Corporation gave notice to the defendant Company determining the contract. On the 30th of April, 1913, a receiver and manager was appointed in this action at the suit of the plaintiff Bank. By the order appointing him, the receiver and manager was directed to take possession of the defendant Company's assets, which he accordingly proceeded to do. The Corporation then claimed the material and plant of the defendant Company, which the receiver refused to deliver. The Corporation now moved *pro interesse suo* in the action, for an order directing the receiver and manager to deliver possession of the materials and plant to the Corporation, who claimed it under the above clause in the

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contract. Judgment had been obtained in this action, declaring the plaintiff Company to have a first charge on all the assets of the defendant Company. The action by the defendant Company against the Corporation was still pending.

Held, that the Corporation was not entitled to possession as against the receiver and manager under the floating charge.

MOTION by the Corporation of the City of Victoria, intervening, *pro interesse suo*, in the above action. Heard by MORRISON, J. at Victoria on the 27th of May, 1913.

Ritchie, K.C., and *T. R. Robertson*, for the Corporation: The Corporation obtained possession by the notice determining the contract with the defendant Company: the judgment in this action directed an inquiry as to incumbrances, and the right of the Corporation is an incumbrance. Moreover, on the analogy of assignees in bankruptcy, the holder of a floating charge can only take property subject to all claims attaching to it.

Mayers, for the plaintiff Company: This case is decided by two propositions, *viz.*: that the receiver and manager is entitled to possession of all chattels of which the property is still in the defendant Company, and secondly that the receiver is not bound by contracts made by the mortgagor: *Parsons* v. *Sovereign Bank of Canada* (1913), A.C. 160 at p. 170.

Argument

The Corporation could not take possession by a simple notice, and therefore, any right of the Corporation rests in contract, and can in no legal sense be called an incumbrance: conditions in contracts may run with land, but they can never run with chattels: therefore, the receiver is entitled to possession of the defendant Company's assets and need not regard any contractual rights of the Corporation, who are left to their remedy in damages against the defendant Company. Moreover, any contractual right of the Corporation is subject to the contingency of a rightful determination of the contract with the defendant Company, and on the trial of the action between the defendant Company and the Corporation it may be found that the right has never arisen.

Cases such as *In re Opera, Limited* (1891), 3 Ch. 260; *Taunton* v. *Sheriff of Warwickshire* (1895), 2 Ch. 319; *Norton*

v. *Yates* (1906), 1 K.B. 112; *Cairney* v. *Back* (1906), 2 K.B. 746, shew that the mortgagee is entitled to all assets of the mortgagor, the property in which has not passed out of the mortgagor.

Ritchie, in reply.

30th May, 1913.

MORRISON, J.: The plaintiffs' possession pursuant to the terms of their mortgage is prior in date to the expression of intention by the City to invoke clause 15 of the contract with the defendants.

The receiver took possession also, and he has been dealt with on that footing by the City. In other words, the floating charge held by the plaintiffs has crystallized. To allow the City to intervene at this juncture would, in my opinion, necessitate deciding the rights of the parties respectively, which rights can be determined only upon a full consideration of all the terms of both the contract and the mortgage. It is obviously impossible to do so upon the material before me, upon which the present application is based, and from which it does not appear that the receiver is in any way acting beyond his powers or doing anything which can be deemed a hardship, or tending to jeopardize those rights.

Judgment

I do not, therefore, consider that it is necessary to interfere with the receiver in his attempt to get in the assets or manage the affairs of the defendant Company.

The application is refused, with costs.

Application refused.

HUNTER, C.J.B.C.

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SIMPSON AND DAWLEY v. PROESTLER.

Statute—Land Act, R.S.B.C. 1911, Cap. 129, Sec. 159—Transfer—Agreement to transfer.

SIMPSON v. PROESTLER

An agreement to sell land comprised in a pre-emption record is not void as being an infraction of the Land Act, R.S.B.C. 1911, chapter 129, section 159.

Semble, even a transfer is not stricken with invalidity, the effect of the section being merely to suspend its validity.

Statement

SPECIAL CASE stated for the opinion of the Court as to whether an agreement to sell land comprised in a pre-emption record is an infringement of the Land Act. Heard by HUNTER, C.J.B.C. at Victoria on the 18th of April, 1913.

Argument

Mayers, for the plaintiffs, contended that *Turner et al.* v. *Curran et al.* (1891), 2 B.C. 51, had been overruled by *Hjorth* v. *Smith* (1897), 5 B.C. 369, and that the interpretation of the word "transfer" was to be found in the Crown Lands Ordinance, No. 144 of the Revised Laws of 1871; by section 13 a transfer was permitted after the grant of the certificate of improvement, and by section 14 a form of transfer was prescribed which shewed that the transfer intended was one of all the right, title, and interest in the land. There was a broad distinction between an act and an agreement to do an act; it is true that equity regards that as done which is agreed to be done, but the effect of the Land Registry Act was that an unregistered instrument passed no estate, legal or equitable, in the land; an agreement for sale could not be registered until after the registration of the Crown grant; therefore an agreement to sell could not be a "transfer" of the land. He also referred to Pollock on Contracts, 8th Ed., 416, and the cases there cited.

F. C. Elliott, for the defendant, contended that the intention of the Act was to prohibit all dealings with land until the issue of the Crown grant.

Judgment

HUNTER, C.J.B.C.: There is nothing illegal in an agreement

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to sell land comprised in a pre-emption record: the section of the Land Act speaks only of a transfer, and in asking me to declare an agreement to transfer illegal and void, the defendant is asking me to read into the Act words which are not there.

If it were necessary, I would have to consider whether *Turner et al.* v. *Curran et al., supra,* had gone too far. At present, I think, even in the case of a transfer, the effect of the Act is merely to suspend its validity.

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Mechanic's lien—Sub-contractor—Placing or furnishing material—Owner taking over contract and completing work—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 8, 15.

B. contracted to build a house for T., and F. was a sub-contractor for the plastering. In each case the contracts included both labour and material and were for lump sums. B.'s contract was for $8,500, and after payment of $6,100, T., under a provision in the contract, took it over from B., who had assigned for the benefit of his creditors, and completed it at a cost of more than $2,400. At the time the contract was taken over, B. had almost completed his contract.

Held, that as there was no amount due by T. to B. when he took over the contract, the limitation in section 8 applied and the lien failed.

APPEAL by defendant from the judgment of GRANT, Co. J. in an action tried by him at Vancouver on the 1st of May, 1912, to establish a mechanic's lien. Defendant Beech, a contractor, did not enter an appearance, and judgment was signed against him by default. GRANT, Co. J. gave judgment for the sub-contractor against the defendant owner, Turner, and the owner appealed on the grounds (1) that plaintiff, who employed labour, neglected to provide or produce the pay-rolls, as required by section 15 of the statute; (2) he gave no notice as to furnishing materials, as required by section 6; (3) that on the day the lien accrued there was nothing payable.

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The appeal was argued at Vancouver on the 18th of November, 1912, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bray, for appellant.

C. J. White, for respondent.

Cur. adv. vult.

30th January, 1913.

MACDONALD, C.J.A.: The plaintiff was a sub-contractor for the plastering, including the material, of a house which one Beech contracted to erect for the defendant Turner. Both were entire contracts and for lump sums. The contract between the defendant Turner and Beech provided that in certain eventualities, one of which happened, Turner might supply the labour and material to complete the contract. Turner did this after having made payments in the aggregate of $6,100 to Beech, of the total of the contract price of $8,500, plus some extras. At the time Turner took the work over, the plaintiff in this action had almost completed his sub-contract. He afterwards fully completed it. It cost defendant Turner more than the balance of the contract price to complete Beech's contract. Plaintiff claims a lien on defendant Turner's property for a balance of his contract price. Section 8 of the Mechanics' Lien Act, chapter 154, Revised Statutes of British Columbia, 1911, reads as follows:

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"With the exception of liens in favour of labourers for not more than six weeks' wages, no lien shall attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor."

Nothing was owing by the owner to the contractor when the plaintiff completed his sub-contract. It was, therefore, contended by the defendant Turner's counsel that the judgment below, declaring the plaintiff's right to a lien, is erroneous. Section 15 of the said Act was relied upon by the plaintiff in answer to said contention. That section provides that a contractor or sub-contractor must post up a pay-roll, and deliver to the owner

"The original pay-roll containing the names of all labourers and persons placing or furnishing materials who have done work, or placed or furnished material for him upon such works or improvements, with a receipt in full."

And it is declared that

"No payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate, or interest in favour of any such labourer or person placing or furnishing material."

I do not think this section helps the plaintiff: he is not within it. The section protects only labourers and material men. For some time I was puzzled by the peculiar wording of the first part of the section above quoted, particularly the words "persons placing or furnishing materials who have done work." It seemed to me at first sight that three classes were included in the first part of the section, and two classes only in the second part above quoted, but on examining the original section, being section 12 in the Revised Statutes of 1897, which extended only to labourers, it now seems plain that the words "who have done work" must relate to labourers, not to persons placing or furnishing materials. The manner in which the original section was amended gave rise to the apparent difficulty in construing it.

I do not see any escape from the conclusion that said section 8, on the facts of this case, bars the right of the plaintiff to a lien.

I may add that I have given full consideration to the learned County Court judge's views. He thought that the defendant repudiated his contract with Beech, and held that after doing this he could not, by spending all the balance of the contract price in the completion of the building, deprive the plaintiff of the right to a lien. With respect, I think the learned judge was in error in finding such repudiation. Defendant was entitled under the contract to complete the work should, *inter alia,* Beech make an assignment for the benefit of creditors. This Beech did some hours before defendant notified him that he, defendant, would complete the work. Beech acquiesced, and made no attempt either to complete his contract or to dispute defendant's right to take over the work. It cannot be suggested, nor did counsel venture to argue, that after his discontinuance of the work, Beech could have claimed a dollar from defendant.

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Nor does it, in my view of the case, matter whether or not defendant kept back from Beech the 25 per cent. he was entitled to retain under the terms of his contract with him. This was an arrangement between themselves to which the plaintiff was

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not privy, and which could be departed from at will by the parties to the agreement. Our Mechanics' Lien Act does not afford a sub-contractor the protection provided by similar laws of other Provinces, *viz.*: that a proportionate part of the contract price shall be retained by the owner at the peril of his paying twice, as a fund to which sub-contractors may resort to satisfy their liens. We have in this Province what appears to me to be an anomaly, that while he who does work alone and he who supplies material alone are protected, he who does work and finds material with which to do his work is left to shift for himself in the event of there being nothing due to the contractor.

MACDONALD, C.J.A.

The appeal should be allowed and the judgment below varied by striking out the third, fourth and fifth paragraphs of the same.

IRVING, J.A.

IRVING, J.A. concurred with MACDONALD, C.J.A.

GALLIHER, J.A.: In this case I think the appeal should be allowed. We were referred to sections 6, 8 and 15 of the Mechanics' Lien Act, Revised Statutes of British Columbia, 1911, chapter 154, but of these I think section 8 is the only one we have to consider, as, in my opinion, the others do not apply here. The learned trial judge assumed that the sum of $6,100, being the amount paid by Turner to the contractor, Beech, represented only 75 per cent. of the work then done, and that inference might be drawn from the evidence of the architect, Julian, who used the expression: "We were supposed to have paid 75 per cent.," and from the contract itself calling for the payment of 75 per cent. of estimates. But I think when one examines the receipts shewing the amounts paid after the work was taken out of the hands of Beech, we must come to a different conclusion. The progress certificates of the 18th of December, 1911, shewed $6,100 paid Beech, leaving a balance of $2,712 before the full contract price was reached. If this $6,100 only represented 75 per cent. of the work done, there would be held back for work then done a sum, approximately, of $2,000, which, added to the balance of $2,712, would practically give in round numbers $5,000 to apply in completion of the contract. But when we examine all the payments made on account of that

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contract from the time it was taken out of the hands of Beech, they amount to approximately $2,800, not including $400 which was paid to Fuller by Turner on account of work done during the time the contractor Beech was in charge. So that, instead of there being a deficit between the contract price and the amount actually paid, as shewn by receipts and estimates, there would have been a considerable surplus. I think we must, therefore, conclude that the $6,100 represented the actual amount of work done by Beech up to the 18th of December, 1911, and not 75 per cent. of the work done. In this view, then, there was nothing due from Turner to the contractor Beech, and as Fuller, who was a sub-contractor, does not come within the saving clause under section 15, we are confronted by the provisions of section 8, which, in my opinion, are fatal to his claim.

Appeal allowed.

Solicitors for appellants: *Henderson, Tulk & Bray.*
Solicitors for respondents: *McLellan, Savage & White.*

ROSIO *ET AL.* v. BEECH *ET AL.*

Mechanic's lien — Sub-contractor — Notice — Claim for work done — Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 6 and 8.

A sub-contractor is not entitled to claim a lien in respect of work done on a building as coming within the provisions of section 8 of the Mechanics' Lien Act.

APPEAL by plaintiffs from the judgment of McINNES, Co. J. on the trial of the action, on the 10th of April, 1912, to enforce a mechanic's lien, the grounds of the claim being in respect of work and material supplied. Plaintiffs undertook the painting of the building in question, supplying their own material, but

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in the proceedings to claim a lien it did not appear that any notice of claim for lien in respect of materials was given. To meet this, plaintiffs shewed that they had received a certain amount in payment of material supplied, and were not claiming a lien in respect of material.

The appeal was argued at Vancouver on the 20th of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Findlay, for appellants: The owner not only paid the amount of the contract, but exceeded it. There were also no pay-rolls produced.

Bray, for respondents: The contractor here is a sub-contractor, and is not entitled to a lien; he does not come within section 15. Also, he has not given notice of a claim for lien.

Argument

[MACDONALD, C.J.A.: The material and labour being mixed, that is to say, as he supplied both, was it necessary for him to give notice?]

We submit so.

Findlay, in reply, referred to *Gidney* v. *Morgan* (1910), 16 B.C. 18. We are not claiming a lien for material. We admit that there was $200 paid for material.

Cur. adv. vult.

30th January, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A. agreed with GALLIHER, J.A. in dismissing the appeal.

IRVING, J.A.

IRVING, J.A. came to a similar conclusion.

MARTIN, J.A.

MARTIN, J.A.: Though the lien as filed for a balance of $390 was based on an entire contract, made by the plaintiffs as sub-contractors, to paint the house, furnishing both labour and materials, yet the lien states, section 6, and it is formally admitted, that the whole of the said balance claimed as a lien was for work done only. In such case, the proviso in section 6 (to which we were referred), as to notice relating to materials, has, in any event, no application to the question in hand, and consequently I do not express any other opinion on it.

Nothing was due by the owner to the contractor when the lien was filed, and on the face of the matter he is protected by sec-

tion 8, but it is contended that the owner cannot set up his payments, amounting to $6,100, to said contractor, because the provisions of section 15, as to pay-rolls, have not been complied with, and the plaintiffs claim the benefit of the prohibition at the end of that section. To obtain this they must bring themselves within the words "any such labourer or person placing or furnishing material" as specified in the proviso, because the somewhat drastic consequences of failure to deliver the pay-roll are clearly limited thereby in favour of two classes of persons only, and the appropriate use of the word "such" is not, in my opinion, sufficient to expand the language to include another class of persons mentioned in the prior portion of the section. Plaintiffs clearly, as sub-contractors, are not within the definition of "labourer," and therefore their names could not even have been placed upon the pay-roll in form B (which should be noticed). Nor, on the facts, has the payment made by the defendant owner, without the delivery of the pay-roll, had the effect "of defeating or diminishing any lien . . . . in favour of any . . . . person placing or furnishing material," because the plaintiffs in this action admit they have been paid in full for all their material, and, consequently, can have no such lien. I think, therefore, that the learned judge below rightly held that section 8 is a bar to the lien.

MARTIN, J.A.

GALLIHER, J.A.: Certain admissions were made for the purposes of appeal, and among these it is admitted that at the time Beech was taken off the contract by the owner, Turner, the $6,100 which had been paid to him up to that time, 18th December, 1911, was in full of all work done by Beech under the contract with Turner. Such being the case, under the provisions of section 8 of the Mechanics' Lien Act, no lien could attach to make the owner, Turner, responsible to the plaintiffs unless they could bring themselves within the provision in the last clause of section 15 of the Act, which is as follows:

GALLIHER, J.A.

"No payment made by the owner without the delivery of such pay-roll shall be valid for the purpose of defeating or diminishing any lien upon such property, estate or interest in favour of any such labourer or person placing or furnishing material."

The plaintiffs were sub-contractors for the purpose of supplying certain materials and doing certain work (namely, paint-

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ing), for a lump sum. In my view they are not within the meaning of the words "labourer," or "persons placing or furnishing material." I think the material man is in a different position to a sub-contractor.

It follows, therefore, that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *A. N. Daykin.*

Solicitor for respondents: *H. R. Bray.*

MARTIN, LO. J.A.

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PALLEN v. THE IROQUOIS

PALLEN v. THE IROQUOIS.

Admiralty law—Collision—Fog—Stopping—Obligation on tug to stop—Collision Regulations, Article 16—Negligent navigation of tug with tow.

By article 16 of the regulations for preventing collisions at sea, "Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

The steamship Iroquois, proceeding in a fog (in which objects were not visible beyond half a cablelength), off the Sandheads, Fraser River, heading for Vancouver Narrows on a course N.W. by N. ½ N., at a speed (with the slight assistance of the tide), of a little over fourteen knots an hour, was given the signal for half speed, and almost immediately afterwards they sighted a tug with loaded scow; engines were immediately reversed, but too late to avoid a collision. The tug was bound for Fulford harbour *via* Active Pass, on a course S.E. by S. ¾ S., when she ran into the fog about three-quarters of an hour before the collision at about six knots, but did not reduce her speed. The master and mate of the tug heard the fog signals of the steamer, but took no further precautions than to continue to sound fog signals. Both vessels appear to have given the proper fog signals, and after sighting one another did everything in their power to avoid the collision.

Held, that both vessels were equally at fault in having brought about the collision, by contravening Article 16, and that the damages should, therefore, be borne equally by both vessels.

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PALLEN v. THE IROQUOIS

ACTION by the owners of the steam tug Noname for damages sustained in a collision with the steamship Iroquois off the Sandheads, Fraser River. The action was tried at Vancouver on the 30th of October and 1st of November, 1912, by MARTIN, Lo. J.A.

J. A. Russell, and *Moffatt,* for plaintiffs.
A. D. Taylor, K.C., for defendants.

28th February, 1913.

MARTIN, Lo. J.A.: On the 22nd of October, 1911, about 4.30 p.m., off the Sandheads, Fraser River, the steamship Iroquois, a high powered passenger vessel (Henry C. Carter, master), heading for Vancouver Narrows on a course N.W. by N. ½ N., collided with the steam tug Noname (registered tonnage 116, length 86 feet, John Barberie, master) with loaded scow in tow, 60 by 26 feet, bound for Fulford harbour, *via* Active Pass, on a course S.E. by S. ¾ S. The day was calm, with little if any wind; tide flooding probably under one knot an hour. The Noname had clear weather till 3.45, when she ran into a thick fog in which objects were not visible beyond half a cable, but proceeded on her course without abating her speed, which was about the best she could make, *viz.*: six knots through the water. I am satisfied that she regularly gave the proper signals, nor do I find any reason for thinking that the Iroquois failed to do the same. The fact that some of the witnesses gave apparently truthful yet conflicting evidence regarding the signals heard in the fog can readily be explained by a perusal of the Report of Trinity House Fog-Signal Committee, 1901, reprinted in Smith's Leading Cases on the Collision Regulations (1907) 296. The Iroquois was, with the slight assistance of the tide, maintaining a speed of probably a little over fourteen knots through the water, which her officers call her "fog speed," as she runs very regularly on that speed and makes distances more accurately on it between fixed points than on her best speed, which, at 143 revolutions, is about 15½ knots. When the ves-

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sels actually came in sight of one another they were not more than 250 or 300 feet apart. It was only immediately before sighting the Noname that the engineer of the Iroquois had been given the signal for half speed, which signal, he says, was followed up without any interval by one for "full speed astern," which was responded to, but it was too late to avoid the collision, though the force of the impact was greatly diminished.

It is proved by the evidence of the master and mate of the Noname that though they heard a vessel approaching them almost, if not quite, right ahead through the fog for five or six minutes before they sighted her, they took no other precautions than to continue to sound the fog signal.

Article 16 provides that:

"Every vessel shall, in a fog, mist, falling snow, or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.

"A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

No valid reason was given for the failure of the Noname to "stop her engines and then navigate with caution"; the suggestion of her master that he did not do so because the barge astern would sheer and become more difficult to handle is inadmissible in the circumstances, because there was nothing in wind, tide or weather conditions to prevent him at least reducing his speed to what would be the lowest possible speed consistent with safety of tug and tow in the circumstances, even if it were not practicable to let the way run entirely off the tow and come to a standstill. To escape liability, it must be shewn that the movement was not more than was necessary, but no attempt was made to establish this. Compare *The Lord Bangor* (1896), P. 28; *The Challenge and Duc d'Aumale* (1905), P. 198. The truth is, according to his own testimony, that he mistook the fog whistle of the Iroquois for that of a small boat, and took dangerous chances which contributed to the collision. Indeed, the man at the wheel, Williams, testified that they had heard the Iroquois for 20 minutes on their port bow, and she had whistled at least four times from that point. On the other hand, I am unable to accept the excuse offered on behalf of the Iroquois for

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running at such a speed, which cannot be called moderate in the circumstances. While it may be true that she runs more regularly at a certain speed, that may make it safer for herself in determining her position as aforesaid, but at the same time it, if high, makes her more dangerous to other vessels, which is the fact the regulations require her to guard against. She might, on the one hand, run more regularly at 12 knots than at full speed, or, on the other hand, at full speed than 12 knots, at which full speed she would be safer for herself but still more dangerous to others than she was in this instance.

I am unable to say that, after the vessels came in sight of one another, either of them could reasonably be said to have failed to do anything which could have avoided the collision. They are equally at fault in having brought it about by contravening Article 16, which the Privy Council stated in *China Navigation Company* v. *Lords Commissioners of the Admiralty and Commander Leathem, R.N.* (1908), 24 T.L.R. 460 at p. 461, "is a most important article, and one which ought to be more carefully adhered to in order to avert the danger of collision in thick weather . . . . It was notorious that it was a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it was almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it was heard." According to the following extract from the judgment of the Admiralty Court in the late case of *The Sargasso* (1912), P. 192 at p. 199, not only the Iroquois, but the Noname also was guilty of excessive speed:

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"With regard to the Mary Ann Short, her speed spoken to by her master was three knots; that is probably a smaller speed than she had a good deal, and in this regard, apart from the angle of the blow, I would come to the conclusion, from the nature of the wound, that the speed at which this vessel was going was a good deal more than he says. If vessels could only see each other at a distance of 100 yards and if they had to be under way at all, they ought to proceed as slowly as they possibly can. It is impossible to say what the speed ought to be in figures in every case, but it is obvious, if a vessel is proceeding at a speed which would not allow her to pull up in something like her own length, in the circumstances of this particular afternoon, and if a vessel could proceed and have steerage way at a smaller speed than she was going, she ought to have

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gone at that speed, and in so far as that speed was exceeded it was excessive."

The situation finally herein was like that described in a case in this Court, *Wineman* v. *The Ship Hiawatha* (1902), 7 Ex. C.R. 446, wherein it was said, p. 468:

"The rate was so immoderate and the fog so thick that it prevented either vessel, in the brief space of time which elapsed after sighting the other, from taking any effective steps to avoid the other."

Pursuant to section 918 of the Canada Shipping Act, chapter 113, Revised Statutes of Canada, 1906, I direct that "the damages shall be borne equally by the two vessels . . . . one half by each," which means in this case that the Iroquois must pay one half of the damage to the Noname, because no evidence was given of any damage to the Iroquois, and there will be the usual reference to the registrar, assisted by merchants, if necessary, to assess them. I note that the Maritime Conventions Act, 1911 (Imp.), 1 & 2 Geo. V., chapter 57, section 9, does not apply to Canada, so no question of establishing the degree of blame can arise in this Court, but it has been decided that even where the statute can be given effect to the old rule that each delinquent vessel bears her own costs is still in force: *The Bravo* (1912), 29 T.L.R. 122. And compare *The Rosalia* (1912), P. 109, the first decision under said Act.

Judgment

Judgment accordingly.

HOUNSOME v. VANCOUVER POWER COMPANY, LIMITED.

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HOUNSOME v. VANCOUVER POWER CO.

Railways—Right to crossing—Conveyance of right of way—Severance of land—Absence of reservation in deed for crossing—Statutory right arising after conveyance—Railway Act, R.S.B.C. 1911, Cap. 194, Sec. 157—Injury to land by blasting—Damages.

In 1910 plaintiff, by absolute conveyance, sold a strip of land to defendants for a right of way. By the Railway Act, R.S.B.C. 1911, chapter 194, it was enacted that where land is severed by a railway, the company shall provide a crossing.

Held, on appeal, affirming the judgment of MORRISON, J. on this point, that the subsequent enactment gave the plaintiff no right to a crossing.

The contractors having the construction of the railway, followed the plan of freely blasting out the rock, in doing which they scattered it over plaintiff's land.

Held, reversing the finding of MORRISON, J., that plaintiff was entitled to damages for the injury thus caused to his land by way of trespass or nuisance.

APPEAL by plaintiff from the judgment of MORRISON, J. at the trial on the 6th of May, 1912. Plaintiff sold to the defendant Company a strip of land for the purpose of a right of way. In constructing this right of way certain blasting was necessary, in doing which a quantity of rock was projected over plaintiff's land adjoining. He also claimed for a proper crossing to be constructed on the right of way, running through his land, to enable him to transfer his animals and machinery from one side to the other.

Statement

The Company replied that (1) they had purchased the land outright without any reservation; (2) that plaintiff had by his conveyance released them from all liability; (3) that they had placed him in as good a position as to crossing as he had occupied before the work was done, but that he was unreasonable in expecting the defendant Company to go to a heavy expense in blasting out a large rock bluff.

The appeal was argued at Vancouver on the 19th of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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E. N. Brown, for appellant: We were not only damaged by these blasting operations, but our access was entirely cut off.

[MARTIN, J.A.: Is there not some reservation in your conveyance as to access or right of way?

IRVING, J.A.: Your conveyance, I see, makes no reservation.]

The Company comes under the provisions of the British Columbia Railway Act, and there is a statutory duty placed upon them to give us access. We rely on our statutory right to a crossing.

[It was admitted that the work was done by a contractor, and also that damage was caused in the course of the work.]

L. G. McPhillips, K.C., for respondents: The evidence is that the contractors were blowing out the rock to get rid of it; *ergo* they did wrong. There is an admission that the work was done deliberately and therefore does not come within the authorities. Being a question of fact, the Court will not review it. As to the crossing, we had not only been released by deed under seal from putting in one, but there was no section in the Railway Act which compelled us to put in a crossing at the time this contract was entered into, and we cannot reasonably be called upon under a subsequent enactment to put in a crossing.

Argument

Brown, in reply.

Cur. adv. vult.

30th January, 1913.

MACDONALD, C.J.A.

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

IRVING, J.A.

IRVING, J.A.: On the 18th of June, 1910, the plaintiff, having conveyed to the defendants and executed to them a release, ceased to have any interest in the strip of land which had been conveyed. The statutory right to a crossing was conferred by an Act which came into force on the 1st of March, 1911. That statute, in my opinion, has no application to the plaintiff's two pieces of property between which the defendants' land lies. This view can be supported on many grounds. Common honesty tells us that where you have executed in 1910 a conveyance and release, such as we have here, you are not entitled to come back in 1911 for a claim for a statutory crossing. The

railway is not carried across the plaintiff's lands within section 167 of the Railway Act of 1911; it is on defendants' own land.

The other question raised on the argument presents more difficulty. In *Bower* v. *Peate* (1876), 1 Q.B.D. 321; 45 L.J., Q.B. 446, where the defendant stipulated that the contractor should take upon himself the responsibility of shoring up the plaintiff's house and satisfy any claims for compensation the plaintiff might make, the Queen's Bench Division thought that the defendant could not escape liability. The Court thought the defendant was not in the position of a man who simply had authorized and contracted for the execution of a work from which, if executed with due care, no injury could arise. They went on to say, p. 326 (449 of the Law Journal report):

"The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful."

The plaintiff in that case recovered judgment against the principal. *Bower* v. *Peate* was approved in *Dalton* v. *Angus* (1881), 6 App. Cas. 740, by Lord Selborne, at p. 791, but in *Hughes* v. *Percival* (1883), 8 App. Cas. 443 at p. 447, Lord Blackburn, after setting out the passage I have just read, said:

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"I doubt whether this is too broadly stated. If taken in the full sense of the words it would seem to render a person who orders post-horses and a coachman from an inn bound to see that the coachman, though not his servant but that of the innkeeper, uses that skill and care which is necessary when driving the coach to prevent mischief to the passengers. But the Court of Queen's Bench had no intention, and indeed, not being a Court of Error had no power, to alter the law laid down in *Quarman* v. *Burnett* (1840), 6 M. & W. 499."

He was of opinion that *Bower* v. *Peate* was properly decided because the defendants had caused an interference with the plaintiff's right of support, and therefore did not then think it necessary to inquire how far the general language should be qualified. In his speech, however, he refers to *Quarman* v. *Burnett* (1840), 6 M. & W. 499, as being the leading authority,

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where at pp. 509, 510 and 511, Parke, B. bases his judgment on the opinion of Lord Tenterden and Mr. Justice Littledale in *Laugher* v. *Pointer* (1826), 5 B. & C. 547. In *Laugher* v. *Pointer,* and again in *Rapson* v. *Cubitt* (1842), 9 M. & W. 710, the difference is pointed out between the liability of the owner of a chattel and the owner of real property, and several cases are referred to where occupiers of lands or buildings have been held responsible for acts of others than their servants done upon or near or in respect of their property.

In my opinion, the defendants, in blowing out their track, owed a duty to the plaintiff to this extent, that they did not shoot their rock over his land in such a way as to amount to a trespass, or a nuisance. The evidence established that their contractors did this, and I think in the circumstances that as the result was something that might easily be expected to occur, it was the defendants' duty to see that reasonable skill and care were exercised to prevent such injury being done, and that in the circumstances they are liable for their contractor's neglect of duty. *Black* v. *Christchurch Finance Co.* (1894), A.C. 48, seems to me to be in the plaintiff's favour. This is not a case of collateral negligence.

IRVING, J.A.

I agree as to the amount of damages.

MARTIN, J.A.: With respect to the question of damages, I am of the opinion that the appeal should be allowed, because the evidence brings this case within the principle laid down by *Bower* v. *Peate* (1876), 1 Q.B.D. 321, wherein Cockburn, C.J. says at pp. 326-7:

". . . . A man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he has ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

MARTIN, J.A.

And compare also *Longmore* v. *J. D. McArthur Co.* (1910),

43 S.C.R. 640. The evidence, practically undisputed, shews that the damage amounts to $500, and therefore there is no obstacle to our directing judgment to be entered for that amount.

Then as to the right of way. Reliance is placed by the defendant on the following release in the conveyance of the right of way executed while the work of construction was in progress:

"And the said grantor releases to the said grantee all his claims upon the said lands, and further releases the grantee from all claims and demands for severance or depreciation of arising out of the expropriation, or taking by the grantee of the said lands, or the construction, maintenance and operation thereon of a line of railway."

The language is very comprehensive and far-reaching, and, in my opinion, the learned trial judge was right in taking the view that in the circumstances the plaintiff, as vendor, could not, after conveying a right of way which necessarily created a severance of his farm, receiving compensation therefor, and after giving a release from the consequences thereof, later turn round, and by seeking to invoke a subsequent general statute, compel the purchaser to make a "farm crossing," as the statute calls it, to connect those portions of his farm which were severed by his own act for a valuable consideration. I do not doubt that on these facts alone the said release relieves the purchaser from such a liability to his vendor. The case is much stronger in this respect than any of the authorities cited to us, which also establish the further contention that the statute is not to be construed retrospectively.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal in part.

I think there should be judgment for the plaintiff (appellant) for $500, which, upon the evidence, I fix as the amount of damage sustained by reason of the rocks being shot over on the plaintiff's land.

As to the claim for a crossing such as the plaintiff insists upon, I would dismiss the appeal.

The plaintiff should have the costs of appeal.

GALLIHER, J.A.

Appeal allowed in part.

Solicitor for appellant: *E. N. Brown.*

Solicitors for respondents: *McPhillips & Wood.*

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Feb. 28.

PATERSON TIMBER CO. v. STEAMSHIP BRITISH COLUMBIA

PATERSON TIMBER COMPANY, LIMITED v. THE STEAMSHIP BRITISH COLUMBIA.

Admiralty law—Collision—Negligent and dangerous navigation—Narrow channel—Blocking channel—Misleading lights—Boom of logs, and control of and lights on—Tow lines.

Porlier Pass is about one mile in length, narrow, with sunken rocks, the tidal streams are from four to nine knots, and overfalls and whirling eddies are always in the northern entrance where it opens out into the Gulf of Georgia. Mariners are advised to avoid this pass. The plaintiffs' tug Erin, having in tow a boom of logs 1,500 feet long with a 240 foot tow line, was proceeding from the Gulf of Georgia to the entrance of the pass, holding its position a little east of a red bell-buoy at the northerly entrance and west side of the pass and waiting for the tide to slacken. As the tide slackened the tug gradually crept up until the boom was half way past the buoy, when the collision in question took place. The tug carried two white lights in vertical line, and an ordinary ship's lantern, with a range of about one and one-half miles, was placed six feet high on the boom, about 40 feet from its rear end. The defendants' steamer, entering the pass from the south, seeing the Erin about one and one-half miles ahead, but not seeing the boom light, proceeded at seven and one-half knots, keeping to the west and passing between the Erin and the bell-buoy before seeing the lantern on the boom, that had twisted around to such an extent that it appeared on their port side, and was at first taken as a light on a fishing boat, as the boom itself could not be seen in the water beyond a distance of about 50 feet. They did not see the boom until almost on top of it. The collision took place about 1.30 a.m., and it appears that the boom had twisted across the channel to such an extent as to practically block the channel.

Held, that the collision was occasioned by the Erin's negligence in the following particulars: (1) Shewing misleading lights; (2) too long a tow; (3) insufficient lights on the boom; (4) losing control of the boom and blocking the channel.

Statement

ACTION by the owners of the tug Erin for damages against the steamship British Columbia for running through and scattering a boom of logs at the northerly entrance of Porlier Pass. The action was tried at Vancouver on the 4th of November, 1912, by MARTIN, Lo. J.A.

C. W. Craig, for plaintiffs.
Ritchie, K.C., for defendants.

28th February, 1913.

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MARTIN, LO. J.A.: This is an action against the cargo steamship British Columbia (length, 170 feet; Gustave Foellmer, master) for having run through and scattered a boom of logs belonging to the plaintiff Company, while being towed by its steam tug Erin (Robert W. McNeill, master), at the northerly entrance to Porlier Pass from the Gulf of Georgia, about one o'clock a.m. on the 15th of December, 1911. The weather was clear, occasionally overcast; wind, light S.E.; tide, on the last of the flood about one-quarter or half an hour before high water slack, setting out towards the gulf at about one and a half knots an hour. The boom was of 22 swifters, 1,500 feet in length, with a tow line of 240 feet, total length, exclusive of tug, 1,740, feet, and the tug and boom had been in the neighbourhood and a little to the east of the red bell-buoy at the entrance to the channel since about 11.30 p.m., holding that position waiting for the strong tide to slacken, the tug being past the buoy, and the boom stretching behind, considerably beyond the buoy, on to which the tide sets, both flooding and ebbing. As the tide slackened the tug gradually crept up till at the time of the collision the boom was about half way past the buoy. The towing lights carried by the tug were two bright white lights in a vertical line, ostensibly under Article 3, and a white light, 6 feet high, about 40 feet from the end of the boom. This last light was not "a bright white light" within the definition of Article 2 (a), but merely an ordinary ship's lantern, with a range of visibility not deposed to exceed one and a half miles instead of "at least five," as the article requires a bright white light to have.

Judgment

A boom of logs is admittedly not a vessel within the meaning of the regulations, and there is unfortunately no article, strictly speaking, which provides for the lights that should be carried when a steam vessel has such a tow, and, apart from the boom light, the proper inference to be drawn from such lights as were here displayed would be that the tug had in tow a vessel or vessels not exceeding 600 feet in length. The nature of the scene of the accident may best be gathered from the following

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extract from the Admiralty "British Columbia Pilot," 3rd Ed., 1905, p. 130, put in by consent:

"Porlier Pass into Georgia Strait, though short (not exceeding one mile from its southern entrance until fairly in the strait), is narrow, and is rendered still more so by sunken rocks the tidal streams run from 4 to 9 knots, and overfalls and whirling eddies are always in the northern entrance.

"Caution—In consequence of the numerous dangers existing in Porlier Pass, mariners are advised to avoid that passage."

This being admittedly a locality to be avoided, it was incumbent upon those who elected to use it to exercise a degree of caution commensurate to the circumstances, and obviously it was a place where it would be difficult to handle a long boom, and only a few booms a year are taken through it, though it is used constantly by tugs with barges. The master of the Erin, who on two prior occasions had fouled the bell-buoy with a boom, seems to have realized this, because, on approaching the bell-buoy, he shortened the scope of his tow line from 120 to 40 fathoms, but even at the reduced length I am satisfied that the tug and tow were still far too long for safety; even 1,200 feet would have been unsafe in the circumstances.

When the British Columbia entered the pass at its southern end she saw the tug, about one and a half miles off, apparently heading across the channel behind Race Point, on the westerly side thereof, shewing the two towing lights (in addition to the customary lights which were duly shewn by both vessels), but did not see the boom light, and proceeded at a speed of seven and a half knots (her full speed being nine and a half), on the usual course, keeping a little to the westward of the two fixed "leading lights" bearing S. 5° E., on Galiano Island set up for the purpose of leading a vessel through the northern entrance into the gulf a little to the east of the bell-buoy. Keeping a little to the westward of that range course so as to be sure to clear the tug, and after exchanging certain signals, which do not affect the matter, she came up to the Erin and passed between her and the bell-buoy, in the belief, as the master and first officer testify, that the tug was towing a vessel or vessels not longer than 600 feet, and never expecting to encounter a boom, the light on the end of which they did not observe till after they had passed the Erin, which by this time had advanced a little

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with the boom so that about half of it was past the bell-buoy. They were keeping a proper look out, and when they saw the boom light it shewed as beyond and to the westward of the bell-buoy, and broad on the port bow, about four points, and was taken to be that of a fishing boat, and as they thought they had passed the tow they proceeded and did not notice the boom till they were almost upon it, the logs not being visible for more than 50 feet or so in the water, and had only time to stop the engines before crashing through it.

The evidence was somewhat conflicting as to the position of the boom, the master of the Erin contending that no part of it was within 300 feet of the bell-buoy, but his evidence is contradicted by one of his own seamen, William Macdonald, who, on cross-examination, admitted that the tail of the boom had become twisted in towards the bell-buoy, and as this important statement corroborates the evidence of the British Columbia's officers, I accept their contention that the channel had become blocked by the boom. It was urged that even so, the British Columbia was in fault for not having slackened her pace, or stopped, or gone to the westward of the bell-buoy, and I was at one time impressed by this submission, and for that reason have given this matter much attention, with the result that, having regard to the condition of affairs that really existed, and that which the Erin led the British Columbia to believe existed, no blame can be attributed to her. If the boom light had been of such a description and so situated, or if the vertical lights had been of such a description that it or they conveyed a reasonable intimation to the British Columbia of the true state of affairs, then I should have found that she had negligently contributed to the collision, but as the matter stands I am forced to the conclusion that she was misled as to the nature and length of the tow, and also that the channel was, unknown to her, improperly and dangerously blocked against her. The point is that the officers of the British Columbia were never placed in the position of being compelled to consider the taking of any other steps than those they did take on the facts as they were, unfortunately, made to appear to them. I can only reach the conclusion that this collision was occasioned by the Erin's

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negligence in four particulars, *viz.*: (1) shewing misleading lights (*cf. The Devonian* (1901), P. 221); (2) too long a tow; (3) insufficient lights on the boom; and (4) losing control of the boom and blocking the channel, as to which this case is stronger against her than that of *The Athabasca* (1890), 45 Fed. 651; wherein that vessel was held justified in breaking through a raft 1,200 feet long, in daylight, in the River Sault Ste. Marie. Some apt cases on this question of the duties and responsibilities attendant upon the towing of booms, rafts and low-lying craft are: *The Alicia A. Washburn* (1884), 19 Fed. 788; *The John H. May* (1892), 52 Fed. 882; *The Gladiator* (1897), 79 Fed. 445; *Consolidated Coal Co.* v. *The Admiral Schley* (1902), 115 Fed. 378; *The Patience* (1908), 167 Fed. 855; *New York O. & W. Ry. Co.* v. *Cornell Steamboat Co.* (1911), 193 Fed. 380; and *Harbour Commissioners of Montreal* v. *The S.S. Universe* (1906), 10 Ex. C.R. 352.

Judgment

As to the light that was carried on this boom, I have decided only that it was insufficient and have said nothing as to the number of lights that should have been carried on it, or on booms or rafts of varying lengths in these waters, because that is not a matter for me to decide, but is one to be brought to the attention of the Federal Government by those interested, and this case shews the importance, and indeed, urgency of the matter, not only for the benefit of mariners, shipowners and lumbermen, but for the protection of the travelling public.

Action dismissed.

MONRUFET v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

COURT OF APPEAL

1913

Jan. 7.

MONRUFET v. B.C. ELECTRIC RY. CO.

Negligence—Collision—Contributory negligence—Perverse finding by jury —Evidence.

Plaintiff was injured in a collision between a motor car, driven by himself, and a tramcar operated by defendant Company.

Held, on the evidence (MARTIN, J.A. dissenting), that the plaintiff's own negligence was such as to disentitle him from recovering; that the verdict of the jury absolving him from negligence was an unreasonable finding, and that the action should be dismissed.

APPEAL by defendants from the judgment of MORRISON, J. upon the verdict of a jury, granting the plaintiff damages in a collision action tried at Vancouver on the 14th of May, 1912. Statement

The appeal was argued at Vancouver on the 8th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

L. G. McPhillips, K.C., for appellant Company.

S. S. Taylor, K.C., for respondent.

Cur. adv. vult.

7th January, 1913.

MACDONALD, C.J.A.: At the close of the argument I had no doubt as to what I ought to do in this case, and further consideration of it has not changed my opinion that the accident was caused by the plaintiff's own negligence. I might state the case even more strongly against him, and say his own deliberate misconduct in continuing on his way against every dictate of caution and of duty towards his passengers, after he saw the tramcar coming on a down grade, and as he describes it himself, at a rate of 30 or 40 miles an hour. While he could have stopped his own vehicle almost instantly, he continued on and ran into the back part of the tramcar as it passed in front of him. I do not think that reasonable men could reasonably acquit him of contributory negligence in these circumstances.

MACDONALD, C.J.A.

I would allow the appeal and dismiss the action.

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IRVING, J.A.: The plaintiff was driving in an easterly direction on a cross-road, 6th avenue, and was about to turn into a main travelled road, Mahon avenue, on the westerly side of which the defendants had their track, a single line, when a collision took place between the plaintiff's motor car and the defendants' street car, which was travelling at a high rate of speed in a southerly direction down Mahon avenue, the front of the motor coming in contact with the right side of the street car, near the forward part of the street car; later, as the motor car was turned to the right, the back step of the street car struck the left rear wheel of the motor. The accident took place in broad daylight and when the converging cars had an uninterrupted view of one another. The driver of the street car saw the motor car when about 87 feet away. The driver of the motor car, when he was 20 feet from the crossing on Mahon avenue, saw the street car coming along at 30, 40 or 50 miles an hour. He, the driver of the motor car, was in his second gear, going only at 4 or 5 miles an hour.

The motor car, to get into the travelled portion of Mahon avenue, had to cross and get clear of the track. Between the crossing and the track there was a space, and in that space there was a ditch eight or 10 feet wide.

With all respect to the jury who found the plaintiff was not guilty of contributory negligence, it seems to me that the plaintiff overlooked several rules which he ought to have observed. In the first place, he should have remembered that as he had to get clear of the track before he could turn to the south, where he was going, he owed a special duty to keep a good look out as he approached a tramway crossing. There are two Scotch cases cited in the 21st volume of Halsbury's Laws of England, at p. 414, to which I would call attention. These cases lead me to believe (something I have always understood was incumbent on a person driving on a cross-road), that it is the duty of persons coming out of a cross-road into a main artery of traffic to wait and give way to that traffic, and not to throw themselves headlong into the advancing traffic along the main travelled road: *Macandrew* v. *Tillard* (1908), 46 Sc.L.R. 111; and *Campbell and Cowan & Co.* v. *Train* (1910), 47 Sc.L.R. 475.

IRVING, J.A.

If we take the distances stated by the plaintiff, we find that when he was going slowly at four or five miles an hour, he saw the defendants' car whirling and rocking along, and he (the motor driver) did not bring his car to a stop until he had travelled a sufficient distance to bring the front of his car (the left mud guard, I take it) right to within a foot or so of the westerly rail—that would be 30 feet or more; even then he had not brought his car to a stop, but to avoid the shock of the collision as much as possible, he, when three or four feet from the track, turned his car down to the right into the ditch, when the hub of his left rear wheel and the rear step of the street car fouled each other.

Metropolitan Railway Co. v. *Wright* (1886), 11 App. Cas. 152, lays down the test that it is not enough that the judge who tried the case might have come to a different conclusion on the evidence than the jury, that the judges in the Court where the new trial is moved for might have come to a different conclusion, but there must be such a preponderance of evidence, assuming there is evidence on both sides to go to the jury, as to make it unreasonable, and almost perverse, that the jury, when instructed and assisted properly by the judge, should return such a verdict. Having that rule before me, I nevertheless cannot uphold the verdict, in so far as it acquits the plaintiff of contributory negligence.

IRVING, J.A.

The plaintiff does not appear to have stopped his speed before he reached the crossing. When "very close" to the crossing, say 20 feet, going at six miles an hour, he would only have about four seconds before he reached the west rail of the track, I think his negligence was two-fold; first in not looking out at a sufficiently early time for the street car before he got too close to the track; secondly, when he did see the approaching car, in not realizing that he could not clear the tracks at the speed he was going.

MARTIN, J.A.: The verdict of the jury should not, in my opinion, be interfered with, because there is ample evidence to sustain it. The explanation of the accident is clearly to be found in the belief expressed by the motorman that he had "the absolute right of way." Even if there had been a finding of

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contributory negligence on the part of the plaintiff, the case would still, in my opinion, be one of ultimate negligence on the part of the defendants' servant, therefore, as Mr. Justice King puts it in *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256 at pp. 258-9, the plaintiff's "act of negligence could no longer be considered as a contributing efficient cause, but would be reduced merely to a link in the chain of anterior circumstances, without which the accident could not have happened."

Appeal allowed, Martin, J.A. dissenting.

Solicitors for appellants: *McPhillips & Wood.*

Solicitors for respondent: *Taylor, Harvey, Baird, Grant & Stockton.*

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MCARTHUR v. THE JOHNSON.

Admiralty law—Misleading defence—Costs—Rule 132—Discretion.

Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy and prolong the trial, the Court, exercising its discretion under rule 132, will make no order for costs.

ACTION tried by MARTIN, Lo. J.A. at Victoria, on the 6th of March, 1913.

D. S. Tait, for plaintiff.
Child, for defendant.

11th March, 1913.

Judgment

MARTIN, Lo. J.A.: This is an action for seaman's wages, the plaintiff McArthur claiming the sum of $150 for two months' wages as engineer on the gasoline launch Johnson, and the plaintiff McKenzie claiming $375 for five months' wages on the same vessel.

Owing to the unusual circumstances and the prior relationship of the plaintiff McKenzie with the vessel's owners as their guest, I have had not a little difficulty, on the largely conflicting

evidence, in arriving at a conclusion as to the true state of the case, but I am finally of the opinion that the said plaintiff has failed to establish an express contract of hiring, or one based upon *quantum meruit*. Apart from other things, it is particularly unfortunate for him in the circumstances that he should not even have made a request for his wages for the whole time of his employment. The inference to be drawn from such a strange omission was pressed by defendants' counsel, and is hard to overcome where the witnesses disagree. On the other hand, I am satisfied that he performed useful and valuable services to the owners over and above his board and lodging, and to such an extent that it was never contemplated by them that he should account for the various small sums of money that were given to him occasionally or for the bill of goods, amounting to $202.50, which he got from David Spencer, Limited, on the arrangement that they were to be charged to Mrs. Anderson. Therefore, the so-called counterclaim for $300 fails, even assuming that it is properly set up and that it is of such a nature that this Court could entertain it: *Bow, McLachlan & Co.* v. *Ship "Camosun"* (1909), A.C. 597. The result of this plaintiff's action is that it must be dismissed, with costs, but as the defendants have set up a largely misleading defence against his claim, which almost invited further controversy, and did considerably prolong the trial, I exercise the discretion conferred upon me by rule 132 and make no order for costs in their favour as against McKenzie.

Judgment

With respect to the plaintiff McArthur, in view of the positive denials of both the defendants of any authority given to McKenzie to engage him, and of their version of the explanation given of his presence on the vessel, the evidence is not sufficient to support his claim, and it must be dismissed, with costs.

Action dismissed.

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MANITOBA LUMBER COMPANY *v.* EMERSON

MANITOBA LUMBER COMPANY, LIMITED v. EMERSON.

Mortgage—Mortgagor's right of redemption—Limitations of in mortgage or by contemporaneous agreement—Mortgagee in possession—Improvements.

Defendant held a mortgage, payable in three months, on a sawmill plant, to secure an advance of $30,000. He allowed the mortgage to run for nearly a year, when, owing to further advances, the indebtedness had increased to some $51,000. The mortgagee then served notice on the mortgagor that unless the indebtedness were paid in ten days he would enter into possession and sell, etc., under the provisions in the mortgage. This notice was accompanied by a letter, in which the mortgagee proposed that the parties should come to an arrangement whereby he (the mortgagee) should enter into possession forthwith and operate the mill on his own account for nine months, during which time the mortgagor should have the right to redeem, subject to the further agreement that the mortgagor should forthwith execute a conveyance of the property to the mortgagee, to be placed in escrow and to be taken therefrom only on certain conditions, one of which was that in case any suits were brought against the mortgagor, the mortgagee would be at liberty to register the conveyance. The mortgagor agreed to the terms of this letter. The mortgagor was sued before the expiration of the nine months, whereupon the mortgagee registered the conveyance and held himself out as the absolute owner of the property. Upon entering into possession the mortgagee expended $30,000 in improvements during the first nine months and $65,000 subsequently.

Held, on appeal, in an action for redemption, that the parties could not, in the instrument of mortgage itself or by a contemporaneous agreement, limit the mortgagor's right of redemption.

Held, further, that the cost of improvements made by the mortgagee in possession, chargeable to the mortgagor, are limited to moneys expended in necessary and reasonable repairs.

Judgment of GREGORY, J. at the trial, varied.

Statement

APPEAL by the defendant from the judgment of GREGORY, J. in an action tried by him at Vancouver on the 27th, 28th and 29th of February, 1913. The facts appear fully in the reasons for judgment of the learned trial judge, and are briefly set out in the headnote.

J. A. Russell, and *M. A. Macdonald,* for plaintiff Company.
A. D. Taylor, K.C., and *Macdonell,* for defendant.

18th March, 1912.

GREGORY, J.: This is an action to recover possession of a certain timber berth, No. 290, and for a declaration that the plaintiffs are entitled to redeem a certain mill property at Eburne, after taking accounts and payment of the amount found to be due to the defendant, and for directions as to the method of taking such accounts.

The timber berth was absolutely assigned to defendant by indenture dated the 22nd of July, 1907, in consideration of one dollar; but it is admitted by defendant that, though absolute in form, it was in reality a mortgage to secure the repayment of $5,500, consisting of a small indebtedness, and moneys to be advanced in the future. On the 28th of September, 1907, defendant agreed to assist plaintiffs by guaranteeing certain bank indebtedness and in other ways; plaintiffs were to secure same by a mortgage for $30,000, which included the said sum of $5,500, and accordingly gave defendant a mortgage, payable in three months, over the mill property in question. This mortgage contains no reference to the mortgage on the timber berth, and so far as the evidence goes, it does not appear that any reference was made to it at the time. I therefore assume that it was superseded by the new mortgage, which furnished ample security for the entire indebtedness. At the conclusion of defendant's argument, I asked his counsel under what he now claimed the timber berth, which he had not touched upon in his argument, and he replied that he "could not support" his claim to it, but he "would not formally abandon it." This I treat as an admission that plaintiffs are entitled to the relief asked for to that extent at least, and there will be judgment accordingly, with costs. The balance of the plaintiffs' claim is not so easily disposed of, and it is necessary to consider fully all the circumstances.

When the mortgage matured on the 31st of December, 1907, plaintiffs were unable to pay it, as defendant knew would be the case, but he allowed it to run until the 25th of September,

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1908, when plaintiffs' indebtedness having grown to some $51,000, he served them with notice that he would enter into possession and take the rents and profits and sell, etc., unless the moneys due were paid within ten days, which he well knew the plaintiffs could not do.

This notice, dated the 24th of September, 1908, was accompanied by the following letter:

"Vancouver, B.C., Sept. 25th, 1908.

"The Manitoba Lumber Company, Limited,
"Eburne, B.C.

"Sirs:—

"As you are in default in the payment of the mortgage for $30,000 given to me on the 28th day of September, 1907, I have given notice to you of my intention to exercise my power of sale and other powers provided for in the mortgage unless within the period of ten days from the notice as stipulated in the mortgage, you repay the mortgage money and interest.

"In view of your present circumstances I do not suppose that you can make arrangements to repay the amount due and I will therefore be in a position at the expiration of ten days to exercise the power of sale and other powers contained in the mortgage.

"I am, however, disposed to give you a further opportunity of paying the amounts due to me and redeeming the property and make the following proposal:

"(1) Your Company to consent to my taking possession forthwith under the mortgage, in other words, that you waive the balance of the ten days' notice. I will also take possession of the logs, sawn lumber and book debts which belong to me under our arrangement respecting the sale of logs and which you have been heretofore holding as representing me.

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"(2) I will operate the mill as I see fit for my own account and allow your Company two hundred dollars ($200) per month from the time I take possession, for the use of the mill.

"I will continue this arrangement for a period of nine months subject to the further provisions of this letter and during that time, unless the property is disposed of sooner as hereinafter provided, you will have an opportunity of redeeming the same on payment of all amounts due for principal, interest and charges including any insurance premiums and improvements, credit being given for the monthly rental of the mill as above provided.

"The Company shall forthwith execute a conveyance of the property to me to be used in the event of its not redeeming within the time herein provided or in the event of the property being disposed of sooner to a *bona-fide* purchaser as hereinafter provided. This conveyance shall in the meantime be deposited in escrow to be delivered to me in either of the events set out above. Thereupon I will give credit for the amount then due on the mortgage.

"If at any time before the expiration of the nine months an opportunity of selling the property to any third party arises and a *bona-fide* offer is

made to me, I agree to give you the option of taking the property over at the same figure as is offered by such third party, you to exercise such option within fifteen days after notice, failing which I shall be at liberty to dispose of the property and the conveyance above referred to shall be delivered to me.

"A memorandum will be taken and kept of all logs and lumber and book debts reasonably discounted and in the event of your Company paying off the amount due to me and redeeming the property the Company shall also pay for any additional amount of logs and lumber and book debts as shewn by such memorandum at the time of the Company's taking back the property and business as herein provided, logs and the lumber to be taken at the then current market price for logs and lumber.

"Nothing in this arrangement is to prejudice my rights as mortgagee in possession, which are retained intact, I merely agreeing to suspend exercising my power of sale, etc., in the terms of this letter.

"Yours truly,

"J. S. Emerson.

"P.S.—If any suits are instituted against the Company I shall be at liberty to register the conveyance forthwith so as to avoid the expense that would be caused by the registration of any judgment and the consequent necessity of foreclosure.

"J.S.E."

The Company agreed to the terms of the letter, executed the conveyance, and surrendered possession. The plaintiffs having been sued before the expiration of the nine months, defendant registered the conveyance, and now claims that the plaintiffs are not entitled to an account, and that he is the absolute owner of the timber limits and mill site, together with the proceeds derived from the book debts, sale of logs and sawn lumber, as well as office furniture, launches, and other things taken by it and sold, although not included in any of the mortgages, nor in any way assigned to the defendant. He further claims that the plaintiffs are not entitled to any rental for the mill.

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Before the nine months period agreed upon in the letter expired, defendant sold an interest in his account with the plaintiffs to two gentlemen, and afterwards, in fulfilment of his contract with them, transferred all the plaintiffs' property to a company in which he and they were shareholders. Defendant did not inform the plaintiffs of this sale and transfer, nor give them an opportunity of purchasing the same, as provided for in the letter above set out. I merely mention this incidentally as defendant says he still controls the property, etc., and the

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Court can deal with it as though there had been no sale by him and he was still in possession.

The defendant, since taking possession, has expended in improvements on the property the sum of $106,000, which, if it decided plaintiffs can redeem, he claims the right to add to his debt as improvements made by a mortgagee in possession, and also under the provision in the letter requiring the plaintiffs to pay for "improvements" before redeeming; $30,306.99 of this amount was expended by the 30th of June, 1909, the date up to which plaintiffs had the right to redeem. During this time the defendant had entire control of all the plaintiffs' assets, and after the nine months period expired on the 25th of June, 1909, he admitted on the stand, and in his discovery, that he treated them as his own absolute property, gave plaintiffs no account of moneys realized from logs, sawn lumber, book debts, etc. He had sold an interest in the account, and his bad faith in general in connection with these improvements is shewn by the fact that he expended $30,000 before the 30th of June, 1909, up to which date plaintiffs had the right to redeem. The mill, as plaintiffs left it, was pulled down on or about the 24th of May of that year; the $76,000 expended since became necessary by reason of the destruction of the old mill, and the expenditure of the $30,000 shewing clearly that when entering upon
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the $30,000 expenditure he contemplated the later and other expenditure of $76,000, without which the mill would be practically useless, but which he could not possibly make until after the period for redemption had expired. He never intended the plaintiffs to redeem. He sought to make it impossible, but now wishes to take advantage of the position. I am unable to resist the inference that when he took possession he deliberately set to work to improve the plaintiffs out of their property and make it impossible for them to redeem. The improvements, so called, consisted in building an entirely new mill of an entirely different character, and in the carrying out of his design, he removed practically new buildings, a photograph of one of which is shewn in exhibit 15. If he had contemplated any such alterations or improvements he should at least have

notified the plaintiffs of it, and secured their assent, instead of attempting to do it under the terms of his own letter, where the only possible justification is found in the word "improvements," without anything in the context to shew what is meant or referred to. He does not now suggest that he had any conversation with the plaintiffs' manager on the subject, while the manager says that it referred to the completion of the minor improvements which he was at the time engaged in carrying out, on the suggestion, apparently, of one Rodgers, who was supplied by the defendant to assist him in running the business in August, 1908.

Defendant also contends that plaintiffs should not be permitted to complain of the improvements since Mr. Wells, their manager, lived in the immediate neighbourhood of the property, and personally saw what was going on, to which plaintiffs reply that they did object repeatedly, but the only definite evidence of objection is that of Wells, who says that on or about the 12th of December, 1908, he met defendant and referred to the great improvements which were foreshadowed in one of the newspapers and objecting to them, saying that if they were made, the Company would never be able to redeem, and that defendant replied that it would only be a few thousand dollars, to which Wells answered, every thousand made it harder. Defendant says he does not recollect any such conversation, but cannot say it did not take place. The newspaper was not put in evidence, but Mr. *Taylor,* on the argument, admitted that it was dated the 12th of December, 1908. Mr. Wells admits seeing the improvements going on, and says if he objected any more, defendant would have sold under his power in the mortgage. He did nothing more, though he in no way consented. He does not appear to have done any acts from which the Court can infer tacit consent or acquiescence. On this point see the remarks of Jessel, M.R. in *Shepard* v. *Jones* (1882), 21 Ch. D. 479.

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On the 24th of June, 1909, plaintiffs' solicitors, Messrs. Russell & Russell, gave the defendant explicit notice that the plaintiffs repudiated liability for these extensive improvements,

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cautioned him to desist from further expenditure in that direction, and almost immediately issued the writ herein; but, notwithstanding this express notice, and the launching of these proceedings, defendant expended the sum of $76,000 in further improvements, which he insists shall also be added to his debt and refunded to him in case the plaintiffs are allowed to redeem. The letter from Russell & Russell notified defendant of the Company's intention to redeem, and asked for a full account of his transaction with the Company's assets. As the defendant had sold logs and sawn lumber, etc., belonging to plaintiffs, and had also collected some of the book debts, and had made expenditures on improvements, insurance premiums, etc., the repayment of which defendant claimed to be entitled to, it was impossible for the plaintiffs, without this account, to form any idea how much money it would have to tender in order to redeem. They could not estimate it within thousands of dollars. The letter states, and Wells also says, that such an account had been asked for before, but it was never at any time furnished. The so-called account of the 30th of June, 1909, does not begin to give the detailed information which plaintiffs would require in order to properly ascertain the correctness of the charges made. It charges a number of items apparently without the slightest authority, and charges interest on total indebtedness before giving credit for any portion of the monthly rent. It makes no mention of the new logs or book debts which the plaintiffs would also, under the agreement, be required to take from the defendant, and pay for, when redeeming. It also charges for superintendence by defendant of the "improvements," shews $30,306.99 of such improvements in four lines, without any details whatever. Plaintiffs were, I think, entitled to a real account, and the single sheet of paper ultimately furnished on the 30th of June cannot be dignified by that name.

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Confident in the inability of plaintiffs to raise any money, defendant piled expense on expense in reckless disregard of the plaintiffs' rights. The nature of the so-called improvements can be easily imagined from defendant's statement of the business done. He says that for the first nine months, that is, up

to the 30th of June, 1909, when the period for redemption expired, the business was carried on at a loss of $622.60, but since then it has made thousands of dollars profit annually. But it is worthy of note that in order to shew the loss of $622.60 he has charged $2,048.81 for insurance which he never paid, and which he had no authority to charge against the plaintiffs unless he had actually paid the same; and according to his statement on the witness stand, this amount represented estimated premiums for nine months on the mill and plant which he testified was only worth $5,500 at the time. Of course, that valuation was absurd, and in the mortgage of the 28th of September, 1907, he required the plaintiffs to covenant to keep it insured for not less than $12,000. There was no accident about that, for the amount was filled in by his own solicitor. In that statement defendant also makes a "provision for bad and doubtful debts" only ten dollars less than the total salaries paid, and charges for supervising log purchase a sum more than double the total amount paid for salaries.

Plaintiffs claim that defendant is a mortgagee in possession, and that as such he must, *inter alia,* account for all the rents and profits (admittedly many thousands of dollars), made by him since taking possession; and claims further, that he is not entitled to be repaid the large sums spent on improvements, and by reason of which the profits were largely made. This suggests to my mind that the plaintiffs are just as willing to wrong the defendant as the defendant is to wrong them. So far as the profits are concerned, it seems to me they are fixed by the terms of defendant's letter at $200 per month.

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Defendant claims that he is entitled to all he has got, logs, sawn lumber, mill, plant, mill site, book debts, etc., on the ground that he is not a mortgagee in possession, but an owner, having purchased the plaintiffs' equity of redemption by the letter and deed, etc., of the 28th of September, 1908. As the defendant was originally a mortgagee only, the burden of proof is, I think, on him to shew that he has changed that position into one more favourable to himself, on the principle of "once a mortgage always a mortgage."

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The notice declares defendant's intention of, at the expiration of ten days, entering into possession—receiving and taking the rents and profits—and of selling.

The letter asks plaintiffs' consent to possession being taken under the mortgage forthwith, provides that his rights as mortgagee in possession shall be retained intact, and that he merely agrees to suspend exercising his power of sale. There is not a word in the letter to suggest that the conveyance referred to is under any circumstances to be used as a transfer to the defendant of the plaintiffs' beneficial interest in the property in fee and in extinguishment of defendant's claim; it only provides that it is "to be used in the event" of the property not being redeemed, etc., "or in the event of the property being disposed of sooner to a *bona-fide* purchaser," and on the happening of either such event defendant was to "give credit for the amount then due on the mortgage" (whatever that might, in the circumstances, mean).

Defendant is not entitled to any more favourable construction of these clauses than the words necessarily imply, and it is not only quite consistent with them, but appears to me to be their natural meaning that defendant was to sell under his mortgage, if the property was not redeemed, and the conveyance was given in superabundance of caution, perhaps to be produced to any intending purchaser to shew a more complete right and title to sell. But before either of these events happened, defendant registered the conveyance under the authority of the last clause in the letter, which provided that it was to be invoked to avoid expense and the "necessity of foreclosure." It must not be forgotten that by the time the period for redemption had expired, it might well have been that defendant would have almost, if not entirely, extinguished the plaintiffs' debt out of the proceeds of the timber berth, book debts, sawn lumber, etc. In such case it would be ridiculous to strain the language of the letter into a contract of sale of the equity of redemption in all this property at the expiration of the redemption period. It seems clear that it was intended that there should be a sale by the defendant under the power of sale in the mortgage, and none

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having been made, the defendant must still be treated as a mortgagee in possession.

I am not at all impressed with the defendant's statements as to values. It seems strange that, experienced mill man as he is, he and his witnesses, also experienced men, should have shewn such hesitation in placing a value on the mill site. Mr. Higgins impressed me as a sensible and fair witness, and I think his valuation of $15,000 an acre, *i.e.*, about $70,000 in all, is fairly accurate, and explains defendant's desire to get absolute possession of it.

Mr. *Taylor,* in support of his contention that the plaintiffs had no right to redeem, as they have sold their equity of redemption to defendant, cited *Davis* v. *Thomas* (1830), 1 Russ. & M. 506, and *Bastin* v. *Bidwell* (1881), 18 Ch. D. 247, but they do not appear to me to assist him, as the facts in those cases are as dissimilar as possible from those in the present case. In the former the mortgagor deliberately sold his equity of redemption in consideration of the cancellation of the mortgage debt, and the payment to him of an additional sum; about three months later he obtained a long lease of the property, the mortgagee indorsing an agreement on it that upon rent being promptly paid he should have the right of re-purchase at a slightly increased price. The rent was not promptly paid, and he was unsuccessful in his endeavour to compel the mortgagee to sell. The charges of fraud against the mortgagee entirely failed, as also did the evidence of great difference in value.

In *Bastin* v. *Bidwell, supra,* there was no question of a mortgage. The plaintiff had taken a lease with a right of renewal "upon paying the rent and performing and observing the covenants," and the Court held that he was not entitled to the renewal, as he had not performed the covenants which were a condition precedent to his right, etc.

The conveyance of the 28th of September, 1908, was not intended as a sale of the plaintiffs' equity, nor was it in any way given in extinguishment of the plaintiffs' mortgage; it is, in fact, expressly stipulated that it is free from incumbrances, except the very mortgage which it is now claimed it extin-

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guished. It was given for the purposes set out in defendant's letter already referred to. In these circumstances it seems clear to me, as already stated, that the relation of mortgagor and mortgagee still exists between the plaintiffs and defendant and that the plaintiffs are entitled to redeem, and there must be a reference to the registrar to take the necessary accounts. The only difficulty about the accounts is the nature of the inquiry to be made with reference to the improvements.

In *Carroll* v. *Robertson* (1868), 15 Gr. 173, a sale by the mortgagee was set aside for irregularity, and the purchaser was allowed for all improvements made by him so far as they enhanced the value of the property, but in that case the purchaser had acted *bona fide* and in the belief that he was absolute owner. But in the present case there is no question of an innocent third party. We are dealing with the original parties to the mortgage.

The case of *Brotherton* v. *Hetherington* (1876), 23 Gr. 187, decided by Proudfoot, V.C., considerably resembles the case at bar. But in that case it is clear that the intention of the parties was that the property should, from the execution of the release of the equity, become the absolute property of the mortgagee, and they were not bound to retain it in the same character in which it previously existed. It was a straight sale with a proviso. There was nothing in the document to restrict the meaning of the word "improvements," and the mortgagees acted *bona fide* throughout, while in the present case, defendant has not acted *bona fide*. The letter and conveyance must be taken together; they were not intended as a sale, but an extension of time under the mortgage. The letter states on its face that defendant was to "operate the mill" then on the premises, not to build a new one of greatly different character and capacity, and the word "improvements" referred, I think, to ordinary improvements, or at least to such improvements as would be completed and still leave the mill a complete mill, capable of being operated at the time the period allowed for redemption expired. I have no doubt that plaintiffs thought

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they referred to improvements of the nature they were carrying out.

Mr. *Taylor* strongly relied upon *Shepard* v. *Jones* (1882), 21 Ch. D. 469, approved in *Henderson* v. *Astwood* (1894), A.C. 150, but *Shepard* v. *Jones* was a case of the expenditure of £83 on a mortgage for £2,000, and, apart altogether from the question of notice, it was held that the expenditure was reasonable, lasting, and had increased the value of the property, while in the present case the expenditure is over three times the amount of the mortgage, and more than twice the total amount owing to the defendant on all heads, at the time the extension of time was granted. The following remarks of Cotton, L.J. in that case appear to me to be peculiarly applicable to the case at bar. He says, at p. 482:

> "Undoubtedly, a mortgagee has no right as against a mortgagor to improve the mortgagor out of his property, and if he lays out a very large sum that is in itself a thing which he has no right to do. A mortgagor must not be prevented from redeeming by the mortgagee when in possession throwing a great burden upon him."

In *Henderson* v. *Astwood, supra,* the action was against the original mortgagee and the purchaser from him. The purchaser was held entitled to the property, as the power of sale was properly exercised; and the mortgagee was held entitled in his account to save extensive improvements which he had made, but the Court expressly found that there was no fraud or oppression, and the plaintiff admitted (see the remarks of Ellis, C.J, at p. 152, and Lord Macnaghten at p. 163), that the money "was reasonably expended in productive improvements," and that they were lasting, necessary and proper, and added to the value of the premises, which I am far from being able to find here. In that case the mortgagee saved the costs of trial because, in his defence, he submitted to account, but he had to pay the costs up to the submission, because, as pointed out by Lord Macnaghten at p. 161, it was his duty to offer them.

There will be judgment, with costs, declaring the plaintiffs entitled to an account, and there will be a reference to the registrar to take the same as follows: (1) An account of what is due to the defendant under his mortgage and of the amounts

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for which the plaintiffs are entitled to credit; and in ascertaining such amounts the plaintiffs are entitled to credit for the full value of all articles taken by the defendant which were not included in his mortgage; (2) an account of all moneys expended by the defendant in necessary or reasonable repairs.

There will be general leave to apply for any further directions which may be necessary, including the question of the costs of taking the accounts, after the same have been taken.

The appeal was argued at Vancouver on the 8th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

A. D. Taylor, K.C., for appellant: The property became absolutely ours at the expiration of the nine months within which the plaintiffs had the right to redeem under the terms in the letter of the 25th of September, 1908, to which they had assented. The mortgage was nine months overdue when notice of foreclosure was given. *Fairclough* v. *Swan Brewery Company, Limited* (1912), A.C. 565, does not apply, as by assenting to the terms of the letter of the 25th of September, 1908, they sold their equity of redemption subject to certain conditions, and the letter was not contemporaneous with the mortgage and did not limit the right of redemption under the mortgage. If the plaintiffs are entitled to redeem, they can only do so on terms. We are entitled to the cost of repairs and improvements found to have been made: *Tipton Green Colliery Company* v. *Tipton Moat Colliery Company* (1877), 7 Ch. D. 192. There is nothing in the evidence to diminish our right to the cost of the improvements made: *Shepard* v. *Jones* (1882), 1 Ch. D. 469. The only question that can possibly be raised is that of fraud, in that the improvements were made in order to prevent the plaintiffs from redeeming, but the evidence cannot justify this contention.

Argument

S. S. Taylor, K.C., for respondents: As to the timber berth there is no dispute, as we admit it is a portion of the security given. The reference should include the logs, lumber and book debts on hand.

A. D. Taylor, in reply.

The judgment of the Court was delivered by

MACDONALD, C.J.A.: From what has already been said on the different points during the argument, I have indicated my opinion that the plaintiffs had the right to redeem. I need not recapitulate any further than to say that the case of *Fairclough* v. *Swan Brewery Company, Limited* (1912), A.C. 565, makes it clear that the parties cannot, in the instrument of mortgage itself, or by a contemporaneous agreement, limit the mortgagor's right of redemption. It was argued here that the agreement fixing the nine months for redemption, while a limitation upon the mortgagor's right, was really not a contemporaneous agreement, but an agreement subsequently made, and must be held to have referred to the original mortgage and to vary it to that extent. But bearing in mind the fact that the transaction, which took place on the 25th of September, 1908, was a new transaction, a transaction which created a new security to the defendant for advances not included in the mortgage and for expenditures which were not then included or contemplated, it must be taken to be in effect a new mortgage. While the conveyance is in form a conveyance absolute, it was in reality given as security for a debt. That debt included the debt in the mortgage and it included subsequent debts to the extent of over $50,000 altogether. That, I think, is the mortgage which the plaintiffs have a right to redeem, and the limitation upon their right to redeem that mortgage by the contemporaneous agreement is not such as the law will admit. That being so, the only question then is, on the assumption of the right to redeem, has the learned trial judge made the right decree?

Judgment

Mr. *A. D. Taylor* has contended that the defendant ought to be allowed for improvements made since he took possession. Those improvements amount, as he admits, to $98,000. The original cost of the mill was about $25,000. It is inconceivable that such improvements could be made *bona fide* as improvements which a mortgagee in possession would be justified in making to mortgaged premises, and therefore, I think the learned trial judge was justified in inferring that they were not made *bona fide* and that nothing ought to be allowed to the

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defendant in respect thereof. He has, in his decree, decided that all just allowances should be made, and that is not appealed against. I think he was right in doing so, but we are not called upon to decide whether he was or not.

With regard to the timber limit, respondent, before the argument, by notice served on the 13th of April, declared that he would not insist upon that term of the judgment, so that that is eliminated from the case, except that the decree must be varied in that respect.

Then with regard to the last point taken by Mr. *A. D. Taylor,* that the decree below should have contained a provision for ascertaining the quantity of logs and lumber and the amount of book debts which, under the agreement of the 28th of September, the plaintiffs were to take over on redemption, I have only this to say: It appears that no evidence was given below that there were any such things on hand either at the expiration of the time fixed in the agreement for redemption or at the date of the decree. Personally, I should be disposed to infer from the evidence that it was understood by all parties at the time of the trial, that the business was a going concern and, therefore, there must be both logs, lumber, and book debts. However, no application was made, as is asserted by counsel for the plaintiffs, to have such a term included in the decree below. Further directions were reserved in that decree, and it may be that the defendant can go before the learned trial judge and get directions on this point, but I think we are not called upon to make any order or even to express an opinion as to what should be done. The result is that the decree below will be varied in respect of the timber limit. The parties may agree upon the form of variation, and failing of agreement, the matter can be settled by one of the judges of this Court at chambers.

Judgment

I think the respondents should have the costs of this appeal.

Order accordingly.

Solicitors for appellant: *Taylor, Hulme & Innes.*
Solicitors for respondents: *Russell, Russell & Hancox.*

DOCTOR v. PEOPLE'S TRUST COMPANY.

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March 12.

DOCTOR v. PEOPLE'S TRUST COMPANY

Practice—Money in Court—Payment out—Application for—Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13.—New trial.

On an appeal from a judgment in favour of the plaintiffs a new trial was ordered upon the defendant paying into Court $4,000 to abide the result of the new trial. On the new trial judgment was again given in favour of the plaintiff, the judge adding that the payment out of moneys must be spoken to. Subsequently the defendants assigned for the benefit of creditors. On application for payment out:—

Held, that as the money was paid in as against the happening of a contingency which eventuated before the assignment, namely, the securing of a judgment, the plaintiff was entitled to payment out.

Neither the Fraudulent Preferences Act nor the Creditors' Trust Deeds Act applies in this case.

MOTION by the assignees of the defendant Company that money paid into Court be not paid out without notice. Heard by MORRISON, J. at Vancouver on the 17th of February, 1913. By consent, the application was treated as one for payment out to the plaintiff. The facts are stated in the judgment. Statement

S. S. Taylor, K.C., for the assignees.
Bird, for plaintiff.

12th March, 1913.

MORRISON, J.: On the 25th of November, 1912, the plaintiff got judgment against the defendants for $3,650, with costs. On the 2nd of December following this, judgment was ordered to be set aside upon payment by the defendants into Court that day of the sum of $4,000, to answer any judgment which the plaintiff might obtain upon a new trial of the action. A new trial was forthwith ordered. The defendant was ordered to pay all the costs thus occasioned to the plaintiff in any event. The immediate payment of the $4,000 into Court was a condition precedent to the order coming into effect. The $4,000 was accordingly paid into Court. Judgment

A new trial took place before MURPHY, J. on the 17th of

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January, 1913, and judgment was again given in favour of the plaintiff for $3,450, and added that the matter of payment out of the said moneys must be spoken to.

On the 29th of January, the defendants assigned for the benefit of creditors, the moneys aforesaid still being in Court.

This is an application on behalf of the assignees of the defendants that the said sum of $4,000 be not paid out without notice having first been given to the assignees. By consent the application is treated as one for payment out to the plaintiff.

In my opinion, the money was paid in as against the happening of a contingency, which contingency happened before the assignment—namely, the securing of a judgment in favour of the plaintiff.

Neither from the material filed nor from the statement of counsel upon the application does it appear why the plaintiff relinquished the judgment which he had previously secured. But of this I am tolerably certain, that that material does not justify me in holding that there are any circumstances which support the contention that the Fraudulent Preferences Act, the Creditors' Trust Deeds Act, or any of the other provisions referred to apply. I am of opinion that the money so paid in was appropriated, ear-marked as it were, and upon the second judgment being given it became absolutely the plaintiff's, and he is entitled to it now. Had the learned trial judge given his judgment in open Court, doubtless an immediate application for payment out would have been made. It could not have been resisted successfully. The short delay in applying does not change the character of the situation.

Judgment

There will be payment out.

Order accordingly.

THE HALL MINING AND SMELTING CO., LTD. v. THE CONNECTICUT FIRE INSURANCE CO.

CLEMENT, J.

1913

June 18.

HALL MINING AND SMELTING CO. v. CONNECTICUT FIRE INSURANCE CO.

Fire insurance—Fire Insurance Policy Act, R.S.B.C. 1911, Cap. 114—"Just and reasonable" conditions—Onus of proof.

The onus of proof that a condition is not just and reasonable within the Fire Insurance Policy Act, R.S.B.C. 1911, chapter 114, lies on the assured.

An assurance policy contained a condition that the insurer should not be liable for loss caused by forest fires, and a further condition as follows: "This policy will not cover vacant or unoccupied premises . . . . and if the premises insured shall become vacant or unoccupied . . . . this policy shall cease and be void unless the company shall by indorsement on the policy allow the policy to be continued."

Held, that these were just and reasonable conditions.

ACTION tried by CLEMENT, J. at Vancouver on the 13th of May, 1913.

The action was brought on a policy of fire insurance issued by the defendant, containing, *inter alia,* the conditions set out in the headnote. It was proved that the loss was caused by a forest fire, and that the insured premises had become unoccupied before the date of the fire. A vacancy permit had been indorsed on the policy, allowing the buildings insured to be unoccupied for 60 days from the date of the permit, but this had expired 17 days before the date of the fire, and had not been renewed. Other questions were raised at the trial.

Statement

Clark, for the plaintiffs: The burden of proof is on the defendants: *Parsons* v. *The Queen's Insurance Co.* (1882), 2 Ont. 45, (1879), 4 A.R. 103. The fact that the loss was caused by a forest fire shews that the non-occupancy had nothing to do with the risk, and was therefore not material to the risk, and was unreasonable: *McKay* v. *The Norwich Union Insurance Co.* (1895), 27 Ont. 251.

Argument

Mayers, for the defendants: The burden of proving that a condition is not just and reasonable lies on the party so alleging, that is, on the assured.

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[CLEMENT, J.: That would seem so from the wording of the statute. By section 7 the judge has to find that the condition is not just and reasonable.]

That is so, and also Mr. Justice Gwynne was of that opinion in *City of London Fire Insurance Co.* v. *Smith* (1888), 15 S.C.R. 69 at p. 80.

There was a current of opinion in Ontario, which found expression in some judicial utterances, that any variation from the statutory conditions was *prima facie* unjust and unreasonable, but this principle was decisively rejected by Meredith, C.J. in *Eckhardt* v. *Lancashire Insurance Co.* (1898), 29 Ont. 695 at p. 699, approved by the Supreme Court of Canada (1900), 31 S.C.R. 72. Here the plaintiffs have given no evidence on the subject.

Argument

Moreover, when the vacancy permit expired, the policy became *ipso facto* void. The righteousness of this condition against non-occupancy was determined in *Spahr* v. *North Waterloo Insurance Co.* (1899), 31 Ont. 525. It is for the assured to obtain the indorsement or renewed indorsement of a permit, and this they have failed to do. It is no answer that the loss was not caused or contributed to by the non-occupancy, for the insurance became void on the expiry of the permit: *Western Assurance Co.* v. *Doull* (1886), 12 S.C.R. 446 at p. 460; *Hendrickson* v. *The Queen Insurance Co.* (1871), 31 U.C.Q.B. 547, *per* Hagarty, C.J. at p. 553.

18th June, 1913.

CLEMENT, J.: At the conclusion of the trial I gave judgment in the plaintiffs' favour on the issue as to the cancellation of the policy sued on, but reserved judgment on the two other questions remaining for determination, namely, as to the operation and effect of two conditions contained in the policy in variation of the statutory conditions as set out in the Fire

Judgment

Insurance Policy Act, Revised Statutes of British Columbia, 1911, chapter 114. It was not disputed that the facts in evidence brought the case within the conditions, but Mr. *Clark* urged that they were unjust and unreasonable conditions to be exacted by the Company. At the hearing no evidence was adduced by the plaintiffs directed specially to

the question of the reasonableness of the conditions, and it was contended that all variations from the statutory conditions are *prima facie* unjust and unreasonable, and that, consequently, the burden should be upon the Company in that regard. I reserved judgment to consider the point more carefully, intimating that if I should continue of opinion that the burden (except in the case of a variation manifestly unjust and unreasonable upon its very face) is upon the plaintiffs in a case of this kind, I should allow the plaintiffs to adduce evidence along that line. In *Eckhardt* v. *The Lancashire Insurance Company* (1900), 31 S.C.R. 72 at p. 74, the Supreme Court expressed unqualified approval of the judgment of Meredith, C.J. at the trial, (1898), 29 Ont. 699, and as I read that judgment, the question is one to be determined on the circumstances of and surrounding the particular contract, and there is no such presumption as is here contended for. Having so concluded, the case was again called, but no further testimony was adduced. It was, however, admitted that the property insured formed part of a group of structures around the mouth of the Silver King mine, upon the wooded mountain side some miles away from any neighbours, and the "survey" was put in, shewing the position of the various structures.

The facts then as they are before the Court shew that at the date of the contract the mine was being operated, the different buildings insured were insured as buildings occupied by various members of the operating staff, and that the *locus* was as above set out.

Judgment

The conditions set up are that the Company should not be answerable, firstly, for loss occurring through forest fires, and secondly, for loss if the premises insured became vacant or unoccupied, and as already intimated, the facts bring the case within these conditions. The fire which destroyed the buildings was a forest fire, the mine was not being worked at the time, and the various buildings were unoccupied.

After careful consideration, I am unable to say that it was unreasonable for the Company, at the date of the contract, to stipulate for immunity in the circumstances indicated. I am free to say that in view of the fact that the Company's refusal

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to recognize the liability was at first (and, indeed, until an amended defence was filed in this action) based solely upon the contention that the policy had been cancelled, their reliance now upon those variations hardly calls for commendation, but legally they are entitled to stand by their contract unless I can find affirmatively that those variations are unjust and unreasonable. I have tried in vain to propound some good reason for so holding and must, therefore, dismiss the action, without costs.

Action dismissed.

MURPHY, J.

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Feb. 27.

REX v. SPARKS

REX v. SPARKS.

Municipal law—Validity of by-law—Hackdriver's licence—Moral character—Power to refuse on ground of—An Act relating to the City of Victoria, B.C. Stats. 1907, Cap. 46, Sec. 3, Subsec (3)—City of Victoria By-law 1,313, Secs. 2 and 3—Prohibition.

The provisions of subsection (3) of section 3 of chapter 46 (B.C. statutes, 1907), regulating, *inter alia*, the licensing of drivers of vehicles for hire, does not confer upon a municipal council the power to vest in the Chief of Police authority to refuse a licence to an applicant properly applying, because such applicant is not considered to be of good character.

Where, therefore, a hackdriver, after regularly applying for a licence and being refused on the ground of his bad moral character, is convicted before the police magistrate for driving without a licence, the magistrate having given himself jurisdiction by an erroneous conclusion on a point of law, a prohibition will lie.

Statement

APPLICATION for a writ of prohibition to issue to the police magistrate at Victoria to prohibit the enforcement of a conviction made on an information laid against the defendant that he acted as a hackdriver of a vehicle plying for hire in the City of Victoria without a licence, contrary to By-law 1,313 of said City. Heard by MURPHY, J. at Victoria on the 24th of February, 1913.

It appeared from the evidence that previous to the proceedings

against him, the defendant had regularly applied for a hack-driver's licence and tendered the requisite fee, but was refused on the ground that he was not of good moral character.

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Aikman, for the applicant.
T. R. Robertson, contra.

27th February, 1913.

MURPHY, J.: Section 291 of volume 10, Halsbury's laws of England, states that where the judge of an inferior Court has given himself jurisdiction by an erroneous conclusion on a point of law, prohibition will lie. I therefore think if it can be shewn that the by-law in question here is invalid, the writ should issue, particularly having regard to the facts. The material before the Court is not exhaustive, but I take it to be admitted, from what was stated in argument, that Sparks, previous to any proceedings against him, took all necessary steps and fulfilled all conditions required by the by-law to obtain a licence, and that the only reason he did not obtain one was because the chief of police, in the exercise of discretion purported to be conferred upon him by the by-law, refused to issue it on the ground that Sparks was not of good moral character.

It was contended that prohibition would not lie because, at any rate, section 2 of the by-law is valid, and, therefore, the magistrate had jurisdiction. In my opinion, if section 3 is invalid, then section 2 can not be relied on, for it provides that all drivers must have licences obtained from the chief of police, else by driving, such driver commits an offence. Since such licence can only be obtained under the provisions of section 3, if these are invalid a man who, but for the by-law, would be exercising his common law right of earning a livelihood by the pursuit of a lawful occupation, becomes guilty of a quasi-criminal offence, involving the possibility of imprisonment because he has not fulfilled all legal conditions. I therefore hold that section 2 cannot be thus divorced from the other sections dealing with the issue of licences.

Judgment

The question remains as to the invalidity of these sections. This depends on whether the Legislature has authorized the Council to enact them. It is contended such power is conferred

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by subsection (3) of section 3 of An Act relating to the City of Victoria, British Columbia statutes, 1907, chapter 46, which authorizes the passing of by-laws, as follows:

"(3) For licensing and regulating motor-cars, hacks, cabs and every vehicle plying for hire, and the chauffeurs or drivers thereof, and to impose, as a condition of such licence, that the said chauffeurs or drivers will adhere to a scale of charges applicable to all such chauffeurs or drivers plying for hire to places within and to a distance of not exceeding six miles without the City; and to establish such scale of charges for the use of such motor-cars, hacks, cabs and vehicles; and for authorizing and assigning stands for motor-cars, hacks, cabs and vehicles plying for hire on the public streets or in public places; and every chauffeur or driver when upon a stand shall be deemed to be plying for hire. Wharves, depots, yards or enclosures used for the arrival or departure of the travelling public, or for transportation, whether on private or public property, shall be deemed public places and stands within the meaning of this subsection."

The principal decision that "regulating" may include prohibiting in certain cases is *Slattery* v. *Naylor* (1888), 13 App. Cas. 446. The *ratio decidendi* of that case is stated by King, J. in *Virgo* v. *The City of Toronto* (1894), 22 S.C.R. 447 at p. 475, to be upon the consideration "that otherwise the matter cannot in common understanding be efficiently regulated." One would hesitate to hold that in common understanding the regulating of the business of hack driving requires that absolute discretion be conferred upon the chief of police to prohibit anyone whom he considered not to be of good moral character from engaging therein; and if this view be correct, I think the sections of the by-law in question invalid under the principles laid down in *Merritt* v. *Toronto* (1895), 22 A.R. 205. The business of hack driving is not *per se* an unlawful calling. Any individual has a common law right to engage therein, and such right is in no way dependent on his previous character. If the Legislature intended to confer the power here contended for, it would easily have done so by express words. Where it has intended to confer power to prevent or prohibit the doing of certain acts, it has used apt and clear language, as appears by the words employed in subsection 2 of section 3 of the Act under discussion, being the subsection immediately preceding the one herein relied upon. Further, in said subsection 3, certain conditions are set out which may be imposed as requisites for obtaining a licence. Good moral character, as determined by

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the absolute discretion of the chief of police, is not amongst such conditions.

It is true that Maclennan, J.A., in *Merritt* v. *Toronto, supra,* makes a distinction between regulating the business, say of hack driving, and the excluding of an individual from acting as a hackdriver, and suggests that in the former case regulation would, under *Slattery* v. *Naylor, supra,* include prohibition. I do not think that said subsection 3 can be construed as regulating the business of hack driving solely, inasmuch as it deals directly and cumulatively with licensing and regulating individuals. Even if such were not the true construction, I think the scope of such regulation of the business, in so far as such regulation can be held to import power of prohibition, is defined and circumscribed by the terms as to charges, location of hack stands, etc., that appear in the subsection.

Judgment

The writ is granted. The matter of costs and any other question incidental to the working out of the order may be further spoken to if counsel cannot agree.

Application allowed.

CLEMENT, J.

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COURT OF APPEAL

1913

May 12.

ERICCSSON v. MARLATT

ERICCSSON *ET AL.* v. MARLATT.

Principal and agent—Commission—Collusion to avoid payment of commission—Duty of Court of Appeal on questions of fact.

As a result of negotiations for the sale of certain land in March, 1911, the defendant, the owner, agreed to accept $100,000 in case the plaintiffs found a purchaser. No sale resulted from this arrangement, and in the month of August following, the plaintiff Ericcsson brought a prospective purchaser named Milne to view the property, when the defendant, on account of certain improvements made in the meantime, raised the price to $105,000. Milne looked the land over, but left without making any offer. In January, 1912, the defendant sold to another broker for $90,000. It subsequently appeared that the broker was acting for Milne, who was the actual purchaser. The defendant denied any knowledge of Milne in his dealings with the broker. The plaintiffs sued for their commission on the sale of the property to Milne.

Held, that the charges of fraud, conspiracy and collusion not having been proved conclusively, the plaintiffs could not recover.

Per IRVING, J.A.: In considering appeals on questions of fact, the Court of review must make up its mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if, after a full consideration, it comes to the conclusion that the Court appealed from was wrong.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 19th, 20th, 21st and 23rd of December, 1912. The facts appear in the headnote and reasons for judgment.

S. S. Taylor, K.C., for plaintiffs.
R. W. Hannington, for defendant.

CLEMENT, J.

CLEMENT, J.: I think the action must be dismissed, with costs. I do not see anything in the earlier negotiations between Hamilton and Marlatt, and Ericcsson and Marlatt to tie Mr. Marlatt's hands in selling to anybody who might want to buy. I accept Mr. Marlatt's evidence. He appeared to me to give his evidence in a straightforward way. I find as a fact, that in selling to Buckley he did not know that Buckley was acting

for Milne, or that he intended turning the property over to Milne. Where charges of fraud, conspiracy and collusion are made, it is trite law that the charges must be proved to the hilt. As I say, I have no reason to discredit Mr. Marlatt's story as to the entire occurrence. It is not for me in this case to say just what the idea in the mind of Gordon was. Gordon was not called as a witness before me. It does look as if, on behalf of Milne, he was trying to get the property for him as cheaply as he could, and it may be he felt that by accepting Buckley's offer, they would be able to buy again from Buckley at a much lower figure than $125,000, which was the figure that Ericcsson was offering the property at. But that, however, does not in any way touch Marlatt. I can see nothing in the circumstances here to prevent him from making a sale, as I said before, to anyone who made a satisfactory offer, and Buckley did actually make such an offer, and he accepted it, as he had a perfect right to do. This, I think, disposes of the action.

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CLEMENT, J.

The appeal was argued at Vancouver on the 9th and 12th of May, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

S. S. Taylor, for appellants (plaintiffs): At the time the sale was made, Milne was in the Province, carrying on his business. The defendant took advantage of our labour, and knowing that we had obtained the purchaser Milne, negotiated a sale through Buckley behind our backs. It is apparent from the evidence that Marlatt, Buckley and Milne entered into a conspiracy to defeat the plaintiffs out of their commission.

Argument

R. W. Hannington, for respondent (defendant) was not called upon.

MACDONALD, C.J.A.: I would dismiss the appeal. The learned trial judge had the witnesses before him, heard the positive evidence of the defendant and his witnesses, which led him to the conclusion that the defendant's story was true. As against that he had certain coincidences, certain matters which were calculated perhaps to raise a suspicion of the *bona fides*

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of the sale. It seems to me a perfectly clear case so far as this Court is concerned. We ought not to interfere with the learned trial judge's findings.

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IRVING, J.A.

IRVING, J.A.: In the view I take, the appeal must be dismissed. In reaching that conclusion, I have before me this idea of the duty of the Court of Appeal: in considering appeals on questions of fact from the finding of a judge, it is our duty to rehear the case, reconsidering the materials before the judge, with such other materials, if any, as this Court may decide to admit. In considering those appeals this Court must make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it, and not shrinking from overruling it if, after a full consideration, we come to the conclusion the Court was wrong.

So far as this case has proceeded before us, I am satisfied the Court below was right. The evidence of Marlatt, so far as it has been recited to us, is, in my opinion, the evidence of an honest man. The greatest weight must be given to the view of the trial judge as to the credibility of oral testimony. I see no reason to doubt, from anything we have heard, the correctness of the judgment appealed from.

GALLIHER, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondent: *Harris, Bull, Hannington & Mason.*

REX v. BOGEOTAS.

HOWAY, CO. J.

1912

Dec. 12.

REX v. BOGEOTAS

Municipal law—Liquor licence—Offences—Sale of liquor without a licence —Unlicensed restaurant—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 318, Subsec. 5.

Y., with a companion, taking a meal in an unlicensed restaurant, of which the defendant was proprietor, asked the waiter to buy him three bottles of beer, for which he gave him the money. The waiter purchased the beer at a saloon next door, and on returning with it, Y. and his companion drank part of it and gave what was left to the defendant.

Held, upholding the magistrate's decision dismissing the complaint, that there was not any disposal of liquor by the defendant to Y. within the meaning of the Act.

APPEAL from the decision of a police magistrate dismissing a complaint against the respondent for unlawfully keeping liquor on his premises contrary to section 322 of the Municipal Act, Revised Statutes of British Columbia, 1911, chapter 170. Heard by HOWAY, Co. J. at New Westminster, in December, 1912. Statement

McQuarrie, for appellant.

A. S. Johnston, for respondent.

12th December, 1912.

HOWAY, Co. J.: This is an appeal from the decision of the police magistrate dismissing a complaint against the respondent for unlawfully keeping liquor in the premises known as the Bismarck cafe. The facts are not in dispute. One Young, accompanied by a friend, entered the Bismarck cafe about 10 o'clock on the night of the 8th of March. Meals costing $1.45 were ordered and consumed. Just after ordering the meals, Young gave to the defendant, who is a waiter at that cafe, the sum of 50 cents, saying: "Go and get three bottles of beer." The defendant went to the Liverpool Arms, which is a saloon situate next door, and obtained the required liquor, paying the 50 cents therefor. On returning with the beer, Judgment

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Young and his friend drank a part and the remainder was given to the defendant. The Bismarck cafe has no licence authorizing the sale or other disposal of liquor under section 318, subsection 5, of the Municipal Act, chapter 170, Revised Statutes of British Columbia, 1911. On these facts the learned magistrate dismissed the complaint, holding that they disclosed no offence.

Mr. *McQuarrie,* for the appellant, strongly urges that these circumstances constitute an offence, because the Bismarck cafe, having no licence, can, by a system such as this, circumvent the statute and supply liquor with meals. This would be a weighty argument if the questions before me were: What should the law be? The question, however, is: Do these facts disclose an offence against the law as it is?

Section 322 of the Municipal Act forbids the sale or barter of liquor without a licence. It is clear to me that neither a sale nor a barter of liquor occurred at the Bismarck cafe on the evening in question. Counsel for the appellant was undoubtedly impressed with this view, for he invokes section 325 of the same Act in aid. That section, which deals with the proof of sale of liquor, says that it shall be sufficient if the Court is satisfied that a transaction in the nature of a sale or other disposal actually took place.

Judgment

This brings the matter to this point: Was there a disposal by the defendant to Young of liquor at the time and place in question? Now it is manifest that a person cannot sell what does not belong to him. It is equally clear that he cannot dispose of it. Thus, in the final analysis, it is reduced to this: Whose liquor was it when it was handed over to Young in the cafe? Can there be any doubt on this question? *Qui facit per alium facit per se.*

The defendant was, on the undisputed facts, the agent of Young to purchase the liquor. The liquor was Young's when handed over by the barkeeper at the Liverpool Arms.

This disposes of the matter. I may add that I am not here dealing with a question of *mala fides* as, for instance, where a restaurant keeper uses a waiter as his agent for the sale of

liquor. Such was the case of *Rex* v. *Gunn* (1905), 10 Can. Cr. Cas. 148. Totally different conditions may in such a case arise for consideration.

I have dealt with this matter without referring to authorities, but not without consulting them. See *Rex* v. *Ma Hong* (1909), 10 W.L.R. 262, and *Pasquier* v. *Neale* (1902), 2 K.B. 287, 71 L.J., K.B. 835, 87 L.T.N.S. 230.

The appeal is therefore dismissed, with costs, which I fix at $35.

Appeal dismissed.

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Judgment

REX v. McNAMARA.

HOWAY, CO. J.
1913
April 8.
REX v. McNAMARA

Criminal law—Bail—Probability of appearance for trial if bailed—Domicile—Weakness of Crown's case—Extradition.

On an application for bail on a charge which before the Code would have been a felony, the probability of the prisoner appearing for trial is the principal consideration in determining whether or not bail should be granted.

Where, therefore, it appeared that the prisoner had not his home or family in this country, and was here by virtue of extradition proceedings, which he resisted, bail was not granted, notwithstanding the apparent weakness of the Crown's case.

APPLICATION for bail heard by HOWAY, Co. J. at New Westminster on the 8th of April, 1913. Statement

Sir C. H. Tupper, K.C., for the application.
Davis, K.C., for the Crown, *contra.*

HOWAY, Co. J.: Application for bail. Counsel on both sides agree that the charge being one which before the Code would have been a felony, the granting of bail is in my discretion—that is, it is to be exercised by me, not capriciously, but on judicial grounds and for substantial reasons. Judgment

HOWAY, CO. J.

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The governing consideration is not in dispute. I must be guided in my action by the probability of the prisoner's appearing to take his trial.

In considering that question, many things are enumerated in the authorities as factors: the nature of the offence charged, the severity of the punishment, the strength of the evidence, the character or behaviour of the accused, his means, and his standing. I take this enumeration to be but a guide; merely another way of saying that the Court must weigh all the circumstances surrounding the alleged crime and the accused. It is very plain that the strength of each factor must depend upon the particular case.

Sir Charles Hibbert Tupper has pressed very strongly the proposition that the Crown's case is weak and that, therefore, I should admit to bail, as no man would flee the realm to escape trial upon such a case. It is, however, a *prima facie* case; the extradition proceedings, referred to by both counsel, and the committal for trial shew that. In any event weakness, if such it be, is but one element. The factor which operates most strongly upon my mind is that the prisoner is not shewn to be a person having his home and family here (as was the case of *Ex parte Fortier* (1902), 6 Can. Cr. Cas. 191), but (and this is common ground) is here by virtue of extradition proceedings. The fact that he, as stated before me, resisted extradition to the last ditch, weighs heavily with me in reaching the conclusion to refuse bail. I cannot feel that the probabilities are that such a person will be present for his trial. Under ordinary circumstances bail should not be granted to a person committed for extradition: see *Re Watts* (1902), 3 O.L.R. 279, where, at p. 280, Osler, J.A. says: "I should be very slow to admit to bail a person who has been arrested or committed for extradition." He adds that he cannot recall an instance of its having been done. The reporter's note to the case shews that in that case the accused failed to answer the terms of his bail bond.

Judgment

The application will, therefore, be refused.

Application dismissed.

BALAGNO v. LE ROY.

GREGORY, J.

1913

March 14.

BALAGNO v. LE ROY

Practice—Lease—Non-payment of rent—Relief from forfeitures—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsecs. 14 and 17.

In an action to recover possession of leased premises for non-payment of rent, the defendant brought into Court all arrears of rent and applied for relief under subsection (14) of section 2 of the Laws Declaratory Act. Under the lease the rent was payable monthly, but defendant was in the habit of paying for several months at a time, to which the plaintiff raised no objection. Defendant was served with notice of re-entry when five months in arrear. He immediately tendered plaintiff all rent due, which was not accepted.

Held, that the lessee was entitled to relief.

On the contention that the Court had no jurisdiction to grant relief under subsection (17), as in every case where the rent became due and was not paid there was a forfeiture which the lessor waived by taking no action:—

Held, that there is no forfeiture until the lessor re-enters and declares the lease forfeited.

MOTION for an order granting relief under the Laws Declaratory Act from forfeiture of a lease. Heard by GREGORY, J. at Victoria on the 10th of March, 1913. Statement

Harold B. Robertson, for plaintiff.
Higgins, for defendant.

March 14th, 1913.

GREGORY, J.: Summons for relief against forfeiture of lease on the ground of non-payment of rent.

Defendant brings into Court all arrears of rent and makes an affidavit that he has been in the habit of paying for several months at a time instead of monthly as called for by the lease, and that the plaintiff appears to have been quite satisfied; that since paying last rent in October, he received no demand or request for payment from plaintiff until served with notice of re-entry on the 5th of March, 1913, and the defendant, on the said 5th of March, tendered plaintiff all the rent then due, and plaintiff would not then accept it, but made an appointment for Judgment

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the following day, when the amount was again tendered and again refused. Defendant further swears that after paying his rent in October the plaintiff offered him $300 to surrender his lease.

Plaintiff filed an affidavit contradicting the defendant in several particulars, but I have no doubt that the defendant's material statements are all substantially true.

This seems to me to be a typical case for relief: see subsection 14 of section 2 of the Laws Declaratory Act. But it is urged by counsel for the plaintiff that I have no jurisdiction, as subsection (17) of the same section and Act provides as follows:

> "The Court or judge shall not have power under this Act to relieve the same person more than once in respect of the same covenant or condition; nor shall it have power to grant any relief under this Act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of Court in favour of the person seeking the relief";

and argues that every time the rent was not paid on the due date, there was a forfeiture which the plaintiff waived by taking no steps to re-enter, etc.; and he states that this subsection is peculiar to our statute. In this he is mistaken; it was introduced into our statutes in 1881, chapter 12, section 4, and was taken *in toto* from the Imperial Act, 22 and 23 Vict., chapter 35, section 6, and since that date the English Courts have frequently granted relief. Relief has also been granted in such cases by our own Courts since 1881. It does not appear to me that there has been such a waiver out of Court as is contemplated by the statute. The lease is in the short form. There is no forfeiture until there has been a re-entry under the terms of the covenant. The lessor may or may not re-enter as he sees fit, but until he does, and declares the lease forfeited, there is no forfeiture to waive. The best that can be said for the plaintiff lessor is that he elected not to re-enter.

Judgment

There will be an order relieving the defendant from the forfeiture for non-payment of rent due up to the present, upon his paying into Court on or before the 22nd of March, 1913, the sum of $150 as security for the plaintiff's costs herein. If this is not done, the summons will be dismissed, with costs. Defend-

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ant must pay plaintiff's cost of the action and of this summons.

The costs will be taxed and the amount thereof paid to plaintiff's solicitor out of the fund so deposited for security, and the balance paid to defendant's solicitor without any further order. Should the plaintiff not deliver his bill of costs before the 29th of March, 1913, and proceed promptly to the taxation thereof, the whole sum so deposited will be returned to the defendant, or to his solicitor, upon his filing the usual written consent.

Judgment

The registrar will indorse upon the lease a record of the relief hereby granted.

Order accordingly.

THE BRITISH COLUMBIA COPPER COMPANY, LIMITED v. McKITTRICK *ET AL.*

COURT OF APPEAL

1913

April 18.

B.C. COPPER CO. v. McKITTRICK

Master and servant—Practice—Arbitration—Award—Filing under paragraph 8, Second Schedule, Workmen's Compensation Act, 1902—Action to set aside—Jurisdiction—Workmen's Compensation Rules, 1904, r. 63—New trial, refusal of.

Where the award of an arbitrator under the Workmen's Compensation Act is filed under paragraph 8 of the Second Schedule, and thereby becomes enforceable as a County Court judgment, an action to set aside the judgment and execution issued thereon is properly brought in the Supreme Court (GALLIHER, J.A. *hesitante*).

Judgment of HUNTER, C.J.B.C. reversed.

APPEAL from the judgment of HUNTER, C.J.B.C. in an action tried at Vancouver on the 14th of February, 1913. One Grover C. McKittrick, a labourer, was killed at Greenwood, B.C., on the 28th of May, 1910, while in the employ of the plaintiff Company. Deceased's father, Ewing A. McKittrick, a resident of the State of Indiana, U.S.A., and one of the defendants in this action, filed particulars of claim under the Workmen's Compensation Act, 1902, in the Supreme Court on the 20th of October, 1910. Subsequently MURPHY, J. appointed BROWN, Co. J. an arbitrator under the statute. The defendant

Statement

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April 18.

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Statement

Leggatt, who was the defendant McKittrick's solicitor, applied for a summons on the 13th of December from the arbitrator, returnable on the 20th of December, for a commission to examine the defendant McKittrick in the State of Indiana. On the 16th of December the plaintiff Company's solicitor, through their agent in Indiana, succeeded in getting the defendant McKittrick to accept $250 in full settlement of his claim. The next day the plaintiffs' solicitors advised the arbitrator and the defendant Leggatt of the settlement. But the latter, upon asking his agent in Indiana for advice as to the settlement, and being informed that no settlement had been made, advised the arbitrator of this, and moved to proceed with the arbitration. The arbitrator proceeded, the plaintiff Company not being represented at the hearings (although duly notified), and gave his award for $1,500, which was filed in the County Court. The defendant Leggatt issued execution and garnisheed the Company's bank account.

On the 8th of December, 1910, this action was brought in the Supreme Court to set aside the judgment and for an injunction to restrain the defendants from proceeding under the execution and garnishee order. Upon the hearing the trial judge dismissed the action, holding that these proceedings should have been brought in the County Court.

The appeal was argued at Vancouver on the 17th and 18th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

S. S. Taylor, K.C., for appellant Company: When an award is filed in the County Court under paragraph 8 of the Second Schedule of the Workmen's Compensation Act, the award does not become a judgment of the County Court, but is simply "enforceable as a judgment of the County Court": *Bailey* v. *Plant* (1900), 70 L.J., Q.B. 63. The Act gives every means to enforce an award so filed, but the jurisdiction is confined precisely to the wording of the Act: see rules 57 to 63 of the Workmen's Compensation Rules, 1904,* particularly rules 62 and 63.

*B.C. Gazette, 1904, p. 289.

Armour, for respondents: Under paragraph 8 of the Second Schedule of the Workmen's Compensation Act, 1902, in conjunction with rule 63 of the Workmen's Compensation Rules, 1904, the proper course for the plaintiff Company was to apply to set aside the judgment and execution in the County Court. The County Court judge has, under the paragraph, power to rectify the register: *Jacques* v. *Harrison* (1883), 12 Q.B.D. 136 at p. 165. In the circumstances we are entitled to a new trial.

MACDONALD, C.J.A.: I do not think that paragraph 8 of the Second Schedule of the Workmen's Compensation Act, 1902, enables the County Court judge to give the relief which the plaintiff is claiming in this action; therefore I think the action is properly in the Supreme Court. The question of the merits is another thing on which we will have to hear counsel.

MACDONALD, C.J.A.

The execution will be set aside, the money in Court, and interest, will be paid out to the plaintiffs, any additional interest will be paid by Leggatt. The sheriff to return the poundage and expenses which he deducted.

IRVING, J.A.: I think the case will have to go back for a new trial.

IRVING, J.A.

MARTIN, J.A.: Clause 8 does not empower a County Court judge to give the relief which the learned trial judge appealed from contemplated when he dismissed the action. Therefore the appeal must be allowed.

MARTIN, J.A.

GALLIHER, J.A.: I merely wish to say that while I will not disagree with my learned brothers, I have not absolutely reasoned it out as to the effects of paragraph 8, in view of the regulations for procedure under rule 63.

GALLIHER, J.A.

Appeal allowed.

Solicitors for appellants: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondents: *Davis, Marshall, Macneill & Pugh.*

COURT OF APPEAL

1913

Jan. 30.

TRAWFORD v. B.C. ELECTRIC RY. CO.

TRAWFORD *ET AL.* v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Damages—Injury resulting in death—Release granted by deceased after injury—Action by defendants—Release pleaded in bar of action—Fraud—Families Compensation Act, R.S.B.C. 1911, Cap. 82—Right to attack release without repayment of consideration money—Absence of personal representative.

In an action for damages for the death of a husband and father, defendants set up that deceased had, after the injury, executed an agreement, in consideration of the payment of $1,000, releasing defendants from present and future liability to himself or his heirs. Plaintiffs' answer was that the release had been fraudulently obtained. They sued under the Families Compensation Act, there being no executor or administrator of deceased's estate. The only evidence given at the trial was the proof of deceased's signature to the release. The trial judge took the case from the jury and dismissed the action because plaintiffs had not brought into Court, to abide the result of the trial, the $1,000 paid by defendants to deceased.

Held, that plaintiffs had not, under the statute, a right of action independent of the right which deceased had for his injuries.

Held, also, that the case on appeal must be considered as before the Court on demurrer, and that it must be assumed that the allegations in the statement of claim and reply were true and that the release was obtained fraudulently.

Held, also, that although the plaintiffs were not the legal personal representatives of deceased, and were not parties to the release, yet they had a right to attack it on the ground of fraud when set up in bar to their claim under the statute, without repaying or tendering the $1,000 or directly asking to have the release set aside.

Statement

APPEAL by plaintiffs from the judgment of MURPHY, J. taking the case from the jury at the trial of an action by the widow of a man killed on the defendant Company's railway. The action was tried at Vancouver on the 13th of June, 1912. The facts are set out in the reasons for judgment of MACDONALD, C.J.A.

The appeal was argued at Vancouver on the 14th and 15th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Argument

Hart-McHarg, for appellants: As to the point raised at the

trial that as the deceased had signed a release, and we had not brought the money into Court, therefore an action would not lie, see *Stewart* v. *Great Western Railway Co. and Saunders* (1865), 2 De G.J. & S. 319; *Hirschfeld* v. *London, Brighton & South Coast Railway Co.* (1876), 46 L.J., Q.B. 94; *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527; *Johnson* v. *Grand Trunk Railway Co.* (1894), 21 A.R. 408. The question of release is for the jury: *Ellen* v. *Great Northern Railway Co.* (1901), 17 T.L.R. 453; *Read* v. *Great Eastern Railway Co.* (1868), L.R. 3 Q.B. 555. An action under Lord Campbell's Act is different from one that the injured person would bring himself: *Pym* v. *Great Northern Railway Co.* (1862), 31 L.J., Q.B. 249. As to what is a new cause of action, see *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59. We do not have to bring a fresh or separate action to set aside the release complained of here.

[MACDONALD, C.J.A.: You have only the right of action arising out of the man's death.]

If the defendants go as far as to make these settlements, they must take the risk of the injured person dying, and having an action such as this brought. We say we inherited a cause of action which is not entirely new, and which was not extinguished by the release.

Argument

L. G. McPhillips, K.C., for respondent Company: *Ellen* v. *Great Northern Railway Co.* is against the appellants. The only answer made to us here is that the release was obtained by fraud. In the *Ellen* v. *Great Northern Railway Co.* case, the pleadings set up that the release was merely a receipt, but the Master of the Rolls says it was evidence of an agreement. Plainly, the document here is an agreement. The only person who could raise a question on that point would be someone representing the deceased, and there is no one here in that capacity. Had the deceased survived here he would not have had a cause of action; therefore the widow has no such right. In any event, the plaintiffs must produce the money which they have received. If they seek equity, they must do equity; and further, we paid him on the basis of the Employers' Liability Act, and have overpaid him.

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[IRVING, J.A.: Have you considered section 4 of the Families Compensation Act?]

Under those circumstances, they must bring the money into Court.

[IRVING, J.A.: Have you ever found a case outside of that of a mortgagor or mortgagee where the money was brought in?]

He cannot hold what he has got and sue on the agreement which has given him what he has got, unless he puts us back in our original position.

Hart-McHarg, in reply: We did not receive that money; the deceased received it.

[MACDONALD, C.J.A.: If you are entitled to take the place of an administrator, would not you be charged with the same duties? You would have to bring in the money whether you recovered it or not ultimately, because you are asking now to recover compensation of which this $1,000 forms a part.]

Even under *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527, the Court cannot ask us to bring that money in. We were willing to have that amount deducted from any verdict returned.

Argument

[MACDONALD, C.J.A.: But if the jury brought in a verdict for nothing, then how could you deduct $1,000 from nothing? You must satisfy the Court that the plaintiff in this case, suing as dependant, has the same right to attack a document executed by her husband as he would have had if he lived; assuming that she can do so, ought she be allowed to do so unless she puts the defendants in their original position by bringing the money into Court?]

Yes, and then we rely on *Lee* v. *Lancashire and Yorkshire Railway Co. supra,* and *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59.

Cur. adv. vult.

30th January, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiffs are the widow and children of George Trawford, deceased, who, it is alleged, died of injuries caused by defendants' negligence. There is no executor or administrator. The action was, therefore, brought by the widow and children in virtue of the right given by the

Families Compensation Act, being chapter 82 of the Revised Statutes of British Columbia, 1911, which provides that if there be no executor or administrator of the person deceased, or, if there being such, no action shall have been brought within six months of his death by the executor or administrator, then and in every such case such action may be brought by and in the name of the person or persons for whose benefit such action would have been brought if brought by the executor or administrator, and shall be for the benefit of the same person or persons.

In their statement of defence the defendants allege that in his lifetime the deceased accepted $1,000 from them in full satisfaction of the injuries from which he afterwards died, and signed an agreement releasing the defendants from all present or future liability to himself or to his heirs.

The plaintiffs, in their reply, allege that the agreement was obtained by wilful misrepresentation. When the action came on for trial, counsel for the defendants took the point that the defendants could not, in the face of the release, the execution of which by the deceased was proved, succeed, because (1) they had no status to attack the release, not being parties to it, and not being the legal personal representatives of the deceased; (2) they had not repaid or tendered the said $1,000; and (3) they had not in terms asked to have the release set aside, but had merely set up in their reply the defendants' fraud in obtaining it.

Mr. *Hart-McHarg,* for the plaintiffs, advanced an argument which, if sound, would meet all of these objections, namely, that the plaintiffs were by the said statute given an independent right of action which the injured man had no power to defeat by an act of his own. This contention, however, is effectually disposed of against the plaintiffs by the decisions in *Read* v. *Great Eastern Railway Co.* (1868), L.R. 3 Q.B. 555; *Griffiths* v. *The Earl of Dudley* (1882), 9 Q.B.D. 357; and *Ellen* v. *Great Northern Railway Co.* (1901), 17 T.L.R. 453. It was argued on the other side that *Pym* v. *Great Northern Railway Co.* (1863), 4 B. & S. 396, and *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59, were authorities to the contrary, but I do not so read them. Lord Blackburn, in the last-mentioned case,

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does not, as I understand him, in any way modify his views as expressed in the earlier case of *Read* v. *Great Northern Railway Co., supra.*

The trial was not allowed to proceed, the only evidence taken being the proof of the deceased's signature to the release. The learned judge thought the action should be dismissed because the plaintiffs had not repaid the said sum of $1,000. The case, therefore, must be considered as if it were before the Court on demurrer. We must assume that the allegations made in the statement of claim and in the reply are true, and that the release was obtained by the defendants by fraud.

The first objection rests upon this, that the legal personal representative only of the deceased could attack the release. The question resolves itself into two parts. First, are not these plaintiffs, in contemplation of the statute, the legal personal representatives of the deceased in respect of everything necessary to assert their rights in an action of this kind? And secondly, had they not an interest in the subject-matter of the release, inchoate though it may have been, when the release was obtained, yet which independently of representative capacity entitled them to shew that a document set up against them as destructive of that interest was obtained by fraud?

MACDONALD, C.J.A.

We were not referred to any authorities upon this question, but, giving the statute and every provision and enactment thereof "such fair, large and liberal construction and interpretation as will best insure the attainment of the object of the Act, and of such provision or enactment, according to their true intent, meaning and spirit," I think the plaintiffs were intended to be put in just as strong a position with respect to everything appertaining to the action as would be an executor or administrator. To hold otherwise would in some cases at all events be to defeat the manifest intention of the Act.

The authorities above referred to on another branch of the case make it clear that the deceased could, by a valid instrument of release, have barred the right of his legal personal representative or dependants, but have not those who, in the absence of fraud would have been barred, a right independently of any representative capacity to attack a fraudulent instrument

set up against them? It occurs to me that this question is not necessarily one of rescission.

Then as to the second part of the question. Is it not sufficient when the fraudulent nature of the release is admitted or proven, to say that defendants shall not be allowed to defeat the plaintiffs' right by means of an instrument so obtained? Before the Judicature Act, the practice in such cases as this was to file a bill in equity to restrain the defendant from relying on such an instrument in an action at law. Since that Act, like relief can be obtained without multiplicity of action. In *Stewart* v. *Great Western Railway Co. and Saunders* (1865), 2 De G.J. & S. 319, it was not rescission, but an injunction that was granted, and now both the legal and equitable questions can be disposed of in the one action, and if the Court finds fraud it, I think, should refuse to give effect to a plea of release where it is shewn that the release is fraudulent, without necessarily rescinding the instrument.

I shall deal with the other objections together. Shortly, they are that the proper course for the plaintiffs to pursue was to ask for the rescission of the fraudulent agreement and to repay or tender to defendants the said sum of $1,000. Perhaps, though I do not say so, the plaintiffs' pleadings may be open to some objection. But no motion was made to strike out any part of them as embarrassing or as shewing no ground for relief. From the several cases to which we were referred it would appear that the course adopted here is that usually followed since the Judicature Act; that, at all events, is the inference which, in the absence of full statements of fact and pleadings in said cases, I should draw. In any case, I do not think the proper course at the trial was to dismiss the action because of any defect in the pleadings, nor do I understand that that was the ground upon which the learned judge did so. It was that the $1,000 had not been repaid. The case principally relied upon by the respondents was *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527 at p. 532, where James, L.J. incidentally mentioned the practice which obtained where rescission was asked for on the ground of mistake. In that case no fraud was alleged.

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In *Lagunas Nitrate Company* v. *Lagunas Syndicate* (1899), 2 Ch. 392 at p. 423, Lindley, M.R. said:

"A fifth principle is that a voidable contract cannot be rescinded or set aside after the position of the parties has been changed, so that they cannot be restored to their former position. Fraud may exclude the application of this principle, but I know of no other exception."

There are many cases in which it has been laid down that in order to obtain rescission of a contract, even when obtained by fraud, the party claiming rescission must be in a position to make restitution. For instance, were a purchaser to seek to rescind a contract for the sale of land, or of a chattel, after the land had been conveyed or the chattel delivered, he could not have rescission if unable to re-convey the land or to re-deliver the chattel. Here no specific thing has been conveyed or delivered, but a sum of money has been paid. The defendants are entitled to have it taken into consideration on the assessment of the damages. Moreover, the doctrine of restitution is an equitable one, originating in the Court of Chancery, and is based upon the maxim that he who seeks equity must do equity. But its application must depend on the circumstances of the particular case. I think it would be most inequitable to hold in the circumstances of this case that because the plaintiffs did not repay the money paid to the deceased, they should be denied the relief which but for defendants' fraud they could have claimed, and, on the facts as we must assume them, could have obtained. As I have already said, the inference I draw from the cases cited in argument is that what is, I think, in this connection inaptly called restitution, does not seem to have been insisted upon in cases like the present. In *Stewart* v. *Great Western Railway Co. and Saunders, supra,* the release was, as in the present case, obtained by fraud, and a small sum of money had been paid to the injured man. He afterwards brought an action for damages for his injuries, and the release was set up as a defence. He filed a bill in equity to restrain the defendants from setting up the release, and this was the relief granted. It was not suggested there that he must first repay the £15 which had been paid to him. It appears to have been assumed that the £15 could be treated as a payment on account. It may be said that in that case the document was no other than a receipt,

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but the Court granted relief on the assumption that it was more than that. In *Johnson* v. *Grand Trunk Railway Co.* (1894), 21 A.R. 408, the release was got after the statement of claim was delivered, and behind the back of the plaintiff's solicitor. The defendants pleaded the release in their defence and the reply alleged that it was improperly obtained. The learned trial judge first dealt with the issue respecting the release, and held that it could not be set up against the plaintiff. On appeal he was sustained. There is no suggestion in that case that there was any serious objection to the pleadings, which appear to have taken the same form as those in the case at bar. A number of other cases are of the same character. For these reasons, I think the learned trial judge was wrong in dismissing the action.

MACDONALD, C.J.A.

There should be a new trial.

IRVING, J.A.: I would allow this appeal. The test of the right to sue under Lord Campbell's Act is whether an action could have been maintained by the deceased in respect of his injuries: *Williams* v. *Mersey Docks and Harbour Board* (1905), 1 K.B. 804 at p. 807.

The release, if it amounts to an agreement of accord and satisfaction, is a bar to the action; if it does not, then I can see no reason why the plaintiffs should not proceed with their action. A receipt is never conclusive evidence of an agreement, though it is evidence of it. Whether the agreement does or does not amount to an accord and satisfaction is a question of fact, and can be tried by the jury at the same time that the other issues raised are being tried.

IRVING, J.A.

It is admitted that if the personal representatives were parties to this action, it would be open to them to contest the validity of the release. As sections 3 and 4 shew that any other claimant proceeding under Lord Campbell's Act is to have all the rights of the executor, that admission seems to me to be conclusive in the plaintiffs' favour.

As to bringing the amount of money paid by the defendants to the deceased as a condition precedent to setting aside the release. In *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527, it was said that if the plaintiff wished to set

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up the contention that he gave the receipt under mistake he would be compelled to bring into Court the money he had received. In that case fraud was not set up. The only equity set up was that the plaintiff claimed that he had signed the receipt subject to a stipulation that in a certain event he should not be bound by its terms, and that as that event had happened, resort to equity was necessary. James, L.J. points out that if the plaintiff had set up a different equity, *viz.*: that the document had been given under a mistaken impression as to its effect, brought about by the agent's representations, then in such a case a return of the money paid to the company would be necessary; but the case set up here is wholly different. The reply set up in this case is undue influence and misrepresentation. Mistake stands on a different footing from fraud. On the footing referred to by James, L.J., there had been no real contract, no meeting of the minds; the money had, therefore, never been paid for value, and as the Courts of Equity had a general rule that where a person was entitled to money, he was entitled to have that money secured, so that there would be no loss to him, that was just and right in a plea of that kind; but it was not just and right where fraud is set up. In *Stewart* v. *Great Western Railway Co. and Saunders* (1865), 2 De G.J. & S. 319, where fraud was charged, there was no talk about paying into Court.

IRVING, J.A.

In this case the plaintiffs have no money in their hands belonging to the defendants. It is quite consistent with the case set up in the reply that the $1,000, or a great part of it, would properly belong to the estate of the deceased. Supposing for a moment that the plaintiffs did pay over to the defendants the $1,000 and that the trial went on; if the plaintiffs won, the $1,000 could not be taken into account by the jury in fixing the compensation. The deceased's estate would have $1,000, the defendants would have $1,000, and the successful plaintiffs would have their damages, but for the privilege of suing they would have paid $1,000. Or take the other contingency: if the plaintiffs lost the action, the defendants would still retain the $1,000. If the Court is right in directing that the plaintiffs ought to repay the $1,000 as a condition to going to trial on a

charge of fraud, it would be absurd to expect that the Court would, after the charges had failed, order the money to be repaid to the plaintiffs.

The plain sense of the matter is that this is a new and independent action to which the defendants are liable, and the plaintiffs wish to shew that the bar the defendants would set up is not really and truly a bar.

MARTIN, J.A.: While I agree with my learned brothers that the appeal should be allowed, yet I consider it desirable to make the following observations in order to avoid any misconception of my views on two aspects of this important case.

The document set up by the defendants herein is, I am satisfied, on its face, essentially an agreement for settlement, and not a mere receipt, as was the case in *Ellen* v. *Great Northern Railway Co.* (1901), 17 T.L.R. 338, and 453; nor are the pleadings similar—see the effect of the statement of claim stated succinctly by Mr. Justice Bucknill at p. 338—upon which state of facts and circumstances the judgment proceeded. No such case is made out here, but we have in answer to the defence of a formal release of all claims present and future, merely the allegation that it was "obtained by the undue influence and wilful misrepresentation of the defendants, their servants and agents," (without stating in what respect), and that it was made when the plaintiff "was without legal advice, was very ill, and died shortly afterwards." No formal request is made that the agreement should be rescinded or set aside, the position taken being that as it was obtained by fraud, it cannot stand to defeat the plaintiff's rights. For the purposes of this appeal it must be assumed that the allegations of fraud are well founded. In my opinion, there was nothing which rendered it necessary to submit this document as such to the jury, because on its face it is one solely for construction by the Court, and is a complete defence, including as it does those elements which were wanting in the receipt in the *Ellen* v. *Great Northern Railway Co.* case and in *Lee* v. *Lancashire and Yorkshire Railway Co.* (1871), 6 Chy. App. 527. But while there is nothing to shew on the face of the release that it was fraudulently obtained, or that the

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settlement was not in every way equitable, yet at the same time the plaintiff was entitled to go to the jury on the issue of its having been obtained by fraud; and if he were alive and attempting to avoid its consequences on the ground that he had entered into it "on the express condition that he should not thereby exclude himself from further compensation if his injuries eventually turned out to be more serious than was then anticipated," then he would come within the scope of the observations made by Lord Justice James in the *Lee* case, *supra,* at pp. 532-3:

> "Of course, it might be open to the plaintiff to say that if the receipt does exclude him from further compensation, then he has a right to have it set aside, because he gave it under a mistake, produced by the representations of the company's agent, who stated that it would not so exclude him. The plaintiff, however, was not disposed to rely on that equity, because he could get no relief in this Court on that ground, except on the terms of giving back the £400, and being put exactly in the same position as he was in when the transaction was completed."

But, as Lord Justice James pointed out, the facts in that case shewed that any misconduct on the part of the defendant company "is entirely out of the question. The only equity raised by the bill is, that the agent of the company agreed with the plaintiff that he should not be excluded from further compensation," and it was upon that equity that the plaintiff would have to refund the amount paid him. In this case fraud is alleged, and therefore, the rule as to refunding does not apply.

MARTIN, J.A.

It was contended on behalf of the plaintiff that as this is an action under Lord Campbell's Act (9 and 10 Vict., Cap 93, 1846), which, on the authority of *Seward* v. *"Vera Cruz"* (1884), 10 App. Cas. 59 at p. 70, is a new and distinct cause of action in all respects from that which might have been maintained by the deceased if he had lived; therefore, the present plaintiffs are in no way bound by, and can legally ignore any settlement, however just and equitable, that the defendants made with the deceased, and that they took the risk of being sued again by the beneficiaries of the injured and fully compensated party, in case he died. That is going to an extreme length, a length to which I think equitable principles would set bounds, but in this case the answer to it is that if as a matter of fact the injured party has come to a *bona-fide* settlement with the negli-

gent author of his injuries, and has released it from all liability in respect thereof, then he is no longer in the position of being one who is "entitled (as) the party injured to maintain an action and recover damages in respect thereof" under the third section of the Families Compensation Act, Revised Statutes of British Columbia, 1911, chapter 82. Nor is the author of the injury in such case any longer in the position of being "the person who would have been liable if death had not ensued," and consequently "liable to an action of damages notwithstanding the death of the person injured," because that liability has been extinguished by the act and agreement of the parties, and as no action could be thereafter "maintained" by anyone in such circumstances, the whole groundwork for "every such action" at the instance of others under section 4 has gone. This is the inevitable result of what Lord Justice James said in *Lee* v. *Lancashire and Yorkshire Railway Co., supra,* p. 531, that if the defendant company there had accepted the plaintiff's offer of settlement, "nothing whatever could have been urged against them." What cause of action can an injured party "maintain" after such an agreement and settlement? Clearly none. And if he could "maintain" none in his lifetime because it had suffered a legal death at his own hands, how can it be re-created by the mere fact of his own death? There is nothing, in short, in such a case for the statute to take effect on.

MARTIN, J.A.

Appeal allowed.

Solicitors for appellants: *Abbott & Hart-McHarg.*
Solicitors for respondents: *McPhillips & Wood.*

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REX v. BOGH SINGH.

Criminal law—Perjury—Case stated—Stenographer's report of evidence taken through interpreter—Voluntary statement of prisoner to constable after arrest—Admissibility.

REX
v.
BOGH SINGH

A transcript of the stenographer's notes of what an interpreter said was the testimony of the witness must govern in the absence of evidence to the contrary.

A voluntary confession made by a prisoner to a constable after arrest is admissible in evidence.

APPEAL by way of case stated, from the judgment of MURPHY, J. and the verdict of a jury on a trial of a charge of perjury. Two Hindoos, Malkland Singh and Issher Singh, were tried for unlawfully wounding one Dharm Singh. The accused (Bogh Singh) was a witness on the trial for the prisoners and was examined through an interpreter, whose answers were taken down by the stenographer.

The charge in the indictment against the accused was as follows:

"That he did upon his oath, falsely, wilfully and corruptly depose, swear, and give evidence in substance and to the following effect, that is to say: That Issher Singh, one of the said prisoners, went with the said Bogh Singh from New Westminster to Vancouver, on the quarter past six car on the evening of the fourteenth day of August, 1911, and he, Bogh Singh, returned at eleven o'clock on the same evening. Whereas in truth and in fact the said Issher Singh was during the whole of the time between a quarter past six and eleven o'clock on the evening of the said fourteenth day of August, at the Small and Bucklin Mill in the said City of New Westminster and was not in the City of Vancouver as he, the said Bogh Singh, well knew when he did so depose, swear and give evidence as aforesaid, and the said Bogh Singh did thereby then and there commit wilful and corrupt perjury against the form of the statute in such case made and provided and against the peace of Our Lord the King, His Crown and Dignity."

Statement

On the trial the stenographer's notes were put in, and the portion that purported to set out the statement made by the accused, upon which the charge was founded, differed from the averment in the indictment in that the words "in the evening,"

which were in the averment, did not appear in the notes. A witness named Jawallah Singh, on the other hand, heard the accused give his evidence, and stated that the words "in the evening" were included in his statement as to his going to Vancouver with Issher Singh. The trial judge, however, directed the jury to disregard Jawallah Singh's evidence, because he was giving testimony as to what a man said in his own language and not what was translated to the Court.

There was some question as to the accuracy of the interpreter's answers as, during the first trial, the interpreter complained that the Hindoo witnesses would not give straight answers. When, however, the trial judge threatened imprisonment if they did not answer properly, there was no difficulty.

After the arrest of accused, he made a voluntary statement to the constable that he did not go to Vancouver with Issher Singh on the 14th of August, as he had stated in evidence at the former trial. The constable had not warned the prisoner, but had not questioned him or done anything that would tend to induce him to speak.

The trial judge put the following questions:

"(1) Was I right in admitting the evidence of David Exley as to the confession of Bogh Singh?

"(2) Was I right in refusing to take the case from the jury on the ground that there was no variance between the evidence and the averment in the indictment 'that Issher Singh, one of the said prisoners, went with the said Bogh Singh from New Westminster to Vancouver on the quarter past six car on the evening of the fourteenth day of August, 1911, and he, Bogh Singh, returned at eleven o'clock on the same evening'?"

Statement

Counsel for the prisoner moved by notice of motion to add two further questions for the consideration of the Court that were refused by the trial judge. They were as follows:

"(1) Was I right in allowing the evidence of Jawallah Singh to supplement or add to the record of the evidence of Bogh Singh?

"(2) Was there sufficient evidence to prove that Bogh Singh gave the evidence attributed to him and did not give any other evidence which would qualify or explain the same or give it another interpretation?"

The appeal was argued at Vancouver on the 16th and 21st of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Mowat, for the prisoner: The averment in an indictment for

Argument

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perjury must be proved precisely: Russell on Crimes, 7th Ed., 492, 494; *Reg.* v. *Bird* (1891), 17 Cox, C.C. 387. The evidence shews there are grave doubts as to the interpreter giving the answers of the Hindoo witnesses correctly: *Rex* v. *Wylde* (1834), 6 Car. & P. 380; *Rex* v. *Prasiloski* (1910), 15 B.C. 29.

Argument

J. R. Grant, for the Crown, referred to *Rex* v. *Allen* (1911), 16 B.C. 9, 44 S.C.R. 331; *Reg.* v. *Sonyer* (1898), 2 Can. Cr. Cas. 501; *Rex* v. *Walker and Chinley* (1910), 15 B.C. 100; *Rex* v. *Aho* (1904), 11 B.C. 114; *Rex* v. *Ellis* (1910), 2 K.B. 746 at p. 763.

16th April, 1913.

MACDONALD, C.J.A.: We need not call upon you regarding the second question, Mr. *Grant*. The question is unintelligible as it appears on this notice of motion, but after hearing the argument, I think I understand what Mr. *Mowat* is attempting to get the Court to direct the trial judge upon.

As I understand it now, his proposition is this: that it is not sufficient that the stenographer take down the evidence as interpreted by the interpreter, and swear that what he has taken down is a true report; that that is not sufficient proof of what took place at the trial, but that the accuracy of the interpretation must also be proven, particularly as the interpreter says there were some things he did not give to the stenographer, things that had no relevancy to the matter at all. For instance, he uses the expression: "And you, in giving your interpretation, do not give all the rigmarole they give? I had to check them several times, you will remember, Mr. Russell." But he then added: "I gave the substance of it fairly and faithfully."

MACDONALD, C.J.A.

If that is not sufficient to prove what took place at the trial, in the absence of satisfactory and clear evidence that something material has been left out or wrongly put in, then I do not know how the record at the trial can be proven. Mr. *Mowat* admits he is not trying to shew that anything material has been left out or anything has been wrongly put in. Under these circumstances, I would refuse the motion so far as the second question is concerned.

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IRVING, J.A.: A written report by the stenographer of what the interpreter stated was the testimony of the witness must, in the absence of evidence to the contrary, be accepted as correct. We should refuse this second application.

MARTIN, J.A.: I agree, and in no event would I be a party to sending the proposed second question back to the learned trial judge. It is unintelligible on its face as it now stands, and even after the long explanation we have had, it is none too luminous. Apart from that, I think it amounts to this: if the contention put before us is to prevail, the administration of justice would collapse.

MARTIN, J.A.

GALLIHER, J.A.

GALLIHER, J.A.: I refuse to send this question back.

Argument

Mowat: The principle is that a constable must keep his mouth shut and his ears open: *Trepanier* v. *The King* (1911), 19 Can. Cr. Cas. 290; *Rex* v. *Best* (1909), 1 K.B. 692; 22 Cox, C.C. 97; *Rex* v. *Bruce* (1907), 13 B.C. 1; *Reg.* v. *Romp* (1889), 17 Ont. 567. This man being a Hindoo, not able to speak English, and not understanding our customs, I submit a voluntary confession by him to a constable, without any previous warning, should, under the circumstances, be inadmissible.

Grant, referred to Russell on Crimes, 7th Ed., 491, 502.

Mowat, in reply.

21st April, 1913.

Judgment

Per curiam: We do not think we ought to send this back to the learned trial judge to state the first question. There are some things in his charge which might be interpreted to mean that the jury were entitled to look at Jawallah Singh's evidence in ascertaining whether the accused misled the Court or not; but in view of the fact that he specifically told the jury that they were to eliminate from their consideration the evidence of Jawallah Singh, we think that is sufficient under the circumstances of this case. Each case, of course, stands upon its own merits. The motion is therefore dismissed.

MACDONALD, C.J.A.

MACDONALD, C.J.A. [on the merits]: I think we will have to refuse the relief asked for and dismiss the appeal. Had it not

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been for the confession, I should have come to the opposite conclusion, but I think the confession is admissible in the first place, and in the second place, it concludes the matter against the prisoner.

MARTIN, J.A.: I agree.

IRVING, J.A.

IRVING, J.A.: I agree. The case of *Rex* v. *Bruce* (1907), 13 B.C. 1, settles the principle of the admission of the confession.

GALLIHER, J.A.

GALLIHER, J.A.: I take a different view. Shortly, I do not think that confession, such as it is, is sufficient to turn the scale. Before bringing home perjury to a man, you must bring home practically the words uttered by the prisoner in giving evidence, at all events as far as they are relative to the issue, and apart from the confession, there is no question in my mind that they have not done so. I do not think the confession, reading it as a whole, is sufficient, as I said before, to fill up that gap.

Solicitor for the prosecution: *The Attorney-General of British Columbia.*

Solicitors for the prisoner: *Russell, Mowat, Hancox & Farris.*

BAILEY v. GRANITE QUARRIES, LIMITED.

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1913

April 14.

BAILEY v. GRANITE QUARRIES

County Court—Practice—Motion to strike out plaint—Application of Supreme Court rules—Advisableness of—County Courts Act, R.S.B.C. 1911, Cap. 53, Sec. 77.

On a motion to strike out a plaint, the County Court judge having exercised his discretion as to the application of the Supreme Court rules, under section 77 of the County Courts Act, his decision is final and there is no appeal.

Per MACDONALD, C.J.A.: The County Court judge had no power to apply the Supreme Court rules, having regard to the fact that the County Courts Act and rules deal with the subject of pleadings.

Semble, as to whether the power given to County Court judges to apply the rules of the Supreme Court in the circumstances here is beneficial, or in the interests of uniformity of practice, and whether it does not tend to increase proceedings in such Courts by leading to multiplicity of interlocutory motions.

APPEAL from an order made by GRANT, Co. J. at Vancouver on the 12th of March, 1913, dismissing the defendants' application to strike out a portion of the plaint. Under an agreement dated the 1st of April, 1912, the plaintiff agreed to do certain work for the defendants, with the tug Vigilant, at $850 a month. On the 2nd of August a dispute arose as to what should be paid for certain extra work done with the tug that was not stipulated in the agreement. The parties could not agree, and as they separated the plaintiff intimated that he would not work under the agreement any longer unless his claim for extras was acceded to. The defendants, considering the contract at an end, hired other assistance. The plaintiff brought action on the 1st of October for the amount payable under the agreement for the month of August, pleading that he was ready and willing to continue working under the agreement, but that the defendants refused to allow him to do so. The judge held the defendants were justified in considering the plaintiff's refusal to do any more towing unless his claim for extras was acceded to as a termination of the contract, and dismissed the action. The plaintiff then brought this action for

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the amount payable under the same agreement for the month of September (less the earnings of the tug during that month), and for certain other small items, and this action was brought on the ground that the contract had been declared terminated on the 2nd of August by the judgment in the former action.

The defendants appealed, and the appeal was argued at Vancouver on the 14th of April, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for appellants, contended that the question of the validity of the contract was *res judicata*: Halsbury's Laws of England, Vol. 3, p. 332 (par. 465); *Birch* v. *Birch* (1902), P. 130. This is frivolous and vexatious litigation: *Stephenson* v. *Garnett* (1898), 1 Q.B. 677 at p. 681. The only difference between the two actions is that the first is for the amount payable under the agreement for the month of August and the second is for the amount payable under the same agreement for the month of September.

Griffin, for respondent: The action is under the same agreement as the former, but the issue may be different, and the evidence may be different. There is an equitable, moral right to try for the amount payable under the contract for a different month: *Lea* v. *Thursby* (1904), 90 L.T.N.S. 265; *Reichel* v. *Magrath* (1889), 14 App. Cas. 665; *Langmead* v. *Maple* (1865), 18 C.B.N.S. 255; *Darley Main Colliery Co.* v. *Mitchell* (1886), 11 App. Cas. 127. A County Court judge is limited to the power he has under the Act, and neither the Act nor the rules refer in any way to the striking out of pleadings. As to the application of section 77 of the Act, see *Robinson* v. *Fawcett and Firth* (1901), 84 L.T.N.S. 629. There is no inherent jurisdiction in the County Court: *Davey* v. *Bentinck* (1893), 1 Q.B. 185; *Republic of Peru* v. *Peruvian Guano Company* (1887), 36 Ch. D. 489; *Attorney-General of the Duchy of Lancaster* v. *London and North Western Railway Company* (1892), 3 Ch. 274.

Argument

Bodwell, in reply.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: My learned brothers think that the trial judge having exercised his discretion in the matter, it

would be a dangerous practice to permit appeals in cases of this kind. I do not disagree with that. I even go further. I think that the learned County Court judge had no power to apply the Supreme Court rule, having regard to the fact that the County Courts Act and rules deal with the subject of pleadings. Powers to amend are given, but none to strike out. Had the case been in the Supreme Court I should have had no doubt. I should have felt that it was a proper case for the exercise of the power. But I am not at all satisfied that the Legislature ever intended County Courts to hear motions by way of what is tantamount to demurrer. County Courts were intended to provide a simple and inexpensive forum where there should not be multiplicity of interlocutory proceedings.

MACDONALD, C.J.A.

The appeal will, therefore, have to be dismissed, with costs.

IRVING, J.A.: Assuming that the County Court judge has jurisdiction to grant the application, I think that in exercising that jurisdiction the judge must have very wide discretion. He had to determine whether he would deal with the matter then or leave it to be dealt with at the trial. If, in exercising that discretion, he dismissed the application, I think we should not interfere with his decision.

In reference to the jurisdiction of County Court judges, my view is that the intention of the Legislature was to make that practice as flexible as possible, so that he could deal with a matter in any way he might think fit, and there should be no review of the question of jurisdiction on appeal.

IRVING, J.A.

Whether it is a good thing to have a statute authorizing one County Court judge to make a ruling one way to-day, and another County Court judge to make a different ruling the next day, may be questioned, but apparently the idea is to make it, the machinery, as flexible as possible, so that the business of the Court can be dealt with as quickly as possible.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellants: *Bodwell, Lawson & Lane.*
Solicitors for respondent: *Martin Griffin & Co.*

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ARMISHAW v. B.C. ELECTRIC RY. CO.

ARMISHAW *ET AL.* v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Railways—Passenger on street-car—Alighting from car—Absence of conductor from platform—Negligence—Submission of questions to jury in such actions—Duty of trial judge as to—Duty of counsel as to.

The plaintiff was riding as a passenger on one of the defendant Company's cars. Upon the conductor collecting her fare she asked him to let her off at a certain place, to which he answered "all right." He then went into the motor vestibule in front and stayed there until after the accident. After turning a corner at plaintiff's destination the car stopped, and as the plaintiff was about to alight it started up again, throwing her to the ground, and from the fall she sustained injuries. At the time of the accident there were but three passengers in the car. The jury gave a verdict for $1,000 for the plaintiff and $500 for her husband.

Held, on appeal, that there was evidence upon which the jury might reasonably come to the conclusion that the Company was negligent.

Observations as to the duty of trial judges, particularly in negligence actions, to submit questions to be considered by the jury, and of counsel not to interfere in the exercise of that duty.

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action for damages, tried at Vancouver on the 5th of February, 1913. The facts appear in the headnote and the reasons for judgment on appeal.

The appeal was argued at Vancouver on the 30th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K. C., for appellant (defendant) Company: The plaintiff made a statement before the action that differed from the evidence at the trial. The jury answered some questions, but on my putting other questions, the judge, owing to the objections of plaintiffs' counsel, would not submit them to the jury. Whether the conductor was or was not attending to his duty cannot be the proximate cause of the accident: *Martin* v. *The Dublin United Tramways Co.* (1909), 2 I.R. 13.

R. M. Macdonald, for respondents: The important point in this case is whether the conductor carried out his duty to the passenger: *McDougall* v. *Grand Trunk R.W. Co.* (1912), 27 O.L.R. 369 at p. 377; *Dynes* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 429.

[MARTIN, J.A.: I think, Mr. *McPhillips,* you sympathize with what my learned brother, Mr. Justice IRVING, has said about the presumption of counsel trying to stop questions being put to the jury. I am quite in accord with what he said, but at the same time, if the evidence is there, the verdict can be sustained on the ground of the duty of the conductor. It is not for us to reject it.]

McPhillips: Possibly, having read the facts, it might have given your lordship a different view of the case.

[MACDONALD, C.J.A.: The salient facts are before us; we have the facts before us—you cannot contradict it as it is a finding of the jury—that she told the conductor she intended alighting there. We also have the fact before us that after that, he went forward to the front vestibule and entered into conversation with the motorman. We also have the fact that the car went some very considerable distance with the conductor in that position, apparently with his back to the woman, because he says he did not see her attempt to alight. We have also the fact of her statement, which we are entitled to believe, that the car stopped for a short time, too short for her to alight at the proper place. While she was attempting to do that, the car started up again and she was thrown off. The fair inference is that had the motorman had a signal from the conductor to stop and to start, as it was the conductor's duty to give, the accident would not have happened.]

Argument

McPhillips: I admit that there is a finding against me as to the question of what his duty is. What does that finding mean? I say it does not mean all it is necessary for it to mean for your lordships to give the judgment my friend wants. What were the facts in regard to that? There were the letters and there was the story of the plaintiff at the trial; she told her story to the jury, and the solicitor who wrote the letters was counsel at the trial; he did not go in the box. The

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stenographer who took his dictation, and wrote the letters, was present at the trial; she was not called to go into the box. The jury did not have in mind which was the true story. They wanted to give a verdict for the plaintiff, but knew they could not put it that the car had stopped and started too quickly, because, in order to do that, they had to find which was the true story; but they said: Here is a way; that man was not in his proper position; we can say that and give a verdict for the plaintiff.

[MACDONALD, C.J.A.: Assuming the first story of the plaintiff is the true one, was not the conductor negligent in staying in the front of the car? I do not know that we can say that every person who steps on a car has a knowledge of the stopping places of that car. It stopped apparently at that corner, and was that stopping at that corner at which she was to get out not an invitation to her to alight? The conductor was not there to inform her the car was only stopping momentarily to turn the points; by reason of his not being there, or by reason of his neglecting his duty to see that his passengers alighted safely, she went down.]

McPhillips: That would amount to this, that the conductor should be there to watch and see that no person did get off until the car had completely stopped.

Argument

[IRVING, J.A.: Different persons, different requirements. If I were standing there, or a young man, we would not require the same amount of attention as an old lady hampered with a bag. I think, following up what the Chief Justice has said, that it was open to the jury to say that the conductor was negligent in not being at his post when he had been told by this lady she wanted to alight at that point. He ought to have been there to warn the old lady when she attempted to get out on the step.]

McPhillips: I do not know of any law that says we have to remember, if there are a hundred persons in the car, where they all want to get off.

[IRVING, J.A.: Not law, but it is a question for the jury. They might think a man could not remember if there were a large number of persons in the car, but with only three persons in

the car they might very easily think the Company was negligent, as the conductor was not there to tell her to keep her seat when the car only slowed up to take the points.]

McPhillips: We say the car did not stop at all. Cars do not stop to enter points; they slow down, but surely that was not an invitation for her to get off. It is quite clear that cars do not stop to enter points.

[MACDONALD, C.J.A.: It is not quite clear. I have seen them myself stopping to turn points.]

McPhillips: There were no points to turn; they were simply entering the points. If we had stopped to turn points it would be an entirely——

Argument

[IRVING, J.A.: I have no doubt she thought they were going to stop, and if your man had been there, attending to his duty, he would have prevented that accident. The jury have heard the evidence, and, as reasonable men, came to the conclusion that the Company was negligent.]

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: I would dismiss the appeal. I would like to state, in addition to what I have already said in the course of argument, this Court has laid it down it is the duty of the trial judges, in negligence cases particularly, to submit questions to be answered by the jury, where they (the judges) can properly do so. That having been said by this Court, I think it is the duty of counsel engaged in such a case to allow questions to be put and answers to be made. Counsel ought not to interfere with the judge in the exercise of that duty by pointing out or suggesting to the judge that the jury are not called upon to answer the questions. The privilege of not being cross-examined on their verdict is a privilege belonging to the jury, which privilege is not to be seized upon by counsel for the plaintiff or counsel for the defendant and employed as a device in order that the judge may be hampered in his charge.

MARTIN, J.A.

MARTIN, J.A.: I concur.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I concur with what Mr. Justice IRVING has said about questions to the jury.

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GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed. It seems to me, under the particular circumstances of the case, having regard to the small number of persons in the car, the time that the conductor was absent for a particular reason (the reason being that he thought a bell had been rung calling him to the front of the car), there was negligence. His first question to the motorman was answered in the negative, and I think his duty was no longer there, and his proper place was at the rear, looking after his passengers, and the jury, under all the circumstances, could reasonably have come to the conclusion they did that the conductor was guilty of negligence.

McPhillips: I would ask your lordships to allow costs.

MACDONALD, C.J.A.: The costs must follow the event.

McPhillips: I thought there was a new statute which gave your lordships discretion.

MACDONALD, C.J.A.: For good cause.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: As far as I am concerned, I think the jury were quite right in the conclusion they came to. It might have been wise on the part of counsel, and as to yourself you did do it, to ask that the answers be made more explicit. But I cannot say that what took place at the trial is good cause for disallowing costs.

Appeal dismissed.

Solicitors for appellants: *McPhillips & Wood.*

Solicitors for respondents: *MacNeill, Bird, Macdonald & Bayfield.*

PARSONS v. FRANCIS.

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1913

April 17.

PARSONS v. FRANCIS

Practice—Discovery—Examination for—Conduct money—Rules 370f, 370g and 370k.

It is essential, where the evidence on discovery is sought of a party resident some distance from the registry in which the action is brought, that the proper conduct money should be tendered.

APPEAL from an order made by CLEMENT, J. at Chambers in Vancouver on the 11th of February, 1913, directing that unless the defendant do attend for examination for discovery on the 11th of March, 1913, his defence be struck out. The order was made under marginal rule 370k on the ground that the defendant had refused or neglected to attend for examination pursuant to appointment.

The appointment in question was served under rule 370g, which provides that in lieu of personal service, service of an appointment upon his solicitor shall be sufficient upon the conduct money being paid or tendered. At the time of service of the appointment on the defendant's solicitors his residence was in Victoria, and it appeared that the proper conduct money was not paid or tendered.

Statement

The appeal was argued at Vancouver on the 17th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

E. M. N. Woods, for appellant (defendant): Where the party taking out an appointment under rule 370g knows that the opposite party is out of the jurisdiction and cannot properly attend, it is not the proper course to invoke this rule. In any event, the defendant, having his place of residence in the City of Victoria, was not tendered the proper conduct money. The words "an appointment" in rule 370g mean an original appointment as distinguished from a copy of an appointment referred to in rule 370f: *Foley* v. *Buchanan* (1908), 18 Man. L.R. 296; *Meyers* v. *Kendrick* (1883), 9 Pr. 363.

Argument

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Sir C. H. Tupper, K.C., for respondent: The defendant is a resident of Vancouver. But even in the event of his being a resident of Victoria, it is within the discretion of the judge to make this order and direct that the proper conduct money be paid: *Emerson* v. *Irving* (1895), 4 B.C. 56.

MACDONALD, C.J.A.: We are all of opinion that the proper conduct money was not paid or tendered. Of course, that being so, the judgment must be set aside, and the defendant is entitled to have it set aside as of right.

That, of course, affects the question of costs, and it seems to me it is a case where, if we had jurisdiction to deal with the costs against the event, in view of what took place between the solicitors, I should be disposed to give no costs, but it seems to me the costs must by statute follow the event. The rule as to good cause has been restored, and we might hear *Sir Charles* on that. I should be disposed, if we could do it, to refuse costs under the circumstances, but I am only speaking for myself.

MACDONALD, C.J.A.

The judgment will be set aside and the appeal allowed, with costs.

IRVING, J.A.

IRVING and MARTIN, JJ.A. agreed.

GALLIHER, J.A.: I agree, and have only one word to add, in case I might be misunderstood—that in view of my question as to the manner in which paragraph 8 is drawn, there did not seem to me to be direct evidence as to residence; but as that is not materially contradicted, I have come to the conclusion that the proper conduct money was not paid.

GALLIHER, J.A.

Appeal allowed.

Solicitors for appellant: *Brydon-Jack & Woods.*
Solicitors for respondent: *Tupper, Kitto & Wightman.*

POS v. JOHNSON.

MORRISON, J.

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May 8.

Pos v. Johnson

Master and servant—Contract—Severable—Breach of—Dismissal—Measure of damages.

The defendant employed the plaintiff under a written agreement in the following terms: "As a draughtsman and generally in survey work for three months or until the drafting and survey work in connection with a certain contract to survey certain Canadian Northern Pacific Railway Company's rights of way held by the employer, at $165 per month, and thereafter to complete a term of three years from the date of this agreement in the said employment at the rate of $125 per month." Plaintiff worked under the $165 wage for nine and a half months, when the defendant told him that the contract with the Canadian Northern Pacific Railway was completed and he (plaintiff) would in future work under the $125 wage. The facts were that, although the defendant had been paid in full for his work under the contract, the drafting had not been completed. On the following day the defendant asked the plaintiff to make certain changes in this drafting, which plaintiff refused to do under the $125 wage. He was dismissed.

Held, that there was a breach of contract and that the measure of damages be $165 per month from the date of plaintiff's discharge to the time of his new employment.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Kamloops on the 11th of October, 1912. The facts appear in the headnote and reasons for judgment. Statement

A. D. Macintyre, for plaintiff.
Fulton, K.C., for defendant.

18th December, 1912.

MORRISON, J.: This is a case involving a matter which, in my opinion, should have been left to the decision of experts in railway work. However, from the best consideration I can give the evidence, I think the plaintiff was without cause discharged by the defendant, who acted, I am bound to say, with too much precipitation in his dealings with the plaintiff, a man most competent and skilled in his line of work. I find there was a breach of the rather vague contract between them. The MORRISON, J.

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measure of damages to which I think the plaintiff entitled will be the amount he would have earned from the date of discharge to the time of his new employment, at the rate of $165 per month. There will be costs on the County Court scale, with liberty to either party to apply before the final order is taken out.

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Pos v. JOHNSON

The appeal was argued at Vancouver on the 7th and 8th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant.
Davis, K.C., for respondent.

8th May, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. I think the work the plaintiff was asked to do and refused to do at the time of his discharge was work in connection with the railway contract mentioned in his agreement of hiring.

IRVING, J.A.

IRVING, J.A.: I agree. I only wish to say this: it was not simply a refusal to find the plan; this was a pitched battle between these two men for a principle.

MARTIN, J.A.

MARTIN and GALLIHER, JJ.A. agreed.

Solicitor for appellant: *F. J. Fulton.*
Solicitor for respondent: *G. W. Black.*

BEATTY *ET AL.* v. BAUER.

MURPHY, J.

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March 13.

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June 26.

BEATTY v. BAUER

Contract—Building—Lease—Breach of—Rent fixed at percentage of value of land and cost of building—Damages—Measure of—Reference to ascertain damages—Jurisdiction of a judge to review findings of registrar.

Upon a reference ordered to assess the damages in an action for breach by the defendant of an agreement to erect and lease a hotel to the plaintiff for a term of years at a rental agreed upon:—

Held (MACDONALD, C.J.A. dissenting), reversing the finding of MURPHY, J. on an application to vary the registrar's report, that the plaintiffs were entitled to the difference, if any, between the agreed rental and the value of the term, and the registrar improperly excluded, as too remote, the testimony of those who, as part of their business or calling, take part in the buying and selling of hotels or in the selection of sites for that purpose. This evidence should be received and considered. It is for the registrar to say what weight should be given to it.

Per IRVING, J.A.: The general rule, where the parties to a contract have not themselves fixed the amount of compensation, and the wrong complained of is a breach of duty arising from an agreement, is that the measure of damages is the loss which ordinarily arises from similar breaches of similar contracts, but it is not the loss which, though in fact sustained, arose in consequence of the peculiar position of the person complaining, unless such peculiar position was known to the other side.

Held, at the trial, that the Supreme Court has jurisdiction to review the findings of the registrar on a reference to ascertain the amount of damages in an action for breach of contract.

APPEAL from an order of MURPHY, J. at Vancouver on the 13th of March, 1913, confirming the registrar's report as to damages in an action for breach of contract.

Statement

The facts were that on the 6th of November, 1908, the defendant entered into a written agreement with the plaintiffs whereby he agreed to erect a hotel building on lots 1, 2 and 3, in block 22, subdivision of district lot 541, in the City of Vancouver, which the plaintiffs, by the same instrument, agreed to rent for a term of 15 years from the date of completion. The rental was to be a clear 10 per cent. upon the value of the land and upon the actual cost of the building to be erected, the value

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of the land being agreed upon as $100,000 for the first three years of the lease and $110,000 for the balance of the term, plus any increase in taxes that might be levied during the currency of the term, as compared with the taxes payable in 1908. A memorandum of the same date was executed by the parties, providing that if any alteration or substitution of plans and specifications then agreed upon was made, as contemplated, the contract should not thereby be invalidated, but the plans and specifications finally agreed upon were to be taken to be the plans and specifications for the building, as referred to in the principal agreement.

The plans and specifications already prepared were signed by the parties. Subsequently new plans and specifications were agreed upon, but were not signed by any of the parties, and on the 17th of March, 1909, the defendant entered into a contract with a construction company for the erection of the building in accordance therewith, and about the same time the defendant notified the plaintiffs that the building would be ready for occupancy on the 18th of September, 1909, from which date he would expect rent to be paid. Plaintiffs thereupon ordered a large quantity of furniture, etc., for use in the hotel business. The contracting company failed to carry out their contract, and on the 10th of July, 1909, abandoned the work. Some negotiations took place between the parties looking to a new agreement, involving an alteration of the plans, but they proved abortive, and the defendant finally abandoned the idea of constructing a hotel building at all. The plaintiffs brought action for damages. The trial judge held in favour of the plaintiffs and directed a reference to the registrar at Vancouver to ascertain the amount of damages to which the plaintiffs were entitled. The registrar found that $6,675.85 should be allowed as the amount expended in furnishings for the proposed hotel, but allowed nothing for general damages, following *Marrin* v. *Graver* (1885), 8 Ont. 39.

Statement

The plaintiffs moved to vary the report on the ground that the registrar had erred in refusing to find and award general damages.

Davis, K.C., for plaintiffs.
Burns, for defendant.

13th March, 1913.

MURPHY, J.: In my opinion I have jurisdiction to review the findings of the registrar herein. The Supreme Court being a Court of first instance of plenary jurisdiction, any Act in force necessary to confer power to deal with a question may, I think, be invoked for that purpose. Therefore, if it is necessary to hold that this reference was under section 16 of the Arbitration Act to give me jurisdiction, I am prepared to do so. If so, marginal rule 478 or marginal rule 479 allows the Court to vary or remit the report for further consideration. In addition, I think there is inherent jurisdiction, at any rate, to vary such report, as the registrar is an officer of the Court: *Hill* v. *Hambly* (1906), 12 B.C. 253. Nor do I think that such jurisdiction is ousted by any particular wording of the judgment as drawn up and entered, whether it exists under either of the aforesaid rules or as one of the inherent powers of the Court. I am, however, of the opinion that the registrar acted on a correct view of the law. In *Kenny* v. *Collier* (1888), 8 S.E. 58, the measure of damages for not admitting a tenant into possession at the beginning of the term is stated to be the excess in the value of the term over the amount stipulated as rent. Again, in *Alexander* v. *Bishop* (1882), 13 N.W. 714, it is stated to be the market rental value, less the rent agreed to be paid. These are, of course, American decisions, but the same standard appears to have been adopted by the Appeal Court of Ontario in *Marrin* v. *Graver* (1885), 8 Ont. 39, where Armour, J. at p. 46 states:

"I would have allowed evidence that the plaintiff had agreed to assign or sub-let the premises at an advance over what he was to pay for them, or that they were worth more than what he was to pay for them; but no such evidence could be given."

Here, according to statements made to me in argument, the only evidence given was as to estimated profits in the business proposed to be carried on by the plaintiffs in the demised premises, and the increased selling value of the building site.

Mr. *Davis* admitted, as I understood him, that loss of estimated profit could not be the measure of damages, but con-

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tended that evidence thereof could be given to shew value of the demise to plaintiffs over and above rent reserved. But that is just what *Marrin* v. *Graver, supra,* as I read that case, decides cannot be done, as being evidence of a speculative kind which, because of its uncertainty, was inadmissible: see judgment of O'Connor, J. at p. 50. And if such evidence is to be rejected, I do not see how evidence as to increase in site value can be received. How can it be said that such a fact may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as enhancing the damages in case of breach, as required by the second branch of the rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341? As put by Mayne on Damages, 8th Ed., 72, the question is not what profit the plaintiff might have made, but what profit he professed to be purchasing. Not what damage he actually suffered, but what the other contemplated and undertook to pay for. The fact that the amount of rental is in part fixed by an assumed site value at first blush seems to lend some force to plaintiffs' contention for the admission of this evidence. But the argument is based on the assumption that site value is a constant indication of rental value, whilst it is notoriously nothing of the kind. In times of real estate inflation, site values, as indicated by prices paid, are far and away above rental value in the sense of securing any adequate return on capital invested. Just as profits of a business depend on a number of indeterminate factors, such as business ability, competition, dull or prosperous conditions of trade, so site values may depend on considerations of unearned increment, rumours as to development of adjacent property, and other factors equally uncertain. However that may be, such enhancement, assuming it can be transmuted into increased rental value, cannot, I think, considering the facts of this case, be held to be what the defendant contemplated and undertook to pay for in case of breach on his part. The rental, depending as it does in part on a per centum return on the site value, which site value is fixed by a sliding scale by the lease, exhausts, in my opinion, what can be reasonably said to have been in the contemplation of defendant under this head as damages when he undertook to pay in case of breach. If he had any idea of a

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further enhancement of site value over that provided for in the lease, the document indicates he would have stipulated for a correspondingly increased rental. If, then, the matter, at the time of his making the contract, was only present to his mind *sub modo,* it is, I think, impossible to adduce the tendered evidence, because of the requirements of the rule in *Hadley* v. *Baxendale, supra.* I therefore consider the registrar's report to be correct.

The appeal was argued at Vancouver on the 6th and 7th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Davis, K.C., for appellants (plaintiffs): This action is for breach of contract and the question is whether we are entitled to more than the actual disbursements paid on the strength of the contract. This is a fifteen-year lease and we claim the value of the lease, and the registrar should take this into account. The registrar is in precisely the same position as a board of arbitrators. The profits of the hotel are not the actual damages, but we claim it is material upon which he can base his decision as to the value of the lease. You must get at the true value of the hotel. We are entitled to the difference between the rent we agreed to pay and what a board of arbitrators would say the fair rental value is at the present time. We could sue at the end of the fifteen years, but suing now, the assessors must assess reasonably. In *Marrin* v. *Graver* (1885), 8 Ont. 39, it was held that the profits are not the test, but the difference in the rental value. The whole question is: What is the difference between the price you pay and the value? It is not a case of ulterior values at all.

Argument

[MACDONALD, C.J.A.: The parties agreed on the rental value when the agreement was signed, and that is the best evidence of its fair value. What has increased it since?]

The property value has increased since then and that would increase the rental value. There is no accurate test, but all the various points must be taken into consideration in coming to a conclusion.

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Argument

Bodwell, K.C., and *Burns,* for respondent (defendant): The plaintiffs must prove their damages. Damages for breach of contract cannot be measured by the loss of expected profits where the latter are uncertain and speculative and depend on so many contingencies that their loss cannot be traced to the breach with any degree of certainty: *Allis* v. *McLean* (1882), 12 N.W. 640; *Marrin* v. *Graver* (1885), 8 Ont. 39. The rule in *Hadley* v. *Baxendale* (1854), 9 Ex. 341, is that damages for breach of contract are such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract. The probable profits of a business of this kind is not a fair basis of estimating damages.

Davis, in reply: It does not follow that because it is difficult to come to an accurate conclusion as to the amount of damages, we cannot get any redress.

Cur. adv. vult.

26th June, 1913.

MACDONALD, C.J.A.: This is an appeal from MURPHY, J. confirming and adopting the report of the registrar at Vancouver, made on a reference to him to assess the plaintiffs' damages for breach by the defendant of an agreement to erect a hotel and lease it to the plaintiffs for a term of years.

The registrar assessed damages in respect of furnishings, crockery, glassware and silverware purchased by the plaintiffs in anticipation of their said tenancy, and with respect to this there is no complaint other than that he did not allow interest to the plaintiffs for the moneys so spent. He does not state why he did not allow interest; he allowed the full cost of these articles, together with freight charges, insurance, etc., and provided that on payment of their value by the defendant they should be handed over to him, being of no use to the plaintiffs. I should have thought he might have allowed interest as well. It does not, however, appear that the question was raised in the Court below. The notice of motion does not specifically raise it, nor does the judge refer to it in his reasons; neither does the notice of appeal to this Court raise the question specifically, although it was referred to on the argument, though not

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strongly pressed. In these circumstances I do not feel disposed to review the registrar's finding on this point.

The substantial question in this appeal turns on the plaintiffs' method of proving damages for the loss of their lease. It is conceded that they would be entitled to the difference (if any) between the agreed rental and the value of the term. The plaintiffs attempted to prove this difference in their favour by evidence of what the hotel, had it been erected and given over to the plaintiffs as agreed, should have brought in; in other words, the profits that the plaintiffs might be expected to make from conducting the hotel business. Against this mode of proof, *Marrin* v. *Graver* (1885), 8 Ont. 39, was relied upon by the defendant. The authority of that case was not denied, but it was sought to distinguish it from the present one. There, the plaintiff was simply seeking damages for loss of profits, and did not found his case on the difference between the value of the term which it was agreed he should have and the agreed rental. But it seems to me that in both cases the objection to evidence of this character, relied on by the plaintiffs in this case, is the same, that is to say, it is too speculative to be safely acted upon.

The plaintiffs make out a very formidable case on paper. They have had prepared two statements lettered B. and C., B. shewing the profits that could be made by conducting the hotel, and C. shewing alternatively the profits which could be made from the rentals of the rooms, stores, and other appurtenances. Witnesses were called to verify these figures. It was urged that this is evidence from which a Court could estimate the value of the term, but it seems to me that such evidence is too speculative and uncertain, and fails to take into consideration the many contingencies which may happen and which may affect the calculations. The best evidence of the value of the term would be the evidence of persons who had had experience either in the renting of hotel premises or in conducting a hotel business. In other words, what would a practical hotel man desiring a hotel of the character of the one in question, and in the situation selected for this hotel, be prepared to pay for the term in question? Or what would he say was the true value of such a term to persons desiring to conduct the business?

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Mr. *Davis* contended that witnesses of this class could very properly be asked upon what they based their opinions, and could very properly give evidence of the profits which might be expected to be derived from the rooms, the meals, the bar, and all other appurtenances, as has been done in the statements above referred to. It is, in my opinion, not necessary to inquire into the soundness of that contention, because the plaintiffs have offered no evidence of the character to which I have referred.

At the close of the argument I was impressed with what counsel had said respecting the evidence of one Woods, a hotel man, who appeard to have made statements as to what the lease, in his opinion, was worth, or what he would be prepared, were he free to do so, to pay for such a term as the one in question. I then thought that the case ought to go back to the registrar for reconsideration. We reserved it, however, so that it might go to the registrar with definite instructions as to the character of evidence to which he ought to give consideration. Since then I have taken the trouble to read the evidence of Woods very carefully, and also that of the plaintiffs' other witnesses bearing upon the point now under consideration. I now think that the evidence of Woods falls very far short of what I then conceived it to be, and that the evidence of the other witnesses does not go beyond the proof of what they considered might be made in the way of profits. Woods was taken by counsel over the different items set forth in statement B., which is headed "Statement of Approximate Profits of One Year's Working." He agrees that the figures set down there are reasonable. He is then taken over statement C., which purports to be a "Statement of the Approximate Profits to be Derived from Letting Rooms, Stores and Floor Space in the Stanley Hotel Building," being the building which it was proposed to build and lease to the plaintiffs. That statement shews an estimated profit on one year's business of $12,499.50. Woods was then asked:

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"Taking these figures altogether, Mr. Woods, you say they were reasonable? Yes, they are reasonable; just something that I would take myself; I would like to have the chance to take it.

"You would like to take a proposition like that upon that basis? Yes."

Then, on cross-examination, he was asked:

". . . . Your idea is simply that those figures that Mr. Armour has been mentioning to you appear to be reasonable to you? Yes.

"As long as they were not attached to any conditions which would detract from their value? Oh, of course those things are—in looking at those things, of course the lease, and things of that kind would depend on whether you are free to sub-lease."

Then, on re-direct examination, he was asked:

"You said something about being free to lease in answer to my learned friend when he was asking you about these figures. He was asking you whether you know anything about the conditions? I do not know anything about them.

"In arriving at the rental which you would be prepared to pay for that kind, on those terms, how would you figure it? Well, I would go through the whole building, all the space that they have, and see what I could utilize, see the layout of the building, the location, and everything of that kind.

"And you say from what you saw of this, you would have been perfectly satisfied to take up that venture? Yes, I would take it up at any time.

"Mr. Burns: If you were free? A. Oh, of course I do not know anything about being free, but I would want to have everything satisfactory."

It is clear to me from this that the witness did not intend to say that he would with his then knowledge, and without more, pay $12,499.50 a year more for the lease than the agreed rental. The language is ambiguous, but it is not too much to infer that the witness did not mean that he would conduct such a business without profit. What he must have meant was that he would have been "perfectly satisfied to take up that venture" on the terms of the lease. If that is the true inference, then, in his opinion, the lease was worth just what the plaintiffs agreed to pay, and they suffered no damage by reason of the breach. More than this, I would point out that the witness was referring to profits to be made "from letting rooms, stores and floor space," whereas the lease required the plaintiffs to conduct the premises as a first-class hotel, and there is a covenant not to assign or sub-let without leave. I refer to this only incidentally, as it does not affect the principle involved. It does, however, shew that, as far as this witness is concerned, he has not advanced the plaintiffs' case beyond an opinion of what profits might have been made, as set out in statement B.

It was further contended that the registrar should have concluded from proof of the increased market price of the land that the value of the term had become enhanced. The fact

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that the rent was fixed with reference to the then value of the land, and the estimated cost of the building does not, in my opinion, affect the case. No inference can be drawn from this fact that an advance in the selling price of land, perhaps entirely speculative, would benefit the term. No doubt it was open to the plaintiffs to prove that the conditions which brought about the increased value of the land beneficially affected the term, but in the absence of such proof the registrar could not infer it.

At the close of the argument, when we thought the case ought to be remitted, we stated that it would have to be considered by the registrar on the evidence already in, but after reading the material parts of that evidence, and having come to the conclusion that the registrar could make no other report on that evidence than he has made, I think I should not adhere to the view I held at the close of the argument, but should now deal with the case in the new light which I have derived from reading the whole of the evidence.

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I think, therefore, the appeal should be dismissed, with costs.

IRVING, J.A.: The registrar, in applying the rule that the damage must not be too remote, shut out what under the circumstances of this case was almost the only guide by which the damages could be ascertained.

The main general rule where the parties to a contract have not themselves fixed the amount of compensation, and the wrong complained of is a breach of duty arising from an agreement, the measure of damages is the loss which ordinarily arises from similar breaches of similar contracts, but it is not the loss which, though in fact sustained, arose in consequence of the peculiar position of the person complaining (unless, of course, such peculiar position was known to the other side).

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The defendants seek to invoke the benefit of the rule which in ordinary circumstances applies, but the injustice to the plaintiff would be this, that although there are, no doubt, to be found similar contracts and similar breaches, yet, where in the world of reported cases can you find similar conditions? In a new country we are constantly having new conditions presented to us. In many cases the difficulty of assessing damages has

been discussed in our own Courts: *Bird* v. *Vieth & Borland* (not reported), a case where a packer bought a train of pack mules at 150 Mile House, to be delivered to him at some place on the Grand Trunk Pacific in time for the season's packing. In *Wilson* v. *Northampton and Banbury Junction Railway Co.* (1874), 9 Chy. App. 279, the defendants had agreed to build a station on the plaintiff's lands, or rather on land which he had sold to them. Bacon, V.C. refused specific performance, but directed an inquiry as to damages because the agreement was too vague to enforce, and yet it could be dealt with by allowing an inquiry as to damages. In the present case that decision seems to me to be instructive. Lord Selborne, who sat with the Lord Justices, at pp. 285-6, said:

"In the case of damages, as it appears to me, the plaintiff will be entitled to such presumptions as, according to the rules of law, are made in Courts both of law and equity against persons who are wrongdoers in the sense of refusing to perform, and not performing, their agreements. We know it to be an established maxim, that in assessing damages every reasonable presumption may be made as to the benefit which the other parties might have obtained by the *bona-fide* performance of the agreement. On the same principle, no doubt, in the celebrated case of the diamond which had disappeared from its setting and was not forthcoming, a great judge directed the jury to presume that the cavity had contained the most valuable stone which could possibly have been put there. I do not say that that analogy is to be followed here to the letter; the principle is to be reasonably applied according to the circumstances of each case. So applying it to the circumstances of the present case, it appears to me that a jury might with perfect propriety take into account the probable benefit which the plaintiff's estate might have derived from the existence of a stopping place on the line to which traffic might have been attracted, or which might have been convenient to the persons resident upon that estate. They might take into account the reasonable probability, that if the company had *bona fide* performed the agreement, they would have made the station in a reasonable manner as regards the mode of construction and the extent of accommodation; and they might also take into account the reasonable probability, that if the company had made the station, they would, in their own interest, have thought it worth while to make a reasonable use of it. All these are elements, no doubt, more or less of an indefinite character, but proper for the consideration of a jury on the question of damages, and proper for the consideration of this Court when it discharges the functions of a jury."

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In *Fletcher* v. *Tayleur* (1855), 25 L.J., C.P. 65, the Court suggested that a rule of law, or of practice amounting to law, might conveniently be framed to meet all cases of breach of

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contract, rather than that the matter should be left at large. From the report of that case, it seems the jury have a very free hand in dealing with a question of damages.

In *O'Hanlan* v. *Great Western Railway Company* (1865), 34 L.J., Q.B. 154, the question was what was the value of some goods which the defendants had contracted to deliver at Neath? The only evidence offered was that of the plaintiff, who said he could not buy the goods at Neath for £25, but there was no market at all for such goods at Neath. In such a case, the jury would have to determine the real value at the time and place, taking into consideration those circumstances which would in any ordinary case be determined by the higgling of the market.

It is quite a common thing for juries to be asked to assess damages where there is no fixed rule, and few ascertained facts to guide them: see the speech of Lord Loreburn in *Clippens Oil Company, Limited* v. *Edinburgh and District Water Trustees* (1907), A.C. 291 at p. 300.

In *Foster* v. *Wheeler* (1888), 38 Ch. D. 130, the defendant very imprudently agreed to accept a lease for a given period, the lease to be on such terms as Dr. Ord (a third party) should approve. Kekewich, J. (1887), 36 Ch. D. 695, directed a reference, and in the Court of Appeal it was pointed out that if the defendant's refusal was wanton, damages might be very substantial.

IRVING, J.A.

I do not feel that I can formulate any rule for the registrar's guidance, but I think that he would, in view of the fact that an estimate of damages cannot be definitely fixed by any witness, not be justified in excluding the evidence of those who would, as part of their business or calling, take part in the buying and selling of hotels, or in the selection of a site for that purpose. I do not wish to say more than this—this class of evidence should be received and considered. It is entirely for him to say what weight he will give to it.

I do not think that there should be any fresh evidence.

MARTIN, J.A.

MARTIN, J.A.: The declaration to the registrar should be that he is to consider the evidence before him that went to shew that, as Armour, J. put it in *Marrin* v. *Graver* (1885), 8 Ont.

39 at p. 46, "the premises were worth more than what the lessee was to pay." Wood's testimony, for instance, contains evidence of this class, not as a claim for profits, but as shewing increased value, based upon and illustrated by a detailed statement of revenue and expenses by an expert witness in that line of business.

GALLIHER, J.A.: I adhere to the opinion expressed at the hearing, that this matter should go back to the registrar for further consideration as to damages. In cases of this kind it is difficult, if not impossible, to produce evidence such that a jury can fix the amount of damages accurately, but where there is admissible evidence adduced, as here, where a jury can say that the plaintiffs have suffered damage, although they cannot say as to what exact extent, they may, on consideration of the whole evidence, arrive at an amount which, in their judgment, is fair and reasonable. I refer particularly to the evidence of Woods. Woods is a hotelman of 13 years' experience in Vancouver, and the proprietor of two hotels, and his evidence, if admissible, is entitled to weight. If this evidence was tendered for the purpose of shewing anticipated profits, under the authorities it would not be admissible. It might in one sense be regarded as such evidence. It is in another sense, and, in my opinion, the proper sense, adduced for the purpose of shewing the value of the term at present as compared with the rental the plaintiffs were to pay. Viewed in this light it transgresses none of the principles in *Hadley* v. *Baxendale* (1854), 9 Ex. 341. Woods was produced for examination, and schedule "C" was shewn to him. Schedule "C" set out in detail rental values of certain rooms to be used in connection with running such a hotel as was proposed here, and as I view it, must be taken to refer to what would be a fair rental value at the time as between the landlord and a tenant who was contemplating leasing the premises to be run as a hotel. Woods went over this item by item, commenting upon the fairness of the values, and finally says:

"In arriving at the rental which you would be prepared to pay for that kind, on those terms, how would you figure on it? Well, I would go through the whole building, all the space that they have, and see what I could

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utilize, see the lay out of the building, the location, and everything of that kind.

"And you say from what you saw of this, you would have been perfectly satisfied to take up that venture? Yes, I would take it up any time."

And again:

"Taking these figures altogether, Mr. Woods, you say they are reasonable? Yes, they are reasonable; just something that I would take myself; I would like to have the chance to take it."

And further, he deals with the location, and its desirability as a hotel site.

There is no question in my mind that he is dealing not with the rental the plaintiffs were to pay, but the rental based on schedule "C." This is evidence which I think is admissible, and is not of the class to which exception was taken in *Marrin* v. *Graver* (1885), 8 Ont. 39. In fact, it comes within the class of evidence which Armour, J., at p. 46, says he would have allowed, *viz.*:

"Evidence that the plaintiff had agreed to assign or sub-let the premises at an advance over what he was to pay for them, or that they were worth more than what he was to pay for them."

I think, therefore, this is evidence upon which a jury might fix compensation under the principle hereinbefore enunciated by me, and that the registrar should have considered it in that respect.

Solicitors for appellants: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Burns & Walkem.*

BERRY v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

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BERRY v. B.C. ELECTRIC RY. CO.

Negligence—Cars approaching cross-streets—Collision with motor-car—Excessive speed—Contributory negligence.

The plaintiff, going north in his motor-car on Seymour street in Vancouver, when approaching Robson street, on which there is a double track street-car line, heard the noise of a street-car and slowed down to about four miles an hour. On reaching the north side of Robson street he looked to the right and saw a car coming on the near track. This car was coming at a moderate speed and there appeared no difficulty in crossing in front. He continued on and when the front of his motor-car was within about a foot of the near track he looked to the left and saw a car approaching at about 20 miles an hour on the far track. He put on all possible speed, at the same time veering to the right in an attempt to cross in front, but was caught on the fender and carried about 40 feet, the motor-car being considerably damaged. The motorman on the street car did not reverse or put on brakes until within a few feet of Seymour street. The trial judge held in favour of the plaintiff and assessed the damages at $300.

Held, on appeal, *per* MACDONALD, C.J.A., and GALLIHER, J.A., that the defendants running their car at an unlawful rate of speed when the accident happened, were guilty of negligence, and the plaintiff was not guilty of contributory negligence.

Per IRVING and MARTIN, JJ.A.: That the defendants were guilty of negligence, but the plaintiff was guilty of contributory negligence.

The Court being evenly divided, the appeal was dismissed.

APPEAL from the judgment of MCINNES, Co. J. in an action tried at Vancouver on the 15th of November, 1912. Statement

Reid, K.C., for plaintiff.

L. G. McPhillips, K.C., and *H. S. Wood*, for defendants.

MCINNES, Co. J.: I will find as facts in this case, having heard the evidence, that the accident was due to the negligence of the defendants' employees, and also that the plaintiff, in view of all the circumstances, did nothing different from what would have been done, and should have been done, by an ordinarily careful man. The plaintiff is, therefore, entitled to judgment in the matter, and I will assess the damages at $300. MCINNES, CO. J.

Judgment will be for $300 and costs.

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The appeal was argued at Vancouver on the 23rd of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K.C., and *G. B. Duncan,* for appellants (defendants): The plaintiff was going north on Seymour street, and as he neared Robson street-cars were coming both ways. He saw the car going west first, but did not see the car going east until nearly on the near track, when he was moving slowly. He was guilty of contributory negligence, first, by taking reasonable care he would have seen the eastbound car before getting so far on Robson street; secondly, even when he saw it, considering his speed, he had ample room in which to stop, and should not have attempted to cross in front.

Reid, K.C., for respondent (plaintiff), on the question of contributory negligence, cited *Davies* v. *Mann* (1842), 10 M. & W. 546, 12 L.J., Ex. 10; *The Toronto Railway Company* v. *Gosnell* (1895), 24 S.C.R. 582. On the position of the Court of Appeal on a review of the facts found by the trial judge in the Court below, see *Colonial Securities Trust Co.* v. *Massey* (1895), 65 L.J., Q.B. 100.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal. The plaintiff was approaching Robson street, on which the accident occurred, along Seymour street going north. He heard the noise of the car as he approached the street. Looking, he saw the tram-car on the right-hand side of him, that is to say, the car that is said to have stopped at the corner, now proceeding in a westerly direction. His own motor-car, he said, was slowed down before he reached the railway tracks, but just about the time he reached the track he noticed another tram-car coming along Robson street in an easterly direction at a high rate of speed; whether he realized at that time that it was running at a high rate of speed or not, the evidence does not shew conclusively, but he afterwards ascertained that the car was running at about 20 miles an hour. The evidence is not clear whether the car at the right hand stopped or not. He was, therefore, in this position, that when he reached the tracks he was in danger, or

might reasonably suppose that he was in danger, from the westbound car. He was also in danger from the eastbound car; and having to choose on the spur of the moment, he thought he could get across ahead of the eastbound car. The evidence is that the driver of that car was going at a rate of 20 miles an hour, and did not, although he saw the plaintiff, slacken down his car at all, but came on at the unlawful rate of speed, striking the plaintiff's motor-car, carrying it some 40 feet.

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It is quite clear that the defendants were guilty of negligence; they were running their car at an unlawful rate of speed when the accident occurred, and I am not satisfied that the learned judge was wrong in coming to the conclusion he did that the whole fault lay with the defendants, and that the plaintiff was not guilty of contributory negligence.

IRVING, J.A.: I would allow the appeal. The defendants were guilty of negligence in driving at an excessive rate of speed. The plaintiff was also guilty of negligence. Before he got as far as the southerly crossing of Robson street he should have ascertained whether he could cross the far tracks, that there would be no danger of his colliding with the eastbound car. If he was going as slow as he says he was he could have, and should have stopped when he saw the pace at which the eastbound car was going. There was no reason for his being afraid of the westward-bound car which Maclean was driving. In the first place he, Maclean, was not going fast; in the next place he, the plaintiff, had a right to presume that Maclean would do the proper thing and stop before any collision with him could take place.

IRVING, J.A.

MARTIN, J.A.: I agree that while there was negligence on the part of the defendant, yet there was contributory negligence on the part of the plaintiff, though an error of judgment may be excused when in the "agony of collision," yet the plaintiff was not placed in that position by the sole act of the defendant Company, but by his own act, and therefore is not entitled to rely on that excuse. The appeal should be allowed.

MARTIN, J.A.

GALLIHER, J.A.: I think the appeal should be dismissed. I

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was, for a time, through misapprehension of the evidence, strongly of opinion that the appeal should be allowed, that is to say, that the defendant should have seen the eastbound car when he was about even with the south boundary of Robson street, and after he slowed down, or started to slow down. If he afterwards went on and placed himself in a dangerous position, certainly his act would have been his own wrong. But on reading the evidence, it appears that he first saw the car that struck him when within five or six feet of the line of the track; it was not negligence on his part, so far as the westbound car was concerned, to have attempted to cross the road, so that unless you can put it on the ground that it was contributory negligence on his part not to have seen the other car practically at the same time, it seems to me you cannot fasten contributory negligence on him. That being the case, he finds himself in this position: the car behind him, I think, had started up slowly, the westbound car—just moving at the time of the impact with the eastbound car. He finds himself within six feet of the rails where he sees the eastbound car, with what he might have presumed the other car starting on, and in fact the evidence is, if I remember it rightly, that it had started on very slowly about the time the impact came. Then, I think, he finds himself in the position where it is a matter of judgment, exercising judgment as to what is best to do. If he had attempted to turn at that point it might have been that the westbound car would have struck him. He takes what he thinks under the circumstances is a safe, or the best way out. Now, if he makes a mistake when trying to choose the best way in an emergency of that kind, and if it turns out not to be the right thing, it does not bring him within the principle where you say he is guilty of contributory negligence, but his status is that of a man who, in case of emergency, acts possibly wrong, but does what he thinks at the moment is right.

GALLIHER, J.A.

The distinction I draw between what Mr. *McPhillips* says and this is: if he had been at a safe point and saw and knew this car was coming, and then moved on in this position, I would agree that it would have been his own wrong, and could be classed as contributory negligence. But I think the evidence

does not bear that out, so that, unless the very fact that he did not see the car on the left hand can be said to be contributory negligence on his part, I do not see anything else that brings it home to him. For these reasons, I think the appeal should be dismissed.

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Appeal dismissed.

Solicitors for appellants: *McPhillips & Wood.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

CHARLES v. NORTON GRIFFITHS COMPANY, LIMITED.

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CHARLES v. NORTON GRIFFITHS CO.

Master and servant—Negligence—Injury—Common employment—Prima facie case for submission to jury.

The plaintiff, under the direction of a foreman of the defendant Company, took a wheelbarrow of cement on an open elevator platform at the basement of a building under construction for use on the upper storeys. The platform was six feet one inch in length, four feet eight inches wide at one end and three feet at the other. After the elevator had gone from the basement to the ground floor other workmen got on, and when it had again started up there were two wheelbarrows, two boxes, two feet by 18 inches, and seven men on the elevator. The plaintiff was crowded over to one side, the heel of one of his feet protruding beyond the edge of the floor. Upon the elevator continuing up his heel was caught on a bolt that was projecting from the side of the elevator shaft and his foot was crushed between the bolt and the floor of the elevator.

Held, on appeal (GALLIHER, J.A. dissenting), reversing the finding of the trial judge, who took the case from the jury and dismissed the action, that a *prima facie* case was made out by which a jury might find negligence and absence of contributory negligence.

APPEAL from the judgment of MORRISON, J., taking the case from the jury and dismissing the action, tried at Vancouver on the 28th of February, 1913. Statement

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The plaintiff, a labourer in the employ of the defendant Company, was engaged in the construction of a building known as the "Vancouver Block," on Granville street in Vancouver, on the 13th of July, 1912. He was ordered by the foreman of the defendant Company to load a wheelbarrow with cement in the basement of the building and take it on an elevator, by which it was to be carried for use on the storeys above. The elevator had no cage or protection on the sides, and its floor was six feet one inch long, four feet eight inches wide at one end, and three feet at the other. It started up from the basement with two wheelbarrows and three men. On reaching the ground floor four more men got on and carried with them two boxes two feet by 18 inches in size each. The plaintiff was crowded over to one side and the heel of one foot protruded beyond the edge of the elevator floor. On the elevator continuing up, his heel was caught on a bolt projecting from the side of the elevator shaft. His foot was jammed between the bolt and the floor of the elevator, the bones of the foot being broken. He was in the hospital for three weeks, and for seven months afterwards was not in a fit condition to work. The bolts (one of which caught the plaintiff's heel) were embedded in the wall and passed through and supported the brackets that ran from top to bottom of the elevator shaft. To these brackets were attached the guides upon which the elevator ran. The bolts projected from the brackets into the elevator shaft about one inch.

Statement

Bird, for plaintiff.

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

MORRISON, J.: It seems to me, surely, that this accident was brought about by a portion of the person of the plaintiff protruding beyond the lines of the elevator, and that was the one part that was hurt, and the only part that came in contact with anything. I do not think that it can be said that this elevator was overcrowded in the sense that is sought here, just because there were these seven persons in it and the particular material that we have heard about.

MORRISON, J.

This man is not a stranger, and not a passenger in the sense

of a person in a public building where strangers come in. Of course there, where all kinds of people come, they expect to have conditions absolutely safe and protected. In this case this was a young man working there and familiar with the customs. He understood the conditions thoroughly. I do not think that reasonable men could reasonably find that he was careful in standing in the way he did, under all the circumstances. He need not have put himself in the attitude in which he was, even to be comfortable. He had plenty of room, and in an elevator like that, where a number of people must use it, and use it with material, they have to economize space and take, I think, a little more than the average care and see that there is room for others and themselves. They necessarily must economize space. I think, unfortunately, this young man simply took a careless attitude, utterly indifferent to the conditions, and he thereby got hurt, and I think, under those circumstances, it would not be right for me to visit the consequence upon the defendant Company. I therefore grant Mr. *Taylor's* application for dismissal.

It will not prejudice you, Mr. *Bird*. You will take your assessment under the Workmen's Compensation Act.

MORRISON, J.

There is one satisfaction, gentlemen of the jury, that in a case of this kind, the plaintiff does not go without something. The Workmen's Compensation Act applies, but with that, of course, you have nothing to do. When a person loses a case like this, and his action is dismissed, he can, of course, invoke the provisions of the Workmen's Compensation Act and then there is a certain amount assessed, not as much perhaps as if the case had gone to the jury and he had won.

The appeal was argued at Vancouver on the 1st of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

R. M. Macdonald, for the appellant: The learned trial judge erred in taking the case from the jury. The evidence shews that the elevator was so crowded as to render the position of the plaintiff unsafe. There was negligence in the condition of the elevator. If bolts are allowed to project into the elevator

Argument

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shaft, there should be a cage on the elevator for protection: *Fakkema* v. *Brooks Scanlan O'Brien Company, Limited* (1910), 15 B.C. 461.

S. S. Taylor, K.C., for respondents: The plaintiff's evidence shews there was no negligence on the part of the defendants. There was contributory negligence on the part of the plaintiff by allowing his heel to protrude beyond the edge of the floor of the elevator, and the accident was, on the admission of the plaintiff, due to the man running the elevator allowing on too large a load at the time of the accident.

Macdonald, in reply.

MACDONALD, C.J.A.: I think the appeal should be allowed. On the question of negligence, it seems to me sufficient was proved to entitle the jury to pass upon that question. The same is true with respect to contributory negligence. What we have to say is whether or not the plaintiff has made out a *prima facie* case which would entitle the jury to find negligence and the absence of contributory negligence.

MACDONALD, C.J.A.

On the question of common employment, that is in practically the same position. The jury might come to the conclusion that there was negligence in not providing a proper elevator, proper safeguards, or that there was negligence in having the bolts projecting the way they were. That might be, in the opinion of the jury, the proximate cause of the accident. The fact that the man operating the elevator allowed too many to come upon it might not, in the opinion of the jury, be the proximate cause; hence, I think the case must be passed upon by the jury.

IRVING, J.A.: I agree. I have some hesitation over the question of common employment. At any rate, that will be open to the defendants at the trial. I think the whole case should be allowed to go to the jury.

IRVING, J.A.

MARTIN, J.A.: I agree that really the serious point in this matter is the absence of the cage and the presence of bolts.

MARTIN, J.A.

GALLIHER, J.A.: I would dismiss the appeal. I think the evidence before us is not sufficient for any jury to come to the

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conclusion that there was negligence on the part of the defendants. I do not regard the evidence that this particular elevator was not caged in as evidence of negligence, nor do I think that the jury would so regard it. That elevator was being used in construction work. Now, the men knew that themselves; they were aware of all the circumstances, and I do not think that a jury should lay down as a principle that every safeguard should be put around a construction such as this elevator, particularly in view of the fact that the plaintiff on his own evidence admits, or his own witnesses say, that it would be practically unfit for the work for which it was being used if it was caged in. On these grounds I think the learned trial judge was right.

New trial ordered, Galliher, J.A. dissenting.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondents: *Taylor, Harvey, Baird, Grant & Stockton.*

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June 13.

LONGMAN *ET AL.* v. COTTINGHAM.

Negligence—Workman on highway—Run down and killed by motor-car—Negligence of driver—Identity of car—Sufficiency of evidence—Verdict of jury—Appeal.

LONGMAN v. COTTINGHAM

Deceased, an employee of the Corporation of Vancouver, was run down and killed by a motor-car while working on a bridge clearing snow shortly after midnight. On the question of the identity of the motor-car that struck deceased there was the evidence of the driver of a sleigh who was close by and saw the accident, he swearing that from the time he came on the south end of the bridge and reached the scene of the accident, the only car to pass him (which was going south, as he was) was the car that struck deceased, and the defendant admitted that after coming onto the south end of the bridge, and before he reached the spot where the accident occurred, he passed a sleigh. This evidence was corroborated by one of deceased's fellow workmen, who swore that the only motor-car that passed between three minutes to twelve and the time of the accident was the car that killed deceased. The jury found in favour of the plaintiffs.

Held, on appeal, that there was evidence upon which the jury might reasonably return the verdict which they did.

Per GALLIHER, J.A.: Where there are probabilities that might be weighed by a jury, it is proper that such a case should go to the jury.

Grand Trunk Railway Co. v. *Griffiths* (1911), 45 S.C.R. 380, followed.

[An appeal to the Supreme Court of Canada was dismissed.]

Statement

APPEAL by defendant from the judgment of MORRISON, J. at Vancouver on the 30th of April, 1913, entered up on the verdict of a jury granting the plaintiffs damages in $5,000 for the death of Martin Longman, who was run down and killed by a motor-car of the defendants. The deceased was employed by the city, clearing snow off the Granville street bridge, when he was struck and instantly killed by defendant's motor-car. The action was for $25,000 damages, and resulted as above stated. The appeal was brought on the usual grounds of the verdict being against the law and evidence, that there was no evidence to go to the jury; that the evidence was consistent with any other motor-car than that of the defendant striking the deceased.

The appeal was argued at Victoria on the 12th and 13th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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S. S. Taylor, K.C., for appellant: The evidence shews that the car that caused the accident had its hood up, whereas our car's hood was down. The onus of proof is on the plaintiffs: *Wakelin* v. *London and South Western Railway Co.* (1886), 12 App. Cas. 41 at pp. 44-5; *The Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595 at p. 600. My motion was for a nonsuit, and I contend there was no evidence upon which to allow the case to go to the jury. It is true the jury weighed the evidence, but it is the duty of this Court to weigh it too. There should be a new trial on the ground of misdirection and on the rulings of the Court throughout the trial.

Argument

McCrossan, for respondents, not called upon.

MACDONALD, C.J.A.: I would dismiss the appeal. The evidence upon which I rely principally in coming to that conclusion consists of, first, the evidence of the defendant himself, who says that he passed the four-horse sleigh between the south end of the bridge and the place of the accident. That is followed by the evidence of the driver of the sleigh, who says that the only motor-car that passed him between the south end of the bridge and the place of the accident was the motor-car which killed the unfortunate deceased. That evidence is not really broken down on cross-examination. He qualifies it slightly by saying that he did not notice any other motor-cars passing during that time, but he says had any other motor-car passed during that time, "I would have noticed it," so that the evidence stands practically intact after cross-examination. That is corroborated by Fleming, one of the men employed by the City in shovelling snow, one of the fellow employees of the deceased. He says he looked at his watch at three minutes to twelve. He gives the reason—they proposed to have lunch at twelve o'clock—looked at his watch at three minutes to twelve, and says no motor-car passed over that bridge from the south going north from three minutes to twelve to the time of the accident from which this man died. That is slightly broken down on cross-examination. In cross-examination he says he will not swear to that, but he says, "I can almost swear to it." While that evidence is not as strong, not nearly as strong as the evidence mentioned above, yet it

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appears to be the evidence, and at all events the impression, of an honest witness, and it is such as is entitled to respect. Now, taking these three pieces of evidence, there is clearly a *prima facie* case made out; more than that, to my mind, a very strong case made out of the identification of this car as the car that did the injury. I think it relieves us from a minute consideration of the other evidence as to identification. There is, undoubtedly, a great deal of conflict between the evidence for the plaintiffs and the evidence for the defendant with regard to the colour of the hood, and as to whether it was up or down; and with respect to the tail light. There is conflict, and the jury were entitled to discard any portion of the evidence they did not believe. But we have the essential facts. I have already stated the essential facts which, if the jury believed, entitled them to come to the conclusion they have come to in this case.

IRVING, J.A.: My conclusions are based on what I have heard from Mr. *Taylor* in his argument. I was inclined to the opinion last night that there was no case to go to the jury, but on reflection I have come to the conclusion that the judge was right in letting the case go to the jury. The evidence, in my opinion, is sufficient that an accident took place at night; the defendant read an account of it in the morning's paper.

IRVING, J.A.

In consequence of what he there read, he did something from which it could be inferred that it was necessary for him to ascertain from the man who was driving his car whether they had struck anybody on the bridge that night. That is one point. Then there was the concealment from the police of the names of the other persons in the car. Then there was other evidence suggesting fabrication of evidence in that the defendant had, notwithstanding the rain, brought his car into the garage with the hood down. Again, the buffer had been mended under circumstances which called for explanation. The evidence shewed clearly enough that this car was at the scene of the accident about or at that time. On the whole I think the judge was right in letting the case go to the jury.

Once it got to the jury there was a conflict of evidence. All

we have to be satisfied with is that the evidence is such that eight reasonable men could reach the conclusion they have reached. It is not necessary for us to express any opinion as to whether we agree with them or not. On that point I have not made up my mind. The incidents referred to by counsel as having occurred at the trial are not such as would justify this Court in ordering a new trial.

MARTIN, J.A.

MARTIN, J.A.: I am satisfied that there is evidence for the jury to reasonably return this verdict.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed. I think there was evidence to go to the jury, on the principle laid down in *Grand Trunk Railway Co.* v. *Griffith* (1911), 45 S.C.R. 380, that where there are probabilities that might be weighed by a jury, it is proper that such a case should go to a jury. I do not express any opinion as to my view of the evidence; I feel very much as my brother IRVING does, that having once established a case to go to the jury, and having gone to the jury, I cannot say that the jury could not reasonably have come to the conclusion to which they did come. It probably may be sailing close to the wind, but that is one of the jury's privileges, and I would not disturb their verdict.

Appeal dismissed.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondents: *McCrossan & Harper.*

MURPHY, J.

1912

Oct. 5.

CUNNINGHAM v. THE CORPORATION OF THE CITY OF NEW WESTMINSTER.

CUNNINGHAM v. CITY OF NEW WESTMINSTER

Municipal law—By-law—Reasonableness of—Application to quash—Council exceeding powers—Confiscatory legislation—Equity—Estoppel—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 208, 209, 210.

In exercising its legislative powers dealing with public utilities, wherein considerable money has been invested over a long period of years, a municipal council cannot ignore the equities which have thus arisen.

Where, therefore, powers were exercised for over 25 years under a by-law granting privileges to a gas company, and on a dispute arising over an alleged irregularity, the municipal council repealed the by-law:—

Held that, in the circumstances, it could not be considered that the Legislature contemplated conferring upon municipal councils the power to pass confiscatory legislation such as that complained of.

APPLICATION to quash a by-law. Heard by MURPHY, J. at New Westminster on the 5th of October, 1912. Under a by-law passed by the municipal council of the City of New Westminster on the 1st of March, 1886, the council authorized the British Columbia Construction Company to erect, construct, maintain and operate gasworks within the limits of the City of New Westminster, and to lay down, re-lay, connect, disconnect all pipes along, through and under the streets, alleys and thoroughfares of the said city that may be necessary for supplying gas to the inhabitants of the said city.

Statement

The British Columbia Construction Company, the company to whom the by-law was granted, was formed under the Companies Act, 1878, and when formed it entered into a bond for the due performance of its obligations.

Under clause 8 of the by-law, the British Columbia Construction Company were, under the superintendence of the board of works, empowered to open and break up the soil, etc., of the streets, upon notice to the city authorities.

This by-law was assigned by the Company to the New Westminster Gas Company, Limited Liability, on the 13th of April, 1887, which continued to carry on business under the provisions

of the by-law down to the 20th of November, 1897. In the latter year the New Westminster Gas Company was wound up, and the concern was purchased by the plaintiff, who carried on the business of the Gas Company under the provisions of the by-law until April, 1912, when trouble arose over his opening up streets without first notifying the city officials. This resulted in the City Council passing the by-law repealing the gas by-law.

A. S. Johnston, for the plaintiff.
W. G. McQuarrie, for the Corporation.

5th October, 1912.

MURPHY, J.: In my opinion the City is estopped from saying that Cunningham is not the successor of the original construction company, whatever the name of it is, because for the last 15 years he has been exercising the powers that were given the company under the by-law, to the knowledge and with the consent of the City, and it is only some time this year that any dispute has arisen. At any rate, if the City is not estopped from taking that position, I think that owing to the large expenditure of money—some money at any rate—which has been spent by Mr. Cunningham, which expenditure seems to have been more or less known to the City for the last 15 years, an equity has arisen in his favour and which I must give effect to as if it were a question between private parties, and the effect would be similar to that of an estoppel. In that regard I refer to *Plimmer* v. *Mayor, &c., of Wellington* (1884), 9 App. Cas. 699.

Judgment

The only point which has given me any difficulty about the matter is, whether the municipal council has the power, despite the fact that such equity has arisen, to pass this repealing by-law. I think there is no doubt that if this was an Act of the British Columbia Legislature it would be within its powers, and it might be argued that under the Municipal Act the Legislature has delegated its powers, with no qualifications of such powers, to the City Council to make, amend and repeal by-laws, amongst other things, in connection with gas companies. But I think that from the statement of the law set out in *Kruse* v. *Johnson*

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(1898), 2 Q.B. 91 at p. 97, and also Dillon on Corporations, it follows that where the Court is of the opinion that something has been done by the municipality which is manifestly unfair and unjust, it must draw the conclusion that it was never the intention of the Legislature to empower such municipal body to pass such legislation.

I therefore quash this by-law, and in so doing do not think that it places the City at the mercy of Mr. Cunningham. Undoubtedly there are other remedies which it is not in keeping with my position to suggest, but there is, I think, some proper procedure to determine whether the contract has been carried out or not. On the other hand, if municipal councils can constitute themselves judge and jury and everything else, and wipe out a by-law of this character, the property of a man who has invested large sums of money, and who has carried on the business in some fashion, possibly not satisfactorily, but through a number of lean years, would be confiscated. I can hardly conceive that the Legislature intended to delegate such authority, and I think the Legislature, if called upon to exercise such authority itself, would hesitate for some length of time before revoking such a contract.

Judgment

I therefore hold that this by-law should be quashed, and I do so on the ground that I think it is *ultra vires,* and if not that, it is unfair under the circumstances for the City to exercise such power, if they have it.

The by-law is quashed.

Judgment accordingly.

IN RE EVANS AND McLAY *ET AL.*

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June 26.

IN RE EVANS AND McLAY

Water and watercourses—Water Act, R.S.B.C. 1911, Cap. 239—Water Act Amendment Act, 1912, Cap. 49—Board of investigation—Finding of easement in favour of claimant—Jurisdiction—Spring on adjoining land—Use of water from—Right of appeal—Objection to jurisdiction not taken before board—Costs.

The powers of the board of investigation under the Water Act do not include jurisdiction to determine the existence or extent of an easement to the use of water.

Semble, per IRVING, J.A.: The powers conferred on the board to renew records by granting licences means *de facto* as well as *de jure* records.

Per IRVING and GALLIHER, JJ.A.: The objectors should not be deprived of their costs because they failed to raise the question of jurisdiction before the board.

APPEAL from the decision of the board of investigation of the 14th of November, 1912, under the Water Act, Revised Statutes of British Columbia, 1911, chapter 239. It appeared that Mrs. Evans applied to the board for a licence in substitution for a water record obtained by her in 1907, in respect of the water from a spring upon a section of land adjoining her section. The board found that there was an easement established in favour of her section and determined that she was entitled to the use of water from the spring for domestic purposes to the extent of 500 gallons per diem, and ordered that her water record should be cancelled and that no licence should be issued in substitution therefor. She did not appeal from this order, but the owners of the section upon which the spring was situated appealed from the finding and determination of the board as to the easement and right of Mrs. Evans. Statement

The appeal was argued at Vancouver on the 7th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellants: We have a right of appeal under section 42 of the Water Act, and the powers of the board are defined in section 9. We say the board had no jurisdiction Argument

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to make the order they did make. Robert McLay, senior, in 1898 or 1899, was the owner of section 13 in range 7 and section 14 in range 6, Quamichan District; he resided on section 13, and about that time laid a pipe to the spring on section 14 and used the water for many years for domestic purposes on section 13. In 1907 he conveyed section 13 to Mrs. Evans, his daughter, who then obtained a water record of one inch of water: *In re Milsted* (1908), 13 B.C. 364. Their jurisdiction is to decide between conflicting claims under the Act, and to determine priority of claims. All they could do was to replace the old record with a new licence, but they did not do that. She would have had to apply under the new Act. Under the old Act a spring could not be recorded, and to that extent Mrs. Evans comes under the *Milsted* case. If they had any jurisdiction they simply turned the law of easements around.

[MACDONALD, C.J.A.: The point of jurisdiction is important in itself. This board would not seem to be entitled to resolve itself into a Court of justice.]

In this case McLay, senior, sold the servitude first and did not make any reservation: Gale on Easements, p. 136.

McDiarmid, for respondents: That easement existed irrespective of the decision of the board: *Nicholas* v. *Chamberlain* (1606), 79 Eng. R. 105, 3 Croke 121. We had a record in 1907. The appellants pulled up our connecting pipes and were convicted under the Water Act Amendment Act, 1912, chapter 49, sections 14, 18 and 20.

Argument

[MACDONALD, C.J.A.: Does not that apply to applications to the board for a licence either original or renewal or replacing, but does it include adjudication on legal rights between an applicant and opponents or objectors?]

Under the Act the board had power to listen to objection to or application to quash our record, and they had a right to adjudicate according to the merits of the case. This is all they have done. They have determined there was an easement, by virtue of which the application was refused.

[IRVING, J.A.: Have not they gone farther than that and said she is entitled to so much water per day? I do not think they can do that.]

If the board thought we had not an easement they would have issued us a new licence. The decision of the board does not affect a right we had already.

[IRVING, J.A.: These men simply intended to put this woman in as good a position as before.]

Bodwell, in reply: There is nothing to reconsider. The board could not grant a licence. They can only replace a record with a licence, but there is no record. In 1907 she could not record a spring. Now she can, therefore she can only get a licence under the form of the Act, and she must apply after staking and advertising.

Argument

Cur. adv. vult.

26th June, 1913.

MACDONALD, C.J.A.: This is an appeal from the board of investigation under the Water Act, Revised Statutes of British Columbia, 1911, chapter 239. The findings and determination of the board are as follows:

"The board doth find: (1) That in 1898 or 1899 Robert McLay, senior, was the owner of section 13, range VII., and section 14, range VI., Quamichan District; (2) That he then resided on section 13, and about that time he laid a pipe from the spring on section 14 and used the water therefrom for many years for domestic purposes on section 13 and thus established an easement in favour of lot 13 and a servitude on lot 14, appropriated the water and put it to beneficial use; (3) That in 1907 he conveyed section 13 to Margaret Nairn Evans, who then obtained a water record of one inch of water from the said spring and that this record was acquired with the intention of establishing her right to the continued use of the water which had been appropriated by her predecessor in title; (4) That trouble having arisen shortly after the date of the record, she then laid a pipe line along the highway and continued using the said water until the beginning of this year, when she was forcibly deprived of its further use.

MACDONALD, C.J.A.

"And the board doth determine that Margaret Nairn Evans, as successor in title to Robert McLay, senior, is entitled to the use of water from the said spring for domestic purposes; that the amount to which she is entitled is 500 gallons per day, and that the means of conveyance shall be the pipe and other works which were laid in or about the year 1908; that on the date of the said record the unappropriated water in the said spring was not unrecorded water as defined by the Water Clauses Consolidation Act.

"And the board doth order that the water record granted to Margaret Nairn Evans on the 8th day of November, 1907, be cancelled and that no licence be issued in substitution thereof."

In the absence in the appeal book of the memorandum in

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writing setting forth the claimant's claim, as required by section 28 of the said Act, I am left to gather from the proceedings that Mrs. Evans applied to the board for a licence in substitution for her record above referred to. It was determined that she was not entitled to such licence, and her record was ordered to be cancelled. From that order she has not appealed, and we are therefore not concerned with the propriety of it. The objectors, John C. McLay and Robert McLay, the younger, appeal from the finding and determination set forth above, which declares that Mrs. Evans is entitled to the use of 500 gallons per day of the water in question under an easement created by her father, her predecessor in title. It was suggested during the argument that perhaps the board did not mean more than an expression of opinion on this point, and that the only operative part of the adjudication was contained in the last paragraph cancelling the record and refusing a licence, but I do not think that view is tenable. The purpose for which the water should be used, the quantity and the means of transmission are all prescribed as if the case fell under the Water Act. I am clearly of opinion that the board had no jurisdiction to declare the easement in question. It had no jurisdiction to declare and determine the common law rights of the parties, and I think this is apparent when the scope and purpose of the Water Act are rightly understood. The Act recites that:

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"Whereas, in the past, records of the right to divert and use water have been honestly but imperfectly made, resulting in confusion and litigation: And whereas it is desirable that the rights of existing users under former records should be properly declared."

By section 9 of the Act, the board of investigation is constituted in pursuance of the purposes above recited:

"For the purpose of hearing the claims of all persons holding or claiming to hold records of water or other water rights under any former public Act or Ordinance, of determining the priorities of the respective claimants, of prescribing the terms upon which new licences, replacing records under former Acts, to take and use water pursuant to this Act will be granted, and generally of determining all other matters and things in this Part of this Act referred to the board for determination, and discharging such duties with respect to existing rights and claims as may be imposed upon the Board, and with such powers and authorities for that purpose as are in this Part of the Act conferred."

That section confers powers only in respect of rights held

under statutory authority. Section 28 further indicates the nature of the claims to be dealt with. The claimant is to set out "an exact copy of the record or records claimed." There is nothing in the amendments made by the statute of 1912 or sections 24, 30 and 33 of the principal Act, to which we were referred, to amplify the powers of the board. Take the most comprehensive of them, section 33, which recites:

"Without restricting the generality of the foregoing sections, the board shall hear and determine all rights and claims submitted to them for adjudication upon their merits."

This means only claims of the character which the board is authorized to adjudicate upon as defined by section 9.

As to whether or not Mrs. Evans acquired an easement of the kind referred to by the board, we have no more to do in this appeal than had the board. That is a matter to be decided in an action commenced in a Court of law, and does not properly come before us in this appeal from the board of investigation. I therefore express no opinion upon it one way or the other; all I can say is that the board of investigation could not make a binding declaration on that question. What purports to be such, therefore, must be declared to be of no effect and not binding on anybody.

MACDONALD, C.J.A.

It follows that the appeal should be allowed. As there is nothing in the proceedings to shew that objection was taken to that part of the board's finding which is appealed against, I would allow counsel to speak to the question of costs.

IRVING, J.A.: We reserved judgment in this case in order that we might determine the form of order we should make. The view expressed at the hearing of the appeal was that the board had no power to determine the existence or the extent of the easement. An opinion was also expressed in which I agree, that the power conferred on the board to renew records by granting licences means *de facto* as well as *de jure* records. Perhaps that point is not necessary for the present decision.

IRVING, J.A.

I would set aside the order of the board and dismiss the application, with costs here and below, on the ground that the board had no jurisdiction to adjudicate on the easement, and thereby restore the parties to their original positions.

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I see no reason for depriving the objectors of their costs because they failed to raise the question of jurisdiction below. It was the duty of the claimants' advisers to see that they made the application to the proper tribunal.

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MARTIN, J.A.

MARTIN, J.A.: In the absence from the appeal book of the very necessary "statement of claim in writing," which the claimant (respondent herein) is required, by section 17 of chapter 49 of the Water Act Amendment Act, 1912, to "present" to the board, it is not easy to gather exactly what was the claimant's position below, nor has it been clearly explained to us, yet the real point of the case is the weight that is to be attached to the expression in the order that "the board doth determine that," etc. It was urged that this was merely a recital and that the only "order" was that contained in the last paragraph. But having regard to the use of the words "determination" in the caption to Part III. of the Water Act, and "determining" and "determination" in the first section (No. 9) of that Part, I am of the opinion that the board has essayed to "determine" a matter beyond its jurisdiction, *i.e.*, the easement claimed by the respondent, and, therefore, the appeal must be allowed.

GALLIHER, J.A.

GALLIHER, J.A.: At the conclusion of the hearing in this case I was satisfied that the commissioners had acted without jurisdiction in granting the order they did. I agree with the reasons given in the judgment of the learned Chief Justice, just read.

I see no reason for departing from the ordinary rule as to costs.

Appeal allowed.

Solicitors for appellants: *Pooley, Luxton & Pooley.*
Solicitors for respondent: *McKay & McDiarmid.*

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Mechanics' liens—Consolidation of claims in one action—Appeal—Right of —Amount in controversy—Each claim considered separately—Lien on sewer—Enforcement—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 3 and 6.

Owner preparing subdivision for residential section—Roadways laid out by owner—Dedication deferred under agreement with municipal body—Whether such roadways are public thoroughfares within the meaning of section 3 of the Mechanics' Lien Act—Claim of lien for supplying teams and drivers subject to orders of contractor.

Upon appeal from a judgment dismissing the action in which claims of several lien-holders under the Mechanics' Lien Act, some of which were less than $250, were consolidated in one action:—

Held, that only each individual claim of $250 or more had a right of appeal.

Gabriele v. *Jackson Mines, Limited* (1906), 15 B.C. 373, and *Gillies* v. *Allan* (1910), *ib.* 375, followed.

A workman is entitled to a lien upon the part of a sewer extending below low-water mark into the ocean, upon which he worked.

Where an owner of property is subdividing and preparing it for sale as a residential section, and undertakes, with the consent of the municipal body of the district, to prepare the roads and streets therein for public passage by persons residing in or passing along or through the subdivision, and it is expressly stipulated that the streets are not to be deemed public streets, such roads or streets are not to be considered as highways in the sense that they are exempt from claims for mechanics' or workmen's liens for the labour bestowed upon them.

But a person delivering upon the land material to be used in preparing such property is not a person who has done work or service upon the land within the meaning of section 6 of the Mechanics' Lien Act so as to be entitled to a claim for lien.

A number of claimants supplied teams, waggons and drivers to the contractors, at so much per diem, for hauling sand, gravel and earth upon the property, and these equipments and drivers were at all times subject to the orders of the foremen of the contractors.

Held (MARTIN, J.A. dissenting), that these claimants came within section 6 of the statute, and were entitled to claim.

Judgment of LAMPMAN, Co. J. reversed in part, and varied.

Statement

APPEAL from the judgment of LAMPMAN, Co. J. in an action to enforce several mechanics' liens that had by order of the Court

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been consolidated in one action, tried by him at Victoria in January, 1913.

The liens were claimed in respect of work done upon and in connection with roadways in a subdivision being prepared for sale as a select residential section by the owners of the subdivision. The owners had an agreement with the municipality by which it was specified that, in certain circumstances and for a certain period, it was not to be considered that the roadways had become dedicated to the municipality, but the owners, for a consideration in the shape of a certain exemption from taxation for the period mentioned in the agreement, were to have charge of the roadways. This agreement was included in a private Act of the Legislature obtained by the municipality.

Higgins, and *Bullock-Webster,* for the plaintiffs.
Bodwell, K.C., and *H. W. R. Moore,* for the defendants.

10th January, 1913.

LAMPMAN, Co. J.: This is a claim for a mechanic's lien in regard to work done by the sewer crew. The evidence shews that it was done outside the boundaries of Uplands. Therefore I do not think that in respect to this class of claims the plaintiffs have any lien.

The others are in a different category, because the work was there done on what is known as lot X. And the first point for decision is as to whether or not this part of land called lot X is a highway or not. I have come to the conclusion that it is a highway. But I must say that in coming to that conclusion I have very grave doubt. Some of the claims, I think, are under an appealable amount; so if the parties wish it, I will give leave to appeal in respect to any of those claims which are under the amount which can be appealed without leave. Now the Act here, it is true, calls these roads private roads, and says that nothing shall be deemed to be a dedication to the public as a public road or street. I do not think it really matters very much what the Act calls this lot X, it is really what the Act does in respect to it; the gist of it is, that all persons might at all times hereafter have free right of way over the said lot. I think that, in effect, makes them highways. They are not

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private roads really. A private road is a road which may be closed by some person. It is quite clear that these roads could not be closed, because it says that at all times hereafter the public shall have free right of way over them. In Shirley's Leading Cases at Common Law, a highway is defined as a passage which the Queen's subjects have the right to use. It seems to me that this lot X answers that definition entirely. It is true that the owners of Uplands, the trustees, may make regulations, limitations and restrictions, as set out here in the Act; but those regulations, limitations and restrictions must be such as would not be repugnant to the free right of way of the public; that is, something similar to the restrictions a municipal council, under the Municipal Act, has the power to lay down. The only question of fact in dispute is as to whether or not this lot X has been used as a passage way. The evidence, I think, shewed that so far as one might expect, that these had been used as roads. The only point in dispute was the place down where the gate was. Well, it appears that before there was a fence there, and that instead of cutting the whole fence away they cut a gap in it and put a gate there, and that afterwards the gate was left open. When one has regard to the fact that the Uplands is lately opened, and streets have not been finished yet, and there is really very little traffic there, except traffic of those going out to see land with a view to purchase, and taking material there for building roads, it does not seem to me that that road was closed; and if it was closed, the people who closed it had no right to close it.

Mr. *Higgins*: There is another point, your Honour, that I do not think you have considered—pardon my mentioning it—I do not know whether your Honour overlooked it—a point taken by me in the argument, and that was whether they have a lien, not on lot X, but on the property benefited by the work done on lot X.

THE COURT: Well, I do not think so, Mr. *Higgins*; it would have to be very clear in the Act if they had. In respect to that, I think that supposing a road was built along your property, you are not a party to it at all; no doubt it is quite possible that the road benefits you, but it does not touch you, the work is not

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done for you; I do not think that your land is subject to a lien for the work done on that road.

The plaintiffs appealed and the appeal was argued at Vancouver on the 7th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C. (*H. W. R. Moore,* with him), for respondents, raised a preliminary objection as to jurisdiction. In the *Baker* appeal, the individual claims in the consolidated action are all under the appealable amount. They cannot be joined on appeal: see *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373, 2 M.M.C. 399.

Argument

Maclean, K.C., Higgins, and *Bass,* for appellants: The *Gabriele* case was decided under a different statute. The decision there went on the distribution of the amount adjudged; here it is as to the amount involved. The judgment, when obtained, is not distributive either as a judgment or a claim. These different claims are the same as the items in an account.

Judgment

Per curiam: The preliminary objection is upheld. We follow the cases of *Gabriele* v. *Jackson Mines, Limited* (1906), 15 B.C. 373, and *Gillies* v. *Allan* (1910), *ib.* 375, in which we have already expressed the opinion that the individual claims must either, as under the original Act, have been adjudicated as sums not less than $250, or, under the present Act, the amount claimed must not be less than that sum. Therefore, those claims which are under $250 are not appealable.

Argument

Maclean, on the merits: As to lien attaching, see chapter 72, British Columbia statutes, 1910, schedule C. This is not a public highway; it is a private road. The road allowances in this subdivision are not public roads. But our lien attaches to the whole property of Uplands, as the whole benefited. The work done effected a great saving of taxation for ten years under the agreement with the municipality. Without this work, the property would be valueless for sale as residential property. Even confining our contention to the work done on the exact roads, then we submit that a lien attaches. All the roads in

question are described in a deposited plan as lot X. The agreement between Gardner and the municipality specifically, in numerous passages, withholds any idea of dedication except upon certain conditions and in certain circumstances which have not yet occurred. That agreement being incorporated into a statute, has the force of law. Apart from what has been done as to non-dedication, the work done would not constitute them highways. But as to dedication, see *Attorney-General* v. *Esher Linoleum Company, Limited* (1901), 2 Ch. 647. We have here no user indicating dedication; the user given so far is liable to all sorts of restrictions. See also *Cubitt* v. *Lady Caroline Maxse* (1873), L.R. 8 C.P. 704, 42 L.J., C.P. 278. We therefore submit that we have a lien. The fact that the sewer extends into the sea does not affect us, as that portion is an integral portion of the sewer, and is beneficial to the whole land.

Bodwell: The *Cubitt* case is not applicable here. If the public have a right of way, it becomes a highway.

[MACDONALD, C.J.A.: That might be so at common law, but has not the Legislature a right to say a road shall not be a public highway?]

That is so if the Legislature has said so in so many words. The regulations referred to in the agreement must mean the ordinary regulations governing the use of thoroughfares: see Halsbury's Laws of England, Vol. 16, p. 7, section 1 *et seq.* See also *Styles* v. *Victoria* (1899), 8 B.C. 406; *Roberts* v. *Hunt* (1850), 15 Q.B. 17. There is a positive agreement with the Municipality of Oak Bay that the public shall have a right of passage. There was a contract by which the Company, in consideration of relieving the municipality from obligations of maintaining the streets, the Company were given the right of regulation of traffic on these ways. But this does not affect the public, who are given the right of user.

Argument

Barraclough v. *Johnson* (1838), 8 A. & E. 99 at p. 105: As to Cameron, there is no proof that he did any work on lot X entitling him to a lien.

Higgins, in reply: The meaning of sections 3 and 6 is clear as to a lien attaching on a road. There is a lien on a road under the Municipal Act, and this is a road, but not a public road.

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The Legislature has specifically defined the character of these roads. As to the sufficiency of the evidence of Cameron's claim, that was not only proved, but admitted at the trial.

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MACDONALD, C.J.A.: I think it is quite clear that Cameron is entitled to a lien on that part of the sewer upon which he worked, which was below low-water mark. I am not placing any interpretation on section 3. I think this case, so far as I propose my judgment to extend, is not affected in any way by section 3 of the Mechanics' Lien Act. Section 6 clearly gives a lien to a workman upon a sewer. Here we have a sewer which extends below low-water mark into the ocean. Upon that part of the sewer upon which he worked I think this man is entitled to his lien. I express no opinion at all upon the other questions, some of which are rather intricate ones.

The appeal will be allowed in so far as Cameron's case is concerned, with costs applicable to his case here and below on the scale applicable thereto.

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IRVING, MARTIN and GALLIHER, JJ.A. agreed.

The appeal in the *Vannatta* case was argued on the 8th of April before the same Court.

Maclean, K.C., Higgins, and *Bass,* for appellants: These men cannot be called sub-contractors or material men, and need not really have given notice of claim for lien. They simply did work hauling. They performed work and rendered service on the lands affected.

[*Per curiam*: The only doubt is as to the meaning of section 3 of the statute as applied to them.]

Argument

Well that merely prevents a lien attaching to a highway that is manifestly a highway. The whole idea is that a man shall have the protection he is entitled to for the work he has done. In any event, we repeat our submission that these are not public highways.

Bodwell, K.C., for respondents: We repeat our submission in the *Baker* case as to these being public highways.

H. W. R. Moore, on the same side: None of these claimants

are entitled to a lien—they are contractors. Vannatta: As to the first half of his claim, the lien was not filed within 31 days after completion of the work. This man is a common carrier (*Webster* v. *Real Estate Imp. Co.* (1886), 6 N.E. 71) and should have given notice of claim for lien, and admittedly no notice was given. None of the other claimants did any work, or caused any work to be done on the property themselves; nor had they any contract, except as a contract of hiring material (teams) and men.

Higgins, in reply: As to time limit, 31 days after completion of work done: this was a continuation of the original agreement. There was no cessation of the work—it continued; the original written understanding was simply enlarged. These claimants do not come within the category of persons who must give notice. There is a distinction between "delivery" and "placing" as to material.

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Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: The Anderson Construction Company had a contract from The Uplands, Limited, to make streets, boulevards and sewers in a tract of land of several hundred acres which was being subdivided for residential purposes, and was known as the Upland Farm, of which William Hicks Gardner was the registered owner, The Uplands, Limited, being the registered holder of an agreement of sale from the said registered owner. The appellant Vannatta was under contract with the Anderson Construction Company to haul cement from the Grand Trunk Pacific wharves to the Uplands, and deliver same in stock piles where needed for the prosecution of the said work, and for the hauling of certain iron pipes from Rithet's wharf to the same place, to be distributed where directed by the Anderson Company. Two questions arise in his claim, one going to the whole, and the other to part of it. As to the first, the learned trial judge held that he was not within section 6 of the Mechanics' Lien Act, as being a person who had done work or service *upon* the premises.

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The fact that the cement and pipes were hauled from a point outside the Uplands to that property does not, in my opinion,

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exclude the said appellant from the class of persons mentioned in the said section. If a hod-carrier were required by his employment to carry bricks or mortar from an adjoining lot not included in the premises being built upon, and deliver them to the bricklayers upon such building, I do not think we could say the hod-carrier was outside the protection of said section, and if that be so, the hauling of material from a greater distance is distinguishable only in degree. The work being performed by said appellant was an essential part of the contractor's work. It was work upon the undertaking, and hence, while not all physically performed upon Upland farm, was in contemplation of the Act performed there. This is not like the case of a common carrier delivering goods at its freight depots. Here the appellant was required to do part of the work on the premises and part of the hauling was over the Upland farm, and the unloading and distribution was done there and was an integral part of the work in progress.

With regard to the other point, it was argued that as to the items of $384.10 and $12, his lien was filed too late. I think this is so. The contract under which the deliveries were made expired on the 1st of October, and the lien was not filed within 31 days of that date. As to the other items, amounting to $294.10, the defendants are entitled to succeed.

MACDONALD, C.J.A.

As to the other lien claimants, McLeod, Gillespie, Cameron & Calwell, and Dilley, whose claims are of an appealable amount, their work was all done on the Upland farm, and hence the question I have just dealt with in *Vannatta's* case does not arise in their cases. I therefore hold that all these claimants, including Vannatta, are within said section 6, and as it has not been made an issue in this appeal that there is no money due by the owner to the contractor, it is unnecessary to distinguish between labourers and sub-contractors.

The principal contest in this appeal was as to whether the work which the Anderson Construction Company had contracted to do for the respondents was work in public highways, and if so, whether section 3 of the Act did not preclude lien claims. I think the several streets which are designated lot X on the plan of the Uplands are not to be regarded as public roads.

Schedule C. of the Oak Bay Act, 1910, chapter 72, British Columbia statutes, 1910, to my mind settles that question in favour of the appellants, hence all the appellants whom I have found entitled to succeed are, I think, entitled to liens upon the Upland farm, including Lot X, subject, of course, to any paramount interest.

I would allow the appeal of the appellants Vannatta to the extent already mentioned, and of McLeod, Gillespie, Cameron & Calwell, and Dilley in whole.

IRVING, J.A.: I see no objection in allowing the lien on the ground that this claim is for filling in and making up roads. I am of opinion that these are not public highways within the meaning of the Act—certainly they were not dedicated until made and completed.

As to Vannatta, I think he had 31 days from completion of the services to file his claim for lien. The latter is spoken of as one contract and the verbal agreement to continue is spoken of as another contract, but really and truly he claims in respect of services. I would therefore hold that he was in time, but in my opinion the Act does not contemplate a lien being allowed for work done upon land to a person who delivers goods to be used in the construction and improvement of a place, although the place of delivery is in or upon the land. The Act speaks of a lien for a person placing and furnishing material, and in the schedule they speak of the delivery by the person who places and furnishes the material. The Supreme Court of Massachusetts, in *Webster* v. *Real Estate Imp. Co.* (1886), 6 N.E. 71, has held that the hauling of raw material to the premises was too remote to entitle the carter to a lien. This case is cited in Phillips on Liens, and I think in 1891, when I was in practice and acted in many mechanics' lien cases for the Victoria Lumber & Manufacturing Company and other mill owners, a decision was given that although the mill owner could have a lien for his lumber, he could not include the cost of hauling. I have tried to find a report of that decision, but no report can now be found one way or the other. I would strike out Vannatta's claim.

As to the other four claimants, in my opinion they caused

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work to be done. They supplied teams and men. I would allow their claims.

MARTIN, J.A.: The first objection to all the liens is based on section 3 of the Mechanics' Lien Act, but I shall content myself by saying that, after a careful consideration of the point, I have come to the conclusion that the roads in question are not "public streets or highways" within that section, and therefore it presents no obstacle.

Vannatta's claim is for hauling material (sand, gravel, cement, pipe, etc.) from town out to the property in question at so much per yard or ton, under a written contract with the contractors, which contract was, I find, renewed so as to form one continuous contract, amounting to $690.20. This includes also some materials which he hauled from the property into town, that had to be returned or changed. No notice in writing of intention to claim a lien was given under the proviso in section 6. It was urged that Vannatta is entitled to a lien as having "placed" material under section 6, but I have come to the conclusion that the expression "places" is not equivalent to "delivers," for it imports the handling of such material after the bare delivery on the ground. The reasoning in *Webster* v. *Real Estate Imp. Co.* (1886), 6 N.E. 71, seems sound, and the true distinction is drawn between helpers, hod-carriers and conveyors of material upon the premises, and bare conveyors of material to the premises, and it makes no difference in principle if the helper or hod-carrier should have to carry the material to the work from *e.g.*, a heap or pile of such material deposited for convenience upon the highway outside of the boundary of the lot upon which the work was being done. At the same time I recognize that in all matters where the question of degree is an important feature, it is hard to draw precisely the real line of demarcation.

MARTIN, J.A.

It follows that this claim should be dismissed.

As to Dilley's claim, it is agreed that he is entitled to $172.10 if we are in his favour as to the road not being a public street or highway, and therefore his claim should be allowed.

The other claimants are all of the same class (except Gillespie

in part, as hereafter noticed), and their claim is based upon the fact that they supplied teams of horses, waggons and drivers to the contractor for hauling sand, gravel and earth upon the property, for which they were paid so much per day, and said teams, waggons and drivers were subject to the control and orders of the contractor's foreman, and did only what work he required of them. It is contended by the defendant that these teams, waggons and drivers should be considered as legally of the same nature as plant or tools hired to the contractor. The point turns on the expression in section 6: "Every person who does work or service or causes work or service to be done upon," etc., which is difficult to exactly define, as it is at once a comprehensive and loose expression. I have reached the conclusion, after some hesitation, that it does not cover the present claims. It is clear that a master who hires out his servant to work for another has no lien for his services, though the servant himself would have; nor is it the less clear that one who hires out teams, *solus,* has no lien. And I am unable to see that the mere conjunction of teams with drivers alters the principle, because both are simply supplied on the ground subject to the order of the contractor, and they stand there idle and ineffective till the will of the contractor, in whose exclusive employment they are for the time being, "causes" them to work—in other words, the primary and moving cause of the work is the will of the contractor, and the men and teams placed under his control for the purpose of his contract are the mere instruments of his will to that extent. It follows that these claims should be dismissed.

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As to Gillespie, he drove one of his own three teams, and it is conceded that if there is a lien at all, he would, in any event, be entitled to one-third of his claim, but it follows from the view I have taken that he should have a lien for the full amount of his claim.

GALLIHER, J.A.: If liens can attach, then in my opinion Macleod, Gillespie, Cameron & Calwell, and Dilley are entitled to liens for the full amount of their respective claims. The learned trial judge has held that the lands comprising lot X are highways, and that therefore, under section 3 of the Mechanics'

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Lien Act, Revised Statutes of British Columbia, 1911, chapter 154, a lien cannot attach for work done thereon, nor can it attach to the lands benefited thereby. At first blush that might seem to be so, but after looking into the whole history of the transaction, and considering section 6, subsection 2 (*c*) of the Mechanics' Lien Act in connection therewith, I have come to the conclusion that the lands benefited thereby and enjoyed therewith are subject to liens.

The registered owner of what is now known as the Uplands is the defendant Gardner, who has, by agreement transferred these lands to the defendants, The Uplands, Limited. These latter have subdivided the lands into residential lots, opened up and laid down roads and streets, and filed a plan of their subdivision. The whole scheme is to provide a strictly high-class residential section, and in order to enable them to place it upon the market advantageously, and to enhance the value of their holdings, and in fact to make it possible for them to sell their holdings as residential sites of the class aimed at, they marked out and constructed expensive roads and streets and also sewers and water mains, etc. It is quite clear from the foregoing that all this was done for the purpose of enhancing, and did enhance and benefit their private holdings. It was in connection with this work that the liens were claimed.

GALLIHER, J.A.

There has been no dedication of these roads as highways. In fact, in the agreement with the municipality of Oak Bay, the limits of which include this property, it is specifically agreed that nothing therein contained shall be deemed a dedication of said lot X to the public or to the municipality as public roads or streets: see Schedule C. to chapter 72, British Columbia statutes, 1910; and the only way in which they can be said to be public highways is that the public, by said agreement, are for all time to have free right of way over them. This may be sufficient to constitute them public highways in that sense, but not such public streets or highways as is contemplated by section 3 of the Act, having regard to the fact that they form so essential a foundation for the development scheme of this whole area of private property, are laid out and constructed by private

interest, control maintained, and are open only to the public on completion.

For work done on these roads and streets, done in the first place (and before they were open to the public) solely in the interest of the defendants and those who should become holders under them, and undoubtedly for the benefit of the lands, I think there is a right of lien on those lands. I have never known, nor have I been able to find a similar case. The circumstances are peculiar, and I think, warrant me in taking the broadest view possible in favour of the workman. The appeal should be allowed, with costs, and judgment entered for the four plaintiffs above mentioned for the respective amounts claimed, with costs.

As to the Vannatta claim, I do not think his work comes within the class contemplated by the Act, being merely for teaming supplies.

Appeal allowed in part, Martin, J.A. dissenting.

Solicitors for appellants: *W. H. Bullock-Webster,* and *A. S. Dumbleton.*

Solicitor for respondents: *H. W. R. Moore.*

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1913

June 10.

HALLREN v. HOLDEN.

Libel—Excessive damages—Counsel suggesting evidence that he knew could not be produced or would be ruled out—Influence of on jury—Objection to not taken at trial—Costs of abortive trial.

HALLREN v. HOLDEN

The plaintiff, before the action, had been divorced by her husband (the defendant) on the ground of adultery with H., who subsequently married her. After the divorce H. wrote scandalous and obscene letters respecting the defendant to defendant's children, and a warrant was issued for his arrest. He was arrested by detectives in the plaintiff's rooms in an apartment house about half past eight in the evening. A newspaper published an account of the trial, when the defendant complained over the telephone to the editor that the affair was not properly reported, saying: "Detective Champion said that he arrested Hallren (H.) last November in the bedroom occupied by Nettie, the divorced wife of Holden." The words were subsequently published in the newspaper. On this statement the plaintiff sued for libel. The jury awarded $25,000 damages, for which judgment was entered. The evidence shewed that throughout the trial plaintiff's counsel continually made suggestions of evidence that he knew he could not produce or that, if submitted in evidence, would be ruled out.

Held, on appeal, that there should be a new trial on the ground of excessive damages.

Held, further, that the plaintiff pay the costs thrown away by reason of the abortive trial because of the course adopted by plaintiff's counsel throughout the trial.

Per MACDONALD, C.J.A.: That the tactics pursued at the trial might have had a great deal to do with the excessive damages arrived at by the jury, who were evidently awarding alimony, and not damages for slander.

Per IRVING, J.A.: That although the failure of counsel for defendant to object to going on with the trial is as a rule necessary for the allowance of a new trial on the ground of inflammatory speeches by counsel, yet justice would be done in this particular case by ordering a new trial, notwithstanding such failure.

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action for libel tried by him at Vancouver on the 14th of March, 1913. The facts appear fully in the judgment of MACDONALD, C.J.A.

The appeal was argued at Victoria on the 6th, 9th and 10th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant (defendant): Hallren's arrest took place on the 2nd of November, 1911, and the slander complained of is that Holden told the newspaper man that "Detective Champion said that he arrested Hallren last November in the bedroom occupied by Nettie, the divorced wife of Holden." We contend: first, the statement is true; second, the plaintiff should have been nonsuited because of her evidence, which established that Hallren was arrested in her bedroom; and, third, that they have not proved any special damages. Under section 5 of the Libel and Slander Act, chapter 139, Revised Statutes of British Columbia, 1911, "words spoken and published which impute unchastity or adultery shall not require proof of special damages." We submit the words used in this case do not come within that section: see Phipson on Evidence, 5th Ed., 585. There is no imputation of unchastity unless that is the only meaning that can be put to the words: *Capital and Counties Bank* v. *Henty* (1882), 7 App. Cas. 741 at pp. 744, 748, 750. To impute unchastity you must impute carnal knowledge, and you cannot put such an interpretation on the words used: *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68 at p. 73. You have to prove that these words impute unchastity. As to the merits, the plaintiff does not say that Hallren was not arrested in her bedroom.

Argument

[IRVING, J.A.: The mode adopted by plaintiff's counsel in changing the subject in his examination of witnesses in order to cover up facts that are against him cannot be too strongly condemned.]

We complain strongly of the conduct of plaintiff's counsel both through the trial and in his address to the jury.

R. M. Macdonald, for respondent: The offence of the appellant here was that of libel, not merely slander. Everyone who writes, prints or publishes a libel, or is in any way responsible for its being written, printed or published, may be sued by the person defamed: Odgers on Libel, 5th Ed., 171; *Parkes* v. *Prescott* (1869), L.R. 4 Ex. 169. The evidence shews that the appellant made the false statement as to Champion's evidence for the express purpose of having it published in the newspapers.

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He is, therefore, equally responsible for the publication of the libel as the printer.

So far as the amount of the verdict is concerned, it is submitted that in an action for libel the amount of damages is peculiarly a matter for the jury, and the Court will not interfere unless it is satisfied that the verdict is the result of gross error, prejudice, perverseness, or corruption: *Davis* v. *Shepstone* (1886), 11 App. Cas. 187; *Praed* v. *Graham* (1889), 24 Q.B.D. 53; *Roe* v. *Hawkes* (1663), 1 Lev. 97; *Roberts* v. *Owen* (1889), 53 J.P. 502.

In actions for libel, the jury, in assessing damages, are entitled to look at the whole conduct of the defendant from the time the libel was published down to the time they give their verdict. They may consider what his conduct has been before the action, after the action, and in Court during the trial: *per* Lord Esher, M.R. in *Praed* v. *Graham, supra,* at p. 55.

In answer to the argument that plaintiff's counsel wrongly and unduly inflamed the jury by reference to inadmissible matter, it is submitted that the matter which counsel at the trial tendered was really admissible, and should have been received by the Court. If the jury were inflamed it was not by reason of any improper references on the part of the plaintiff's counsel, but by reason of the obvious malice shewn on the part of the defendant in pursuing the plaintiff and publishing the gross libel in question. These were properly matters that the jury should consider in assessing the damages. Moreover, the appellant is estopped from raising such an argument at the present state of the case, because he deliberately concurred in having the case go to the jury after all the remarks of counsel, which he now charges as objectionable, had been made. He cannot take such a stand in the hope of a favourable verdict, and, upon its turning out unsatisfactorily to him, complain that the case should never have gone to the jury. Upon this point I rely upon the principle laid down in *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68; *Scott* v. *Fernie* (1904), 11 B.C. 91.

Argument

Taylor, called upon on the question of new trial: We are entitled to a new trial on two grounds: first, owing to the con-

duct of plaintiff's counsel at the trial; and second, the damages are excessive. The damages cannot be sustained. The jury have evidently assumed that the defendant is a wealthy man, and there is no evidence of his means: King on Defamation, p. 779; *Williams* v. *Smith* (1888), 58 L.J., Q.B. 21.

Macdonald: The very widest latitude is given counsel in such cases so that the jury should have all the surrounding circumstances in mind when deciding on a verdict. As to evidence of collateral matter, he referred to Odgers on Libel and Slander, 5th Ed., 373. Any evidence to shew a set intention to injure the plaintiff can be submitted.

[MACDONALD, C.J.A.: The evidence shews clearly that counsel for plaintiff the whole way through the trial was not playing the game. Counsel should never forget that they are officers of the Court, and should conduct their case fairly before the jury.]

Argument

Taylor, in reply.

MACDONALD, C.J.A.: I think there should be a new trial.

The plaintiff, prior to bringing the action, was divorced by her husband for adultery committed with one Dennis Hallren, who has since married her. After the divorce Hallren wrote scandalous and obscene letters respecting the defendant to the defendant's children. On this charge Hallren was arrested; we have not heard any statement as to whether he was acquitted or not. The Sun newspaper published an account of the trial of Hallren, and the defendant, over the telephone, complained to the editor that the report did not shew that the arrest of Hallren was made in plaintiff's bedroom, which he asserted was the fact. It was for this statement that the action is brought. The trial was conducted in a very unsatisfactory manner. Counsel for the plaintiff, it appears to me, systematically sought by propounding inadmissible questions, and by improper suggestions, to inflame the minds of the jury. The jury awarded $25,000 damages. The answer of the foreman to the question "Have you arrived at your verdict?" was, "We certainly have." And the amount of the verdict shews how successful were the efforts along the line I have just indicated. I think it was alimony that the jury was awarding, not damages for slander. As I

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think there should be a new trial, principally on the ground of excessive damages, which alone would lead me to grant a new trial, I will not say anything further about the facts of the case. I think the tactics pursued at the trial may have had a great deal to do with the excessive damages arrived at by the jury. I think there has been a mis-trial in this case, and it should go back.

MACDONALD, C.J.A.

With regard to the costs, the costs of this appeal, of course, will go to the appellant. As to the costs thrown away by reason of the abortive trial, I shall be pleased to hear what counsel have to say on that.

IRVING, J.A.: In my opinion there was a case to go to the jury; the words used were capable of being construed by a jury as an imputation against the woman's chastity.

I cannot say that the evidence was not sufficient to support a verdict.

The assessment of damages by the jury, $25,000, seems to me extraordinarily heavy, but speaking for myself, I would not order a new trial on that ground only. But there were very

IRVING, J.A.

inflammatory statements made by counsel for the plaintiff, and also statements by the same counsel not supported by evidence; and there was throughout the trial a failure to a very great extent to sheet home to Hallren as the person responsible, the so-called "spying" and other acts of aggravation. Having regard to the conduct of counsel and the extraordinarily heavy damages, I think we ought to order a new trial. The failure of counsel for the defendant to object to going on with the trial is to my mind very serious. But having regard to the whole trial, I think that justice will be done by setting aside the verdict and ordering a new trial. I think the suggestion of the Chief Justice as to costs is right.

MARTIN, J.A.: I am of the opinion there ought to be a new trial on the ground of excessive damages. While I concur in

MARTIN, J.A.

what my learned brothers have said in regard to the conduct of plaintiff's counsel at the trial, yet at the same time I do not think that of itself is sufficient to warrant a new trial being ordered, because the counsel for the defendant did not do what

I think, strictly speaking, he ought to have done, *viz.*: ask the learned judge to discharge the jury on account of the prejudice which he alleges was created in their minds. It is, I think, in this case at least, too late for him now to rely upon that as a ground for a new trial.

I agree with what has been suggested with regard to costs.

GALLIHER, J.A.: I also think there should be a new trial. I do not know that I can usefully add very much to what has been said by my learned brothers. I think it is unfortunate that frequently counsel—and sometimes it may inadvertently be done—allow themselves to be carried away by the bitterness that exists between the parties, and in that way are, possibly inadvertently, led into a course during a trial that if they took a cooler view of matters would not occur. If it were only one or two isolated instances in the trial, I do not think that would be sufficient to place very much weight upon. But when the general trend of the trial shews what does appear here to be a systematic course followed along those lines, then I think it really amounts to a case that has been mis-tried. The real facts have not been left fairly before the jury unencumbered by suggestions or attempted introduction of evidence that was not admissible.

I do not say anything about the question of damages, for this reason, that it is very hard indeed to say; that depends entirely on the circumstances what damages are adequate in a case of that kind. It may very well be, even although this woman has been divorced on the grounds stated, that she still has friends that believe in her innocence, and believe in her innocence in that connection; and it might indeed be a serious thing to that woman if an attempt is made to shew that even after a divorce was obtained she is continuing the conduct that she is alleged to have indulged in before a divorce was obtained. Under those circumstances it is pretty hard to say just what is excessive damages, and what is not excessive damages, therefore I express no opinion on that matter at all. But I agree in the main with my learned brothers that there should be a new trial. As to the question of costs, I do not dissent from the views that have been expressed in regard to that.

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GALLIHER, C.J.A.

The Court heard the argument of Mr. *Taylor* and Mr. *Macdonald* on the question of costs.

Per curiam: We are all agreed that the plaintiff should pay the costs thrown away by reason of the abortive trial. We do that principally for this reason, that we think we ought to emphasize our disapproval of the course that was adopted by plaintiff's counsel in this case by ordering her to pay the costs of the abortive trial; of course, those will only be the costs that have been thrown away.

New trial ordered.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondent: *MacNeill, Bird, Macdonald & Bayfield.*

MCINNES, CO. J.

1913

June 2.

FRIPP v. CLARK

FRIPP v. CLARK *ET AL.*

County Court—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154—Right of architect to lien—Entire contract.

An architect is not entitled to a mechanic's lien for preparing plans, and where a lump sum is to be paid for preparing plans and for superintendence, he is not entitled to a lien for any amount.

Statement

ACTION on a claim for a mechanic's lien to recover $600 for preparing plans and for superintending the erection of a dwelling house for the defendant Clark. The plaintiff was to receive five per cent. of the cost of the dwelling house as remuneration for his services. Tried by MCINNES, Co. J. at Vancouver, on the 2nd of June, 1913.

Argument

W. C. Brown, for plaintiff.

Saunders, R. W. Hannington, and *Creagh,* for the various defendants.

Judgment

MCINNES, Co. J.: Under the Mechanics' Lien Act, an architect is not entitled to a lien for preparing plans, and as the contract in this case was an indivisible one, the plaintiff is not entitled to a lien for any amount.

Action dismissed.

KIDD v. NELSON.

MORRISON, J.

1913

March 28.

COURT OF APPEAL

June 5.

KIDD v. NELSON

Contract—Repudiation of—Action to enforce—Fraud—Misrepresentation—Reference.

An action by a vendor to enforce a contract for the sale of a business fails where it appears that the purchasers were induced to enter into the contract by the material misrepresentations of the vendor, though innocently made.

Judgment of MORRISON, J. varied.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 12th of March, 1913. The action arose through an agreement between the parties partly in writing and partly oral, whereby the plaintiff sold to the defendant his business as a tea merchant in Vancouver, which included the goodwill of the business, his title to the registered trademark "Overwaitea," with a stock of special bags used in packing the same; also all orders then on hand for tea, with bags and other goods in connection with the business. The consideration for the sale was the sum of $1,307.08, and the transfer to the plaintiff of 20 shares of the capital stock of the defendant Company. The defendants took possession of the business, but on not carrying out their part of the agreement, the plaintiff sued for $1,307.08 and for specific performance of the agreement for the transfer of the shares of the defendant Company. The defendants pleaded that they were induced to enter into the agreement by the representations of the plaintiff as to the volume of business he had done and as to the prospects for an increased business. Subsequently it appeared that these representations were false, to the knowledge of the plaintiff, when they repudiated the agreement.

Statement

D. A. McDonald, and *Housser,* for plaintiff.

Armour, for defendants.

28th March, 1913.

MORRISON, J.: I think the contract sued upon must stand. The defence set up and argued with emphasis at the trial is

MORRISON, J.

MORRISON, J. 1913 March 28. COURT OF APPEAL June 5. KIDD v. NELSON

fraud. I do not find that the plaintiff in any way acted fraudulently. He was certainly sanguine. He is sanguine now. I cannot see in what way the defendants could have been misled by the plaintiff. They are experienced business men and were not dealing with a man who had, as I confess they would have one believe, just sprung from the ground, whose sanguine expectations and estimate of his business and worth were taken without investigation or thought. I quite agree with Mr. *McDonald's* contention, supported as it is by evidence, that the defendants did not, or would not, realize that they had to push the trade and spend money in so doing by adopting one or all of the methods known to the trade.

MORRISON, J.

There will be a reference to ascertain the exact amounts constituting the particulars of claim. The plaintiff will pay the costs of the adjournment of the first day.

The appeal was argued at Victoria on the 5th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Davis, K.C., for appellants (defendants).
Housser, for respondent (plaintiff).

MACDONALD, C.J.A.: The Court is unanimous in thinking that the contract ought not to stand, because of the misrepresentations of the plaintiff; and that the judgment below, which held that the contract had been broken by the defendants is erroneous. The present situation has been brought about by the plaintiff's own misrepresentations, which we will assume for the purposes of this case were innocent misrepresentations.

Judgment

The only other question then, is, what directions ought we to give to the registrar, to whom it should be referred to ascertain what, if anything, ought to be paid by the defendants to the plaintiff by reason of deliveries of tea, or of transactions between them while the arrangement lasted? Upon that point, if you have anything to say, we shall be glad to hear you.

Further argument was then heard.

Argument

Davis: There are three elements of the action; one is the

transfer of the stock, and the second is liability for outstanding orders, that is where the tea is held in warehouses at the banks. That is the important item.

MACDONALD, C.J.A.: According to my idea of it, the present judgment disposes of the first two points, that is to say, there is to be no delivery or transfer of the shares, and there is to be a release from the obligation to take over orders which were given by the plaintiff to persons supplying the tea. As to the third point, there should be a reference.

Per curiam: The appeal will be allowed with costs, and the order below varied in the manner indicated. The question of the costs of the trial will be left to the judge of the Court below, to be fixed after the reference; that is, the question of the costs below, including the costs of the reference.

Judgment

Appeal allowed.

Solicitors for appellants: *Davis, Marshall, Macneill & Pugh.*
Solicitors for respondent: *Williams, Walsh, McKim & Housser.*

BARKER, CO. J.

1912

Oct. 22.

COURT OF APPEAL

1913

June 26.

GLOBE REALTY CO. v. MARTINDALE & BATE

THE GLOBE REALTY CO. v. MARTINDALE & BATE.

Principal and agent—Sale of land—Commission—Sub-agent's right to share —Agreement—Sub-agent in service of purchaser.

J. and G., members of the plaintiff Company, sold a newspaper plant to M., one of the terms of the sale being that G. should remain as manager of the paper for two months. Whilst so acting as manager, G., learning that M. required more extensive quarters owing to a contemplated enlargement of the plant, proposed to the defendant Martindale that his firm should obtain an option on a certain property. Acting on the suggestion, Martindale secured an option, and shortly after G. introduced M. to Martindale, who, after the usual negotiations, sold the property to M. and received $1,000 commission for the sale. G. claimed that from the time he proposed the defendants should take an option on the property in question it was understood between himself and Martindale that he was acting as a member of the plaintiff Company and agreed that they should share in the commission. Martindale, on the other hand, swore he looked upon G. as M.'s agent and knew nothing of the plaintiff Company or of the claim for a share in the commission until after M. had personally negotiated for the purchase of the property and very shortly before the sale was closed.

Held (GALLIHER, J.A. dissenting), that the plaintiffs had not established an agreement or promise by the defendants to pay the plaintiffs a share of the commission, although the defendants admitted that but for the fact that G., a member of the plaintiffs' firm, was in the employment of the purchaser of the land, he and his firm would have been entitled to a commission, according to the usage of land brokers, for G. had introduced the purchaser to the defendants.

Judgment of BARKER, Co. J. affirmed.

Statement

APPEAL by plaintiffs from the judgment of BARKER, Co. J. in an action tried by him at Nanaimo on the 22nd of October, 1912. The facts are set out in the headnote and reasons for judgment.

F. C. Elliott, for plaintiffs.
Beevor-Potts, for defendants.

BARKER, CO. J.

BARKER, Co. J.: In this action the plaintiffs claim from the defendants $500, being half of the commission received by the

defendants for the sale of what in the trial has been called the Dailey property, to one Matson, owner of the Nanaimo Daily Herald.

It seems to me that the rights of the plaintiffs depend (apart from the question as to whether the plaintiffs, as the employee of the purchaser, could have any right to the commission) upon what took place between the defendants and George Mowat, one of the plaintiffs, on the date of the first conversation between them. Some days before that date it had been published in the Herald that Matson had purchased that paper, and that Mowat was to act as manager. According to the evidence of the defendants, Mowat saw them, representing himself as manager of the Herald, and acting for Matson, saying that Matson wanted to look over some properties suitable for a site for the Herald offices. The defendants say (and I am taking their evidence as the correct version of what took place) that there was nothing whatever said about his getting any commission in case a sale should be effected, or indicating that he expected any commission. They thought he was representing Matson, did not know that he had any connection with the Globe Realty Co., or that he had any interest in the real estate business. The letter from the Globe Realty Co. to George Mowat was not shewn to them, or read to them, and they knew nothing about it until shewn to them during the trial. They were dealing at the time with Mowat as manager of the Herald, and agent for Matson. A few days later, acting on the suggestions made during the conversation above mentioned, they made up a list of the properties they had for sale which they thought might be suitable, and also got from the owner of the property in question (which had been mentioned by Mowat as a desirable locality), the right to sell at $20,000, added $1,000 for their commission, and included it in their list. They say that they were instructed by Mowat to put this list in a sealed envelope and leave it at the Herald Office to be opened by Matson when he came to Nanaimo. Matson came a few days later and whether he opened this envelope or not I do not know, but he and Mowat went around and looked at the different properties listed, finally going to the office of the defendants, travelling together as owner and man-

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ager of the Herald, and going to the defendants' office as owner and manager of the Herald, and I do not think that the defendants at that time had any idea except that they were dealing with the owner and manager of that paper. From that time Mowat took no further part in the business, the final arrangements, after considerable delay, being completed between the defendants and Matson. The defendants say that later, when the deal was about complete, Mowat came to them and suggested that he should be allowed half the commission and said that he was a member of the Globe Realty Co., and they say that was the first time commission was mentioned.

The right to commission must depend upon a contract either express or implied. What took place between the members of the Globe Realty Co., or between Matson and that Company, has no bearing in the absence of any knowledge of the defendants. According to the best consideration I have been able to give to the evidence, the plaintiff George Mowat and defendants talked together in the first instance, the plaintiff as manager of the Herald for Matson, and the defendants as real estate brokers, and there was no suggestion made that Mowat was acting for his own Company, or in any other capacity than as agent for Matson, and there was no arrangement at the time, or at any time, as to commission being allowed to him. Consequently, I cannot see that the plaintiffs have established any right for any share of the commission received by the defendants, and have no course but to dismiss the action on the usual terms.

BARKER, CO. J.

The appeal was argued at Vancouver on the 9th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

C. K. Courtney, for appellant: The finding of the learned trial judge is not in accordance with the evidence. The letter of the 28th of May, 1912, from Martindale & Bate to G. N. Mowat shews there was an understanding between the parties such as the plaintiff contends.

Argument

Beevor-Potts, for respondents: If Mowat was an employee of the purchaser Matson, he cannot obtain commission. He cited *Panama and Sou h Pacific Telegraph Company* v. *India*

Rubber, Gutta Percha, and Telegraph Works Co. (1875), 10 Chy. App. 515 at p. 526; *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549; *Williamson* v. *Barbour* (1877), 9 Ch. D. 529; *Bagnall* v. *Carlton* (1877), 6 Ch. D. 371; *Thompson* v. *Havelock* (1808), 1 Camp. 527.

Courtney, in reply, referred to *Miner* v. *Moyie Lumber Co.* (1909), 10 W.L.R. 242.

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Cur. adv. vult.

26th June, 1913.

GLOBE REALTY CO. v. MARTINDALE & BATE

MACDONALD, C.J.A.: I would dismiss this appeal. I am unable to say that the learned County Court judge was wrong in his conclusion. It seems clear that George M. Mowat, one of the members of the plaintiff firm, was at the time he introduced Mr. Matson to the defendants as a proposed purchaser of the land in question, the employee of Matson to the knowledge of the defendants. The learned judge has found that at the time of the introduction he represented himself as manager for Mr. Matson, and the defendants say they dealt with Matson and Mowat on that basis. Defendants admit that just before the sale was closed, Mowat informed them that he was a member of the plaintiff firm and suggested that the firm was entitled to share the commission. In answer, the defendants told him that this claim was an afterthought; that he was in the employ of Matson. The repudiation of the suggestion of commission at this time was not very emphatic. That could be understood in view of the fact that the transaction had not been wholly closed, but I do not think what was said by defendants at that time amounted to a promise to divide commission either with Mowat or with the Globe Realty Co. It is true that defendant Martindale states in his evidence that had Mowat not been an employee of Mr. Matson, he should consider him entitled to a share of the commission claimed, but I do not think this advances the plaintiffs' claim. The custom of sharing commission with another agent would then doubtless have been recognized, but what was done here was done by Mowat on the representation, as has been found by the judge, that he was acting as manager for Matson.

MACDONALD, C.J.A.

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IRVING, J.A.: I think we should accept the judge's findings and dismiss the appeal. The letter of the 28th of May, 1912, to plaintiff G. N. Mowat, causes some doubt in my mind, but it is susceptible of explanation consistent with the facts found by the trial judge. On the other hand, the plaintiff's letter of the 25th of May, 1912, does not read as if there was any contract made by the plaintiffs with the defendants for a commission. It is written rather in the tone of an entreaty than a demand for a settlement of a claim.

MARTIN, J.A.: I think the learned judge below has reached the right conclusion.

GALLIHER, J.A.: The continuing in charge by Mowat was a term of the sale of the newspaper plant. It was to be handed over as a going concern at the end of two months. The payment of $30 weekly by Matson—call it salary or what you like—and Mowat continuing in charge, does not create that relationship between Matson and Mowat which would prevent the latter from recovering here. On the facts I entertain no doubt that the plaintiff should succeed. The defendants' letter of the 28th of May, 1912, is their own condemnation. That letter, short, emphatic and underscored, reveals the true reason why they departed from what they themselves admit was the usual custom to share commission. What they term "full investigation," but what I would term seeking about for a means of evading a just responsibility, convinces me that had they not come to the conclusion that Mowat's relation to Matson precluded him from recovering, there would have been no trouble about the matter. Their introducing the feature of the Globe Realty Co. as something they had never heard of, and were not concerned with, is only an evasion, and their objection on that ground has no force.

GALLIHER, J.A.

Taking the circumstances of the procuring defendants to obtain the listing, the introduction to them of Matson, the final consummation of the sale, all this through the agency of Mowat in the first instance, and the defendants' admission that under such circumstances commission is divided, it appears to me there is a contract upon which plaintiffs can recover.

I would set aside the judgment below, with costs, and enter judgment for the plaintiffs, with costs.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *Courtney & Elliott.*
Solicitor for respondents: *C. H. Beevor-Potts.*

BARKER, CO. J.

1912

Oct. 22.

COURT OF APPEAL

1913

June 26.

GLOBE REALTY CO. *v.* MARTINDALE AND BATE

JACKSON v. IRWIN AND BILLINGS COMPANY, LIMITED.

MORRISON, J.

1913

March 31.

COURT OF APPEAL.

June 4.

JACKSON *v.* IRWIN

Vendor and purchaser—Sale of land—Conveyance—Deficiency—Compensation—Rescission.

Plaintiff purchased 87 acres of land from defendants, paid cash, and was given a conveyance containing the usual statutory covenants. There was no preliminary contract by way of agreement for sale. Some six months afterwards, he discovered, on having the land surveyed, that there were only 25 acres in the property. Fraud was not alleged or set up.

Held, on appeal, in an action for compensation, that as the conveyance had been executed and there was no preliminary contract for compensation, the plaintiff was not entitled to relief.

Judgment of MORRISON, J. at the trial reversed.

APPEAL by defendants from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 17th of December, 1912, allowing the plaintiff compensation for a shortage in acreage. The defendants, real estate brokers, owned a piece of land containing, according to the Crown grant, 112 acres. They sold 25 acres to one Hillseth. In July, 1910, the plaintiff came to their office and the remaining portion was sold to him for $1,653, being 87 acres at $19 an acre. He paid $100 and obtained a receipt note. A few days afterwards he came in again and paid the balance due and obtained a conveyance. The

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property was bounded on one side by a river and was mostly bush land, with a small area in cultivation. The plaintiff had been shewn what were supposed to be the general boundaries by a farmer living in the neighbourhood. Subsequently he sold five acres, and for the purpose of conveying had the property surveyed, when he found there were only 25 acres instead of 87, and that the five acres were not within his boundaries. The purchaser of the five acres brought an action against the plaintiff and obtained judgment to the effect that the plaintiff had to convey to him the five acres or pay the sum of $50 damages, at the option of the purchaser. Before the discovery of the discrepancy in the quantity of land first sold, the plaintiff expended considerable sums in alleged improvements, including the erection of a large barn, all outside the 25-acre area. The plaintiff then brought this action for compensation for the shortage of 62 acres and for damages. No allegation of fraud was made against the defendants. The defendants refused to pay compensation, and, while denying liability as to rescission, offered to pay back to the plaintiff the whole of the purchase price if he would re-convey the property. This the plaintiff refused, claiming he could not do so on account of the judgment obtained by the purchaser of the five acres.

Statement

Mowat, for plaintiff.
Abbott, for defendants.

31st March, 1913.

MORRISON, J.: I find there was a mutual mistake as to the quantity of land in the area agreed to be sold. I find that a bargain of sale was concluded between the parties on the basis of 87 acres at the price of $19 per acre. Immediately upon the conclusion of the purchase by conveyance, the plaintiff proceeded to clear the land and erect a barn with a capacity commensurate with the extent of land acquired, and he also purchased machinery to work that area of land. He also sold five acres to one Anderson and thereupon, for the purpose of that sale, he had the land surveyed for the first time, when it was found that the parcel bought from the defendants contained only 25 acres, and that the five acres sold to Anderson were not within this 25-acre area. The defendants were quite unaware of these

MORRISON, J.

circumstances at the time. The plaintiff now claims damages for breach of contract to convey 87 acres, or alternatively a return of the price of 60 odd acres at $19 per acre, with interest from the date of the conveyance. The defendants are willing to take a reconveyance of the property, and they bring into Court the necessary sum for repayment thereupon to the plaintiff. This the plaintiff refuses, alleging as a ground that he had agreed to convey a portion of the land. It seems to me that the plaintiff alone is responsible for the consequences of his precipitancy in subdividing his purchase. For aught I know he can reconvey as desired by the defendants. I do not think he is entitled to the damages he claims, in consequence of his own acts. He knew, or must be held to have known the defendants' connection with the property. I do not think he in any way relied upon anything they may have said as to the acreage, if they said anything or did anything other than exhibit the sketch attached to the Crown grant, which does shew 87 acres to be the quantity of land in the parcel. He should have taken ordinary precaution to check up the boundaries, if not before the purchase, at any rate before he started to sell a portion and before he began erecting buildings and expending money in alleged improvements by denuding the property of timber.

If I understand Mr. *Abbott* aright, he contends that inasmuch as the contract was completed by conveyance there can be no relief. The competent relief in a case such as this, of a common mistake, is rectification: *Cole* v. *Pope* (1898), 29 S.C.R. 291; *Paget* v. *Marshall* (1884), 28 Ch. D. 255 at p. 263. The defendants must return to the plaintiff the price of so much of the land as falls short of the quantity proved to be there.

As to the costs of the action, the plaintiff is not entitled to costs, because he has failed on the main ground of his action and has refused to accept the defendants' reasonable offer of repayment owing to his alleged inability to accept it. The defendants are not entitled to costs owing to their mistake.

The appeal was argued at Victoria on the 4th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

MORRISON, J.

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March 31.

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June 4.

JACKSON v. IRWIN

Hart-McHarg, for appellants (defendants): Our contention is that where a sale has been perfected by conveyance, and there is no preliminary contract providing for compensation in case of defects or deficiencies, the Court will not give compensation. Neither is the plaintiff, having accepted a conveyance, entitled to rescission, although we were willing to arrange the matter on this basis, as there was no fraud nor a total failure of consideration. He referred to Dart on Vendors and Purchasers, 7th Ed., 807 and 812; *Follis* v. *Porter* (1865), 11 Gr. 442; *Penrose* v. *Knight* (1879), Cass. Dig., 2nd Ed., 776; *Clayton* v. *Leech* (1889), 41 Ch. D. 103; *Palmer* v. *Johnson* (1884), 13 Q.B.D. 351. *Cole* v. *Pope* (1898), 29 S.C.R. 291, referred to by the learned trial judge, is a case where there was complete failure of consideration, and the purchaser was held to be entitled to rescission, not compensation.

Argument

M. A. Macdonald, for plaintiff (respondent): The authorities shew that the principle of compensation applies in this case: *Hird* v. *E. & N. Ry. Co.* (1909), 14 B.C. 382; *Chapman* v. *Wade* (1911), 20 O.W.R. 680; *In re Turner and Skelton* (1879), 13 Ch. D. 130; and *Hill* v. *Buckley* (1811), 17 Ves. 394. The deficiency in the acreage is covered by the covenant in the deed. The cases referred to by the appellant do not shew such a substantial difference in the amount of property originally purported to be conveyed and the amount actually conveyed: *Portman* v. *Mill* (1826), 2 Russ. 570; *Connor* v. *Potts* (1897), 1 I.R. 534; Williams on Vendor and Purchaser, 2nd Ed., Vol. 1, p. 611.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed. I express no opinion as to what course might have been adopted by the Court had the purchaser been in a position to reconvey. As it is apparent that he was not in a position to reconvey, and has not offered to reconvey, no relief can be afforded. Plaintiff insists on the right to compensation for deficiency in acreage. I do not think that after conveyance that is a remedy that can be given.

IRVING, J.A.

IRVING, J.A.: I agree. The main points which seem to have been overlooked by the learned trial judge were these: that there

was no preliminary contract for compensation, and the conveyance had been executed. Therefore, I do not think that the plaintiff is entitled to maintain this action. I would not say that he would not have been entitled to apply for rescission. It is unnecessary to express any opinion on that point.

MARTIN and GALLIHER, JJ.A. agreed.

Macdonald, moved for leave to be reserved to bring a fresh action.

Per curiam: After you have gone to trial on the basis you did here, after you have conceded that you cannot reconvey, and have come to this Court and had the matter litigated in due course, surely it would not be proper for us to leave the door open for further litigation. If plaintiff can get the property back from his vendee and if you can agree upon it, it seems to be quite a proper case for a compromise such as Mr. *McHarg* offered to make. that is, to pay back the purchase money on reconveyance of the property. If you can agree, that is a matter between yourselves.

Judgment

The appeal will be allowed, with costs, and the action dismissed.

Appeal allowed.

Solicitors for appellants: *Abbott, Hart-McHarg, Duncan & Rennie.*

Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

MORRISON, J.

1913

Feb. 28.

COURT OF APPEAL

June 11.

DISHER v. DONKIN

DISHER v. DONKIN.

Partnership—Evidence—Admission in letter—Appeal—Reversal of trial judge on facts—Taking of accounts.

The defendant engaged the plaintiff in 1907 as a salesman at a salary and a percentage of the profits of his business. The basis of remuneration was adjusted from time to time. The business took the defendant away on long trips yearly and the plaintiff managed the business during his absence. From 1910 on the plaintiff urged for an interest in the business, with a view to a partnership, to which he contended the defendant agreed but would not come to a definite settlement, the defendant, on the other hand asserting that the discussions were always on a basis of what percentage of the profits the plaintiff should receive, claiming that a partnership was never contemplated. In January, 1912, the defendant left on a trip to the Orient, *via* England. On reaching Montreal he received a letter from the plaintiff asserting a partnership and insisting that it should be evidenced in writing at once. The defendant's letter in reply was evasive, not openly affirming the partnership, but not in any way denying the assertions in the plaintiff's letter. In June, 1912, the defendant served the plaintiff with a notice of dissolution of partnership in which he referred to their relations as that of a partnership.

Held, reversing the judgment of MORRISON, J. on a question of fact, that the evidence of the defendant's letter and of the notice of dissolution amounted to an admission of an existing partnership and that the plaintiff was entitled to the usual decree.

Statement

APPEAL by plaintiff from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 5th, 7th and 9th of December, 1912. The action was one for a declaration of dissolution of partnership. Defendant, who was carrying on business as Donkin & Co., engaged the plaintiff in 1907 as a salesman on salary and a percentage of profits. This basis of remuneration was varied and adjusted from time to time. The character of the business necessitated frequent and long absences of the defendant, and the charge of the business was in plaintiff's hands at such times. In 1910 plaintiff urged that some arrangement be made whereby he would "get a share in the business," but no definite arrangement as to partnership was arrived at. Defendant admitted that he agreed to some share being given in

the profits, which might amount to a partnership, but no partnership agreement was drawn up, and he denied that he intended a partnership, owing to plaintiff's real-estate transactions, which he feared might render him (defendant) liable in some way.

S. S. Taylor, K.C., for plaintiff.
A. H. MacNeill, K.C., for defendant.

28th February, 1913.

MORRISON, J.: The trial of this case came first before the learned Chief Justice, who requested the parties to attempt an amicable adjustment of their difficulties. Upon the matter coming before me and after hearing both parties, particularly in view of paragraph 11 of the defence, I certainly considered it a fit subject for settlement out of Court and delayed the final determination of the issues involved in order that that might be done. However, apparently owing to the ill-feeling imported into the case by both these young men, the attempt on the Court's part to effect a settlement has failed.

Harry Donkin, the defendant, began business as a commission broker in the year 1899, in British Columbia, under the name of H. Donkin & Co., and subsequently extended his operations into Alberta. About the year 1907 the plaintiff Disher was employed as a salesman on a salary *plus* a percentage of the profits. This was readjusted and varied from time to time advantageously to the plaintiff. The nature of the firm's business necessitated the prolonged and periodical absence of the defendant Donkin in the Orient, the business, in Vancouver particularly, being then left entirely in the plaintiff's hands.

In 1910 the plaintiff urged for an arrangement whereby he would get, as he termed it, a share in the business. But no basis was arrived at. In January, 1911, however, the plaintiff, by commendable persistence, succeeded in bringing the defendant to an arrangement as to his future status in the firm, the meaning of the exact terms of which is the issue in this case. They had frequent interviews, apparently always brought about by the plaintiff, and I have little doubt but the word partnership was used by both. One of the difficulties of this case is to determine in what sense the expression was used by either, or both.

MORRISON, J. 1913 Feb. 28. COURT OF APPEAL June 11. DISHER v. DONKIN

If used in its popular and not its legal sense, or as a matter of business convenience, then a real partnership may not have been intended. The plaintiff alleges that the arrangement was that he was to be taken in as a partner, the profits to be derived from the partnership to be divided between them in equal shares, and that on the 1st of January they commenced business on that basis in British Columbia and Alberta. The defendant admits he agreed to share in the net profits equally with the plaintiff in lieu of the previous arrangement existing between them as to the plaintiff's remuneration, and that this arrangement is what he characterized as a partnership. The plaintiff alleges that the defendant said he would have the necessary partnership papers drawn up. But, notwithstanding frequent requests to have the arrangement reduced to writing it was not done, so finally, along in 1912—more than a year after the new arrangement—plaintiff had articles of partnership drawn up by his solicitor, incorporating the usual partnership terms. This was submitted to the defendant, who still refrained from signing, alleging on one occasion, at any rate, that the reason he hesitated was that he feared liability in respect of the private debts of the plaintiff should any arise, as he was involved in certain real estate transactions. During all this time, as far as the public was concerned, there was no outward intimation that a partnership in the sense claimed by the plaintiff had been formed. Their bankers were not so informed, and the books of the concern do not throw any light on the matter, nor did the plaintiff take any part in the conduct of the business inconsistent with the relationship previously existing. True he may have redoubled his efforts, if that were possible, to make the business pay, and he was interested in having it prosper, but that does not mean that the business was carried on in his behalf as it would if he were a partner (owner). Even if the defendant agreed to let him superintend or control the business, that would only be an extra security to him. In such a case he is not interested in the losses of the firm except in so far as they affect the amount of his remuneration. From the evidence it does not appear that Donkin in any way relinquished or altered his former methods

of carrying on the business as regards his relationship with the plaintiff. He consulted the plaintiff, if anything, less than before. In the defendant's absence the plaintiff had his power of attorney, enabling him to transact partnership business. Then followed the correspondence and the notice of dissolution. I accept the defendant's version of that incident. I am satisfied that the term partnership was used in its conventional, colloquial sense.

The relationship of employer and employee existed between the parties up to January, 1911. The plaintiff's contention now is that on that date that relationship was changed into one of co-partnership, and this contention is based upon an alleged verbal arrangement, supplemented by later correspondence, including a notice of dissolution of partnership given by the defendant to the plaintiff. Where a former servant or employer claims partnership he must make out a very strong case, particularly in view of section 3 of the Master and Servant Act, Revised Statutes of British Columbia, 1911, chapter 153.

The question of partnership depends on the real contract of the parties. What contract can be extracted from the material adduced in this case? In my opinion, none, except an agreement whereby a defined share in the annual net profits of the business of H. Donkin & Co. was to be allotted to the plaintiff in lieu of the previous arrangement between them, and doubtless, in view of the substantial share thus acquired, he was desirous of reducing the concession to writing, to the terms of which, however, the defendant would not and did not agree. In order to make out a partnership, the whole transaction must disclose an arrangement by which the parties are co-principals in a business carried on for their mutual profit. The true test is the relation of agent on the part of each partner to the firm, and the consideration is the mutual promises and covenants.

MORRISON, J.

The action will be dismissed, with costs. As to the counterclaim, I reserve judgment for further argument, if counsel desire to press for a decision thereon.

The appeal was argued at Victoria on the 10th and 11th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

MORRISON, J.

1913

Feb. 28.

S. S. Taylor, K. C., for appellant (plaintiff).

A. H. MacNeill, K.C., for respondent (defendant).

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June 11.

DISHER v. DONKIN

MACDONALD, C.J.A.: I think the appeal should be allowed, and an order made for the taking of the partnership accounts on the basis claimed by the plaintiff.

I should be very loath to reverse the judgment of the learned trial judge on any question of fact. But it is the duty of the Court, as has several times been pointed out, to review the whole case, on the facts as well as on the law. But there is a very salutary rule in regard to reviewing cases on the facts: that the Court ought to give due weight to the finding of fact of the learned trial judge. In this case we are relieved of any embarrassment with respect to that, because, as it appears to my mind, the case can be settled in the plaintiff's favour on the defendant's own letter, dated the 12th of February, 1912. When it is borne in mind that that letter is written in answer to the plaintiff's letter of a few days earlier, of the 3rd of February, 1912, in which the plaintiff all through is asserting a partnership—not claiming that a partnership ought to be entered into, but asserting that a partnership actually existed between the plaintiff and defendant since the 1st of January, 1911, and insisting that it should be evidenced by writing, it cannot be doubted that he was assenting to the position taken by the plaintiff that such a partnership did exist—I say, under circumstances of that kind, it is not sufficient for the defendant now to come to the Court and say, I wrote that letter under pressure, that is, under this pressure that the demand was only made upon me to sign the partnership articles on the eve of my departure for the Orient, and I could not very well dispense with the plaintiff's services at that time, and the plaintiff knew this, and therefore insisted upon forcing this partnership upon me, because he knew he had me in a difficult place. I say I do not think the defendant can successfully make any such excuse for writing a deliberately misleading letter. And if we take that letter at its face value against this defendant, then it means that there was a partnership such as the plaintiff alleges. In connection with this it is also proper to remember that the

defendant gave a regular notice of dissolution of that partnership, in which he calls it a partnership, and in which he refers to the Partnership Act of this Province. Further, there is the evidence of Branch and of Miss Copp. If it were clearly a case of conflict between witnesses I perhaps would not refer to the evidence of these two witnesses, because the learned trial judge may not have placed as much reliance upon it as we might, sitting here, without seeing the witnesses; but their evidence is to be taken into consideration in connection with the other evidence in this case, evidence of the defendant himself, contained in the letter, and contained in the notice of dissolution of partnership.

IRVING, J.A.: I think the appeal must be allowed. I have some doubt whether we have reached the right solution of this case, but to my mind the case must be determined by the letter the defendant himself wrote. Had he denied there was any partnership, and said, what we were talking about was simply a division of the profits, I should have accepted his statement without hesitation. He can only thank himself for his loss if our decision is not right.

IRVING, J.A.

MARTIN, J.A.: I concur in allowing the appeal. The crux of the case is the defendant's letter, the effect of which has been explained or excused by the learned counsel on his behalf as being a "temporizing" one. All that it is necessary to say on that point is that the time had arisen in the relations of these two parties when a temporizing letter was one that ought not to have been written. It was incumbent upon the defendant to define his position and write a frank, fair letter in order to protect himself, instead of an indefinite one.

MARTIN, J.A.

GALLIHER, J.A.: I would allow the appeal.

GALLIHER, J.A.

Appeal allowed.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for respondent: *MacNeill, Bird, Macdonald & Bayfield.*

COURT OF APPEAL

1913

June 24.

CANADIAN LOAN AND MERCANTILE CO. v. LOVIN

CANADIAN LOAN AND MERCANTILE COMPANY, LIMITED v. LOVIN.

Master and servant—Moneys received by servant on option on property—Commission—Return of option—Accounting, master's right to.

W., acting for the owner of two lots, listed them with the defendant. Subsequently the defendant entered the plaintiff Company's employ, with whom he listed the property. The defendant shortly afterwards obtained a better price for the property from W., and urged his employers to take an option themselves. Nothing came of this, however, and the defendant then negotiated with C., who paid him $5 to obtain an option for ten days. The defendant saw W., who gave the option in C.'s name, for which he was paid $5. Two days later W.'s principals sold the property to other parties. The defendant and W. then came to a settlement whereby W. paid the defendant $250, and he received back the option given C. The defendant then paid C. $250, less $15, which he withheld for his own services. The plaintiffs claimed that the $250 was paid as a commission to which they were entitled, the defendant being in their employ, the defendant on the other hand claiming that the money was paid in consideration for the return of the option.

Held, on appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., affirming the judgment of the trial judge, that the $250 was paid for the defendant's services, to which his employers were entitled.

Per IRVING and GALLIHER, JJ.A.: That the plaintiffs' claim did not fall within the defendant's retainer, the money being paid in settlement of the claim of the option holder.

The Court being equally divided, the appeal was dismissed.

Statement

APPEAL from the judgment of LAMPMAN, Co. J. in a trial before him at Victoria on the 28th of March, 1913, whereby judgment was entered for the plaintiffs for $150 and costs. The facts on which the judgment was given are set out shortly in the headnote.

The appeal was argued at Victoria on the 24th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

D. S. Tait, for appellant.

M. B. Jackson, for respondent Company.

MACDONALD, C.J.A.: I think the appeal should be dismissed. There is no question about it that this listing was obtained by the defendant for his employers, the plaintiffs. He was told to push the sale of the property, and suggested that some advertising be done by the plaintiffs. He was told that it was a matter that should be energetically put upon the market. He says that he went to Cohen, from whom he got $5, obtained an option from Wright for Cohen on payment of a deposit of $5. Afterwards, when Cohen was ready to pay the balance and take up his option, it was found that the owner on whose behalf Wright purported to have given the option had sold the property to someone else. Defendant then asked Wright what was to be done about it, and Wright told him to bring the option. The option was brought and Wright offered to pay $250 for services. That is what Wright says, and that is what Lovin says in the document he signed at that time. The learned trial judge chose to believe that those were the facts, that is to say, what was stated by Wright and in the receipt signed by Lovin. I do not think I could disagree with his finding of fact. He saw the witnesses. He is the best judge of that, having the advantage of seeing the witnesses and their deportment in the box. That being so, his judgment ought not to be disturbed. The $250, according to that finding, were paid for services performed by Mr. Lovin in and about this option; perhaps not strictly a commission, but in lieu of commission he lost for the sale of the property over his head. Being in the employ of the plaintiffs, he was bound to account for what he received, and the learned trial judge says he was to account for the $250. I cannot say that the learned trial judge was wrong in finding the facts as he did.

IRVING, J.A.: I would allow this appeal. The plaintiffs' claim never fell within the terms of the defendant's retainer, unless possibly to the extent of $15. There is no doubt the defendant introduced the matter to Cohen and obtained for him an option, and that deal fell through under such circumstances that Wright, or his principal, might have found themselves involved in a lawsuit. Wright settled that possible lawsuit by

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paying $250. That sum was really paid to settle Cohen's claim—not the plaintiff's—because Cohen was the only person who had any cause of action against him. Wright says that it was for Lovin's time. Well, he may have been influenced by that, but what Wright says is in contradiction of what Wright did. Wright could have paid Lovin for his time by giving him a cheque for $250, but we know that he would not pay until his option contract was returned to him, and all danger of a lawsuit had disappeared. I have no difficulty in dealing with what the County Court judge has found. What Wright paid the $250 for was to settle Cohen's claim, and Cohen had, in turn, to settle with his brokers, the plaintiffs.

For these reasons, it does not seem to me that this settlement for $250 was within the defendant's retainer; but for obtaining that settlement, what would be a fair commission for Cohen to allow him? I think $15 would be fair. The plaintiffs, having regard to the fact that the defendant was entitled to a percentage, would not be entitled to receive from the defendant as much as $10—out of the $15. If I had been the County Court judge I think I would have held that the plaintiffs had misapprehended the facts of the case, and that the $15 was not really within the agreement. I would have dismissed the case. It may well be that there are reasons justifying the plaintiffs in dismissing Lovin for undertaking work of this kind, but this claim ought to have been dismissed.

IRVING, J.A.

MARTIN, J.A.: It is obvious that the defendant is entitled to something, and I think the trial judge has taken the broad and proper view of this case by giving judgment for the full amount. In my opinion the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: My brother IRVING has put into words, I think, my view of the matter, very much along the lines I suggested to Mr. *Jackson* at the close of his address.

GALLIHER, J.A.

Appeal dismissed.

LUCAS v. MUNICIPALITY OF NORTH VANCOUVER *ET AL.*

MURPHY, J.

1913

June 2.

COURT OF APPEAL

June 30.

LUCAS v. NORTH VANCOUVER

Municipal law—Municipal corporation acquiring shares in a public utility company—Power of corporation to transfer shares to trustees—Qualification of such trustees to act as directors——"Owning" and "holding" shares—Bare trustee—Municipal Act Amendment Act, 1913, B.C. Stats., Cap. 47, Sec. 5.

Railway Act, R.S.C. 1906, Cap. 37, Sec. 112—Mode of relief of person complaining—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 208.

A municipal corporation owning shares in the capital stock of an incorporated company may appoint trustees to whom they have the power to transfer the shares. MACDONALD, C.J.A. dissenting.

Semble, per MACDONALD, C.J.A., and GALLIHER, J.A.: Under section 112 of the Railway Act, which provides that "no person shall be a director unless he is a shareholder owning 20 shares of stock," a shareholder must have some substantial interest beyond that of *holding* shares as a mere trustee in order to qualify as a director.

Per IRVING, J.A.: The plaintiff could have obtained all the relief necessary by a motion to quash under section 208 of the Municipal Act.

APPEAL by defendants from an order of MURPHY, J., made by him at Vancouver on the 2nd of June, 1913, on an application for an injunction, in which it appeared that the defendant Municipality, under the powers conferred by the Municipal Act Amendment Act, 1913, subscribed for and had issued to it 2,500 shares in the capital stock of The Burrard Inlet Tunnel and Bridge Company, which was made a party defendant in the action. This Company was incorporated by chapter 74, Statutes of Canada, 1910, to which the Railway Act, Revised Statutes of Canada, 1906, chapter 37, was made to apply. Subsequently the Municipality transferred certain of its shares in the Company to the four defendants, Bridgman, Loutet, McLurg and Farner, in order to qualify them as shareholders, with a view to their election as directors of the Company. The plaintiff, a ratepayer, brought action for an injunction restraining the defendant Municipality from in any way disposing of its shares in the defendant Company, for an injunction restrain-

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ing the defendant Company from transferring on its books the shares transferred to the defendants Bridgman, Loutet, McLurg and Farner, and for an injunction restraining Bridgman, Loutet, McLurg and Farner from dealing in any way with said shares.

F. G. T. Lucas, for plaintiff.

Burns, for defendants.

2nd June, 1913.

MURPHY, J.: This is an application for an interim injunction. The preliminary objection was taken that under the Municipal Act there is a provision for attacking a resolution by a city council on the ground of illegality. I do not think this objection well founded, because to give effect to it would narrow the grounds of attack by the plaintiff.

To proceed under the Municipal Act would mean that the illegality of the resolution could alone be called in question and, as my judgment will shew, I do not feel called upon to express any opinion at this stage as to whether the resolution in itself is illegal or not. I therefore overrule the preliminary objection. I am of the opinion that the plaintiff is entitled to an interim injunction. He is a ratepayer of the City of North Vancouver. The documents produced before the Court shew that the Municipality transferred some 20 shares in a bridge company to several parties with the intention of qualifying them to become directors of the company, presumably on behalf of the Municipality. On the same day, apparently immediately after the execution of the transfer of the 20 shares by the Municipality to these individuals, each one of them executed an absolute transfer back, in fact the two transfers are identical, *mutatis mutandis*. I fail to see how on any construction of the word "own" these individuals can be said to have any property whatever in these shares. The Railway Act requires that to qualify for a director, in regard to this particular Company at any rate, an individual must own 20 shares. It is possible that these individuals were owners for the brief period that elapsed between the execution of the transfer to them and the execution of the transfer back to the Municipality. On these documents being executed and delivered, as they were, I fail to see how the parties proposed to

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be qualified, have any interest whatsoever. Therefore they could not be directors. If that be so, there would be a board, the majority of whom, I believe, would be unqualified, and yet I gather from the proceedings, it is intended for them forthwith to act in a matter of great magnitude as a board of directors. The result might be very serious indeed to the ratepayers of North Vancouver.

I therefore grant the interim injunction on the usual undertaking of solicitor as to damages.

The appeal was argued at Victoria on the 26th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Burns, for appellants (defendants): On an application to restrain a corporation from transferring shares to individuals in the council in order to qualify them to act as directors on the board of a company for the further protection of a municipality's interest therein, see *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462; *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610.

[IRVING, J.A. referred to *Beatty* v. *North-West Transportation Company* (1887), 12 App. Cas. 589.]

Registration is conclusive as far as the company is concerned: *Sutton* v. *English and Colonial Produce Company* (1902), 2 Ch. 502. These men are registered owners on the company's books and that is all that is required: *Cooper* v. *Griffin* (1892), 1 Q.B. 740; *Howard* v. *Sadler* (1893), 1 Q.B. 1; *Boschoek Proprietary Company, Limited* v. *Fuke* (1906), 1 Ch. 148; *Dunster's Case* (1894), 3 Ch. 473. Under section 112 of the Railway Act, Revised Statutes of Canada, 1906, chapter 37, citing the qualification of a director, the word "owning" is used. In the Ontario Companies Act, Revised Statutes of Ontario, 1897, chapter 191, section 42, directors must hold stock "absolutely **and** in their own right," and in the English statutes the words are "holding in his own right." In the case of *Ritchie* v. *Vermillion Mining Co.* (1902), 4 O.L.R. 588, Maclennan, J.A. at p. 597, says the word "absolutely" in the Ontario statute distinguishes the case from the English cases.

Argument

Under section 53, subsection (21) of the Municipal Act, the

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Corporation may aid by subscribing for stock in the defendant Company. There is an adequate remedy in this case by applying to quash the by-law: *City of London* v. *Town of Newmarket* (1912), 2 O.L.R. 244; *Little* v. *McCartney* (1908), 18 Man. L.R. 323.

F. G. T. Lucas, for respondent (plaintiff): We had to make both the Municipality and the Company parties to the action. A motion to quash the by-law would not, therefore, be an adequate remedy considering the circumstances of this particular case: see *Ritchie* v. *Vermillion Mining Co.* (1902), 4 O.L.R. 588. The words "holder in his own right" is just as strong as owner," and the question here is: what is the meaning of the word "owner"? As to the power of the Municipality to sell the property thus acquired, see Dillon on Municipal Corporations, 5th Ed., Vol. 3, pp. 1,581, 2,128. The by-law passed under subsection 15 of section 53 of the Municipal Act does not give power to the Municipality to transfer the shares belonging to them to their councillors. The only way by which this transaction can be effected is by the councillors acquiring shares in their own right.

Argument

Burns, in reply.

Cur. adv. vult.

30th June, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: With the latter part of the judgment of my brother GALLIHER I agree, that is to say, that, owing to the difference in language of the English Act and ours, we are free from the embarrassment caused by the *dictum* of Sir George Jessel in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610. The object in imposing a share qualification is perfectly plain, that a director should have 20 shares to qualify him for directorship, that he should have some substantial interest in the company, not the interest of a bare trustee. The English Courts felt themselves bound to follow the said *dictum* of the late Master of the Rolls, but only because a practice had grown up under it which it was thought undesirable to disturb.

On the other points, as I have already intimated, I am unable to agree with my learned brothers. I think the municipal Cor-

poration had no authority to do what it attempted to do here. The statute, it is true, gives the Corporation power to subscribe for and obtain shares in a company of this class, but it makes special provision for the representation of the Municipality upon the board of directors; the reeve or mayor is to be *ex-officio* a member of that board. I do not think we can say that this statutory body might resort to other and indirect means of obtaining representation on the board by transferring said shares to third persons to qualify them for directorship. To dispose of the shares by sale is one thing: to manipulate them for the purpose of obtaining a representation on the board different from and in addition to that expressly provided by Parliament is quite another.

IRVING, J.A.: The plaintiff, a ratepayer, having come to the conclusion that a scheme or plan, devised by the Council for the advantage of the Corporation, was unworkable, and being thoroughly satisfied with the correctness of the opinion he had formed, applied for and obtained an injunction restraining the Council from carrying out their scheme.

The Council now appeals, and asks in effect that their management of the Corporation's affairs be not interfered with. Unless their action is *ultra vires,* or is not *bona fide,* their request seems to me a reasonable one, and should be acceded to.

When a case such as this is brought before the Courts, one asks oneself at the outset: For what purpose is a council elected, and when and under what circumstances can a ratepayer wrest from the elected of the people the power which has been committed to the council to manage? The general rule, as laid down in Bryce on Ultra Vires, 2nd Ed., p. 371, is that whatever (that is not being *ultra vires*) concerns "a corporation" can be dealt with by the majority of the corporators, or the governing body, if they have vested in them the capacity to exercise the powers of the corporation. It seems to me undesirable that there should be any departure from so sensible a rule.

Turning to this particular case, it would appear that the defendants, the Municipality of North Vancouver, acting under the powers conferred by the Municipal Act Amendment Act, 1913, British Columbia statutes, chapter 47, subscribed for

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2,500 shares in the capital stock of The Burrard Inlet Tunnel and Bridge Company, a company incorporated by Dominion statute (1910, chapter 74), to which company the Railway Act, Revised Statutes of Canada, 1906, chapter 37, applies. The shares were duly issued to the defendant Municipality, and the consequence was that by section 111 the reeve of North Vancouver became a director. The Council then, thinking the voting power, and consequently the influence of the Municipality in the promotion of the objects of the Company, could be increased by causing to be elected on the board of directors certain persons well disposed towards the Municipality of North Vancouver, determined to place in the names of four gentlemen (the defendants), Messrs. Bridgman, Loutet, McLurg and Farner, shares sufficient to qualify them for election as directors of the Company, and the intention was to have them elected as directors. This scheme was being carried out, when the plaintiff arrived at the conclusion that the appointment of these four gentlemen holding qualification shares from the defendant Municipality in the manner I have mentioned, would render any action by the directorate of the Tunnel Company nugatory, and that thereby the objects which he and the defendant Municipality desired to see accomplished, namely, the completion of the undertaking for which the defendant Company had been organized, would be delayed, and possibly prevented.

IRVING, J.A.

Under these circumstances he felt himself compelled to leap into the gulf, and obtain an injunction against the defendant Municipality preventing the transfer of the shares to these four gentlemen, and prohibiting the four gentlemen from receiving the shares or applying to register the same, and the Company from recognizing the transfer.

In the first place, I think the plaintiff, if entitled at all to maintain the position he has assumed, could have obtained all the relief that was necessary, *viz.*: a prohibition against the transfer of the shares to the four gentlemen, by a motion to quash the by-law, under section 208. Because he thinks fit to add the other (and unnecessary) parties, who can only be reached by injunction, he is not at liberty to escape the consequences of section 208.

On the main point, in my opinion, the plaintiff's position is quite wrong. The defendant Municipality are by statute authorized to "alienate" their personal property. The four gentlemen were trustees for the Municipality. There is no suggestion of bad faith in transferring the shares to them. I can see nothing *ultra vires* in a municipal corporation appointing a person a trustee and conveying to him property to be held in trust.

In England, prior to the passage of the Municipal Corporation Act, 5 & 6 Wm. IV., chapter 76, it was competent for municipal corporations to alienate their property, and as a consequence vest it in a trustee: see *The Mayor and Commonalty of Colchester* v. *Lowten* (1813), 1 V. & B. 226, a decision by Lord Eldon, and so far as personal property is concerned, that power remains with a British Columbia corporation (real property in this Province, as in England, by statute, stands on a different footing).

The contention advanced in support of the plaintiff's view, *viz.*: that the proceedings of the board of which these four gentlemen were members would be invalid, is that by section 112 of the Railway Act it is provided that "no person shall be a director unless he is a shareholder, owning 20 shares of stock." This, he contends, means that he shall own these 20 shares as a beneficial owner, and not as holding shares given to him to qualify, as in the present case.

The decision, or rather, *dictum,* in *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, was with reference to the language used in the English Act. Looking at our section 112 of the Railway Act, I can see no reason for saying that a person is not qualified if the 20 shares held by him are held in trust. If we turn to the Companies Act, Revised Statutes of Canada, 1906, chapter 79, we see that Parliament has made it clear in that case that a director must own the shares absolutely in his own right. Why there should be a difference I cannot say, but the contrast between the two Acts is significant.

The Legislature having authorized the Municipality to embark in commercial pursuits by acquiring shares in a railway company, I can see no reason why the Municipality should not exer-

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cise all the rights that any individual shareholder might properly exercise. That the Corporation should be a shareholder and yet not enjoy all the advantages of its position seems to me to be irreconcilable with the trend of modern legislation and decisions relating to municipal government.

GALLIHER, J.A.: I agree that the Corporation of North Vancouver have power to transfer the shares in question to the respective members of the Council to be held in trust for the Corporation. That is what has been done here, the purpose sought being to qualify them to act as directors on the board of The Burrard Inlet Tunnel and Bridge Company. There is, however, a further question which perhaps does not arise directly under the injunction as it is worded, but which counsel argued before us, and upon which the Corporation are desirous of having the opinion of the Court. That is as to whether a bare trustee can, under the Act, qualify as a director. While, generally, I disapprove of the Court dealing with matters where it is sought to obtain an expression of opinion on a question which, though incident to, is not strictly speaking before us as an issue, yet, considering all the circumstances of this case, and that it has been argued before us, and as it is of great importance considering the English decisions upon the point, I think we should deal with it.

GALLIHER, J.A.

This Company is incorporated by Dominion Act. Section 112 of the Railway Act, being chapter 37 of the Revised Statutes of Canada, 1906, in so far as it affects this question, is as follows:

"No person shall be a director unless he is a shareholder, owning 20 shares of stock," etc.

It is admitted that the Councillors to whom the Corporation transferred certain of the stock held by the Corporation in the Bridge Company, merely hold it in trust for the Corporation, and have no beneficial interest therein, the object being as before stated. The words in the Imperial Act, upon which the English cases relied on by the Corporation here were decided, are " is to hold as registered member in his own right."

The first case cited is *Pulbrook* v. *Richmond Consolidated Mining Co.,* 9 Ch. D. 610, wherein Jessel, M.R. expressed the

view that under these words beneficial ownership was not necessary for a qualification. This case was decided in 1878, and has been followed in England since.

In *Bainbridge* v. *Smith* (1889), 41 Ch. D. 462, Cotton, L.J. distinctly dissents from this view, and in *Cooper* v. *Griffin* (1892), 1 Q.B. 740, in the Court of Appeal, Lord Coleridge, C.J. at p. 744, says that "even if the case of *Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610, was directly in point, I should have a difficulty in deciding according to Sir George Jessel's view," and goes on to say that "the decision appears to have given rise to a practice which there would be great difficulty in overruling in cases where the words are the same, but it is a very different matter where the governing words are different"; and again, in *Howard* v. *Sadler* (1893), 1 Q.B. 1, Lord Coleridge, C.J., and Wills, J. comment upon the decision in the *Pulbrook* case, and it would appear that a practice had grown up under the decision in that case which the Courts in subsequent cases were loath to disturb. The only Canadian case to which we were referred was *Ritchie* v. *Vermillion Mining Co.* (1902), 4 O.L.R. 588. At page 597, Maclennan, J.A. says:

"If the shares held by the directors, or any of them, were actually held in trust, and not beneficially, I do not think, having regard to the discussion of the subject in the three English cases—*Pulbrook* v. *Richmond Consolidated Mining Co.* (1878), 9 Ch. D. 610; *Cooper* v. *Griffin* (1892), 1 Q.B. 740; and *Howard* v. *Sadler* (1893), 1 Q.B. 1—we could hold them qualified,"

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and goes on to say that the Ontario Act is stronger than the English Act by reason of the word "absolutely." To my mind the words in the English Act are just as wide as in our Act, and had it not been for the discussion of the *Pulbrook* case in the later English cases referred to, I should have felt bound by the opinion of so eminent a jurist as the Master of the Rolls. We have not been referred to any cases in the Canadian Courts where this view has been followed, and after a consideration of the cases, I feel at liberty to express my opinion that the parties whom it is sought to register here could not qualify as directors.

Appeal allowed, Macdonald, C.J.A. dissenting.

Solicitors for appellants: *Burns & Walkem.*
Solicitors for respondent: *Lucas & Lucas.*

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July 3.

EX PARTE WILLIAMS.

Land Registry Act—Mortgage on portion of a lot—Registration—Map or sketch to accompany same—R.S.B.C. 1911, Cap. 127, Secs. 90 and 100.

EX PARTE WILLIAMS

The map or sketch required on the registration of a mortgage of a portion of a lot is governed by section 100 of the Land Registry Act. Section 90 of said Act does not apply.

APPLICATION by way of petition for a direction to the district registrar of titles to register a mortgage of a portion of certain lots particularly described in the mortgage. Heard by MORRISON, J. at New Westminster on the 3rd of July, 1913.

Sections 90 and 100 of the Land Registry Act read as follows:

"90. Whenever any land, or original section, or town lot has been surveyed or subdivided into town or other lots, so differing from the manner in which such land, section, or lot was surveyed or granted by the Crown, or by the Hudson's Bay Company, that the same cannot or is not, by the description given of it, easily or plainly to be identified, the person, corporation or company making such survey or subdivision, ... shall, within three months from the date of every such survey or subdivision, deposit in the office of the registrar of the district in which the land is situate a plan or map of the same on a scale of not less than one inch to every four chains, shewing the number and range and group (if any) of the original section or lot, and the number or letter of each subdivision, the names of streets, with the magnetic bearings of the same, and shewing thereon all roads, streets, lots, and commons within the same, with the courses and widths thereof respectively, and the width and length of lots, and the courses of all division lines between the respective lots within the same, together with such information as will shew the adjacent sections or lots of land.

Statement

"100. Notwithstanding anything hereinbefore contained, whenever any person applies for registration of a portion of an entire lot or section, or for the issuance of a certificate of indefeasible title to the same, he shall, if so required by the registrar, append to or procure to be indorsed on the instrument conveying the said land, or shall deliver to the registrar, a map or sketch thereof, certified by a Provincial land surveyor, and signed by the grantor or other conveying party, or by the applicant, shewing the dimensions of the land, and giving such information as will easily identify the same."

W. J. Whiteside, K.C., for petitioner.

H. C. Hanington, for the registrar.

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MORRISON, J.: The petitioner, who is owner in fee simple of certain lots in the City of New Westminster, has executed a mortgage of a portion of them, particularly described in the mortgage. The district registrar of titles declines to register this mortgage, assigning as his reason that registration of a portion of a lot shewn on a deposited subdivision plan cannot be effected; that a re-subdivision plan must be first deposited under section 90 of the Land Registry Act. Mr. *Whiteside*, for the petitioner, contends that the plan attached to the mortgage is not a statutory re-subdivision of the character dealt with in section 90; that the section which governs this application is section 100. I am inclined to agree with him. Surely an owner may encumber any designated portion of his property without necessitating a statutory re-subdivision, or any division such as is contemplated by section 90. The plan attached to the mortgage is of no further use after the mortgage is paid, nor is the contingency of foreclosure an answer at this juncture. The plan in question is not a substitute for previously deposited plans, or any portion of them. The prayer of the petitioner is granted.

Judgment

Order accordingly.

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April 4.

TUCKER v. MASSEY *ET AL.*

Principal and agent—Commission—Sale of land—Introduction—Whether subsequent sale effected in consequence—Evidence.

TUCKER v. MASSEY

In an action for commission on the sale of land, plaintiff claimed ten per cent. of the price for which defendants sold a half interest in certain lands, alleging that his agreement with defendants was that he was to receive ten per cent. commission "on all such sales as should be effected on his introductions." The jury at the trial so found, and plaintiff having introduced F., that the sale in question resulted from such introduction.

Held, on appeal (GALLIHER, J.A. dissenting), affirming the finding of the jury, that notwithstanding the fact that the sale in question was more extensive than the one in contemplation when the agreement was made, yet plaintiff was entitled to ten per cent. commission, as the sale resulted from the introduction.

APPEAL by defendants from the judgment of MORRISON, J. and the verdict of a jury in an action tried by him at Vancouver on the 23rd of May, 1912. The facts and arguments appear in the reasons for judgment on appeal.

Statement

The appeal was argued at Victoria on the 9th and 10th of January, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellants.

C. W. Craig, for respondent.

Cur. adv. vult.

4th April, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The plaintiff recovered judgment against the defendants other than the defendant Garvey, who was dismissed from the action during the trial, for an amount represented by ten per cent. of the price for which the defendants sold an undivided half interest in the Haysport townsite through, as the plaintiff claims, his instrumentality. The defendants had purchased the said townsite for speculation. The plaintiff and the defendant Massey met, and as the result of a conversation they then had with respect to the Haysport townsite, Massey,

according to the plaintiff's evidence, agreed to pay him ten per cent. commission "on all such sales as should be effected through his (the plaintiff's) introductions." The jury found that the agreement between the parties was "that the plaintiff was to receive ten per cent. commission on sales effected through parties introduced to the defendants by the plaintiff." Plaintiff having introduced one Somerset Finch, the jury found that the sale in question was "the result of the introduction of Finch by the plaintiff to the defendants."

I think the fair inference from the evidence is that all parties understood that Finch was simply a promoter, and that if any business were done by reason of Finch's introduction, it would be done with persons in England through the efforts and connections of Finch. After the introduction, Finch agreed to purchase four lots on the representation of the defendants that it would be advisable to secure at once some portion of the water frontage in the townsite. I think it cannot be doubted that the purchase of these lots was regarded by all parties as merely an initial one, because shortly afterwards Finch obtained an option to purchase eight other lots; then sixteen others; and on the day upon which he obtained the last-mentioned option, he obtained a further option to purchase a considerable portion of the townsite at a price of $100,000. Finch then, early in 1910, went to England, and busied himself in promoting a fishing company to take over his options and carry on business at Haysport. He kept in touch with the defendants, as the correspondence shews. Ultimately, on the 3rd of July, 1911, he cabled to the defendants to the effect that negotiations were under way with the Alberta Land Company, Limited. Thereupon the defendants replied that defendant Freer would leave at once for London, which he did. On his arrival he interviewed officers of the Alberta Land Company, Limited, the result being a sale to that company, with the concurrence of Finch, of an undivided half interest in the Haysport townsite. Some other rights or options of no apparent value, controlled by Finch, were included in the sale, but if they affected the purchase price, and therefore the amount of commission, the point is not raised in the notice of appeal, as I read it.

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It was argued on behalf of the appellants that the agreement to pay the plaintiff a commission ought to be held to be limited to sales of lots to a fishing company for the purposes of their industry, whereas, as was contended, the sale to the Alberta Land Company, Limited, was of an entirely different character, and was not in contemplation of the parties when the commission agreement was entered into. No doubt it was to a fishing company that plaintiff expected sales would be made as a result of his introduction of Finch, but the agreement was not expressly limited to such. The defendants were content to promise a commission on all sales which might result from plaintiff's introductions, without restriction as to the character of the interest sold. But assuming that in the circumstances the narrow construction contended for by the appellants ought to be placed upon the agreement, yet I think it cannot be said that the jury was not at liberty to conclude from all the evidence and circumstances of this case that the sale finally effected was one falling within the purview of such an agreement. It was not seriously suggested that the initial purchase of four lots was all that could come within the commission agreement. Had the other eight lots or the sixteen lots been purchased, I do not think the defendants would have ventured to argue that the plaintiff ought not to have his commission on their purchase price. I think this is also true of the large block agreed to be sold for $100,000. Now, all these initial transactions were merged in the final agreement with the Land Company. The agreements executed at the time of that sale, first by the defendants and Finch, in which the defendants undertook to allot to Finch certain shares in a projected company to operate at Haysport in consideration of Finch agreeing to "transfer to the Alberta Land Company, Limited, and Messrs. Massey and Freer jointly, with a view to the establishment of a fishing industry at Haysport, all the rights and concessions he possessed," including the lots and options above mentioned, and the reference in the agreement of sale with the Land Company of the intention of that company "to promote and form a company with limited liability in England or in Canada with the object, amongst others, of acquiring and taking over from the proprietors the whole or some part or

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parts of the properties and rights hereafter to be acquired by the proprietors as aforesaid, with a view to the development thereof," are indicative of the purpose to which the purchaser proposed to devote either the whole townsite or a substantial part thereof.

The main distinction between this case and such cases as *Burchell* v. *Gowrie and Blockhouse Collieries, Limited* (1910), A.C. 614, and *Stratton* v. *Vachon* (1911), 44 S.C.R. 395, is that here the subject-matter to be sold was not definitely ascertained at the time the commission agreement was made, in this sense, that no limit was placed upon the number of lots or the *quantum* of interest which might be sold as the result of the plaintiff's introduction. Had the agreement been that the plaintiff should be paid a commission on the sale of a half interest in the townsite effected by a person introduced by him, there could, I apprehend, be no doubt about his right to recover. The defendants, however, left the matter at large. There was no break in the continuity of the efforts of Finch, and of the defendant's assent thereto, from the beginning until the final sale. It cannot, therefore, I think, be said that the latter was a new and independent transaction.

MACDONALD, C.J.A.

I am unable to say that the verdict is wrong, and therefore the appeal must be dismissed.

IRVING, J.A.: I would dismiss this appeal. I am satisfied that the question in issue was as to the ten per cent. on $26,000 and that the jury had that in view, and that their answers are to be read in that connection. The answers support the fourth finding of the verdict. Finch's five per cent. was in consideration of his giving up his interest.

IRVING, J.A.

MARTIN, J.A.: I concur in the opinion that there was evidence to go to the jury. I hesitated for some time, in deference to the view taken by my brother GALLIHER, for whose opinion in these matters I have great respect, but I find that on re-perusing the evidence for the third time I cannot escape from the conclusion that the case was properly left to the jury. It must be borne in mind that the agreement, as set up, was a general one for the sale of all the lots in the townsite. The plaintiff was

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authorized to dispose of them all, and while it is perfectly true that he introduced Finch, who was admittedly a promoter, not a purchaser on his own account, to the owners as a person who would buy only at the time, as they thought, lots for the establishment of a fishing industry, yet, even though the introduction was on that basis it would not, on the language employed, prevent the plaintiff recovering if, by any chance, Finch were to expand his ideas and purchase, entirely apart from his original intention as to the fishing industry, another block of lots in the same way, say for the purpose of establishing a lumber industry. And *e.g.*, if the plaintiff at the same time had introduced another man representing a lumber industry who had come to buy, and had bought lots for that sole purpose, and also bought more lots on his own account because of what he heard Finch say respecting his fishing project, the plaintiff would be entitled to his commission. It is all a question of degree of remoteness, and it was for the jury to say what meaning was to be attached to the intention of the parties in the special circumstances. Subsequent events, I think, shew that even though the ideas of Finch were expanded they were not very far from what was originally contemplated. The statements of Tucker and Garvey largely support this view.

MARTIN, J.A.

GALLIHER, J.A.: The question narrows itself down to the consideration of whether the plaintiff was the *causa causans,* or merely the *causa sine qua non* of the sale which took place. The authorities to which we have been referred after all go to emphasize the fact that the determination of this question depends largely upon the particular facts and circumstances of each case.

GALLIHER, J.A.

The jury have made two important findings of fact: (1) That the plaintiff was to receive ten per cent. commission on sales effected through parties introduced to the defendants by the plaintiff; (2) that the sale to the Alberta Land Company was the result of the introduction of Finch by the plaintiff to the defendants. These findings, if I may use the expression, seem to me to be half truths, or to put it in another way, they may be construed in a limited sense or in the fullest and broadest sense

that the words can be used. If construed in their limited sense, *viz.*: that had it not been for the introduction of Finch to the defendants the sale might never have come about, and in that sense is due to the introduction, it may very well be that the evidence warrants such a finding, but that in itself is not sufficient to entitle the plaintiff to succeed. On the other hand, if it is intended to be and is to be construed in its broadest sense, that, to my mind, cannot be done without giving full effect to the facts and circumstances surrounding the initiation of the dealings and the introduction of Finch, and having regard to what was in the contemplation of all parties when the agreement for commission was made. As I regard that part of the evidence, if those facts and circumstances entered into the consideration of the jury, and they should, they would not be warranted in coming to the conclusion they did if their findings are to be interpreted in their broader sense.

Taking the evidence of the plaintiff himself: At the time when Finch was introduced to the defendants, and when the agreement for commission was made, there was nothing in the contemplation of any of the parties other than that Finch, who was in touch with capital in England, was introduced to the defendants for the purpose of inducing that capital to establish a fishing industry on the Haysport townsite, owned by the defendants, and for the purchasing of such lands as might be necessary in connection therewith. This is evidenced by the nature of their first transaction, and purchase of four lots. Moreover, the plaintiff says he never regarded it as a real-estate proposition at all, but only as in connection with the establishment of fishing industries. Nor do I think the subsequent options or agreements between Finch and the defendants, and which he unsuccessfully endeavoured for two years to carry through, alters the position, for the deal that eventually went through was one of a different character entirely to that contemplated when any agreement for commission was made, being not only for the establishing of a fishing industry, but for the exploitation of the townsite as a real-estate proposition by the expenditure of large sums of money, and was for a half interest in the townsite, and not for the acquiring of any particular portion of the townsite for the purposes of a fishing industry.

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It may be, though I express no opinion thereon, that the plaintiff is entitled to commission on such portion of the purchase moneys as are applicable to purchases in connection with the fishing industry, but there is not sufficient evidence before us upon which we could intelligently deal with that. In my view there is, in these circumstances, no appreciable difference between the right to commission on the whole transaction here and in a case of, say, this kind: supposing after Finch had been introduced for the purpose before set out, and a commission agent agreed upon as before stated—valuable oil springs or minerals had been discovered on the property, and the Alberta Land Company, who had been introduced to the defendants by Finch, decided that in addition to purchasing such lands as they might require for the purpose of their fishing industry, they would go in with the defendants for developing these oil springs or minerals, and paying perhaps large sums of money for an interest in these, could it be said in view of the nature of the transaction between the plaintiff and the defendants when Finch was introduced, and of what was then in contemplation of the parties when the promise for commission was made, that the plaintiff would be entitled to commission on the sales of the oil and mineral interests? If it can, it is carrying it farther than I am prepared to go, and it would be difficult to prescribe a limit beyond which the plaintiff might not go in claiming commission through the various ramifications that might ensue in dealing with the property.

GALLIHER, J.A.

For these reasons I am, with great respect, unable to reach the same conclusions as my learned brothers. The appeal should be allowed, and the action dismissed, with costs, but in the circumstances, without prejudice to the plaintiff, if he may be so advised, to bring an action for the recovery of commission in respect of so much of the transaction as is connected with the establishment of the fishing industry.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *Shaw & Shaw.*
Solicitors for respondent: *Craig, Bourne & McDonald.*

ASHMORE v. BANK OF BRITISH NORTH AMERICA.

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April 22.

ASHMORE v. BANK OF BRITISH NORTH AMERICA

Master and servant—Contract for service—Void or voidable contract—Servant treating contract as legal for a portion of the term—Approbation and reprobation—Estoppel—Master and Servant Amendment Act, 1899, B.C. Stats. 1899, Cap. 43, Sec. 3—Constitutionality of.

Plaintiff was engaged in Scotland by the defendant Bank for service in Canada for a period of three years at a salary of $700 per annum, the service to be terminated by three months' notice in writing on either side, or three months' salary, except in case of misconduct on the part of the plaintiff. At the end of the three years' term, if plaintiff remained in the service, plaintiff had to give six months' notice. Plaintiff, before the expiration of the term, gave three months' notice, which, not being accepted, he left the service and went into other business. He sued for his salary due and "risk money" to his credit at date of leaving, which the Bank contested and counterclaimed for $400 damages for breach of the agreement of service. One of his contentions was that the contract was illegal and void by virtue of the Master and Servant Amendment Act, 1899, British Columbia statutes, 1899, chapter 43, section 3: "Any agreement or bargain, verbal or written, express or implied, which may be made between any person and any other person not a resident of British Columbia, for the performance of labour or service, or having reference to the performance of labour or service by such other person in the Province of British Columbia, and made as aforesaid, previous to the migration or coming into British Columbia of such other person whose labour or service is contracted for, shall be void and of no effect as against the person only so migrating or coming. (*a.*) Nothing in this section shall be so construed as to prevent any person from engaging under contract or agreement skilled workmen not resident in British Columbia, to perform labour in British Columbia in or upon any new industry not at present established in British Columbia, or any industry at present established, if skilled labour for the purpose of the industry cannot be otherwise obtained, nor shall the provisions of this section apply to teachers, professional actors, artists, lecturers or singers."

The trial judge gave judgment for plaintiff and dismissed the counterclaim.

Held, on appeal, varying the judgment of MCINNES, Co. J., that plaintiff have judgment for salary due at time of leaving, and also the "risk money," but that defendant Bank have judgment on the counterclaim.

Held, further, however, that while the contract came within the statute, yet, plaintiff having elected to accept the contract as valid for two years of the term, he could not be allowed to approbate and reprobate.

Semble, per IRVING, J.A.: That defendant Bank should have pleaded this estoppel.

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Held, further, that it was within the power of the Provincial Legislature to pass the Master and Servant Amendment Act, 1899, as coming under the head of civil rights.

APPEAL by the defendant Bank from the judgment of MCINNES, Co. J. at Vancouver on the 16th of October, 1912, in favour of the plaintiff, and dismissing the counterclaim for damages for breach of a contract for service. The facts appear in the headnote.

The appeal was argued at Victoria on the 15th of January, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

Ritchie, K.C., for appellant: Upon a proper construction of the statute, we say that the contract was not one for the performance of labour or service in British Columbia; it is for any place in North America to which the Bank desires to send the plaintiff. The statute is aimed at any person going out of the Province and making contracts for labour coming into the Province.

[MARTIN, J.A.: Is not the test that if the employer asks or assigns the servant to work or perform some part of the contract within British Columbia, then he comes within the statute?]

But he did not take that ground; he simply said he wanted to resign. This is not a contract for three years' work in British Columbia.

[MARTIN, J.A.: That is at the master's will. The greater should include the lesser.]

Argument

The contract cannot be declared void as to work elsewhere; the jurisdiction of the Legislature is territorial only, and our statute is aimed at contracts over which the Legislature has jurisdiction. Also, the services of a clerk or officer in a bank are not labour or service within the meaning of the statute. As to the meaning of "master and servant," see *Holy Trinity Church* v. *United States* (1892), 143 U.S. 457, Stroud's Judicial Dictionary, 2nd Ed., Vol. 3, p. 1,833. The Jurors Act, Revised Statutes of British Columbia, 1911, chapter 121, distinguishes clerks and servants; also see Bank Act, Revised Statutes of Canada, 1906, chapter 29, section 30, as to officers, clerks and servants, and this statute here, so far as it affects banks, is *ultra vires*.

[MARTIN, J.A.: It is a pernicious system to encourage the importation of cheap labour from Scotland to undermine our young men who work as clerks here, and it is scandalous the niggardly salaries banks pay their clerks. The banks seem to take more pride in building huge reserves than in paying their clerks a living wage.

GALLIHER, J.A.: Do you claim you come under the term "skilled labour not otherwise obtainable"?]

No; scarcely that. However, even supposing the contract is unenforceable in British Columbia, it is good elsewhere. On the facts here, plaintiff broke the contract; his conduct was a violation of it. The $400 was liquidated damages.

Griffin, for respondent, called upon as to (1) Is plaintiff entitled to the "risk money" if he has abrogated the contract? (2) Does a clerk come within "labour" or "service" under the statute? As to labour and service under section 3, while bank work is not "labour," it is "service," and therefore applies here: Halsbury's Laws of England, Vol. 30, p. 67. See *Down* v. *Pirto* (1854), 9 Ex. 327; *Harnwell* v. *Parry Sound Lumber Co.* (1897), 24 A.R. 110.

Argument

Ritchie, called upon.

[*Per curiam*: You have entered into a contract so wide that your man can be called upon to perform almost menial labour.]

That he was " to take up such office" excludes any possibility of being called upon for the performance of menial work; the surrounding circumstances are against such an inference. He cannot approbate and reprobate; he cannot claim payment and also claim benefit of the voidableness of the contract.

Cur. adv. vult.

22nd April, 1913.

IRVING, J.A.: This action requires us to interpret the third section of the Master and Servant Amendment Act, 1899, chapter 43, which declares as follows: [already set out].

IRVING, J.A.

In *Vacher & Sons, Limited* v. *London Society of Compositors* (1913), A.C. 107, the considerations which ought to prevail with a judge in arriving at the meaning of a statute are set out. Although there is no new rule in this judgment, it is instructive, particularly in these days of progressive legislation, and it is

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one which illustrates most happily the late Lord Macnaghten's gift of expression. The method recommended by the Lord Chancellor is to exclude consideration of everything except the state of the law as it was when the statute was passed, and the light to be got by reading the Act as a whole—including its title—before attempting to construe any particular section. In more than one of the speeches delivered it is pointed out that a judicial tribunal has nothing to do with the policy of the Act which it is called upon to interpret.

The questions we have to determine are: (1) Does the contract made between the plaintiff and the defendant come within the terms of the statute, so as to enable the plaintiff to declare that he is not bound by it? (2) And if so, can the plaintiff, having regard to the circumstances of the case, avail himself of the provisions of that statute?

In Maxwell on Statutes, 5th Ed., p. 337, there is a section dealing with the construction of statutes against impairing obligations, or permitting advantage from one's own wrong, where it is said that in certain cases the word "void" should be understood as voidable only. I would so read it in this case, notwithstanding the language of the second subsection. The words in question are "any contract for the performance of labour or service, or having reference to the performance of labour or service . . . ." by the person "whose labour or service

IRVING, J.A.

is contracted for." In my opinion, the contract entered into was a contract having reference to the performance of service by the plaintiff, and therefore, that part of the question argued before us I would answer in favour of the plaintiff. The American authorities cited to us, being decisions on a different statute, are of no use to us. On the other hand, the plaintiff is not at liberty to approbate and reprobate. He elected to treat the contract as valid for a couple of years, and he has founded his action upon it.

In Maxwell on Statutes, 5th Ed., several pages (p. 625 *et seq.*) are devoted to the maxim *cuilibet licet renuntiare juri pro se introducto,* and at p. 632 it is stated that a person is sometimes estopped by his own conduct from availing himself of legislative provisions intended for his benefit.

The doctrine of approbate and reprobate is described in Halsbury's Laws of England as a species of estoppel intermediate between estoppel by record and estoppel *in pais*. It proceeds on the theory that the person estopped, having made his election prior to the putting forward of his inconsistent claim or defence, it is then too late for him to shift his ground. In my opinion, the plaintiff, having elected to sue on his contract, and thereby affirmed it, cannot now be heard to say that it is void.

As to the power of the Provincial Legislature to pass an Act dealing with clerks in a bank, I have no doubt the section in question deals with "civil rights," and is therefore within its powers under section 97 (13) of the British North America Act. I would allow the appeal.

IRVING, J.A.

I am not at all sure that the Bank should not have pleaded this estoppel.

MARTIN, J.A.: Several questions have been raised on this appeal, and some of them it is not necessary for us to consider, in the view I take of the matter.

There is no doubt, in my opinion, that the Legislature of this Province had power to pass this Act, and it is also clear that the contract was one for the "performance of . . . . service" within this Province, as well as in other parts of North America, and under it the plaintiff served the defendant as a clerk for two years in this Province, leaving its service on the 6th of May, 1912, against its wishes, and he now sues for the proportion of his wages for the last six days of his employment, while the defendant counterclaims, under the contract, for the sum of $400 for liquidated damages specified therein.

MARTIN, J.A.

Two United States authorities on the same Act of Congress, February 26th, 1885, chapter 164, 23 Stat. 332, were much discussed in the argument, *viz.*: *Holy Trinity Church* v. *United States* (1892), 143 U.S. 457, and *United States* v. *Laws* (1896), 163 U.S. 258, but a careful perusal of them shews that they are of no assistance to us, because the Supreme Court of the United States laid down the principle that though the case before it was within the letter of the statute, yet it was not within the spirit of it, as not being "within the intention of the Legislature, and

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therefore cannot be within the statute" (p. 472), coming to this conclusion for a variety of historical and other reasons which have no counterpart in this country. And furthermore, that statute was essentially different from the one before us because, after a recital in its title that it is "An Act to prohibit the importation and migration of foreigners and aliens under contract," etc., it proceeds, in the second and third sections (see p. 260 in the *Laws* case), to declare that all such contracts are "unlawful" and "utterly void and of no effect," without any qualification. On the other hand, our section merely declares that agreements of that general description (though extending the class to include non-residents of British Columbia) "shall be void and of no effect as against the person only so migrating or coming." The authorities shew that this means that the contract is voidable only at the election of the immigrant, and illustrations of the application of this construction are numerous, *e.g.*, *Maline* v. *Freeman* (1838), 7 L.J., C.P. 212, where a bidding at an auction, declared by statute to be "null and void to all intents and purposes," was held to be so only at the option of the seller: *Valentini* v. *Canali* (1889), 24 Q.B.D. 166; *Billiter* v. *Young* (1860), 6 El. & Bl. 1, 8 H.L. Cas. 682; *St. Nicholas* v. *St. Peter* (1736), 2 Str. 1,066; *Gray* v. *Cookson* (1812), 16 East, 13; and *Rex* v. *The Inhabitants of St. Gregory* (1834), 2 A. & E. 99, these last three being cases on the binding of apprentices.

MARTIN, J.A.

The plaintiff, the immigrant herein, not only did not wish to avoid the contract, but he elected to take the benefit of it for two years, and after having done so, now seeks to repudiate it. The circumstances are such that he ought not to be allowed to approbate and reprobate this contract; to permit him to do so would "involve a violation of natural justice," as was said in *Valentini's* case, where an infant attempted, under section 1 of the Infants' Relief Act, 1874 (37 & 38 Vict., c. 62), to recover back money he had paid for articles of furniture which were not necessaries, but which he had had the use and benefit of for some months. In my opinion the contract must be held to be in existence at the time of breach thereof by the plaintiff, who could not take its benefits without its obligations, and therefore I see no good reason why the defendant should not have judgment against him on its counterclaim for $400.

It is admitted that the plaintiff is entitled to the "Teller's risk money" sued for, under a special arrangement, and he should have judgment for that amount, and we were informed by defendant's counsel that as a matter of grace he consented to add to this amount the sum of $17.10 for the six days sued for, though as a matter of law the plaintiff cannot recover it because of his breach of contract.

GALLIHER, J.A.: I have reached the same conclusion. The view taken by my brother MARTIN was my understanding regarding what Mr. *Ritchie* said about the $17.10 item. As it was not pressed on us by Mr. *Ritchie,* or objected to on that ground at the hearing, I conclude the judgment should be in favour of the plaintiff, and there should be judgment for the defendant on the counterclaim, the one set off as against the other, and that the defendant should have the costs of the appeal.

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitor for respondent: *D. S. Montgomery.*

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June 26.

GREAVES v. CARRUTHERS.

Land —Trespass — Action for — Possession — Partial enclosure — Entry — Statute of Limitations—Title by prescription.

Practice — Setting down appeals — Postponement — Procedure — Court of Appeal Act Amendment Act, 1913, Cap. 13, Sec. 3.

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The plaintiff brought action for trespass to establish her title under the Statute of Limitations to a strip of land for which the defendant had the paper title.

Held, on appeal, affirming the judgment of the trial judge, that upon the evidence, the plaintiff had not shewn that she and her predecessors in title were in actual, constant, visible occupation of the land in question for the full period of 20 years before the alleged trespass.

Per MACDONALD, C.J.A.: The plaintiff did not shew enclosure at an early enough date to give her a title by virtue of the statute, nor occupation before enclosure of the character necessary to sustain her claim.

Held, that an application for postponement of the hearing of an appeal will not be heard unless formal notice is served on the opposite party and the application is supported by affidavit shewing such postponement is necessary. A copy of the notice of motion and affidavits for each judge must also be left with the Registrar before the hearing.

Remarks *per* MACDONALD, C.J.A. as to the objection to counsel putting in quotations from judgments that they have cited when given leave to put in a list of authorities only at the end of the argument.

APPEAL from the judgment of MURPHY, J. in an action tried by him at Victoria on the 27th of February, 1913. The action arose over a strip of land 15 feet in width by 11 feet in length to which the defendant had a good paper title, but to which the plaintiff, through her predecessors in title, claimed title by prescription. In 1860 one Rothwell (through whom the plaintiff claimed title) owned four acres of land bounded on the north by the old Esquimalt road and on the south by the new Esquimalt road. The adjoining property to the east was owned by one Carroll, who, in 1861, built a fence from the old to the new road, for the purpose of separating the two properties. This fence was through inadvertence put too far east, leaving a strip 15 feet in width between the Rothwell property and the fence. At time of action brought a portion of this fence still remained, and its location was identified by a

Statement

willow tree, alongside of which it ran. Rothwell built an inn on his property in 1860, and after living there for two years, he rented to tenants until 1891, when it was burnt down, not being rebuilt until 1895, the property in the meantime remaining idle. There was no satisfactory evidence of any fence or enclosure being erected on any of the three other sides of the Rothwell property until 1895. Subsequently the property was subdivided and the portion abutting on the ground in dispute was acquired by the plaintiff, whose property, with the ground in dispute, was enclosed by a fence. The defendant, having acquired a paper title to that portion of the Carroll property that included the ground in dispute, tore down the plaintiff's fence, and enclosed the ground with his own. The plaintiff claimed damages for trespass and for an injunction restraining the defendant from further trespass on the land in dispute. The trial judge dismissed the action on the ground that the plaintiff had not shewn that she and her predecessors in title had been in open, continuous and adverse possession of the property in question for the prescribed period.

Statement

The appeal was argued at Vancouver on the 2nd of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

A discussion arose as to the status of the appeal at the present sittings of the Court.

Per curiam: If this appeal was not set down in Vancouver, we do not think we have the jurisdiction to postpone it to be heard at Victoria at the next sittings. . . . . The amendment recently passed puts litigants in an awkward position. If there is any postponement it must be for six months—over to the second sittings. We think we ought not to permit any postponement unless formal notice is given to the other side, and application is supported by affidavit shewing such postponement is necessary. A copy of the notice of motion and affidavits for each judge must also be left with the registrar before the hearing. Counsel will bear that in mind in asking for postponements in future. It is a serious matter, in the public interest, to keep litigation long pending before the Courts.

Judgment

Bodwell, K.C., for appellant (plaintiff): In 1879 the ground

Argument

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in question was in actual occupation by the plaintiff's predecessors in title, as in that year wheat had been grown up to the fence, and in 1890 the whole four acres, including the 15 feet in dispute, were fenced in on all sides, and I submit the trial judge was in error in holding that as there was no one living on the ground between 1891 and 1895, there was a break whereby the plaintiff loses her right to claim the ground by prescription. It is not necessary to shew acts of occupation before 1879. The right by prescription depends on two things: possession by one man, and the relinquishment of claim by the other. Possession must be considered in every case with reference to the peculiar circumstances: *Kirby* v. *Cawderoy* (1912), A.C. 599. The respondent relies on *Agency Company* v. *Short* (1888), 13 App. Cas. 793, but in that case possession was abandoned. A person in possession need not shew connection between the different occupants: *McConaghy* v. *Denmark* (1880), 4 S.C.R. 609 at pp. 632-3.

H. W. R. Moore, for respondent (defendant): There is no evidence of continuous possession since 1890. We having a paper title by admission, the onus is on the appellant to shew that she has a possessory title. *McConaghy* v. *Denmark, supra,* is in our favour. They must shew actual, constant, physical possession to the exclusion of the defendants for the prescribed period: Bullen & Leake's Precedents of Pleading, 6th Ed., 502. There is no privity between the different parties who have been in possession: Armour on Real Property (1901), 437.

Argument

Bodwell, in reply: The title to the four acres was continuously in Rothwell up to 1895. It is not necessary to shew privity between the different occupants during that period: *Lord Hamner* v. *Flight* (1876), 36 L.T.N.S. 279.

[MACDONALD, C.J.A.: Counsel for the appellant was given leave at the end of the argument to put in a list of authorities. He not only cited cases, but quoted extracts from each of the judgments, making his submission practically an argument. To this, counsel for the respondent objected. We think when counsel are given leave to put in citations, they should confine themselves strictly to that. The registrar is directed to return this memorandum.]

Cur. adv. vult.

26th June, 1913.

MACDONALD, C.J.A.: I think this appeal must be dismissed. The defendant, having the paper title to the piece of land in dispute, was entitled to take possession of it unless the plaintiff could shew that he had lost his title and that she had acquired it by the operation of the Statute of Limitations. This she set out to do, but I think she has failed. I can find no satisfactory evidence that she or her predecessors in title were in actual, constant, visible occupation for the full period of 20 years before the alleged trespass, which was on the 21st of June, 1911, though there is evidence that in the year 1895, when the witness Wood went into occupation of the property then known as "Rothwell's," it was enclosed, including the strip in dispute. There is ample evidence that the fence which was interfered with by the defendant was there for a period much longer than 20 years before the 21st of June, 1911. That fence was not on the true boundary between Rothwell's property and the property to the east owned by the predecessors in title of the defendant. It was about 15 feet east of the true boundary, and left this strip alongside of the Rothwell place between it and the fence. There is no satisfactory evidence of the enclosure of the Rothwell place and this strip by fences on the other three sides before 1895, or at all events before the 21st of June, 1891, which would be 20 years before the alleged trespass. Had there been such evidence of enclosure, I should have come to the conclusion that the plaintiff was entitled to succeed in this appeal, in other words, that she has obtained a title under the statute to the land in question. In the discussion between counsel and the learned trial judge, it seemed to have been assumed that the Rothwell property, including the strip in question, was actually enclosed by fences on all sides at an earlier date than 1895. There was an inn on the property, known as the Bush Tavern, which was burnt down about the year 1891 and not rebuilt until four or five years later. There was no evidence of actual occupation during these years, and the learned trial judge intimated that assuming enclosure prior to the time the inn was burnt, there was a hiatus in the occupation between that time and the time it was rebuilt, which would

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be fatal to the plaintiff's claim. With much respect, I differ from that view. Had it been shewn that the land was actually enclosed by fences in 1890, or beginning of 1891, I should hold on the evidence in this case, that notwithstanding there was no evidence of actual occupation of the field during the period between the destruction and rebuilding of the inn, the possession still remained in the Rothwells. There was no evidence of abandonment; in fact, the contrary is true, and the previous occupation and subsequent occupation were known to the defendant's predecessors in title at that time. Unfortunately, however, for the plaintiff, she has not shewn enclosure at an early enough date to give her a title by prescription, nor has she shewn by satisfactory evidence before enclosure an occupation of the character necessary to sustain the claim.

IRVING, J.A.

IRVING, J.A.: The piece of land in question is a strip of 15 feet lying to the east of a four-acre plot to which the plaintiff has a good title. The defendant has a good paper title to the 15-foot strip. The plaintiff claims that the defendant has, by virtue of the Statute of Limitations, lost his title to the 15-foot strip. A fence, erected in 1861 or 1862, separated this 15-foot strip from the land lying to the east of it, and so gave the strip an appearance of being part and parcel of the four-acre plot; and there is no doubt the owners—or occupants—of the four-acre plot used it from time to time as if they owned it. I would draw the inference that the wheat crop which was on the strip in 1879 was planted by the owner of the four-acre plot, and the tenant occupying the four-acre plot under Rothwell regarded the 15-foot strip as included in his lease. The four-acre plot was not fenced on the north and south until 1872. Prior to that, the north and south boundaries were the old and new Esquimalt roads respectively; on the west there was bush. It was not until 1895 that a fence was put up on the west.

In June, 1911, the defendant broke down this eastern fence and took possession of the 15-foot strip. The defendant, in June, 1911, took actual possession of the premises. Unless he then had by the Statute of Limitations lost possession, using the word in the sense of present right to occupy or hold, he was then

in possession, and the plaintiff—who had been in actual possession—was a trespasser. The defendant's title prevailed, and the plaintiff was ousted. Proof of these facts displaced the plaintiff's right to maintain an action of trespass.

To entitle a party to bring an action of that nature he must, at the time of the act committed, either have the actual possession, or a constructive possession in respect of the thing being actually vested in him: *Revett* v. *Brown* (1828), 5 Bing. 7; *Smith* v. *Milles* (1786), 1 Term. Rep. 475; *Brown* v. *Notley* (1848), 3 Ex. 219; *McNeil* v. *Train* (1847), 5 U.C.Q.B. 91. I do not think the plaintiff established her case if the action is to be regarded as an action of trespass.

The action, in my opinion, was really an action for a declaration that the plaintiff was entitled to the strip in question. The defendant's position on this aspect of the case is that the plaintiff has not adduced evidence sufficient to bar his right under the statute, and I think that defendant is entitled to succeed on that ground. There has been no exclusion of the defendant—no dispossession, and only vague evidence of occupation by the plaintiff: *Marshall* v. *Taylor* (1895), 1 Ch. 645; and *Kynoch, Limited* v. *Rowlands* (1912), 1 Ch. 527. The occupation of others prior to the plaintiff's possession does not help him: *Agency Company* v. *Short* (1888), 13 App. Cas. 793. We have been referred to section 102 of the Criminal Code. With that section should be read the decisions in *Beddall* v. *Maitland* (1881), 17 Ch. D. 174 at p. 187; and *Edwick* v. *Hawkes* (1881), 18 Ch. D. 199. Opinions have differed as to the effect of the statute against forcible entry in a Court of civil jurisdiction. It may be that the rightful owner may be punished for the breach of the peace, but it would seem that he is, so far as the dispossessed person is concerned, not a trespasser. But I would not call this a forcible entry within the meaning of the statute. There was not such a show of force as would constitute forcible entry.

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A.: I agree that the appeal should be dismissed.

MARTIN, J.A.

GALLIHER, J.A.: Up to 1890 there was no such occupation

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by the plaintiff or her predecessors in title as would entitle her to claim the lands in dispute by prescription. At the time the Bush Tavern was burnt down, in 1891, there is evidence (which though not direct) from which we might infer that the field taking in the disputed land was fenced on all sides. This is found in the evidence of Wood. It appears no one was in actual occupation of the lands from that time until about 1895, when Wood rented it for a cow pasture.

As the plaintiff bases her claim to the land in question solely upon prescription, I agree with the learned trial judge that there is not that open, continuous and adverse occupation by either the plaintiff or her predecessors in title shewn upon the record as would entitle her to succeed.

GALLIHER, J.A.

It was urged upon us that this was an action for trespass upon which the plaintiff should succeed in any event. It was an action for trespass brought to try out the title to the land, and proceeded upon that basis throughout the whole trial, and we must so regard it.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Bodwell & Lawson.*
Solicitors for respondent: *Oliver & Patton.*

BARK FONG *ET AL.* v. COOPER.

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Oct. 14.

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1913

April 4.

BARK FONG *v.* COOPER

Vendor and purchaser—Sale of land—Default in payment of instalments under agreement—Notice—Tender after default and notice of cancellation—Time of the essence—Specific performance.

Plaintiffs, having defaulted in their payments under an agreement for the sale of land, and notice of cancellation having been given by the vendor, tendered the amount due, which was refused. They sued for specific performance.

Held, per IRVING and GALLIHER, JJ.A., that there was no proper legal tender, no conveyance having been submitted for execution on behalf of the plaintiffs.

Per MARTIN, J.A.: That the case was not one for specific performance. Admittedly the purchase was one of speculation, and the principle of the case came within that of *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171.

Judgment of GREGORY, J. affirmed.

APPEAL by plaintiffs from the judgment of GREGORY, J. at Victoria, on the 14th of October, 1912. The plaintiffs (purchasers) sued for specific performance of an agreement entered into by defendant Cooper, to sell them two lots under an agreement dated the 6th of December, 1910. The consideration was $1,600, of which $800 was to be paid in cash and $400 on the 6th of June, 1911, and the balance, $400, on the 6th of December, 1911. On the 24th of February, 1911, the plaintiffs sold the property to Lim Bang, who paid them $1,700 in cash, and agreed to pay the other two instalments on the dates above mentioned, namely, $400 on the 6th of June, and $400 on the 6th of December, 1911, but no notice of this sale or assignment was given by the plaintiffs to the defendant. Under this arrangement the plaintiffs were no longer interested as soon as they obtained their money. The agreement between the plaintiffs and the defendant contained this clause:

Statement

"It is expressly agreed that time is to be considered the essence of this agreement, and unless the payments above mentioned are . . . . made at the times and in the manner above mentioned, and as often as default shall happen in making such payments the vendor, his heirs or assigns, may give to the purchasers, their heirs, executors, administrators and assigns, 30 days' notice in writing demanding payment thereof; and in

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case any such default shall continue, these presents shall at the expiration of such notice be null and void and of no effect, and the vendor shall be at liberty to re-possess or re-sell and convey the said lands to any purchaser as if these presents had not been made, and all the moneys paid hereunder shall be absolutely forfeited to the vendor, his heirs, executors, administrators or assigns. The said notice shall be well and sufficiently given if delivered to the purchasers, their heirs, executors, administrators or assigns, or mailed at Victoria, B.C., Post Office under registered cover, addressed as follows:"

Lim Bang made default, nor did the plaintiffs pay after they had been requested to do so. Notice to cancel was given, and the power to cancel was exercisable 30 days after the 6th of June. On the 26th of March, 1912, the defendant addressed a notice to the plaintiffs at Victoria, B.C., demanding payment of the sum of $800 and all interest due to date, and giving notice that if default should continue after the expiration of 30 days from that date, the agreement should be null and void and of no effect, and that all moneys paid thereunder should be forfeited. Two of the plaintiffs, Wing On and Chuck Sing, received their notices, and the third, Bark Fong, was away in China from November, 1911, to June, 1912. The two who received the notice communicated with him, and on the 15th of May, 1912, when $838.50 was owing, the plaintiffs made a tender to the defendant of all money then due and owing, but the defendant declined to accept it.

H. C. Hall, and *Brandon,* for plaintiffs.
Langley, for defendant.

GREGORY, J.

GREGORY, J.: This is an action for specific performance brought by the plaintiffs, the purchasers, against the vendor. The plaintiffs have not shewn readiness or willingness to pay until somewhere about the 15th of May, and claim that they are entitled still to specific performance, because the notice required by the agreement has not been given. It seems to me that the notice has been sufficiently given, and that in any case the plaintiffs are not entitled to sue for specific performance. They never made any attempt to meet the payments due on the 6th of June, 1911, or 6th of December, 1911. Wing On, when asked for payment, said that his money was invested in other enterprises. Bark Fong went to China, and said that he expected

the payments to be made by the persons to whom he had sold the property; and the other plaintiff had lost his money in gambling, and was unable to pay. It seems to me they practically all of them abandoned their purchase, and it was only because of the increased value afterwards that they brought these proceedings. However, as the defendant himself has offered to return the payment of $800 and keep the land, there will be an order for the repayment of that money; but the defendant is entitled to his costs of the action, and to have a lien on the $800 for that.

The appeal was argued at Victoria on the 17th of January, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

Maclean, K.C., and *H. C. Hall*, for appellants: It is submitted that although time is of the essence of the agreement, and although default has been made, and if there is an attempt to cancel the agreement, yet if the cancellation has not been properly done, the Court will say that the agreement is still in force, and will grant specific performance: see *Barlow* v. *Williams* (1906), 16 Man. L.R. 164; *Whitla* v. *Riverview Realty Co.* (1910), 19 Man. L.R. 746.

Argument

Langley, for respondent: The plaintiffs were in default in every respect for carrying out the agreement. As to serving Bark Fong with notice, we did all that we could be expected to do under the terms of the agreement; we were not concerned with Lim Bang.

Maclean, in reply: There was no notice given to Bark Fong.

Cur. adv. vult.

4th April, 1913.

IRVING, J.A.: I agree with my brother GALLIHER, and think the appeal should be dismissed.

IRVING, J.A.

MARTIN, J.A.: My opinion is that while the contention advanced by Mr. *Maclean* is correct as to personal service of the notice in the circumstances, yet the judgment can be supported on the other branch adopted by the learned judge below, *viz*: that the case is not one for specific performance. Admittedly, and in express terms, the purchase was one of speculation, and the principle of the case comes within that in *Wallace* v. *Hesslein* (1898), 29 S.C.R. 171.

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GALLIHER, J.A.: In this case there seems to me to have been no proper legal tender, no conveyance having been submitted for execution on behalf of the plaintiffs, and I am unable to say that defendant's conduct in the matter constituted a waiver. In this view, it becomes unnecessary to pass upon the validity of the notice given by Cooper to the plaintiffs. The appeal will, therefore, be dismissed.

Appeal dismissed.

Solicitors for appellants: *Tait, Brandon & Hall.*
Solicitor for respondent: *W. H. Langley.*

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IN RE UNITED BUILDINGS CORPORATION, LIMITED, *ET AL.* AND THE CORPORATION OF THE CITY OF VANCOUVER.

Municipal law—By-law closing public lane—Validity—Vancouver Incorporation Act, B.C. Stats. 1900, Cap. 54, and amending Acts—Municipal Act, R.S.B.C. 1911, Cap. 170—Public interest—Erection of business block.

The Hudson's Bay Company, the owner of lots on each side of a lane, which, with the lane, made a block facing on three streets, desiring to erect a large business block covering the lots and the lane between, petitioned the Council to close such portion of the lane and to lease it to the Company for 25 years, the Company agreeing to convey to the City a lot and two important easements to be used as an outlet from the lane in substitution for the portion closed. In pursuance of this petition the Council passed a by-law closing the portion of the lane in question and providing for its lease to the Company. Certain owners of the lots adjoining that portion of the lane that was closed applied to CLEMENT, J. to quash the by-law. The application was dismissed.

Held, on appeal, *per* IRVING and MARTIN, JJ.A., that the appeal should be dismissed.

Per MACDONALD, C.J.A., and GALLIHER, J.A., that the appeal should be allowed, and that the by-law should be quashed.

Per IRVING, J.A.: Where bodies of a public representative character, entrusted by Parliament with delegated authority, are acting *bona fide* and within the limits of the powers conferred upon them by Parliament, they are not to be interfered with by the Courts.

Slattery v. *Naylor* (1888), 13 App. Cas. 446, approved.

Per MARTIN, J.A.: The question of public interest is one of degree, dependent upon the particular circumstances of each case, and where present in any appreciable degree, the Court should not interfere with the *bona-fide* exercise of municipal powers.

Per MACDONALD, C.J.A., and GALLIHER, J.A.: The erection of a costly private building in a city is not a matter of public interest in the legal sense of the term.

The Court being evenly divided, the appeal was dismissed.

Directions as to maps and plans not being bound in the appeal book.

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APPEAL by the United Buildings Corporation from an order of CLEMENT, J. made at Vancouver on the 12th of February, 1913, dismissing the plaintiff's application to quash By-law 917 of the City of Vancouver. The Hudson's Bay Company, having decided to extend their premises from Granville street to Seymour street and erect a new building fronting on Granville, Georgia and Seymour streets, to cost in the neighbourhood of $2,000,000, obtained the passage of a by-law giving permission to close the southern portion of the lane passing through their premises that runs from Dunsmuir to Georgia streets. In lieu of the closed portion of the lane the Company conveyed to the City a lot (120 x 25) leading from the lane to Seymour street, and also gave a perpetual easement for the public use, two plots of ground (25 x 25, and 25 x 35) adjoining the said lot, thus furnishing an outlet at the southern end of the lane to Seymour street. Against this the adjoining owners to the north protested, on the grounds that it would interfere with and hamper traffic in the lane, and that fire-fighting facilities would be interfered with to such an extent as to constitute a grave danger to the public safety.

Statement

Bodwell, K.C., in support of the application.

Davis, K.C., contra.

12th February, 1913.

CLEMENT, J.: This is an application to quash By-law No. 917 of the City of Vancouver, passed on the 15th of July, 1912, and entitled "A by-law to close a portion of the lane in block 43,

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subdivision of District Lot 541, group 1, New Westminster District, City of Vancouver." In addition, the by-law provides for the leasing to the Hudson's Bay Co. (to use the title by which the Company is commonly known) of the portion of the lane so stopped up.

The first ground of attack upon the by-law is that it was not passed in the public interest, but for the sole benefit of the Hudson's Bay Company. That question of fact is dealt with in the affidavit of Mr. Hewitt in a most general way, and his statement of his belief "that the Corporation are not acting in the interests of the general public of the City of Vancouver in passing the said by-law," might, standing alone, mean merely that in his opinion the effect of the by-law would be prejudicial to the public interest. In the same category are the statements by several chiefs and assistant chiefs of fire brigades in various coast cities of their belief that the closing of the lane in question will create a grave menace in case of fire. In the absence of any allegation of *mala fides,* the beliefs of these gentlemen as to the effect of the by-law is quite beside the mark. Under our system of municipal government it is the opinion of the city council which governs, and even if I agreed entirely that the action of the City in this case was unwise, and prejudicial to the public interest, I have no right to sit in judgment upon their opposite view. Jurisdiction conceded, and honest action, that is an end of the matter so far as the Courts are concerned. The latest case I have seen on this subject is *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211, in which a by-law was attacked as unfair and unreasonable. Mr. Justice Duff, speaking for the Court, at p. 216 said:

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> "To establish this contention in any sense *germane* to the question of the validity of the by-law, it was necessary that the respondents should make it appear either that it was not passed in good faith in the exercise of the powers conferred by the statute, or that it was unreasonable, unfair or oppressive as to be upon any fair construction an abuse of those powers."

In my opinion the same principle applies when a by-law is attacked as against the public interest. The only suggestion of *mala fides* or sinister motive is in the concluding clause of Mr. Hewitt's affidavit, stating his belief that this by-law was passed "solely in the business interest of the Hudson's Bay Co." No

facts are set out to support this grave charge, and it is emphatically denied in the affidavits filed in answer. Lightly made, it seems to have no basis of fact beyond this: that the Hudson's Bay Co. were petitioners for the closing of the lane, and will apparently benefit by it. One may assume that they would not have petitioned to have the lane closed had they not expected to gain by it. But if, when the proposal was made, the Council considered it honestly, with an eye to the public advantage (and it seems clear that they did so consider it), that again is an end of the matter so far as the Courts are concerned. They were entitled to use their corporate powers to carry out what they honestly considered was a good bargain for the City. They may be, though I do not suggest for a moment that they are, all wrong; but self-government, it has been said, involves the right to make mistakes.

What I have said practically disposes of the argument that this is a bonus by-law, and as such should, in order to its validity, be voted upon by the property owners of the City. If I were to accede to this argument, every by-law, the enactment of which enured to the particular advantage of some individual over and above the general advantage to the public would be a bonus by-law. A by-law for the purchase of any property by the city would be a bonus by-law in the eye of a willing vendor. In short, I can see no principle to prevent the city from making bargains and exercising their corporate powers to carry out such bargains, even if in the opinion of some people the city is not benefiting to as great an extent as the other party to the bargain. If they get what they honestly think is a good *quid pro quo,* this Court has no right to call the other party's *quid pro quo* a bonus.

The next objection is that the City Council has no power under section 125, subsection (52) of its charter to pass a by-law to close a street or lands except as part of some work connected with the public health, or with a view to the betterment or conditions along that line. This objection is founded upon the fact that in the statute (British Columbia statutes, 1900, chapter 54) which constitutes the City's charter, the powers of the Council to pass by-laws are to some extent, but only to some extent, arranged

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in groups with appropriate (?) headings; and subsection (52) of section 125 is one of a group headed "Public Health." I have examined *Inglis* v. *Robertson* (1898), A.C. 616 at p. 630, cited by Mr. *Bodwell,* and also other cases collected in Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 261, as to the effect to be given to headings of this sort, and it seems to me that the result is to establish that headings may be good servants but should not be made masters. They may throw light on dubious phraseology, but they should not hinder the giving effect to plain language. It would be strange if the power were found to be limited in the way suggested, as the wider untrammelled power is commonly bestowed on municipal bodies. Subsection 52 read alone clearly conveys the power generally to open and stop up streets and lanes, and when I find on a hasty perusal of the different subsections that it would border on the nonsensical to limit the power apparently conveyed by at least two subsections by the group heading of the group in which they occur, it would be wrong to cut down the effect of subsection (52) on any such principle. The two instances to which I refer are subsection (56) and subsection (77). By the former power is given to pass by-laws "for regulation of the weight of bread," and it occurs in the "Public Health" group. Except by way of a joke, it is hard to see what the weight of bread has to do with public health. The other instance is still more grotesque. Under a

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group heading "Markets," power is given by subsection (77) to pass by-laws "for compelling persons to remove snow, ice and dirt from the roofs of the premises owned or occupied by them and also to remove the same from the sidewalks," etc. The connection with "markets" seems difficult to find. In short, the group headings of section 125 are too erratic for practical use as aids to interpretation.

It is next contended that the City has no power to lease a lane except as a lane, and that the mention in the statute of the air spaces above and subways underneath bear out this view. In my opinion the intention shewn by the word "lease" and the inclusion of the air spaces, etc. (by way of greater caution), was that such a lease should put an end to the public right of user, or, perhaps it should be put, that the power of leasing

should cover only unused or stopped-up lanes. The power must be construed reasonably, so as to give it some practical operation. What good a lease of a lane as a lane, and as such subject to all rights of user by the public, would be to the lessee is hard to imagine. The word lease would be quite inappropriate to describe such a transaction.

The last objection is that the lease is not absolutely, but only conditionally authorized by the by-law; that the City is to lease the lane to the Hudson's Bay Co. upon "performance" of terms, some of which run through the entire life of the lease. As to this, I think that the entire by-law and the agreement which are mentioned in it must be read together, and that so read it would be a wrong interpretation of the by-law to treat what is obviously a condition subsequent as a condition precedent. No such absurd intention should be attributed even if a strict grammatical reading of the clause might seem to justify it.

On the whole, therefore, I think the by-law is a valid municipal enactment, and this application to quash must be dismissed, with costs.

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The appeal was argued at Vancouver on the 11th and 16th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C. (*J. H. Lawson,* with him), for appellants: Proceedings began by petition to the City Council, and the by-law was then passed on that petition. The by-law is *ultra vires* of the Vancouver Incorporation Act, 1900, British Columbia statutes, chapter 54, section 125, subsection (52). Subsection 34 is headed "Public Health," and all subsequent subsections to (62), inclusive, relate to public health.

Argument

[MACDONALD, C.J.A.: We think that maps and plans should not be bound in the appeal books. It would be to the convenience of all concerned if they were kept separate in a pocket at the back of the book.]

The powers under subsection (52) are therefore confined exclusively to matters of public health, so that the power given the Council to stop up lanes, etc., is for the public use, and cannot be used to benefit any individual or private corporation:

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Argument

Scott v. *Corporation of Tilsonburg* (1886), 13 A.R. 233; *Re Morton and Corporation of St. Thomas* (1881), 6 A.R. 323; *Re Peck and Corporation of Galt* (1881), 46 U.C.Q.B. 211; *Pells* v. *Boswell et al.* (1885), 8 Ont. 680; *Re Weir and City of Calgary* (1907), 7 W.L.R. 45. Subsections 171 to 178, inclusive, provide for bonuses, but not in the nature of the concession applied for here: *In re Inglis and City of Toron'o* (1905), 9 O.L.R. 562; *Re Waterous and City of Brantford* (1904), 4 O.W.R. 355; *Re Loiselle and Town of Red Deer* (1907), 7 W.L.R. 42.

Davis, K.C. (*E. F. Jones,* with him), for respondents: The fact that the by-law is prejudicial to the public interest is not before the Court: *In re J. L. Young Manufacturing Co.* (1900), 2 Ch. 753, 69 L.J., Ch. 868. The affidavit upon which the applicants rely is contrary to the law set out in the above case. See also *Lumley* v. *Osborne* (1901), 1 K.B. 532. The whole question is whether this by-law is passed solely for the benefit of the Hudson's Bay Company; that is the test, and the burden is on the appellants to shew this to be the case. The fact that the by-law is more good to one person than to others is not sufficient to quash. The test is: Is the by-law passed solely in the interest of an individual? Any injury to the appellants may be ground for compensation, but is not a ground for quashing the by-law. The inconvenience the United Buildings Corporation are put to is entirely aside from the real question. If the closing of the lane is a benefit to the public, it is in the jurisdiction of the Council. The interference of private rights is no test whatever as far as the jurisdiction of the Council is concerned. The question is: Is the erection of the new store of the Hudson's Bay Company in the public interest? In addition to the powers in subsection (52) of section 125 of the charter, the powers in section 4 of the Municipal Act are included and are in force with the charter. See also section 8 of the statutes of British Columbia, 1907, chapter 61. If the by-law is passed in the interest of the public, even if an individual is benefited, then the by-law is regular: *Attorney-General* v. *City of Toronto and Molson* (1864), 10 Gr. 436.

Bodwell, in reply: The material filed shews that this was a

bonus by-law and nothing else. The Council can give a bonus by way of an exemption from taxation or by a grant of money, but they cannot give a bonus under the Act by way of closing a street. Under section 8, chapter 61, of the Act of 1907, they can close lanes only when they are no longer required. It must be shewn it is no longer required, but the evidence shews it is wanted as a means of ingress and egress to other property holders. Even when a lane is closed and another opened in its stead, that cannot be done solely for the purpose of benefiting a private individual.

Cur. adv. vult.

26th June, 1913.

MACDONALD, C.J.A.: By section 125, subsection 52 of its Act of incorporation (chapter 54 of the statutes of British Columbia, 1900), the Council of the City of Vancouver was given power to pass by-laws, *inter alia,* for the stopping up of streets and lanes within its jurisdiction; and by subsection (215) of the same section it was given power to pass by-laws for acquiring real property for the use of the Corporation for parks, squares, marine parades, school purposes, roads, streets or any other purposes, and for disposing of or leasing the same when no longer required, on such terms as might be deemed expedient, provided that where the lease should extend for a term of over five years the assent of the electors should be obtained.

MACDONALD, C.J.A.

By amendment made in 1907 (British Columbia statutes, chapter 61, section 8), the following proviso was added:

"Provided that the Council may lease, on such terms and conditions as it may deem expedient and without the assent of the electors, the ends of streets abutting on the foreshore, for a period not exceeding ten years, and lanes or portions of lanes, including air spaces above or subways thereunder, for a period not exceeding twenty-five years."

The Hudson's Bay Company being the owners of lots on each side of a lane in the said City, and being desirous of erecting a large building for commercial purposes covering the said lots and that portion of the lane lying between them, petitioned the Council to close such portion of the lane and to lease it to them for 25 years. The petition recites:

"That in order to meet the requirements of the Company's business and the demands of the public (*sic*) the Company are compelled to erect a new

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building on the said property and for that purpose desire to have one complete block running from Granville street to Seymour street."

It then recites that the petitioners are desirous that the said portion of the lane should be closed up and the Company allowed to take same in order that the Company might erect a very substantial block from Granville street to Seymour street, and that the Company were willing to give in exchange a certain lot for a lane from Seymour street to the balance of the lane in said block. The appellants are owners of lots abutting on that portion of the lane which was to remain unclosed, and objected to the proposal. Notwithstanding their opposition, the respondents passed the by-law in question here, which recited that the petitioners were the owners of the lots above referred to, and had petitioned for the closing of that portion of the lane lying between their lots, and had agreed to convey to the City a lot to be used as a new lane, and had executed an agreement to indemnify the City against all actions for compensation, damages or injunction or otherwise, by reason of the passing of the by-law, and had undertaken at their own expense and to the satisfaction of the city engineer, to execute all works and supply all material to protect sewer-pipes, water-pipes and wires, whether owned by the City or any-one else, then laid or which might thereafter be laid under the stopped-up portion of the lane, and to pave the new lane. The by-law provided that the lease, which was for a term of 25 years, should be granted when the petitioners had performed their part of the agreement above referred to.

On the appellants' application to quash the by-law, affidavits were read on their behalf directed to shewing that they would be seriously damaged by a change in the lane. The respondents read affidavits of several aldermen all in the same form, setting out their view of the transaction. If anything were required more than appears above to shew that the transaction was one which was not called for in the public interest, these affidavits supply it. Paragraph 3 states:

"That the statement made to the board of works was that the Company was about to erect additional buildings on Georgia street from Granville street to Seymour street, the Company being the owner of all the lots abutting on that portion of the lane desired to be stopped up."

And paragraph 6:

"That the board of works considered the request a reasonable one and considered that in the interests of the City it was advisable to grant same, considering the class of building that the Company proposed to erect and the facilities which they were offering in return to the other owners in the said block,"

meaning, I presume, the substituted lane. It cannot be successfully contended that the closing of this portion of the lane was required for any other purpose than the private purposes of the Hudson's Bay Company, and the expression of opinion by these aldermen and others that the appellants would not be injured by the change does not, in my opinion, affect the matter one way or the other. If this was a purely private arrangement, as I think it was, and had no reference to public interests, as I think it had not, then the offer of something just as good will not help respondents. The City cannot use its powers to compel one property owner to submit to the invasion of his rights by another because it thinks the proposed exchange not unreasonable: *Re Morton and Corporation of St. Thomas* (1881), 6 A.R. 323; *Re Peck and Corporation of Galt* (1881), 46 U.C.Q.B. 211; *Re Waterous and City of Brantford* (1904), 4 O.W.R. 355; *Re Weir and City of Calgary* (1907), 7 W.L.R. 45; *In re Inglis and City of Toronto* (1905), 9 O.L.R. 562. The contention that the erection of costly private buildings in the City is a matter of public interest in the legal sense of that term is to my mind untenable. It has not been, and could not in the circumstances of this case be suggested that this lane ought to, or would have been closed apart from the private considerations referred to. What was done was solely in the interest of the Company, and the specious pretence that it was otherwise is too thin to veil its real character.

MACDONALD, C.J.A.

This brings me to the consideration of the said amendment. The first question is: Has it reference to the subject-matter of the main section of which it is a proviso, namely, the real property acquired by the Corporation pursuant to a by-law or by-laws which it is thereby authorized to pass, or is it wider in its scope and intended to apply to streets and lanes which were not so acquired? If on its true construction it ought to be confined to the subject-matter of the main section, then it has

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not been proved in this case that the lane in question was acquired in the manner contemplated by the said section, and therefore subject to be sold or leased as therein provided. There is no evidence that this lane, or any portion of the lane dealt with by the by-law was acquired in that way. Unless, therefore, the proviso goes beyond the section, it has no application to this case.

In *Rex* v. *Dibdin* (1910), P. 57, Fletcher Moulton, L.J. at p. 125, said:

"The fallacy of the proposed method of interpretation is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered with relation to the principal matter to which it stands as a proviso. . . . . The Courts, as for instance in such cases as *Ex parte Partington* (1844), 6 Q.B. 649; *In re Brockelbank* (1889), 23 Q.B.D. 461; and *Hill* v. *East and West India Dock Co.* (1884), 9 App. Cas. 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso.

I do not understand from this that all provisoes are to be so confined. The cases above referred to shew that this is not so. The point is that in a case of doubt that construction which confines the proviso to the subject-matter of the section ought to be preferred, and I adopt it here.

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But assuming that the proviso goes beyond the section, what then? By said subsection (52) the Council may stop up lanes. By the proviso in question the Council might lease lanes. In the former case it might not do that except in the interest of the public. Is a different rule to be applied where the lane is both stopped up and leased? I think not, and therefore it seems to me to make no difference in this case whether the proviso be confined to the main section or not. The result is the same when it once appears that the transaction is one which was not conceived and carried out in the interests of the public, but in the sole interest of a private concern.

The case might be different where property no longer required by the Corporation is being dealt with under the powers given by the proviso. In such a case the only question of public interest is: was the lease granted in good faith?

I would allow the appeal and quash the by-law.

IRVING, J.A.: I would dismiss this appeal. I see no good reason for believing that the Council did not act in good faith, and although much may be said as to the advantages of having an open way for fire-protection purposes, nevertheless I recognize that there may be other reasons for granting the application of the Hudson's Bay Company. Brice on Ultra Vires, 3rd Ed., 371, states the broad rule to be that whatever (that is not being *ultra vires*) concerns "a corporation" can be dealt with by the majority of the corporators, or the governing body, if they have vested in them the capacity to exercise the powers of the corporation. It is unnecessary to say more, but I think it will not be amiss to draw attention to the case of *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, which supports this principle, *viz.*: where bodies of a public representative character, entrusted by Parliament with delegated authority are acting *bona fide* and within the limits of the powers conferred upon them by Parliament, they are not to be interfered with by the Courts. Compare the case of *Haggerty* v. *Victoria* (1895), 4 B.C. 163.

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MARTIN, J.A.: Apart from the question of public interest, which I shall consider later, it is clear to me that the Council had authority to pass the by-law under the powers conferred upon it by subsection (52) of section 125, which in express terms empowers it, *inter alia,* to alter, divert, and stop up lanes, and to enter upon, break up, take, or use any land in any way necessary or convenient for that purpose. It was, indeed, at first, and very diffidently, suggested that as this subsection is one of a group of 29 headed "Public Health," these powers could only be exercised in relation to that subject-matter; but in answer to that I observe, first, that two more of said subsections (in addition to (56) referred to by the learned judge below) have also nothing to do with public health, *e.g.,* (44) and (46), which are essentially taxing sections; and second, that subsection (54) itself deals with five separate and distinct subject-matters: (1) drains and sewers, (2) watercourses, (3) roads, streets, lanes, etc., (4) fertilizing purposes, and (5) "repairing and maintaining all bridges," in such a way that it is obvious on the face of the section that there is no intention to

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restrict its application to one subject-matter because of any relation it may or may not have to another. It is indeed a crudely drawn "omnibus" section, wherein various powers derived from various sources (*e.g.*, subsection (127) of section 50, Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144) have been mixed up and lumped together in an inconvenient manner, but the history of the clauses shews beyond doubt what the general intention is.

Having, then, the power to close up the lane and divert it and to take and use the land necessary or convenient for that purpose, the Council, in granting a lease of the land which it necessarily took and used for the purpose of stopping up the lane, *i.e.*, that portion of it (beyond the new lane) by the taking and occupation of which the stopping up was and could only be accomplished, was "using" that piece of land (formerly part of the lane) in a manner authorized by the statute. It was necessary to take and occupy the land to close the lane (in no other way could it be done), and having done so the Council continued to "use" it by means of its tenant just as much as if it had decided to build a fire station, or a city hall, on it.

Furthermore, I adhere to the judgment I delivered on the 18th of June, 1908, in *Mahon* v. *City of Vancouver,* on section 4 of the Municipal Clauses Act (which is essentially identical with section 4 of the Municipal Act, Revised Statutes of British Columbia, 1911, chapter 170), wherein the right to construct a bridge was involved, that in addition to the powers conferred by its special Act of Incorporation, the City of Vancouver may invoke all powers conferred by the Municipal Act which are "not repugnant to or inconsistent with" said special Act, and therefore, as the relevant sections in each Act are harmonious, the Council, in this case, may rely upon the "Streets-General" subsection (176) of section 53 of said chapter 170, which leaves no room for argument.

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But if I am wrong in this view, then I am of the opinion, with all deference to contrary ones, that under subsection (215) as amended by section 8 of chapter 61, 1907, the power of the Council to "obtain" and lease the land in question is put beyond peradventure. The expressions "as may be required," and

"when no longer required," must mean in the opinion of the Council, which is the only body which can determine the need of the Corporation in that respect—certainly not this Court. After a careful consideration of the main subsection and the amendment of 1907, I see no good reason for restricting the application of the latter to land acquired in any particular way; its object and language are both opposed to that construction. If I am right in this, then no question can arise as to the Council not acting in the public interest (provided it has been acting *bona fide,* which is not disputed), because the amending section 8 provides expressly that the Council may lease "on such terms and conditions as it may deem expedient and without the assent of the electors." This language confers an absolute power, which if honestly, though improvidently exercised, no Court can review, and there is an end of the matter. No question of the unreasonable, unfair, or oppressive exercise of power arises here, on which point the authorities are reviewed in *City of Montreal* v. *Beauvais* (1909), 42 S.C.R. 211 at pp. 216-7.

In whatever light the various sections may be viewed, one result is the same; either the Council has the power to stop up and then use a lane, or it has the power to lease a lane (or portion thereof) directly, which necessarily carries with it the further ancillary power to enter upon, occupy, and stop up the lane before or at the time of leasing the same.

This brings me to the question as to whether the Council did not act in the public interest but solely in a private one, which is a matter this Court is, on the authorities, entitled to inquire into, if my view of the effect of the said subsection (215) and amendment should not prevail. The appellant recognizes that it must go to the length of establishing this contention, as is shewn by the second ground set out in the order *nisi*:

"2. The closing of the said lane is solely in the interests of the Governor and Company of Adventurers [of England] trading into Hudson's Bay, being a private corporation . . . ."

A number of cases were cited in support of this ground, in none of which were the circumstances essentially similar to those at bar, and this it is necessary to keep prominently in mind because nothing is more unsatisfactory or unsound in cases of

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this nature than to attempt to fit a principle extracted from a certain set of facts upon another set of facts of a wholly or largely different kind. I make the following observations upon the principal cases:

In *Re Peck and Corporation of Galt* (1881), 46 U.C.Q.B. 211, the by-law was unquestionably passed only for the benefit of a particular church, the public deriving no benefit.

In *Re Morton and Corporation of St. Thomas* (1881), 6 A.R. 323, the Council had not acted "in good faith in the interest of the public," but had "prostituted their powers for the benefit of one individual at the cost of another, the general public not being interested": p. 325, Osler J. *Pells* v. *Boswell et al.* (1885), 8 Ont. 680, is of the same class. The transaction was admitted, indeed, by the Council itself to be a private contract merely (p. 690), with "not even a colour of public interest."

Scott v. *Corporation of Tilsonburg* (1886), 13 A.R. 233 at pp. 237 and 249, and *Campbell* v. *Village of Lanark* (1893), 20 A.R. 372, are cases where the by-law was held to be an attempt to evade a statute and "represent untruly the transaction as a whole" with "no other ground to rest upon"; or to attempt to accomplish indirectly a prohibited object.

Re Waterous and City of Brantford (1903), 2 O.W.R. 897; (1904), 4 *ib.* 355; and *Re Weir and City of Calgary* (1907), 7 W.L.R. 45, are cases wherein the Council "acted merely out of favour to an individual"; or that sufficient did not appear to justify the Council in coming to the conclusion it did come to if it had been "acting in good faith."

Re Loiselle and Town of Red Deer (1907), 7 W.L.R. 42, clearly carries, I think, with all respect, the views of Chief Justice Moss on "public interest" in the *Waterous* case to an extreme and untenable length, and restrict the scope of that expression to the vanishing point. Chief Justice Moss recognized that if "sufficient did appear to justify the Council acting in good faith in coming to the conclusion" that the public interest was being served by the course it adopted, then the Courts could not interfere.

In re Inglis and City of Toronto (1905), 9 O.L.R. 562, is a decision on a different class of case, on a section authorizing

the granting of aid by way of a bonus, but if anything can be extracted from it which applies to the case at bar it is in favour of the respondents as regards the unfettered discretion of the Council to grant the lease in question, and the impropriety of a Court attempting to usurp the Council's functions.

What are the facts relied upon here to establish the contention that the Council has acted solely in a private interest? I pass over the evidence of certain officials of fire departments respecting the increased danger from fire, and also that which goes to shew that the appellants will be injuriously affected in their business, because these elements are beyond question no answer to the *bona-fide* exercise of legislative powers. The only direct statement is that contained in paragraph 15 of Hewitt's affidavit, as follows:

"15. I verily believe that the Corporation of the City of Vancouver are not acting in the interests of the general public of the City of Vancouver in passing said by-law, but have passed the said by-law solely in the business interests of the Hudson's Bay Company . . . ."

But it is objected that this paragraph cannot be received as evidence as it is a mere bald statement, and does not disclose the grounds of belief, as required by rule 523. This is an objection of substance which has been constantly given effect to heretofore, and the same course should be followed now, as such statements "are worthless and ought not to be received": *In re J. L. Young Manufacturing Co.* (1900), 2 Ch. 753-4; *Lumley* v. *Osborne* (1901), 1 K.B. 532; *Tate* v. *Hennessey* (1901), 8 B.C. 220; *Chong* v. *McMorran, ib.* 261. MARTIN, J.A.

It follows that there is no evidence in support of the contention except such inferences as may be drawn from the fact of the closing of the lane on the Company's application and the leasing of the same, and from the facts set out in the petition and affidavits filed on behalf of the Company.

But, in refutation of the charge, we have the uncontradicted evidence that the Board of Works was unanimously of the opinion that in all the circumstances the Company's request was "a reasonable one, and considered that in the interests of the City it was advisable to grant same, considering the class of building which the Company proposed to erect and the facilities which they were offering in return to the other owners in the

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said block." Moreover, the Company's petition "was indorsed by more than a majority of the owners in said block." See Alderman Hepburn's affidavit, paragraphs 3, 4, 6 and 9, and also those of Aldermen Baxter and McSpadden to the same effect. These affidavits shew that the Council was careful to safeguard the public interest in every way, not only by requiring the Company to enter into a formal agreement (dated 15th July, 1912, and recited in the by-law) to provide, and convey to the City, a wider lane of 25 feet, instead of 20 feet, to be substituted for the closed portion, but also secured a perpetual easement for the public use over a large open area of 25 feet square, and a still larger perpetual open air space of 25 x 35 feet, one storey high, as shewn by the plan. The Company also was required, and agreed to bear all the expense of protecting and laying drains, pipes and wires, and paving the new lane and the easement area, to the satisfaction of the Council, and also to indemnify and save harmless the City against all claims for compensation and damages by reason of the closing of the lane.

The Company's petition was based upon the fact that it desired to greatly enlarge its existing departmental stores in the block in question, wherein, it appears by Lockyer's (the general superintendent of stores) affidavit, it already employed 350 persons, by erecting a great new building at a cost of over $2,000,000, which, "in order to meet the requirements of the
MARTIN, J.A. Company's business and the demands of the public," it was desired to have constructed in a continuous front of one complete block on Georgia street, running from Granville to Seymour street. The number of people to be employed in this new immense establishment is sworn to be "between 700 and 800, probably more," and it is easy to see that not only for the benefit of the Company, but also for the convenience of the purchasing public, how much more desirable it would be to have all the departments of such a great emporium of trade under one roof instead of business being dislocated and shopping retarded by the public having to cross a 20-foot lane to get from one department to another. Times, and customs and habits of business change, and the Courts must view such matters with the eye of the present day, and the recent great increase in number and

size of departmental stores has reached such a stage that the convenience of the public in attending them is a matter which a city council could well consider from the broad view of a public convenience rather than the narrow one of any benefit to the proprietors thereof merely. Moreover, the erection and maintenance of a great emporium of trade of a high class is something very much to be desired in any city, as facilities for shopping add much to the attractions of a town, just as do fine hotels, opera houses, picture and art galleries, libraries, museums, etc., etc., and the fact that Vancouver has been chosen for the real distinction of the erection therein of one of the chain of great departmental stores that it is common knowledge the Company is building half way across the continent from Victoria to Winnipeg, is a matter of real importance to the public of that city, and the sworn amount of the contemplated expenditure and number of employees shews that the establishment will in all probability be of a character which will be an attraction and ornament to any city in the Empire. There is furthermore this additional feature, that the Council might well have deemed it desirable in the public interest that there should be a continuous front of the great building on Georgia street, unbroken by an unsightly lane, because a harmonious facade of that description would add greatly to the architectural beauty of two of the principal thoroughfares, at the crossing of Georgia and Granville streets, which is one of the finest positions in the town, where the appearance of the buildings is of general interest and desirability and much lasting public importance.

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An act of a council is none the less done in the public interest because it benefits primarily a private individual; almost every contract entered into by the city has that effect. No ratepayer, for example, directly benefits as much by a contract for uniforms for the fire brigade as the tailor who is paid by the city for making them; nor as much by a contract to provide oats for the corporation horses as the dealer who sold them; but is the act done any less in the public interest on that account? The principle is not altered by the fact that some one else receives a more immediate and greater benefit than the public does, provided there is an appreciable element of public interest

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which influenced the council to act, and if in that exercise of its powers it should deem it advisable to act in harmony with a private interest and co-operate with it to the full extent of its statutory authority so as to result in some appreciable degree of benefit for the public, no just or lawful exception can be taken to so praiseworthy a course, which enures to the mutual benefit of the public and private interests; the public interest is often best attained by a combination with private ones. It is all a question of degree, and no general rule can be laid down. Can it be said that, for example, a council would not be justified in diverting a lane, street or road to enable a railway station to be constructed by a private company, or a steamboat landing, or a badly needed fine hotel, or a splendid opera house, or kursaal, or athletic ground, or golf links, or baths, or anything which might draw commerce, business or visitors to the community, even though the direct and greatest benefit would accrue to the private proprietors thereof, in case the circumstances were such that the roads, streets and lanes had been so badly laid out that without some change none of the said things could be built or laid out in a desirable situation? In any of these cases, in different circumstances the public interest might be so obvious as to require no argument, and in another it might be so slight as to almost reach the vanishing point, and be inappreciable, and therefore non-existent in a legal sense.

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And in the determination of what is best in the public interest the personal element might justifiably largely enter, being part indeed of the question of degree. For example, that agreement made with this ancient and powerful corporation, inseparably connected with the history (and indeed government, civil and criminal, of a great portion) of Canada for nearly two and a half centuries, and having all the prestige of a great and honoured name, vast assets and landed estates (confirmed by Parliament after its surrender of Rupert's Land: see Imperial Order in Council, 23rd June, 1870) and far-reaching commercial influence from which many indirect advantages and benefits might reasonably be expected to flow, might not bear the same relation to the public interest if it were entered into with a paltry firm of no credit, antecedents or reputation.

But it was objected that the Company had not in the agreement covenanted to erect any building at all, though it had agreed to the other requirements of the Council, hereinbefore mentioned, and that the lease, for 25 years, was also silent on this point, but I am of opinion that this omission is not a matter of substance, because the lease is based upon the written representations in the Company's petition, and those made to the Board of Works when it was heard (Hepburn's affidavit, paragraph 3), and no difficulty would be experienced in setting aside the lease if they were not lived up to; and further, I have no doubt that the Council felt safe in accepting the statements of the intentions of a company having such an enviable history as the petitioner.

It is difficult to distinguish this case in principle from that of *Attorney-General* v. *City of Toronto and Molson* (1864), 10 Gr. 436, wherein that city leased for a long term a piece of land used as a park to private persons, who agreed to erect buildings upon it and other city property to cost $125,000, which were to be used as a brewery and distillery or similar works. Apparently the lease was for a nominal rent (as the amount is not given in the report), and the only benefit the city derived was by increase of revenue, as stated in the headnote. No evidence was given to shew that the consideration was insufficient, or that any improper means had been used in obtaining the lease, and Chancellor Vankoughnet held that as the council has the power to "shut up this piece of ground, or take from it its use and character as a park," no case was made out for interference, and dismissed the bill, with costs.

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Now, I cannot imagine that if the lease here had fixed the rent payable by the Company at, say, $5,000 per annum, there would have, on the face of it, been any doubt about the Council's action being for the public benefit. But the Council considered that they were promoting the public interest in a better way by accepting considerations of a different sort, and is this Court to sit in judgment on it and say it was wrong for so doing, and that in the long run its policy was at fault? I am decidedly of the opinion that it should not. It cannot for a moment be presumed that the Council did not intend to exercise its powers for

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the public benefit, and the onus is upon him who alleges that it did not do so to prove his case. It comes to this, that the question of acting in the public interest is one of fact, to be determined on all the special and ever-varying circumstances of each case, and I think a fair test to apply to the action of the Council would be similar to that which is applied to the verdict of a jury, *viz.*: were there facts before it on which reasonable men could reasonably reach the conclusion that the course of action they decided on would be in the public interest? If so, then a Court could not properly interfere, because to do so would be to usurp the legislative or executive functions of the council, whereby mischievous consequences would inevitably ensue.

Finally, I can only reach the conclusion that the statement of the three aldermen that they acted "in the interest of the City" is fully justified by all the facts and circumstances, and therefore

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the learned judge below rightly took the view that he was not warranted in interfering with a *bona-fide* exercise of the powers of the Council.

The appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I would allow the appeal for the reasons given by the learned Chief Justice.

Appeal dismissed.

Solicitors for appellant: *Bodwell, Lawson & Lane.*
Solicitor for respondent: *J. G. Hay.*

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WILLIAMS v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Railways—Street railway—Boarding car while in motion—Injury to passenger standing on step—Negligence—Contributory negligence—Proximate cause of accident—Findings of jury.

The plaintiff boarded a car of the defendant Company, while in motion, about 40 feet from its starting point on a siding. The car being crowded, he and two other passengers were forced to stand on the lower steps of the back entrance, he being forward of the other two and holding on to the railing at the doorway, where he remained up to the time of the accident. The car over-ran a switch it should have made, and while backing up, was met by another car on a parallel track. The plaintiff and the other two men were overhanging the devil-strip, and the cars, in passing, forced the two men into the vestibule, which had the effect of shoving the plaintiff out and between the cars, where he was thrown to the ground, sustaining injury. When the car first started, the conductor had cleared the lower step of passengers and then went ahead to flag the car, not seeing the plaintiff getting on board. At the trial the jury found that the defendants were guilty of negligence and the plaintiff of contributory negligence, but that the defendants' negligence was the proximate cause of the accident, and they entered a verdict for the plaintiff.

Held, on appeal, affirming the decision of MURPHY, J. at the trial (GALLIHER, J.A. dissenting), that the defendants were liable; that the plaintiff was negligent in standing on the step, but the ultimate negligence was that of the defendants' servants in not exercising reasonable care in backing the car.

Davies v. *Mann* (1842), 10 M. & W. 546, followed.

APPEAL from the judgment of MURPHY, J. and the verdict of a jury in an action for damages for injuries sustained in an accident on the defendant Company's railway, tried at Vancouver on the 30th of September, 1912. The jury, in returning a verdict in favour of the plaintiff, answered the questions put by the Court as follows:

Statement

"1. Was the accident caused by the negligence of the defendant Company? Yes.

"2. If so, in what did such negligence consist? Answer fully. In not having a switchman to flag the car out, and in the conductor not seeing that the car was clear when backing up.

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"3. Was the plaintiff guilty of contributory negligence which was the proximate cause of the accident? Yes.

"4. If so, in what did such contributory negligence consist? Answer fully. In riding on steps of car contrary to law.

"5. If you answer 1 and 3 both in the affirmative, did the defendants do anything or omit to do anything constituting a proximate cause of the accident despite such contributory negligence? Omitted precautions, as answered in question two.

"6. Was the plaintiff a passenger? Yes.

"7. Was the plaintiff on the car by the permission of the defendant Company? Yes.

"8. Damages? $750."

The facts appear in the headnote and reasons for judgment.

M. A. Macdonald, for plaintiff.

L. G. McPhillips, K.C., for defendant Company.

31st September, 1912.

MURPHY, J.: In my opinion the question of nonsuit decides the question of contributory negligence and concurrent negligence by the defendants, and I therefore deal with the motion for nonsuit first.

That depends on whether there was evidence given on which the jury could reasonably find that plaintiff was not a trespasser; in other words, whether they would reasonably find that plaintiff was on the car steps by the leave and licence of defendants. I agree that a conductor could not give such permission, as it would not be within the scope of his authority. If, however, there is evidence on the record justifying reasonable men in concluding that the practice was so common and was followed under such circumstances that the Company must have known, or ought to have known of it, then I think it was my duty to let the case go to the jury. I think there was such evidence. The plan, and other evidence, shews that the *locus* of the accident was close to, and the overcrowding at an interurban station of defendants. It is a reasonable inference, I think, that officials of the Company would be about such a station. Even if this inference should not be drawn, on the evidence of Williams I think it was open to the jury to find that "crowded" cars mean cars on which people stand on the last step, and his evidence is that that condition had existed for over 12 months previous to the accident. The evidence of Lang is, I think, open to the

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same construction, especially when read with his rebuttal evidence, and he states his experience extended over six or seven years. When he says, in effect, that people habitually, to his knowledge for some years, have stood on the last step of the 5:30 car when he (referring to Patterson, the conductor) took it out, I think the jury may reasonably say he means that was the usual practice on the 5:30 car at all times within his experience, not particularly when Patterson was conductor. Even on the other construction, if Patterson did allow such practice for a long time, that in itself would be material evidence which might possibly justify the verdict. Taken with Lang's evidence in the main case, and with plaintiff's evidence above referred to, I hold the nonsuit must be refused, and the matter becomes one for the jury. This, to my mind, disposes of the "concurrent" argument. If the Company must be held to have known and allowed the practice—and the jury have so found—then the conductor, as their servant, should have looked to the condition of the steps and for approaching cars before he gave the signal for the car to back. He admits the car would not have moved but for such signal having been given. If the car had not backed, quite possibly this accident would not have occurred. The conductor of the city car probably would have stopped before he reached the interurban car.

Judgment for plaintiff for amount of verdict.

The appeal was argued at Vancouver on the 20th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellants (defendants): The plaintiff was standing in a position contrary to the Tramway Inspection Act and contrary to the by-law when he was injured, being caught between two cars. He got on the lower step of the rear entrance while the car was moving, and was kept there owing to the crowded condition of the car. We try to keep people off the steps, but it is difficult to do so, and when they stay on under these conditions we consider them trespassers. The principle laid down in *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361 applies in this case. The general

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rule is that where a man is a trespasser he is there at his own risk; this man was standing on the outer step contrary to law, which was the proximate cause of the accident.

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M. A. Macdonald, for respondent (plaintiff): The main point of the defendant Company is that the plaintiff violated the Tramway Inspection Act and the by-laws: *Andreas* v. *Canadian Pacific Ry. Co.* (1905), 37 S.C.R. 1; *Grand Trunk Railway of Canada* v. *Barnett* (1911), A.C. 361. But we contend it was in pursuance of a general custom that the plaintiff boarded the car. One witness, who was on the car, says there was no order given by the conductor to those standing outside the vestibule to get off. There was, therefore, sufficient evidence for the jury to find he was a passenger. He was standing in that position by necessity and not by choice: *Burriss* v. *Pere Marquette R.W. Co.* (1904), 9 O.L.R. 259; *Ryckman* v. *Hamilton, Grimsby and Beamsville Electric Ry. Co.* (1905), 10 O.L.R. 419. We are not out of Court even if I concede there was contributory negligence. The breach of the by-law is not sufficient: *Bears* v. *Central Garage Co.* (1912), 22 Man. L.R. 292, 2 W.W.R. 283. The question is: could not the Company, with care, have avoided the accident? See *Dynes* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 429.

Argument

McPhillips, in reply.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: There is evidence that the appellants habitually allowed persons to ride on the steps of their cars as passengers. The respondent was a passenger on the step of the car at the time of the accident. Both parties were breaking a city by-law, the one in riding there, the other in allowing him to do so. It was not a safe place to ride, and I think the respondent was negligent in so riding, but the ultimate negligence was that of the appellants' servants. Had they exercised care in the operation which they were performing in backing the car, the accident could not have happened. The facts of the case bring it within *Davies* v. *Mann* (1842), 10 M. & W. 546.

I would dismiss the appeal.

IRVING, J.A.: In this case I think there was evidence to support the finding of the jury that the plaintiff was a passenger. In my opinion, the fact that the plaintiff got on the car while it was in motion does not prevent him from being a passenger, particularly in view of the fact that he held a commutation ticket. Having regard to the crowded state of the rear platform, a fact of which the conductor was fully aware, and also of the fact that the car was being backed on its wrong side, in my opinion the conductor might reasonably have anticipated harm arising from the overcrowded condition of the car unless he took steps to clear the platform, or clear the steps on the side of the platform, upon which steps the plaintiff was standing.

I do not think we should interfere in this case.

MARTIN, J.A.: After carefully reading all the evidence in this case, in addition to that which was cited to us, I have come to the conclusion that there is ample evidence to support the findings of the jury and that the answer to the fifth question, when read in relation to the facts, is sufficient to sustain the verdict, despite the finding of contributory negligence. As was remarked by Mr. Justice Garrow in *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121, "Under the circumstances, where so much depends upon the actual facts, not much assistance can be got . . . . from decided cases," and I shall content myself by saying that to back up the car in such a congested place of traffic, where there was admittedly "a continuous stream of cars on both tracks" in question, was a highly dangerous thing to do, and therefore required a corresponding degree of care. But the conductor (who had gone on ahead to attend to the switch) admits that he did not even take the obvious precaution of taking one or two steps to the side of the car to inform himself as to passengers on the steps, who, in view of the long standing state of affairs, abundantly proved, must have been expected to be there at that time of day, but climbed into the car through the end window of the vestibule (owing to its congested condition) and thereupon, in that state of almost wilful, and certainly reckless ignorance, gave the signal to back up! No more, in my opinion, need be said, except that the appeal should be dismissed.

MURPHY, J.

1912

Sept. 31.

COURT OF APPEAL

1913

July 22.

WILLIAMS v. B.C. ELECTRIC RY. CO.

GALLIHER, J.A.

GALLIHER, J.A.: I adhere to the opinion I expressed at the hearing of this case, and would allow the appeal.

The plaintiff jumped on the rear steps of the defendants' car, which was crowded, not at any regular stopping place, but while the car was in motion, and was there without the knowledge or consent of the defendants. Neither can it be said he got on at the invitation of the defendants, as his act in getting on the car was in violation of the rules of the Company. It is true that passengers, although not desired to do so, in fact, requested not to do so, were allowed by the Company to ride on the rear vestibule and steps of the car, and had this man got on while the car was stopped and while the conductor could have had an opportunity of putting him off, if the steps were too crowded, it may be he would be entitled to recover, but he jumped on these steps while the car was in motion between two points, and was there by his own wrongful act, without the knowledge of the defendants, and I do not think that what transpired later in shunting the car, under the circumstances of this case, gives him a right to recover.

Appeal dismissed, Galliher, J.A. dissenting.

Solicitors for appellants: *McPhillips & Wood.*
Solicitors for respondent: *Russell, Russell & Hancox.*

HOLT v. BROOKS.

CLEMENT, J.

1913

Jan. 10.

COURT OF APPEAL

April 23.

HOLT v. BROOKS

Sale of goods—Horses—Warranty—Return of horses as unsound pursuant to agreement—Acceptance and retention by defendant—Action for return of purchase price.

Where, upon the sale of a team of horses, the vendor warranted them sound, and they were returned as unsound in three days pursuant to an agreement that in the event of their turning out unsound within ten days they could be returned, and they were accepted and retained by the vendor:—

Held, that the purchaser was entitled to a refund of the price paid for the horses; and was not driven to sue for breach of the warranty.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 28th of November and the 16th of December, 1912. The plaintiff purchased a team of horses, with waggon and harness, from the defendant for $1,050. The defendant guaranteed the team sound and true and agreed that if within ten days the horses proved to be unsound, they could be returned to the defendant, who would refund the purchase price. The horses were returned in three days as unsound and were accepted and retained by the defendant. This action was brought for the recovery of the purchase price.

Statement

J. H. Senkler, K.C., for plaintiff.

W. P. Grant, for defendant.

10th January, 1913.

CLEMENT, J.: This case was before me in November last, but after the evidence then available was in, I suggested that an effort should be made to procure further evidence, and with that view the hearing was adjourned to the 16th of December. In the interval I had tried other cases and heard much testimony, so that when this trial was concluded on the 16th ultimo, I hesitated to pronounce judgment at once, fearing that my recollection of the evidence given in November might be at fault. I therefore have had the notes of evidence extended, and gone through the testimony with much care. The result has been to confirm the view I had formed at the conclusion of the trial.

CLEMENT, J.

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1913

Jan. 10.

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I find that the team of horses examined by Drs. Jagger and Swinerton was the team bought by the plaintiff from the defendant; that both horses were unsound; and that the plaintiff therefore is entitled to a return of the money and notes constituting the purchase price, less a credit of $15 which plaintiff has received as the hire of the team for three and three-quarter days, on which he drove them. There will be judgment for the plaintiff for $510, with interest at five per cent. from the 7th of May, 1912, and for delivery up and cancellation of the notes still outstanding, with costs.

CLEMENT, J.

The team brought by defendant to the Court House square as the team sold by him to the plaintiff, was not that team at all. Whether the defendant designedly endeavoured to mislead justice I am not driven to say. With a stable full of teams for sale, he may have been innocently confused on the question of identity, but I have my doubts.

The appeal was argued at Vancouver on the 22nd and 23rd of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

W. P. Grant, and *Dockerill,* for appellant (defendant): The plaintiff claims that when the horses were returned they were accepted and retained by us. We submit the evidence is conflicting as to this. We claim the horses were returned and left in our stable when no one was there. Under the agreement it was purely a case of breach of warranty, and the plaintiff's proper course was to bring an action for damages: *Power* v. *Wells* (1778), 2 Cowp. 818; *Weston* v. *Downes* (1778), 1 Dougl. 23*a*; *Payne* v. *Whale* (1806), 7 East, 274; *Street* v. *Blay* (1831), 2 B. & Ad. 456; *Chapman* v. *Gwyther* (1866), L.R. 1 Q.B. 463; *Buchanan* v. *Parnshaw* (1788), 2 Term. Rep. 745.

J. H. Senkler, K.C., for respondent (plaintiff) was not called upon.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: Mr. *Grant,* you have made a very good argument, and pressed it as strongly as the interests of your client require; but, unfortunately, your client precluded him-

self from taking the course which he is now taking in this action. If he had refused to take the horses back and allowed the plaintiff to pursue whatever legal remedy was open to him, in all probability the judge below would have refused to give the relief he did give, but probably would have given damages for breach of the warranty, if there was a breach.

I think the appeal must be dismissed.

IRVING, J.A.: I agree.

MARTIN, J.A.: I agree. On the cases referred to by counsel it is impossible to support this appeal.

GALLIHER, J.A.: I agree.

Appeal dismissed.

Solicitors for appellant: *MacGill & Grant.*
Solicitors for respondent: *Senkler, Spinks & Van Horne.*

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IN RE MOFFATT AND THE CROW'S NEST PASS COAL COMPANY.

MURPHY, J.
1913
May 8.
COURT OF APPEAL
July 22.
IN RE MOFFATT AND THE CROW'S NEST PASS COAL CO.

Master and servant—Injury to servant—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244, Sec. 7—Notice and claim under—Given by servant before death—Subsequent claim by dependant without further notice or claim.

A notice of injury given by a workman is sufficient to entitle those dependent upon him, after his death, to the benefits of the Workmen's Compensation Act, Revised Statutes of British Columbia, 1911, chapter 244, without any other or further notice.

Judgment of MURPHY, J. affirmed.

APPEAL by the defendant Company from the judgment of MURPHY, J. on the 8th of May, 1913, on a case stated by an arbitrator under the Workmen's Compensation Act, 1902. The

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main point for consideration was whether the injured man, having given notice of a claim for compensation under section 7 of the Workmen's Compensation Act, and having died before the claim was adjudicated upon, it was necessary for his dependants to give a fresh notice.

W. A. Macdonald, K.C., for appellant.
Bodwell, K.C., for respondent.

MURPHY, J.: The only question argued before me was number 4. In my opinion it should be answered in the affirmative. The giving of the notice under the Act seems to be for the protection of the employer and so that he may not be made to suffer by stale claims. Having received such notice from the injured person, I see no reason why such persons (dependants) after his death should be called upon to give another notice.

MURPHY, J.

The appeal was argued at Victoria on the 23rd of June, 1913, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Bodwell, K.C., for appellants, contended that as the claim for compensation was made on behalf of the injured workman before his death, and none made for the dependant after his death, there was no claim for compensation in existence, and the applicant must fail: *Powell* v. *Main Colliery Company* (1900), 2 Q.B. 145.

Argument

Maclean, K.C., for respondent: The liability arises the moment the accident takes place: *United Collieries, Limited* v. *Simpson* (1909), A.C. 383. It is not necessary to put the amount claimed in the notice: *Thompson* v. *Goold & Co.* (1910), A.C. 409; *Darlington* v. *Roscoe & Sons* (1907), 1 K.B. 219.

Bodwell, in reply.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: James Roby was, on the 9th of August, 1910, injured while employed in the appellants' mines at Fernie. Notice of injury was given, and claim for compensation under the Workmen's Compensation Act was made on his behalf and served on the appellants on the 16th of the same month. Roby

died on the 25th of the same month, before any further proceedings had been taken.

Subsequently proceedings were taken on behalf of his wife and children, the respondents in this appeal. Appellants contend that because a new claim under the said Act was not made by the respondents, they had lost their right to compensation. The arbitrator and the learned judge appealed from, each held that the first claim was sufficient. As has been stated by the arbitrator, a liberal construction in favour of beneficiaries ought to be given to the Act, so as to carry out the manifest intention to provide for the injured and his dependants, without undue regard to mere technicalities.

I would dismiss the appeal.

MURPHY, J.

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July 22.

IN RE MOFFATT AND THE CROW'S NEST PASS COAL CO.

IRVING, J.A.: James Roby, who was injured on the 9th of August, 1910, put in his claim on the 16th of August, 1910, and died on the 29th of August, 1910. In August, 1912, the plaintiff, the legal personal representative of James Roby, applied for an arbitration in the interest of the widow of James Roby, a dependant. It is objected that as no claim was made on behalf of the widow within six months of the death, the dependant's claim is gone. In considering that question—or any other question on the construction of this Act—we must be guided solely by the language of the statute, without the addition of anything that is not necessarily implied. When we examine the Act, we find that as soon as the accident happens the owner is liable to "make compensation." The measure of liability may vary according to the facts of the particular case, but the liability of the defendants to make compensation is fixed by the accident. That being so, a demand by the workman himself, or by his agent in the workman's lifetime, is the only claim necessary to support the proceedings under section 7 of the Act.

IRVING, J.A.

The section says:

"Proceedings for the recovery under this Act of compensation for an injury shall not be maintained unless notice of the accident has been given . . . . and unless the claim for compensation with respect to such accident has been made within," etc.

The section does not say "the claim for compensation *of the*

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workman, or of the dependant," but speaks of the claim for compensation with respect to such accident.

The form of the notice served on the defendants shews that the claim was made by or on behalf of the workman, but the insertion of the name of the applicant does not, in my opinion, prevent it from being a claim for compensation with respect to such accident.

I would dismiss the appeal.

MARTIN, J.A.: In my opinion the statute is satisfied if "the claim for compensation with respect to such accident" is duly made by any one at the time lawfully qualified to make it. Here that was done by the deceased, and I agree with the learned judge below that it was not necessary for a "dependant" to give a second notice. It appears from the highest authorities that the object of the notice is to give the employer an opportunity of settling the claim, or defending it—or as Lord Atkinson puts it in *Thompson* v. *Goold & Co.* (1910), A.C. 409 at p. 413, "to protect the employer from stale demands, to warn him that a claim is about to be made against him, and thus put him upon his guard"; and that warning was given herein by the only person entitled to give it at the time, and I see no good reason for requiring a second one.

MARTIN, J.A.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Herchmer & Martin.*
Solicitor for respondent: *Alexander Macneil.*

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1913

May 20.

GENTILE v. B.C. ELECTRIC RY. CO.

GENTILE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Contributory negligence—Excessive speed—Finding of jury—Limitation of action—Statute, construction of—Consolidated Railway Company's Act, 1896, B.C. Stats. 1896, Cap. 55, Sec. 60—Families Compensation Act, R.S.B.C. 1911, Cap. 82, Sec. 5.

In an action for damages resulting from the death of a passenger on a car of the defendant Company, it appeared that deceased alighted from a car about 7.40 o'clock in the evening. There was another car immediately behind that from which he alighted. He passed between the cars, and while doing so, the motorman on the rear car called to him to "look out." He continued on, however, and when he reached about the centre of the parallel track, was struck and killed by a car coming in the opposite direction at an excessive speed. At the trial the jury brought in a verdict for the plaintiff.

Held, on appeal, that there was sufficient evidence to support the finding of the jury.

The action was brought under the Families Compensation Act, R.S.B.C. 1911, Cap. 82, under section 5 of which all actions must be brought within one year from the death of deceased. The accident happened on the 7th of October, 1911, and the action was brought in June, 1912. The defendants set up as a bar to the action as against them section 60 of their Act of Incorporation, which limited the time to six months within which an action may be brought against them for any damage or injury sustained by reason of the tramway or railway or works or operations of the Company.

Held, that the provisions of the Families Compensation Act do not come within the scope of the Consolidated Railway Company's Act, 1896, and that the plaintiff had therefore, under section 5 of the Families Compensation Act, one year from the death of deceased within which to bring the action.

Green v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, followed.

APPEAL by defendant Company from the judgment of MORRISON, J. and the verdict of a jury in an action under the Families Compensation Act, tried by him at Vancouver on the 30th of October, 1912. The facts appear in the headnote and reasons for judgment. Statement

The appeal was argued at Vancouver on the 20th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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1913

May 20.

GENTILE v. B.C. ELECTRIC RY. CO.

L. G. McPhillips, K.C., for appellants: The action was brought under the Families Compensation Act, chapter 82, Revised Statutes of British Columbia, 1911 (Lord Campbell's Act). It is admitted that the car that struck deceased was going beyond the speed limit and that it did not stop, as it should have done, when going past the other car, so that in this regard we must admit negligence on the part of the Company. On the other hand, there is no doubt of the negligence of the deceased. He referred to *Toronto Railway* v. *King* (1908), A.C. 260, 77 L.J., P.C. 77; *Morton* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 187; *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3. App. Cas. 1,155; *Rice v. Toronto R.W. Co.* (1910), 16 O.W.R. 527; *Harnovis* v. *Calgary* (1913), 4 W.W.R. 263. There is evidence of a motorman on the second Grandview car calling to deceased to "look out" just before the accident: *Williams* v. *Richards* (1852), 3 Car. & K. 81.

Under section 60, chapter 55, of the Consolidated Railway Company's Act, 1896, all actions for damages, etc., shall be brought within six months next after the time when the damage was sustained. Under Lord Campbell's Act the action must be brought within a year. In this case the writ was issued between six and twelve months after the accident. It will be said that *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, stands in the way [following *Zimmer* v. *Grand Trunk R.W. Co. of Canada* (1892), 19 A.R. 693]. He referred to *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386 at p. 398, and relied on the reasoning of MARTIN, J.A. in his judgment in that case, and contended that the Court of Appeal should not follow the *Green* case, but should be guided by the English decisions: *Markey* v. *Tolworth Joint Isolation Hospital District Board* (1900), 2 Q.B. 454; *Williams* v. *Mersey Docks and Harbour Board* (1905), 1 K.B. 804, 74 L.J., K.B. 481.

Argument

M. A. Macdonald, for respondent: There is the negligence of excessive speed which is admitted. The car that caused the accident was not provided with an automatic fender, and the evidence is conflicting as to whether the gong was sounded or not. This is the same as the *Slattery* case. It is a statutory rule that they must slow down to two miles an hour when passing

a car that is not moving. The motorman could have avoided the accident by stopping the car. If a point was not taken in the Court below it cannot be taken on appeal: *Laidlaw* v. *Crow's Nest Southern Ry. Co.* (1909), 42 S.C.R. 355.

McPhillips, in reply: *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, ought not to be followed.

[IRVING, J.A.: This Court should follow the decision given by the Supreme Court of British Columbia, sitting as a Full Court, in 1906, in *Green* v. *B.C. Electric Ry. Co.,* 12 B.C. 199, where the Court, consisting of HUNTER, C.J., myself and DUFF, J., sitting in appeal from MORRISON, J., decided that section 60 of the defendant Company's Act did not apply to actions under Lord Campbell's Act, and I referred to the doctrine of *stare decisis* on the ground that the rule decided by that Court might now (1913) be fairly regarded as having passed into the category of established and recognized law in this Province.

MACDONALD, C.J.A.: I do not know as to the other members of the Court, except my brother IRVING. I take the view that he does. There might be a case where we should be quite right in reversing a decision of the Full Court, or perhaps of our own, if we were convinced beyond all question that that decision was wrong; that it had gone upon a wrong principle, or contrary to some well-established authority which had not been brought to the attention of the Court. I can quite conceive of a case of that kind, but that is not this case.]

Argument

McPhillips: I cannot put it any stronger than Mr. Justice MARTIN has put it in *McDonald* v. *B.C. Electric Ry. Co., supra,* and I rely on the English authorities.

[MACDONALD, C.J.A.: Yes, but as between the judgment of the Full Court and that of the Court of Appeal in England, we ought to follow that of the Full Court, unless on the principle I have just mentioned. Suppose the Full Court had decided some question that had already been authoritatively decided in England, and that the English decision had not been brought to the attention of the Court at all, or there were several decisions upon the point which had not been brought to the attention of the Court, and we were convinced that had those decisions been

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brought to the attention of the Court the decree would have been the other way, we might, under such circumstances, be justified in reconsidering the whole matter.]

McPhillips: The matter was fully argued and all the cases cited.

[MACDONALD, C.J.A.: Then you should have appealed that case.

MARTIN, J.A.: I need only say that I remain of the same opinion I was on the argument of *McDonald* v. *B.C. Electric Ry. Co.*, and I reiterate what I have said in that case.

GALLIHER, J.A.: I take the view expressed by the Chief Justice and Mr. Justice IRVING to a certain extent, that is, I agree that it is very dangerous to establish a practice where we might find ourselves at sixes and sevens, deciding perhaps one time one way and another time another, that is, upholding in one instance and in another instance reversing; but there is a point in all these cases. The learned Chief Justice has put one instance. If, speaking for myself, it appears clear to me that the decision of the Full Court is palpably wrong, that is, if it is based on absolutely wrong conclusions, or a misconception probably of some authorities decided by some other Court, then I think that it is not the duty of this Court to perpetuate the error, if that error is manifest; and I think we have good English authority for that proposition. A start has to be made some time in setting right what has been decided wrongly, and somebody is apt to suffer. It should not be lightly made, and it should only be made where a Court is absolutely satisfied that the judgment relied on is erroneous, and not merely a case where they might come to a different conclusion.

Argument

MACDONALD, C.J.A.: Then, Mr. *McPhillips*, you have not succeeded in getting the majority of the Court with you on this point. I do not think you need trouble about that (the fender). Your difficulty is to get rid of the verdict of the jury, that there was not contributory negligence. The impression is at present that the boy had the right to assume that a car coming from the other direction would not be going at an excessive rate of speed, and on the evidence, I

think it is apparent that he was not aware that the car was coming, at all events, at an excessive rate of speed, and that the warning given him by the conductor of the third car, the one behind the car he had just left, may have been misunderstood and may have attracted his attention to that car as the source of danger. All these circumstances are such, I think, as to justify the jury in coming to the conclusion they came to.]

McPhillips: Is that not entirely overlooking the principle as laid down in *Williams* v. *Richards* (1852), 3 Car. & K. 81, and other later cases?

[MACDONALD, C.J.A.: I think that the rule "Stop, Look, Listen," can be overstrained in cases of street traffic. Having regard to the amount of traffic on the streets to-day, if a man were required to stop, look and listen for every motor-car and street-car, he would be stopping, looking and listening all the time; he would never venture off the sidewalk.

MARTIN, J.A.: Now, if a motor-horn is sounded a person has to jump for his life.]

Argument

MACDONALD, C.J.A.: I think the appeal must be dismissed.

MACDONALD, C.J.A.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: I agree, and I think that the circumstances here are almost tantamount to a trap.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellants: *McPhillips & Wood.*
Solicitors for respondents: *Russell, Russell & Hancox.*

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1913

July 22.

JOSEPH CHEW LUMBER AND SHINGLE MANUFACTURING COMPANY, LIMITED v. HOWE SOUND TIMBER COMPANY, LIMITED.

Trespass—Timber berth—Incorrect survey of boundaries—Plan and field notes—Filing and acceptance of by Land Department—Effect of—Location post—Estoppel—Cutting timber in disputed area after warning—Damages—Assessment.

JOSEPH CHEW LUMBER AND SHINGLE MANUFACTURING CO. v. HOWE SOUND TIMBER CO.

When the holder of a timber berth, after having the claim surveyed and the plan and field notes filed and accepted by the Land Department, subsequently finds that the survey is incorrect and does not include certain ground falling within a corrected survey of the location:—

Held, that he is entitled to all the timber within the proper boundaries of the location.

Held, further, that he is not estopped from asserting his rights as against a trespasser on the ground not included in the incorrect survey.

Held, further (IRVING, J.A. dissenting), that the trespass being committed through the error in the survey, the trespasser, by continuing the trespass after being warned of the error, is not deemed to be a deliberate and wilful trespasser. The damages should therefore be assessed on the milder scale and limited to the value of the standing timber.

Judgment of MORRISON, J. varied.

Statement

APPEAL from the judgment of MORRISON, J. in an action tried at Vancouver on the 23rd and 24th of September, 1912. The facts were that the plaintiffs held a timber location on Gambier Island, New Westminster district, which they acquired in November, 1911, from Joseph Chew, who had staked and obtained a timber licence for the ground in August, 1906. He had had the claim surveyed (with two adjoining claims that he held) by one Bauer, a provincial land surveyor, in January, 1909. The field work of the survey was done by an assistant named Barkley, and the plan and field notes of the survey were filed and accepted in the surveyor-general's office, the location being numbered 2079. The defendants held a subsequent location, adjoining lot 2079 on its west side, which, on being surveyed subsequently, was numbered lot 3111. Under the defendants' instructions, one of their cruisers, after obtaining a

copy of Bauer's field notes, cruised their location in December, 1909. He found Bauer's western boundary line of lot 2079, and made a report to his principals on the assumption that this line divided the plaintiffs' and defendants' respective locations. Acting on this report the defendants started cutting in 1910 and continued to do so through the summer of 1911. In May, 1911, Chew again looked over the ground and found that his location post (which was originally placed at the south-west corner of his claim) was 15 chains west of the western boundary of the location as surveyed by Bauer. He employed another surveyor named Bond, who made a survey from the original location post as shewn by Chew. They warned the defendants' workmen who were working in the 15-chain area that they were cutting timber on the plaintiffs' location, but the defendants continued to cut as far as the Bauer line and took practically all the timber from the ground in dispute. On the trial it was held that the defendants had committed wilful and deliberate trespass upon the property covered by the plaintiffs' timber licence, and the defendants were ordered to pay the plaintiffs the value of timber at the time of its removal.

Statement

The appeal was argued at Vancouver on the 14th and 15th of April, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for appellants (defendants): The action is for trespass and the cutting and removing of timber. There are, I consider, four questions that have to be answered in this case: first, having regard to the statute, have the plaintiffs any right whatever in the disputed area? Secondly, assuming they have, are they not estopped from asserting their rights under their location? Thirdly, was the trial judge right in concluding that Chew's location post was where he contended it was? Fourthly, was the trial judge right in finding us guilty of deliberate and wilful trespass, and fixing the damages as stated in the judgment? The respondents will contend that under the Act the words "limits of licence" mean boundaries fixed by the location post: see British Columbia statutes, 1905, chapter 33; but sup-

Argument

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pose he is correct in claiming that he has a right to change to his location, I submit he is estopped as against us.

Ritchie, K.C.: The question of estoppel is not raised in the pleadings.

Bodwell: We simply claim the whole plea is that Chew is estopped.

[MACDONALD, C.J.A.: I think you will have to confine yourself to the pleadings.]

The estoppel that arises in a person not doing his duty to the public need not be pleaded. In this case there was a failure of the performance of his duty in having a survey in the wrong place: *Swan* v. *North British Australasian Co.* (1863), 2 H. & C. 175. There is a statutory duty to have his claim surveyed. He did this, and owing to his survey he misled the respondents. Estoppel *in pais* need not be pleaded: Everest and Strode on Estoppel, 2nd Ed., 458; *Freeman* v. *Cooke* (1848), 18 L.J., Ex. 114; *Nixon* v. *Dowdle* (1912), 2 D.L.R. 397 at p. 412. The assessment of damages was wrong, in our having been assessed as wilful trespassers: *Trotter* v. *Maclean* (1879), 13 Ch. D. 574, 10 Morr. M.R. 263; *Hilton* v. *Woods* (1867), L.R. 4 Eq. 432; *Bulli Coal Mining Co.* v. *Osborne* (1899), A.C. 351; *Union Bank* v. *Rideau Lumber Co.* (1902), 4 O.L.R. 721 at p. 727.

Argument

Ritchie, K.C., for respondents (plaintiffs): We were compelled, under the Act, to make the first survey; we are not bound, therefore, by that survey. The Crown is in the same position as any other grantor. There is no provision in the statute providing for the rectification of a mistake, but at the same time there is no provision in the statute binding us to our survey when we subsequently find the survey does not disclose our land according to our original location. When we obtain our licence the statute vests in the licensee all the timber within the ground described in the licence: *Grosett* v. *Carter* (1883), 10 S.C.R. 105. There is no statute binding a person to a survey which has been accepted by the department; you can rectify a mistake: *Johnstone* v. *Clarke* (1884), 1 B.C. (Pt. 2), 81. No person can cut timber unless he has had the land surveyed. Where you have a statute that requires you to employ a par-

ticular person under a penalty, he is not the agent of the employer: *Carruthers* v. *Sydebotham* (1815), 4 M. & S. 81; *Redpath* v. *Allan* (1872), L.R. 4 P.C. 511 at p. 519. In order to constitute estoppel there must be a deliberate misrepresentation upon which others act and rely. You cannot lose title by a mere mistake: see Everest and Strode on Estoppel, 2nd Ed., 231. Estoppel *in pais* should be expressly pleaded: Annual Practice, 1911, p. 293. All estoppels should be pleaded: *Scott* v. *Fernie* (1904), 11 B.C. 91; *Willmott* v. *Barber* (1880), 15 Ch. D. 96 at pp. 105-6. The learned trial judge was justified in treating this as a wilful trespass. The evidence shews they went on working in the face of directions to stop by the Provincial authorities: *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150; *Union Bank* v. *Rideau Lumber Co.* (1902), 4 O.L.R. 721 at p. 727; *Llynvi Company* v. *Brogden* (1870), L.R. 11 Eq. 188; *Taylor* v. *Mostyn* (1886), 33 Ch. D. 226.

Bodwell, in reply: The pleading of estoppel should be considered with the fact that we bought: Halsbury's Laws of England, Vol. 13, section 562; the authorities are collected there. When he once defines the area he takes, he is bound by that definition, and selecting that, he is bound by it.

Argument

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: I concur in the judgment of my learned brother GALLIHER.

MACDONALD, C.J.A.

IRVING, J.A.: The plaintiffs complained that the defendants have trespassed on their westerly 15 chains, to which the defendants replied that "the 15 chains in question are not yours, and if they are, or were, you are estopped by your negligence from complaining," the negligence in question being the neglect of the plaintiffs to have the 15 acres included within their first survey. On the question of fact I am satisfied that the learned trial judge was right. The 15 chains in question were included in the plaintiffs' original location.

IRVING, J.A.

On the question whether the neglect of the plaintiffs to have the 15 chains included in their survey is such as to deprive the

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defendants of their rights, I have reached the conclusion that it was not. The mistake of the plaintiffs was not the cause of the defendants' undoing. There was no intention on the part of the plaintiffs to abandon. Had the defendants applied to the plaintiffs and got an answer, the case might be different, but the evidence satisfies me that the defendants were never misled, and they really were seeking to take advantage of plaintiffs' mistake.

Willmott v. *Barber* (1880), 15 Ch. D. 96, is a case of estoppel by misrepresentation, but I can see no difference in principle between one kind of conduct and another. The basis of estoppel is the same, acquiescence, standing by, knowing what the other side is doing. No evidence of that kind can be found here. We have no sworn statement that the defendants were misled, and in view of their planting a post at C., in the absence of such evidence, the defendants' contention that they were misled is incredible.

In my opinion this is a proper case for full damages. The defendants persisted in going on with their cutting, although warned by the plaintiffs. It is only where the trespasser acts honestly and without negligence that the damages are limited. The leading authority on the point is the judgment of Lord Chancellor Hatherley in *Jagon* v. *Vivian* (1871), 6 Chy. App. 742 at p. 760 *et seq.* With that judgment should be read the speeches of Lord Cairns, L.C., Lord Hatherley and Lord Blackburn in the House of Lords in *Livingstone* v. *Rawyards Coal Company* (1880), 5 App. Cas. 25.

IRVING, J.A.

GALLIHER, J.A.: Four points were argued before us: (1) Has Chew any right to timber in disputed area? (2) If so, is he estopped from asserting them? (3) Was the trial judge right in finding that Chew's location post is at the point where he asserts it is? (4) Was the finding of deliberate trespass and damages following thereon by the trial judge right? From the best consideration I have been able to give to the statutes bearing on the point, I think Chew was entitled to the timber in the disputed area, and in that respect I think the licence and the later survey, starting from Chew's location post, and not the survey by Bauer, governs. The defendants were, therefore, trespassers.

GALLIHER, J.A.

As to the second point, I do not think Chew is estopped from asserting his rights. I have read all the authorities referred to, and others, and I do not find any authority which goes so far as to say what was done here by Chew would constitute estoppel. It is true he caused a survey to be made by Bauer, and the defendants say they took that to be the easterly line of Chew's limits and cut up to, but not over it. Chew says this survey is wrong, and although it is the one accepted by the Lands Department, and which they refuse to alter, yet Chew, at the commencement of the cutting by the defendants, warned the defendants to desist, as they were on his lands, and pointed out to them that the line was not the correct boundary according to his licence. There was no standing by or acquiescence on the part of Chew and allowing the defendants to incur expense under a mistake; in fact, the contrary.

On the third point I think the evidence sufficient to warrant the learned trial judge's finding.

On the last point I think the learned judge was wrong in finding deliberate trespass and awarding the severer class of damages. In *Last Chance Mining Co.* v. *American Boy Mining Co.* (1904), 2 M.M.C. 150, the matter is carefully discussed by my brother MARTIN, and the leading cases on the point referred to, a number of which have been cited to us.

GALLIHER, J.A.

The defendants' timber limit here adjoins that of the plaintiff, and in view of the fact that the Bauer survey laid down a line beyond which they did not cut, they could hardly be said to be deliberately trespassing on plaintiffs' lands. It is rather a case of both parties acting in a *bona-fide* belief in their title to the timber, and where such is the case, the authorities lay down the rule that the severer class of damages shall not apply: see *Trotter* v. *Maclean* (1879), 13 Ch. D. 574; *Livingstone* v. *Rawyards Coal Company* (1880), 5 App. Cas. 25.

I would, therefore, vary the judgment below to the extent of allowing damages only as of the value of standing timber.

Judgment below varied.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Bodwell, Lawson & Lane.*

LAMPMAN, CO. J.

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IRVIN v. VICTORIA HOME CONSTRUCTION AND INVESTMENT CO.

IRVIN v. VICTORIA HOME CONSTRUCTION AND INVESTMENT COMPANY, LIMITED, *ET AL.*

Mechanics' liens—Sub-contractor supplying both material and labour—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 6—Notice under—Necessity for—Effect of section 15.

A sub-contractor who not only supplies material, but works it into the building, is not obliged to give notice to the owner of the material supplied, in order to make his claim for a lien valid in respect of the material: section 6 of the Mechanics' Lien Act applies to a material man pure and simple.

Per IRVING, J.A.: The failure of the contractor to keep a pay-roll, as required by section 15, prevents any one bringing an action against the owner for payment. The section does not prevent a sub-contractor from filing a lien.

Judgment of LAMPMAN, Co. J. affirmed.

Statement

APPEAL from the judgment of LAMPMAN, Co. J. in an action tried by him at Victoria on the 17th of February, 1913. The facts are set out in the reasons for judgment.

Maclean, K.C., and *F. C. Elliott*, for plaintiff.
Aikman, and *M. B. Jackson*, for defendants.

LAMPMAN, CO. J.

LAMPMAN, Co. J.: I think the section requiring notice applies to persons who supply material only—placing or supplying is all the same thing—putting it on the ground. Now, if the plaintiff is not required to give notice, he is entitled to a lien unless it be shewn that he agreed to forego his lien. It does not seem to me at all that the agreement of the 10th of July is an agreement by him with the others that he would forego any existing claim which he might have. This committee were to carry out some further arrangement with regard to the building. In the first place, it has never been proved that these creditors supposed to act as a committee were appointed by those creditors who were authorized to appoint them. And again, it does not seem to me, if properly appointed, they had any authority to enter into the agreement they did enter into. I certainly would not hold the

plaintiff waived his rights unless it were very clearly shewn that he did waive them.

Then as to the other point, as to section 8: it appears to me there is a sum of $5,000 held back, and the effect of the agreement is that Colbert & Company's claim takes precedence only of plaintiff's claim as it existed on the 10th of July, so it does not seem there is a fund here to satisfy this claim. I do not see that the defendants can avail themselves of the provisions of section 8. I think the plaintiff is entitled to judgment against Murray & Aves, Limited, and also to the lien.

The appeal was argued at Vancouver on the 9th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Aikman, for appellants (defendants): There is no evidence to justify the judgment that the plaintiff is entitled to a lien. Section 6 of the Mechanics' Lien Act has not been complied with; being a sub-contractor who did work and supplied material, he must give notice within ten days of the completion of the labour under which he claims a lien: *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69; *Rosio et al.* v. *Beech et al, ib.* 73. Section 15 of the Act has not been complied with: *Weller* v. *Shupe* (1897), 6 B.C. 58; *Haggerty* v. *Grant* (1892), 2 B.C. 173. Argument

F. C. Elliott, for respondent (plaintiff): The plaintiff supplied a large amount of material and did the work in connection with putting the material in the building. The history of the legislation on the Mechanics' Lien Act shews clearly that the notice required under section 6 of the Act applies to the material man only: *Coughlan* v. *National Construction Co.* (1909), 14 B.C. 339.

Aikman, in reply: There is no evidence that there is any money due the plaintiff, and there is no evidence segregating the value of the material supplied from the cost of the work performed: *Sherlock* v. *Powell* (1899), 26 A.R. 407; *Kelly* v. *Tourist Hotel Co.* (1909), 20 O.L.R. 267.

Cur. adv. vult.

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IRVIN v. VICTORIA HOME CONSTRUCTION AND INVESTMENT CO.

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MACDONALD, C.J.A.: The plaintiff was a sub-contractor for the tiling of the building which was being erected under contract by the defendant Companies for the owners, the individual defendants, the plaintiff supplying the material as well as the labour for a lump sum of $5,050. No notice was given by the plaintiff under section 6 of the Mechanics' Lien Act to the owners of the material supplied. But for that section it seems clear that the plaintiff would have a sub-contractor's right to a lien, which, though less beneficial under certain circumstances than that of persons supplying material who have given the required notice, yet is clearly recognized by the Act.

The appellants contend, and this is the only question raised in this appeal, that the plaintiff is a person who places or furnishes material, and not having given the notice, is precluded by said section from asserting a claim of lien as a sub-contractor for the materials included in his contract. Originally the Mechanics' Lien Act gave labourers, contractors and sub-contractor, only, lien rights; then the Act was amended so as to give liens to persons placing or furnishing materials. A person merely furnishing materials to be used in a building must give notice. By doing so he not only obtains a right to lien, but one which, in virtue of section 15, may be much more advantageous than that given to a sub-contractor. If the appellants' contention be right, then a sub-contractor's status has been changed by the rights granted to suppliers of materials. The sub-contractor who supplies his own material must perforce, if that contention be right, segregate materials from labour, and notify the owner of the value of the materials and claim for it as materials furnished to be used in the building, and for the balance of his contract as a sub-contractor, and if he fails to do this, his right to a lien for the value of his materials is gone.

MACDONALD, C.J.A.

Having regard to the history of the Act, the language of the section itself, and the form of notice prescribed in the schedule, I think the appeal fails.

IRVING, J.A.: I would dismiss the appeal and hold that the plaintiff, being a sub-contractor undertaking to supply material and work the same into the building, is not required to give

IRVING, J.A.

notice of his intention to claim a lien. The provisions of section 6, requiring a notice to be given, apply to material men pure and simple.

The failure of the contractor to keep a payroll, as required by section 15, prevents anyone bringing an action against the owner for payment. The section does not prevent a sub-contractor from filing a lien. The section was designed to afford some measure of protection to the owner.

MARTIN, J.A.: The plaintiff is a sub-contractor under an entire contract for $5,050 with the Victoria Home Construction and Investment Company, Limited, to supply marble and tiles, and do all the work connected therewith according to plans and specifications, under a contract which the Company had with the owners for the erection of a certain building. The plaintiff gave no sufficient written notice under the proviso in section 6 of the Mechanics' Lien Act; and it is submitted that he has no lien for the material which he supplied and actually "placed" in the building. But the exact point is decided in his favour by us to-day in *Fitzgerald* v. *Williamson* [(1913), 18 B.C. 322], *viz.*: that said proviso only applies to a bare material man, and therefore plaintiff is entitled to a lien for the full amount of his claim.

GALLIHER, J.A.: I concur.

Appeal dismissed.

Solicitors for appellants: *Aikman & Austin.*
Solicitors for respondent: *Courtney & Elliott.*

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FITZGERALD v. WILLIAMSON

FITZGERALD *ET AL.* v. WILLIAMSON *ET AL.*

Mechanics' liens—Sub-contractor supplying work and material—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154—Notice to owner under section 6—Necessity for—Pleading of section 8 by defence—County Court Rules, 1905, Order XI., rr. 1, 2, 18.

A sub-contractor supplying material and performing the work in which the material is used may obtain a lien without giving notice under section 6 of the Mechanics' Lien Act.

Irvin v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318, followed.

Per IRVING, J.A.: By Order XI., rule 1*a*, County Court Rules, 1905, the dispute note shall state the several grounds of defence, and as rule 2 limits the defence to matters stated in the dispute note, the defendant should have pleaded the payment in full to the contractor, whether the plaintiff in his plaint alleged the matter or not.

This Court has power in a case where a note of oral evidence has been accidentally lost to allow the evidence to be taken over again.

Per MARTIN, J.A.: Section 8 of the Mechanics' Lien Act, by which the amount of the lien is restricted to the sum payable by the owner to the contractor, is a special defence which should have been raised in the dispute note under Order XI., rule 18 of the County Court Rules, 1905.

APPEAL from the judgment of MCINNES, Co. J. in an action to enforce a mechanic's lien, tried at Vancouver on the 14th of October, 1912. The facts are set out in the reasons for judgment.

Statement

The appeal was argued at Vancouver on the 6th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

J. A. Clark, for appellants (defendants): The case turns on section 6 of the Mechanics' Lien Act: *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69; *Rosio et al.* v. *Beech et al., ib.* 73. The plaintiff gave no notice of material supplied, as required. As to the notes of evidence taken by the trial judge, see *Rendell* v. *McLellan* (1902), 9 B.C. 328. The plaintiff must prove there is money in the hands of the owner before he can succeed, and there is no evidence to this effect. It is not necessary for the defence to set out each particular defence. No written notice claiming a lien was given as required by section 6 of the Act. They are, therefore, not entitled to a lien, either for material

Argument

supplied or labour: *Heins* v. *Elliott* (1911), 119 Pac. 826; *Finlay* v. *Tagholm* (1911), 62 Wash. 341, 113 Pac. 1,083. A sub-contractor has a lien if he can segregate his claim: *Weller* v. *Shupe* (1897), 6 B.C. 58; *Sharpe* v. *Bridd* (1907), 17 Que. K.B. 17.

Todrick, for respondents (plaintiffs): They did not raise the question in the defence of the amount owing by the owner to the contractor. It was not argued at the trial, and there is no evidence of what is owing. It is a special defence he should have raised in his dispute note. On the point that no notice has been given, it is not necessary for us to give notice, as we are not material men under the Act. The sub-contractor has a lien only for the amount in the owner's hands, whereas the material man has a lien whether the owner has paid the contractor or not.

Argument

Clark, in reply.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: I would dismiss this appeal for the reasons I gave in *Irvin* v. *Victoria Home Construction and Investment Co.* [(1913), 18 B.C. 318].

MACDONALD, C.J.A.

IRVING, J.A.: In my opinion the plaintiff, a sub-contractor for the painting, himself doing the work and supplying paint, does not fall within the provisions of section 6 of the Mechanics' Lien Act. Therefore, he may obtain a lien under the Act without giving notice.

It is said that evidence was given at the trial, without objection, that there was no money payable by the owner to the contractor, and that, therefore, section 8 afforded the owner a defence.

Order XI., rule 18, County Court Rules, 1905, in my opinion, does not require section 8 to be pleaded as a defence. On the contrary, I think the right to a lien being foreign to the common law, it would be the duty of the plaintiff to set out in his plaint that there was money due the contractor from the defendant owner. Then the defendant could deny it. There is no presumption that there is money in the hands of the owner. The limitation placed on the right to a lien can hardly be called a

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statutory defence. In any event, if it was necessary for the defence to plead that the contractor had been paid in full, although Order XI. does not cover the case, by rule 1 (*a.*) of Order XI., the dispute note shall state the several grounds of defence, and as rule 2 limits the defence to the matters stated in the dispute note, the defendant ought to have pleaded the payment in full to the contractor, whether the plaintiff in his plaint alleged the matter or not. The plaintiff was at liberty to waive that protection, and if the evidence was given and no objection taken, the plaintiff must be taken to have waived the point. But I cannot find in the appeal book any evidence on the point.

Ex parte Firth (1882), 19 Ch. D. 419, lays down two rules. The first is that it is the duty of the appellant to have his tackle in order before he comes into the Court of Appeal. That is a good, wholesome rule, and we have given effect to it. The second is that the Court of Appeal has power, by way of indulgence, in a case where a note of oral evidence has been accidentally lost, to allow that evidence to be taken over again. Should we allow the evidence to be received now? This question has troubled me very much. This is not like the case which we decided the other day. The judge here was taking notes, and counsel might very well assume he would take down the defendant's evidence that there was nothing due to the contractor, but owing to the omission in the dispute note, the judge did not appreciate the point.

IRVING, J.A.

The Court of Appeal has power to grant a new trial on the ground of mistake or inadvertence (*e.g.,* where a witness made a mistake as to a date), but we are told it is a power that should be exercised with great caution: *The Germ Milling Company* v. *Robinson* (1886), 3 T.L.R. 71. The objections to granting a new trial are well set out in *Caswell* v. *Toronto R.W. Co.* (1911), 24 O.L.R. 339 at p. 350. But on the whole, I think that under the circumstances of this case the defendant ought to be allowed to give this evidence on payment of costs here, and the costs thrown away in the Court below.

MARTIN, J.A.

MARTIN, J.A.: The plaintiffs are sub-contractors, under an entire contract with the defendant Williamson, to paint a house

which the latter was erecting, for the sum of $582, including materials, and a lien is claimed for work done and materials furnished, which, with extras allowed, amounted to $601.80, for which sum judgment was given. The work is not segregated from the materials either in the particulars in the affidavit, or in the evidence at the trial. The learned trial judge held in effect that the proviso in section 6 as to written notice does not extend to a sub-contractor (or contractor) who contracts to do work as well as "supply" or "place" or "furnish" material, and I agree with my learned brothers that this is the correct view to take of that section, and therefore the plaintiffs were not required to give such notice, and the lien is valid for both work and material. A sub-contractor who agrees to supply material alone is in the same category as a bare material man.

But the owner, Richardson, now attempts to set up as the defence that under section 8, the amount of the lien, if any, should in any event be restricted to the "sum payable by the owner to the contractor," to which it is objected that this is a special defence which should have been raised in his dispute note, under Order XI., rule 18 of the County Court Rules, 1905, and in my opinion (since no application was made to amend, nor any evidence given on the point without objection, which might operate as a waiver), the objection must prevail, because if an owner seeks under section 8 to reduce wholly or in part the amount of the lien which otherwise would attach to the full extent under the preceding sections, the onus is upon him to do so.

MARTIN, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed.

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellants: *Lennie & Clark.*
Solicitors for respondents: *Fillmore & Todrick.*

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BROWN v. ALLAN & JONES

BROWN v. ALLAN & JONES *ET AL.*

Mechanics' liens—Sub-contractor for material and labour—Lien for—Segregation of labour from material—Want of notice—Right of lien for labour—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Sec. 6—Allegation that nothing due from owner to contractor—Must be pleaded—Onus on owner.

The plaintiff, in pursuance of an agreement, having done work and supplied material in connection with the construction of a building, brought action for the enforcement of a lien. He gave no notice of his intention to obtain a lien, but he was able to segregate the amount due for labour from the value of the material supplied. It was held by the trial judge that he was entitled to a lien for the amount due for labour.

Held, on appeal, that by section 6, subsection 1, of the Mechanics' Lien Act, the plaintiff was a person who "does such work or causes such work to be done"; and even if his claim for materials failed, there was no reason why he should not succeed for labour.

Irvin v. *Victoria Home Construction and Investment Co.* (1913), 18 B.C. 318, followed.

Held, further, that the defence that nothing is payable by the owner to the contractor must be raised in the dispute note and the onus is on the owner to shew that nothing is due.

Fitzgerald v. *Williamson* (1913), 18 B.C. 322, followed.

Statement

APPEAL by defendants from the judgment of MCINNES, Co. J. in an action to enforce a mechanic's lien for work done and material supplied. The defence was a general denial and an allegation that the provisions of the Mechanics' Lien Act as to notice had not been complied with. Upon the trial it appeared that the plaintiff, who was a sub-contractor, was owed in all $2,586.20, of which $1,826.38 was for material supplied and $759.82 for labour. He had not given any written notice of intention to claim a lien. The trial judge gave personal judgment against the contractors for the whole amount, and declared the plaintiff entitled to a lien for the amount due for labour. An appeal was taken by the defendant, Robert Wallace, the owner of the property.

The appeal was argued at Victoria on the 5th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

R. M. Macdonald, for appellants: We contend that the plaintiff is a sub-contractor. There is nothing due from the owners to the contractors, as the contractors absconded. Under section 8 of the Mechanics' Lien Act the plaintiff, being a sub-contractor, is precluded from recovery as against the owner: *Fuller* v. *Turner and Beech* (1913), 18 B.C. 69.

McLellan, for respondent: The contract narrows down to section 6 of the Act, *i.e.,* whether it is necessary to give notice, and whether the labour can be segregated from the material. We have segregated the labour from the material and have received judgment for the amount due for labour. As to whether the statute has been complied with, it is a question of onus, and it is submitted the burden is on the defendant to shew the statute has not been complied with. It is similar to the Statute of Frauds and Statute of Limitations.

Argument

Macdonald, in reply.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: The appeal should be dismissed.

This case is identical in so far as the main question is concerned with *Irvin* v. *Victoria Home Construction and Investment Co.* [(1913), 18 B.C. 318]. Had the respondent insisted upon his right to a lien for the whole of the contract price he should have secured it. The fact that he has asked for part only of what he was entitled to should not rob him of that part. Had it been shewn that there was nothing, or not a sufficient sum due by the owner to the contractor, then it might be necessary to vary the judgment below to make it clear that respondent was not in that class of lien holders designated labourers. Respondent's lien is that of a sub-contractor, not a labourer. Their rights are not identical when the sum owing to the contractor is insufficient for all. The onus of proof is upon the owner to shew that nothing was due to the contractor.

MACDONALD, C.J.A.

IRVING, J.A.: I concur.

IRVING, J.A.

MARTIN, J.A.: The plaintiff, who is a sub-contractor, obtained a judgment giving him a lien for $759.82 for the amount of

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labour only done under his entire contract to do, for $7,467, the plumbing and heating in a certain building that the contractors were erecting; his claim for materials under the same contract was disallowed. I can see no good reason why the learned judge was not justified in taking this course. The plaintiff shewed at the trial that the labour could be easily, and was, segregated from the material, as appears by his statements, and to do this there is no question of his attempting to alter his condition or status as a sub-contractor into that of a labourer. By section 6, sub-section (1), he is a person who "does such work or causes such work to be done," and even if, from any cause, his claim for material fails, why should he not succeed for the labour? The case of *Weller* v. *Shupe* (1897), 6 B.C. 58, was decided when there was no lien for material, and the facts are so insufficiently stated that I am unable to obtain any assistance from it; it is not even certain that the work was done under an entire contract, nor was the plaintiff represented.

MARTIN, J.A.

Then it was urged on behalf of the owner that there was nothing "payable by the owner to the contractor," and as the sub-contractor is not a labourer, he cannot have a lien, according to section 8. But objection has been validly taken, for the reason given in *Fitzgerald* v. *Williamson* [(1913), 18 B.C. 322], that the onus is upon him to prove the fact of payment after raising the defence in his dispute note (in the County Court). He has done neither, and the mere statement in plaintiff's evidence that the "work stopped because the contractors skipped out" is not sufficient, because that is not at all inconsistent with the fact that money may have been owing. The Court cannot be left to speculate in such a matter.

In my opinion the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. agreed in dismissing the appeal.

Appeal dismissed.

Solicitors for appellants: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondent: *McLellan, Savage & White.*

IN RE LEWIS AND GRAND TRUNK RAILWAY COMPANY.

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IN RE LEWIS AND GRAND TRUNK RAILWAY CO.

Master and servant—Arbitration and award—Workmen's Compensation Act, R.S.B.C. 1911, Cap. 244, Schedule 2, Sec. 4—Power to state case under—Arbitrator functus officio on making award—"Sealed and filed," meaning of.

An arbitrator having made his award is *functus officio*, and has no power to then submit a question of law for the decision of a judge under section 4 of the Second Schedule of the Workmen's Compensation Act.

Per IRVING, J.A.: The words "sealed and filed" in rule 36, refer to things to be done in the Court at the instance of the person who intends to enforce the award.

Judgment of MURPHY, J. affirmed.

APPEAL by the applicant from the judgment of MURPHY, J. on an application by way of a case stated under section 4 of the Second Schedule of the Workmen's Compensation Act. The arbitrator heard the case and made his award, dismissing the applicant's claim, on the ground that he being employed as a cook in a construction camp, was not engaged in an employment contemplated by the Workmen's Compensation Act. He then, on application, stated a case for the opinion of a judge, which was heard on the 4th of March, 1913.

Statement

McTaggart, for the applicant.

A. Alexander, for the respondent.

8th March, 1913.

MURPHY, J.: I am of the opinion that the decision of *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304, shews I have no jurisdiction to entertain this application. The arbitrator here has determined the question as to whether the employment is one to which this Act applies adversely to the applicant. Having made and published his award, it is now attempted to bring the matter before this Court by way of case stated under section 4 of the Second Schedule of the Workmen's Compensation Act. To my mind the section does not authorize such procedure. The arbitrator has not thought fit to submit any ques-

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tion of law, making the determination of the matter dependent upon the answer thereto, as I think he might have done. Instead, he has first decided the case and then, as an afterthought, this application is made. If this is allowed once, why not a dozen times, as further afterthoughts occur to him? Such a course would be in direct opposition to the spirit of the Act, that proceedings thereunder be speedy and final, save as therein set out.

I think he ceases to be an "arbitrator," as that term is used in section 4 of the Second Schedule, so far as the determination of this particular question is concerned, when he has once adjudicated upon it. It is true that under the Arbitration Act this result would not follow, as *In re Stringer and Riley Brothers* (1901), 1 Q.B. 105, shews that if the Act governed, an award may be sent back even when the arbitrator is *functus officio*. But that case also shews that apart from the Arbitration Act the old cases still govern. As summarized in Russell on Arbitration, 6th Ed., 114, they decide that the authority of the arbitrator is absolutely determined by making the award. As I understand the *Basanta* decision, the provisions of the Arbitration Act do not apply to the determination by the arbitrator of the question whether the employment is one to which the Workmen's Compensation Act applies.

MURPHY, J.

The application is dismissed.

The appeal was argued at Vancouver on the 30th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

McTaggart, for appellant (applicant): The applicant in this case was a cook in the camp of the respondents, and the arbitrator held that a cook was not a workman within the meaning of the Act: *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304; Ruegg's Employers' Liability, 8th Ed., p. 738; *John Mowlen & Co.* v. *Dunne* (1912), 2 K.B. 136, 81 L.J., K.B. 777. Up to the time the arbitrator submitted a case he had not filed and sealed the award: *Henderson* v. *Williamson* (1718), 1 Str. 115; Russell on Arbitration, 7th Ed., 186. As to the meaning of the word "workman," and as to whether "surveying" is work within the meaning of the Act, see *Back* v. *Dick, Kerr & Co., Limited*

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(1900), 2 K.B. 148, 75 L.J., K.B. 569; *In re Knight and Tabernacle Permanent Building Society* (1891), 2 Q.B. 63, 60 L.J., Q.B. 633.

A. Alexander, for respondents, contended the arbitrator had done everything he could do when he had given his award; he was then *functus officio*: *Lee* v. *Crow's Nest* (1905), 11 B.C. 323; *Mordue* v. *Palmer* (1870), 6 Chy. App. 22, 40 L.J., Ch. 8. If either party wishes a resubmission on a point of law (a stated case), he must ask for it before the award is given, under section 4 of the Second Schedule of the Act: *In re London Dock Co. and Shadwell Trustees Arbi'ration* (1862), 32 L.J., Q.B. 30. The only way to review the award is to proceed by way of appeal.

Argument

McTaggart, in reply: Until everything is done that is required under the Act the award is not complete, and the arbitrator is not *functus officio* until it is complete.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: An arbitrator appointed pursuant to the Workmen's Compensation Act, Revised Statutes of British Columbia, 1911, chapter 244, made his award against the claimant, who was a cook in a railway construction camp of the said Company. Afterwards, the arbitrator was requested to state a question of law for the opinion of a judge of the Supreme Court, pursuant to section 4 of the Second Schedule, which he did, the question being whether or not the arbitrator was right in his holding that the applicant, being a cook, was not within the benefits of the Act. The learned judge to whom the question was submitted held that the arbitrator had no power after he had made his award to submit a question to a judge; that he was *functus officio.* I think the learned judge was right. The purpose of the privilege of submitting a question of law to a judge appears to me to be to assist the arbitrator in making his award. The intention of the Workmen's Compensation Act was to have disputes of the character covered by the Act summarily disposed of with as little expense as possible. That intention is more manifest in the British Columbia Act than in the English Act, said section 4 itself being an instance of this. By the English

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Act the arbitrator is given the same power as in ours to submit questions of law, but in addition it is provided that a judge may direct him to submit such questions. Here the decision of both law and fact within the jurisdiction of the arbitrator appears to be left to his own judgment and discretion. He may decide a question of law himself. If so, it appears to be final, or if he be in doubt he may submit questions to a judge to assist him (the arbitrator) in arriving at his conclusion.

The rules passed in pursuance of the Act, both in England and in British Columbia, indicate that the construction that I have placed on said section 4 is the correct one.

In speaking of the arbitrator having made his award, I mean by *making,* that he had done everything which he had to do to perfect it. Until he has done this it might be still open to him to change it, and hence, to submit a question of law to a judge. In this case, I think the award had been perfected as far as the arbitrator was concerned.

MACDONALD, C.J.A.

I would dismiss the appeal.

IRVING, J.A.: I would dismiss this appeal. The reasons given by the learned judge, in my opinion, say everything that is necessary to be said.

In *Basanta* v. *Canadian Pacific Ry. Co.* (1911), 16 B.C. 304, this Court held that where the question as to whether employment is one to which the Act applies, the only way to review the arbitrator's finding is by means of a case submitted under section 4 of the Second Schedule, and that the Arbitration Act did not apply so as to enable the Court to set aside an award made without jurisdiction.

IRVING, J.A.

By rule 36 of the Workmen's Compensation Rules, 1904 (see British Columbia Gazette, 1904, p. 295), it is enacted that the award shall be in writing and shall be sealed, filed and served on all persons affected thereby. *John Mowlen & Co.* v. *Dunne* (1912), 2 K.B. 136, deals with the English rule. That rule differs from ours, but I think the same principle applies, *i.e.,* when the award is completed the arbitrator can do nothing except correct a clerical error under subsection 2. The question then is: When is an award made? In my opinion, when

the arbitrator has done all that he can do, namely, reduced it to writing and published it as his award. In *Mordue* v. *Palmer* (1870), 6 Chy. App. 22 at p. 31, Mellish, L.J. uses this language:

"When an arbitrator has signed a document as and for his award, he is *functus officio*."

It was never necessary to seal an award, although a seal is frequently used. I suppose if the submission contained directions that the arbitrator must execute the award under his seal, it would be necessary to comply with those directions, but in the absence of such a direction, it seems to me unnecessary for an arbitrator to seal the award with his own seal. The "sealing and filing" referred to in this rule, in my opinion, are things to be done in the Court by, or at the instance of the person who intends to enforce the award. It is to be noted that our rule 36 does not profess to say when the award shall be deemed to be completed. It does not even say that it shall be signed in the presence of a witness. Signature by the arbitrators without doubt is necessary, otherwise it would not be in writing, but if it was intended that it should also be authenticated by the seal of the arbitrators, I would expect to see a clear direction to that effect. A more simple construction can be given by holding that it deals with the form the award shall take, then provides for its enforcement.

IRVING, J.A.

MARTIN, J.A.: I concur.

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GALLIHER, J.A.: The arbitrator has the power under our Workmen's Compensation Act to decide whether the class of employment in which the applicant is engaged comes within the Act. Having so decided and completed his award, which I hold he did in this case, he cannot under section 4 of the Second Schedule of the Act, submit a case stated for the opinion of the Court. During the progress of the hearing, or before the award was completed, he would have, of his own motion, or upon request of either party, been at liberty to submit a case. Neither party requested this to be done, and he did not do so himself, but proceeded to determine the matter, and the applicant not having requested it, and having chosen to take his chance as to what that decision would be, cannot now complain.

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The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Dickie, DeBeck & McTaggart.*
Solicitors for respondents: *Tiffin & Alexander.*

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Principal and agent—Agent's commission for past services—Consideration for subsequent promise—Later acceptance of promissory notes in settlement—Moral obligation—Conditional promise—Non-fulfillment of.

The plaintiff, the manager of a coal company of which the defendant was vice-president, suggested to him the advisability of purchasing certain coal properties consisting of two separate areas and including the surface rights of one of them. It was arranged that the plaintiff should buy the properties for the defendant for $65,150. The defendant commenced prospecting on the properties for coal with drills. While the work was in progress he wrote the plaintiff stating he would protect him for 11,000 shares in a coal company to which it was his intention to sell, provided the sale netted him a profit of 22,000 shares, and that he would protect him for $25,000 as the sale of the surface rights progressed. This was the first reference as between the parties to remuneration for the plaintiff's services. Later developments from the prospecting shewed that there was little coal value in the properties, and a sale of the properties was made on a smaller basis. The parties came together and the defendant paid the plaintiff $5,000 in promissory notes, which the defendant alleged were taken by the plaintiff as settlement in full, the plaintiff denying this and saying it was made in part payment of the amount due him. In an action for specific performance of the first agreement, it was held on the trial that the plaintiff was entitled to be paid for his services on a *quantum meruit* basis, and that the payment of the notes for $5,000 was a fair payment for what he did.

Held, on appeal (*per* MACDONALD, C.J.A., and MARTIN, J.A.), that the plaintiff's claim was settled in full when the promissory notes for $5,000 were given to him by the defendant.

Per IRVING, J.A.: A moral obligation arising from a past benefit does not constitute a good consideration for a promise, where the past benefit

was not conferred at the request of the promisor, and even if the promise was to be regarded as supported by a good consideration, the express contract to protect the plaintiff to the amount stated was discharged by the non-existence of the particular state of things which was the basis on which the contract was entered into.

Taylor v. *Caldwell* (1863), 3 B. & S. 826, approved.

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APPEAL by plaintiff from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 12th and 13th of September, 1912. Plaintiff sued in respect of a verbal agreement with defendant whereby defendant was to purchase certain lands supposed to contain coal areas, on Vancouver Island, for the sum of $65,150. As compensation he was to receive 11,000 shares in the Vancouver & Nanaimo Coal Mining Company in the event of a sale to the Company realizing a net profit to the defendant of at least 22,000 shares over the price, interest and expenses paid by defendant to the owner of the land; further, that plaintiff was to be paid not less that $25,000 as the sale of the surface rights of the land in question progressed. This was confirmed in a letter from defendant to plaintiff on the 18th of April, 1910. In January, 1911, plaintiff, on defendant's request, agreed in writing to sell the land, with its mining rights, to the company for the sum of $150,000, payable in shares and cash. Plaintiff received only the sum of $3,000 in respect of his services, and sued for the delivery of the 11,000 shares, an accounting of the dividends on same, payment of $22,000. The defence was that plaintiff, an employee of the company, carried through the negotiations for the purchase of the property in question, and on prospecting the land for coal measures, defendant was pleased with the indications and voluntarily told plaintiff that if the result proved as successful as indicated by the prospecting, he would give him 11,000 shares of the company and $25,000 as the sale of the surface rights progressed; that there was no consideration for this promise, and that the exploitations shewed that no coal existed on the properties, one of which was abandoned to the original owner. The other property was sold to the company for $100,000 in shares. and the assumption of a payment of $50,000. Defendant alleged that this state of affairs was communicated to plaintiff, who agreed that defendant could not carry out his promise, and

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plaintiff consented to accept $5,000 in settlement. On this there was a balance due of $2,055.78, which, as plaintiff would not accept it, was paid into Court. MURPHY, J. gave judgment for $2,037, with interest and costs.

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

Davis, K.C., and *Hart-McHarg,* for defendant.

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MURPHY, J.: In this action I find that the contention of the plaintiff that there was a contract made in the fall of 1909 on the terms of the letter written in April of the following year is not proven. In my opinion, Grant, becoming aware in Nanaimo that the Hoggan and Waddington properties could be acquired at prices which he considered favourable, came to Vancouver expecting that he could interest the company of which he was manager, the Vancouver & Nanaimo Coal Mining Company, in the acquisition of those properties, and he saw Mr. Alvensleben and then learned that the company was not in a financial position to take up the proposition, but Alvensleben intimated that he himself would not be averse to taking it up as a personal speculation. Alvensleben subsequently did this, the options being taken in Grant's name. I think that Grant expected to be remunerated for what he had done, and that Alvensleben expected to pay, but whether this is so or not, I find there was a legal liability on Alvensleben to recompense Grant for his services. I think that the reason that Grant did not make any specific demand, and the reason why no contract was made as to remuneration, is the one which Grant himself gave in explaining why he had not kept the shares which he now claims, when they were issued in his name. He was at that time in the employ of the Vancouver & Nanaimo Coal Mining Company, of which company Alvensleben was the principal financial prop, I think, and consequently he did not insist on any particular terms of remuneration for what he was doing. Alvensleben proceeded to exploit the Hoggan property and along in the early part of 1910 indications were very bright that they were going to find valuable seams of coal in that property. I may say that in my opinion the Hoggan and Waddington properties were

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submitted to Alvensleben at the same time, or if not on the same day, at any rate that his decision to go into the speculation was made on the basis of going in for both of the properties. That, in my judgment, though, is not a matter of very much importance, as I will explain later. When the favourable indications were found in the early spring of 1910, Grant, I think, thought it would be an opportune time to settle the matter of his remuneration with Alvensleben. He came to Vancouver and I find that he did have a discussion, which resulted in the writing of the letter of the 18th of April, 1910. Taking the language of that letter and the surrounding circumstances, I think it is perfectly clear that a contract was intended to be made between these two parties. It seems to me beyond doubt that it was then expected that the coal rights would be very valuable and that they could be sold for a high figure, such figure as would give Alvensleben a profit of at least 22,000 shares in the Vancouver & Nanaimo Coal Mining Company, leaving him the surface rights of the Hoggan property as additional profit. It was, I think, in the mind of Alvensleben that if the coal rights proved as valuable as expected, he would have no difficulty in making a bargain with the company, ensuring that profit as soon as the organization scheme was completed, and I think he imparted this idea to Grant, at least in a general way. If the coal rights of the Hoggan property alone had been sold for any such price, then I find Grant would have been entitled to recover, and that is what I meant when I stated earlier in my judgment, that to my mind the question of whether the Hoggan and Waddington properties were being dealt with together was not of any great importance. It seems to me that if Alvensleben had been able to carry out the deal which he anticipated he would be able to make for the coal rights of the Hoggan property with the Vancouver & Nanaimo Coal Mining Company, at a price which would result in a profit to him of 22,000 shares, then the plaintiff would be entitled to recover, even if the Waddington property turned out to be of such little value as to occasion the dropping of the option. I think it was clear to Grant's mind, as well as to Alvensleben's, that he, Grant, was not to get 11,000 shares in the Vancouver & Nanaimo Coal Mining Company and

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$25,000 cash, unless those coal rights did prove to be of such value as would enable Alvensleben to make such a bargain as would secure that profit, leaving the surface rights of the Hoggan property to be additional profit, or "velvet," as Alvensleben termed it. It is common ground, I think, that the coal rights were finally decided to be of no value at all. In my opinion, the letter of the 18th of April, 1910, embodied a contract with a condition; that it was made on the assumption that certain things were to be done, and that Grant knew this. But, unfortunately, those things could not be done; this sale of the coal rights alone could not be made for the price stipulated in the letter of the 18th of April, 1910, and consequently I hold that the plaintiff cannot recover on that as a specific contract. It is true that a sale was made later to the Vancouver & Nanaimo Coal Mining Company of the surface rights and of the coal rights, but to my mind that sale was not at all the sale contemplated in the contract of the 18th of April, 1910. It seems fairly clear to me on the evidence that the real thing purchased by the Vancouver & Nanaimo Coal Mining Company was the surface rights, and that Alvensleben did not receive, through no fault of his own, but because the coal was not there, or because the parties concluded it was not there, he did not receive what he was to receive under the contract of the 18th of April, 1910, before the plaintiff would be entitled to recover. I think Grant was well aware before this sale of the conclusion that the coal rights were valueless, and concurred, or at any rate did not dissent therefrom.

MURPHY, J.

With regard to the contention that the matter was settled by the payment of $5,000 in notes to the plaintiff, I find that not proven. I find that Alvensleben did not undertake, and did not intend to pay any more than the $5,000. I find on the other hand that Grant considered he would have a claim beyond that amount, but neither one nor the other of them clearly expressed what was in their minds, probably because they expected the result would be what it now turns out to be, namely, a lawsuit. Because I hold that the contract of the 18th of April, 1910, was the only contract ever made between these parties, and because I hold further, that that contract was made subject to a condition

which has not been fulfilled, through no fault of Alvensleben, the plaintiff's claim, so far as it is based on the contract, fails. I find, though, that the plaintiff is entitled on a *quantum meruit* basis, and under the circumstances I hold that the sum of $5,000 in notes was a fair payment for what he did.

There will be judgment for the plaintiff for the amount admitted due on the pleadings, and inasmuch as the money was not paid into Court, the question of costs is reserved, and also the question of whether interest should be allowed from the time the money was due.

The appeal was argued at Victoria on the 11th and 12th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellant: The amount claimed is due under a specific contract that cannot be varied by future revelations as to the value of the property. You cannot go outside the agreement, and if you do, it is a matter for equitable adjustment: *Briggs* v. *Newswander* (1902), 32 S.C.R. 405.

Hart-McHarg, for respondent: We are not bound by the contract. Anything done in the past cannot be a consideration to bind a future promise: Leake on Contracts, 6th Ed., 440. There is no consideration for the letter of the 18th of April, 1910, upon which the plaintiff's case is founded: Halsbury's Laws of England, Vol. 7, p. 383 (paragraphs 793-4); *Lampleigh* v. *Brathwait* (1614), Hob. 239, 1 Sm. L.C., 11th Ed., 141. It is clear that there was a meeting between the parties at which the defendant explained how unfortunately the transaction had turned out, and the plaintiff agreed to accept $5,000 in full settlement.

Argument

Taylor, in reply: As to the settlement, it must be shewn that there was an express arrangement understood and agreed to by both parties: *Cumber* v. *Wane* (1718), 1 Str. 426. In law, the alleged settlement is not a settlement.

Cur. adv. vult.

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MACDONALD, C.J.A.: I would dismiss the appeal on the

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ground that the parties settled the matter now in dispute when the notes were given. That that was a full settlement is, to my mind, amply borne out by the evidence.

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IRVING, J.A.: At the trial, the plaintiff's case was that he claimed by virtue of an exact promise made to him by the defendant in September or October, 1909. The learned trial judge finds against him on that point, and I have no doubt but that finding is absolutely correct. In my opinion the plaintiff, in October, 1909, could not have maintained an action for a commission, as the service was purely a friendly one, and there was no intention to enter into a contract. At that time I think the plaintiff's idea was to make himself useful to the defendant, and to rely upon his generosity rather than upon any contract.

The learned trial judge finds that there was an interview between the plaintiff and the defendant just before the letter of the 18th of April, 1910, was written. He does not say whether at Kerrisdale or in Vancouver. The amounts mentioned in that letter are without doubt the amounts mentioned in that interview, and the letter professes to repeat what the defendant had said in that interview he would do for the plaintiff.

Having regard to the surrounding circumstances, I have reached the conclusion that there was no good consideration for the promises in the said letter, but it is said that by reason of the defendant's request to the plaintiff to get a price for this property, and also by reason of the plaintiff acting as trustee for the defendant, there is a contract with the defendant, and that the plaintiff is entitled to a reward of some kind.

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At one time it was supposed that a previous moral obligation arising from a past benefit constituted a good consideration for a promise. *Eastwood* v. *Kenyon* (1840), 11 A. & E. 438, decided that it did not constitute a good consideration in a case where the past benefit was not conferred at the request of the defendant. Whether a past benefit conferred at the request of the defendant is a good consideration has not yet been finally settled: see *In re Casey's Patents* (1892), 1 Ch. 104 at p. 115. Pollock on Contracts, 8th Ed., 189, says:

"On our modern principles it should not be, and it is admitted that it generally is not."

Anson on Contracts, 12th Ed., at pp. 113-116, discusses the question and states the rule to be this: the subsequent promise is only binding when (a) the request, (b) the consideration, and (c) the promise form substantially one transaction; so that the request by the defendant is virtually the offer of a promise (of a payment), the precise extent of which is hereafter to be ascertained.

Applying this test, I do not think the plaintiff can rely on the letter of the 18th of April as a promise. The promises in the letter of the 18th of April, 1910, in my opinion, must be read as subject to the condition that the coal should prove of the value expected in the spring of 1910. A promise of $25,000 on a $65,000 purchase, regardless of results, seems to me to be so out of proportion that we should, unless the words of the letter prevent us so construing it, read the condition with respect to the giving of the coal shares, as also applicable to the money payable in respect of the surface rights. The letter, in my opinion, is capable of being so construed. The use of the words "I will further protect you for a sum not less than $25,000 which I pay to you as the sale of the surface rights progresses" clearly indicated that the reward or gratuity was to be dependent upon the discovery of the coal, and the consequent establishment of a town on the surface.

As to the settlement on the 13th of February, 1911, the defendant intended that the notes should be accepted in full settlement for his services and in lieu of the promises contained in the letter of April, 1910. The plaintiff "pouted," as he says, but did not inform von Alvensleben that he would accept the notes on those terms. The only complaint he then made was that the notes did not bear interest. Had it not been for the letter of the 27th of March, I should have come to the conclusion that the plaintiff had accepted the notes in satisfaction of the promises in the letter. It seems to me that the inference is that the plaintiff would have accepted the notes in full settlement if he had been advised the letter of the 18th of April, 1910, was not enforceable. In my opinion, the conclusion reached by the learned trial judge is right in every respect. I do not think the plaintiff is entitled to a *quantum meruit,* because it was never

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intended that there should be a contract, but if the plaintiff is entitled to a *quantum meruit* the sum of $5,000 would be a liberal recognition for his services.

If the promise in the letter of the 18th of April is to be regarded as supported by a good consideration, then I would take the view that the learned trial judge took, namely, that the express contract to protect the plaintiff to the amount stated was discharged by the non-existence of the particular state of things which was the basis on which the contract was entered into, on the principle of *Taylor* v. *Caldwell* (1863), 3 B. & S. 826, 32 L.J., Q.B. 164; see *Krell* v. *Henry* (1903), 2 K.B. 740, one of the many cases arising out of the postponement of King Edward's coronation; see also *Chandler* v. *Webster* (1904), 1 K.B. 493; and *Elliott* v. *Crutchley, ib.* 565, affirmed by the House of Lords (1906), A.C. 7; *McKenna* v. *McNamee* (1887), 15 S.C.R. 311; and *Manley* v. *O'Brien*: *In re Mackintosh* (1901), 8 B.C. 280 at p. 284, (1903), 34 S.C.R. 169. The difference between the learned trial judge and myself is this: he recognizes the promise as made on good consideration and would hold it discharged, and that the parties are relegated back to a *quantum meruit* basis. I think there was no *animus contrahendi,* and therefore no contract to remunerate, the plaintiff, in the beginning, being willing to accept what von Alvensleben was willing to give him, and not intending to make any charge for the friendly service he was rendering. Therefore, the plaintiff would not be entitled to a *quantum meruit.*

IRVING, J.A.

I would dismiss the appeal.

MARTIN, J.A.: It is unavoidable that we should, in my view of the matter, pass upon the defence set up of a settlement, and the ascertainment of that fact is, in effect, left open to us untrammelled by any positive finding of the learned trial judge based upon the credibility or demeanour of the witnesses. I can only reach the conclusion that there was a settlement, and the direct evidence is supported by the fact that in the unusual circumstances there is a strong probability that such an arrangement was come to.

MARTIN, J.A.

The appeal should be dismissed.

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GALLIHER, J.A.: I would dismiss this appeal on the short ground that the remuneration to be paid Grant under the letter of the 18th of April, 1910, was conditional on the coal lands being sold so as to realize a net profit of 22,000 shares over and above all cost, including expenses, which are estimated at approximately $30,000. This condition failed through the lands proving practically valueless as coal lands, and if plaintiff is entitled as for services rendered, the amount paid by von Alvensleben is ample.

Appeal dismissed.

Solicitors for appellant: *Taylor, Harvey, Grant, Stockton & Smith.*

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

THE UPLANDS, LIMITED v. GOODACRE & SONS.

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1913
Jan. 13.
COURT OF APPEAL
July 22.
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Interpleader—Plant and material of contractor—Right of owner to enter upon and complete contract—Use and ownership of contractor's plant and material—Sheriff seizing under execution for creditor of contractor.

By virtue of an execution issued in an action for debt, the sheriff seized certain plant and goods of the debtor, a contractor. The plant and goods were claimed by a company with which the defendant had a contract, there being a clause in the contract giving the claimants power to enter upon the works, oust the contractor, and complete the works, using the plant and material found there for the purpose of such completion. This could be done by the company themselves, or they could employ another contractor. They chose the latter course. The contract did not provide that the property in the plant and materials should vest in the company for the purpose of completing the work in the event of the company having to exercise its right of entry.

Held, on appeal, affirming the judgment of GREGORY, J. (IRVING, J.A. dissenting), that the claimants alone had the right to use the plant and materials in the event of entry, and that they could not delegate such

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user to another contractor. Therefore, an interpleader issue to try the sheriff's right to seize was properly found in favour of the execution creditor.

APPEAL by plaintiff Company from the judgment of GREGORY, J. on an interpleader tried by him at Victoria on the 10th of January, 1913. The proceedings arose out of the failure of the contracting company to fulfill a certain contract with the plaintiff Company, whereupon the defendants secured judgment against the contractors for a debt, and seized the plant, material unused by the contractors on the works, and certain other chattels. Plaintiff Company resisted, and the sheriff interpleaded. In the contract was a clause providing that in certain contingencies, such as insolvency, default, abandonment of the contract by the contractor, or certain other events happening, "then the Company, without in anywise prejudicing any other of the rights or remedies of the Company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the Company and manager thereby."

Statement

Bodwell, K.C., and *H. W. R. Moore,* for plaintiff.
Maclean, K.C., and *Higgins,* for defendant.

13th January, 1913.

GREGORY, J.: This is an interpleader issue brought about through the seizure by the sheriff of certain goods of the Anderson Construction Company, which was building roads, etc., for the plaintiff. By agreement between the parties the goods claimed by both plaintiff and claimant were sold by the sheriff. There has been some discussion as to the sufficiency of the issue as drawn up, but I understand it has been agreed by all parties that I shall determine the real issue, namely: Who is entitled in the circumstances to the proceeds of the sale by the sheriff?

GREGORY, J.

In the plaintiff's contract with the Anderson Company it is provided that upon abandonment of the contract by the Company, etc. (which contingency has happened), then the Company

". . . . may enter upon the said works and expel the contractor therefrom and may itself use the material and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works," etc. This is the only clause in the contract in which the word "materials" is used, and it seems clear to me that materials must mean materials which could be used in the actual work of the Anderson Company, and can in no way apply to kitchen plant and supplies which the company, for its own convenience, had in connection with its business of carrying on a boarding house for its own men. However, it seems unnecessary, in the view I take, to make any special finding on this point.

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The Uplands Company could have no better right to any materials than the language of the contract gives it, and it seems to me that the contract itself limits the right of The Uplands Company to use of materials and plant by itself, for the contract says "may itself use the materials and plant." The words following appear to me to give it a right to have the work completed by another company or contractor, but did not in any way give it the right to pass to such company or contractor the right to use the materials and plant of the Company. If this is so, what right can the plaintiff now have to the proceeds of the sale? The plaintiff at best had an option to use or not to use the material, etc. He exercised that option when he let a new contract, which he did as soon as he possibly could after the abandonment of the contract by the Anderson Company, and the sheriff actually sold the goods to the new contractor after he had made his contract with the plaintiff Company. It is evident, therefore, that the plaintiff does not itself seek or intend of itself to use the materials, and if the materials were back in place to-day, it would, I think, in the circumstances, have no right to retain them, as it has already let a contract for the same work to another company. The plaintiff's contention really amounts to this: that it has the right to let the contract to a new contractor, then itself sell the plant and materials and bring the proceeds into its account with the Anderson Company. I cannot see that the language of the contract gives them any such privilege. It falls far short of the clause usually inserted in such contracts.

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In *Hawthorn* v. *Newcastle, &c., Railway Co.* (1840), referred to in the note at p. 734 of 3 Q.B., it is clear that the company itself undertook to use the materials, and the language of the contract in that case was very similar to the one now under consideration. While in that case the defendant succeeded entirely on its claim, it is only by reason of the particular form of the pleadings that it succeeded as to some of the plant, etc., in dispute. The case of *Baker* v. *Gray* (1856), 17 C.B. 461, referred to by Mr. *Maclean,* seems to me to be very much more in point. Mr. *Bodwell's* criticism of that case is that it is merely an interpretation of the statute 12 and 13 Vict., chapter 106, section 144, but that statute does no more for an assignee in bankruptcy in passing on a bankrupt's right to any property belonging to him than a judgment creditor receives when he obtains judgment. It is true the title does not actually pass, but a judgment creditor can in such case seize every interest in the property the judgment debtor had at the time. In this case it appears that the sheriff seized more than he was entitled to. On the other hand, the plaintiff Company apparently claimed more than it was entitled to; one seizing and the other claiming the entire property; but in view of what I have already stated, it is unnecessary to consider the effect of these respective claims.

GREGORY, J.

Judgment will therefore be for the execution creditor, and as to the question of costs, I will hear the parties, unless they can agree that in the circumstances they should follow the event.

The appeal was argued at Vancouver on the 8th and 9th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., and *H. W. R. Moore,* for appellant: We say that the sheriff had no right to seize the goods. While we do not claim the ownership, yet under the contract we had the right, on default of the contractors, to the possession and user of the goods, consisting of plant and material, and when we had worked the material into the undertaking we would be the owners. We were rightfully in possession. There was no right to possession in the debtor. They cited and referred to *Garstin* v. *Asplin* (1815), 1 Madd. 150; *Reddell* v. *Stowey* (1841), 2 M. & Rob.

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358; *Balls* v. *Thick* (1845), 9 Jur. 304; *Rogers* v. *Kennay* (1846), 9 Q.B. 592; *Legg* v. *Evans* (1840), 6 M. & W. 36. As to the right to use the goods being in The Uplands, Limited, see *Levasseur* v. *Mason & Barry* (1891), 2 Q.B. 73; *Young* v. *Lambert* (1870), L.R. 3 P.C. 142. There could not be any sale: *Snetzinger* v. *Leitch* (1900), 32 Ont. 440 at p. 445; *Beeston* v. *Marriott* (1864), 4 Giff. 436 (66 Eng. R.R. 778); *Wickham* v. *New Brunswick and Canada Railway Co.* (1865), L.R. 1 P.C. 64. *Baker* v. *Gray* (1856), 25 L.J., C.P. 161, is distinguishable here. The seizure by the sheriff does not change the right to the property: *Giles* v. *Grover* (1832), 9 Bing. 128; *Hawthorn* v. *Newcastle, &c., Railway Co.* (1840), 3 Q.B. 734; *Ross* v. *Simpson* (1876), 23 Gr. 552.

Maclean, K.C., Higgins, and *Bass,* for respondents: The Uplands, Limited, took possession of a great deal of material they were clearly not entitled to; for instance, the boarding houses, offices and equipment were not part of the plant, which manifestly were not necessary for the completion of the work. The issue in question submitted to all the solicitors was the right to the property in those goods, and not to the possession of them. The Uplands, Limited, after the failure, simply locked up the goods and only used a few tools and materials in certain necessary or urgent work, while they were endeavouring to get the bonding company to complete the work, which they failed in, and then endeavoured to re-let the work to other contractors. Notwithstanding Uplands taking possession, the sheriff could seize and sell, subject to the interest of the Uplands Company: Revised Statutes of British Columbia, 1911, chapter 79, section 17, Execution Act; Ont. Digest (1903), Vol. 2, p. 2,627. See also *Baker* v. *Gray* (1856), 25 L.J., C.P. 161. Here The Uplands, Limited, never took the goods into possession for completion of the work.

Argument

Higgins, on the same side: As to the sheriff's right to seize: Uplands had no interest at the time of seizure; the goods were owned by and in the possession of Anderson. The ownership remained in Anderson. Anderson himself instructed his timekeeper to point out the goods to the deputy sheriff. Uplands did not exercise their right under the contract to

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expel him and take over the work themselves. The work that Uplands did was only of a temporary, urgent character, and in no sense a user within the terms of the contract. Uplands never made any demand to use, but set up a claim to property in the goods. After the issue was obtained we consented to the sale of the goods, then they set up a claim to possession of and property in the goods. We objected. Not having asserted any right, and having consented to the sale, they waived that right.

Bodwell, in reply: *Inglis* v. *Robertson* (1898), A.C. 616. There was an abandonment by Anderson, and Uplands had taken first step towards assuming possession: *Scott* v. *Scholey* (1807), 8 East, 467.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred in the conclusions arrived at by GALLIHER, J.A.

IRVING, J.A.

IRVING, J.A.: We are not concerned with section 17 of the Execution Act, as the section is limited by the *fasciculus* to mortgages. For the history of the section, see *Ross* v. *Simpson* (1876), 23 Gr. 552 at p. 554. As to the effect of limiting the words in a section or group of sections by using one heading, the House of Lords, in *Hammersmith* v. *Brand* (1868), L.R. 4 H.L. 171, declining to follow the opinion of Lord Cairns, L.C., held that the headings of different portions of a statute are to be referred to. In our own Courts the title of an Act has been regarded as furnishing a key to the meaning of an Act: see *O'Connor* v. *The Nova Scotia Telephone Company* (1893), 22 S.C.R. 276 at p. 293. See on this point *Regina* v. *Washington* (1881), 46 U.C.Q.B. 221 at p. 229.

I do not agree that this litigation is useless by reason of the fact that the parties thereto agreed that the property should be sold. We are not concerned with what was done after the seizure, or by arrangement between the parties to prevent unnecessary loss.

Dealing with the case itself, I think we must be governed by the interpleader issue put before the judge who tried the case. I have reached the conclusion that the sheriff was not justified

in seizing the goods which on Sunday, the 20th, or Monday, the 21st, were taken possession of by the defendants. See evidence of Livingstone, Ferris, Evans, and Wescombe. Evans was not cross-examined. Lindquist was told he could use some of the tools. Under the terms of the contract, it seems to me that the plaintiff was at liberty either to use the tools themselves or hand them over to the surety company, or such other person as they might arrange with to complete the contract. In any event, they certainly had a right, even if they could not turn them over to these other companies, as I think they could, to hold them for a reasonable length of time to enable them to determine whether they might or might not use them. The contract does not contain a clause vesting the materials and plant in the plaintiff. Different considerations apply to plant than those which apply to materials. The property in the plant does not pass under a user clause; "use," as applied to plant, does not include the right to retain. It is a licence to employ, but not consume. On the other hand, the property in the "material" which the plaintiff was authorized to use in the completion of the work, passes to the plaintiff when it is actually built into the work.

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The defendant's writ of execution could not confer upon him any greater power than that held by the judgment debtor. The right of the defendant was to take the precise interest, and no more, which the debtor possessed in the property seized. The sheriff could sell only the property subject to all the charges and encumbrances to which it was subject in the hands of the debtor. I think the licence to take possession would cover the material in the boarding house.

I would allow the appeal.

MARTIN, J.A.: It is to be regretted that the issue which was directed to be tried by the order of the 14th of November, 1912, was not prepared and delivered as therein directed by the plaintiff's solicitor, instead of which he prepared and delivered one containing a material and unauthorized change, which the defendant's solicitor very properly refused to accept (as Mr. *Moore* admits), despite which, though no issue was settled, the matter was brought on for trial, though there could be nothing

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to try till the issue had been returned as directed by said order. With every respect, I cannot understand why the learned judge below allowed the proceedings (I do not call them a "trial," as there was nothing before him to try) to blunder on at all in such extraordinary circumstances, and that confusion promptly and inevitably arose, which always does arise when slovenly methods unknown to any system of legal procedure, are countenanced or permitted, and the laboured controversy as to what, if any, issue really was ultimately agreed upon to be tried was continued before us, causing much difficulty. I confess, after reading and re-reading the record several times, I am still at a loss to know exactly what issue or issues was or were in the minds of all concerned, though the case was one which particularly required precision of statement to bring it within certain decisions, and I doubt very much if they were *ad idem,* but in such unsatisfactory, and I hope, not-to-be-repeated circumstances, I can only take the learned judge's version of what he thought he was expected to do, and in such case I think the matter must be determined by clause 5 of the contract, the peculiar language of which, in my opinion, puts the plaintiff out of Court. I think

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the learned judge has, on the whole, taken the right view of the case as it was agreed to be presented to him (and in such unusual circumstances I should naturally be loath to reverse his conclusions), and I agree that the use of the materials and plant was limited to the plaintiff personally and not to be extended to "any other contractor" it might employ. Furthermore, and in any event, as regards the kitchen utensils and supplies, they do not come within the expression "materials and plant" as contemplated by said section 5, and were therefore liable to seizure.

The appeal, I think, should be dismissed, with costs.

GALLIHER, J.A.

GALLIHER, J.A.: This is an interpleader issue. By an order of GREGORY, J., dated the 14th of November, 1912, it was ordered that the parties proceed to the trial of an issue, and that the question to be tried shall be whether at the time of the seizure by the sheriff the goods seized were the property of the claimant as against the execution creditor.

The issue, as framed on the 10th of December, 1912, departs

from the above order in that a further question, *viz.*: the right to possession is made a part of the issue, and when the matter came up for trial before GREGORY, J.. considerable discussion arose over this.

The learned trial judge decided to try, as he termed it, the real issue: Had the sheriff any right to go in? This would seem rather at variance with his words in his reasons for judgment, but be that as it may, the point was taken below, and strenuously argued before us, that the sheriff had no right to seize the goods in question.

First, let us examine any right to possession the claimants had: Whatever right they had was acquired by virtue of the concluding paragraph of section 5 of the contract between themselves and the contractors, the Anderson Construction Company. This clause is (in part) as follows:

> "Then the company, without in anywise prejudicing any other of the rights or remedies of the company under the contract, may enter upon the said works and expel the contractor therefrom, and may itself use the materials and plant upon the premises for the completion of the works, and employ any other contractor to complete, or may itself complete the works, and upon such entry the contract shall be determined save as to the rights and powers conferred upon the company and manager thereby."

GALLIHER, J.A.

My interpretation of this clause is that the claimants alone may use the material and plant upon the premises for the completion of the works by them, and gives them no such right where another contractor is employed to do the work. It is urged that the seizure by the sheriff was made at a time so closely following on the throwing up of the contract by Anderson (some three days later), that they had no opportunity of making up their minds whether they would complete the contract themselves, in which case they would be entitled under the terms of their contract to use these tools and materials. If the evidence pointed to the fact that they were considering doing so, the contention might have some weight, but the evidence is all the other way. As soon as the Andersons threw up the work, Uplands called upon the bondsmen to complete, and when notified that they repudiated liability, at once called for tenders. While they may have been technically in possession of the goods at the time of the seizure, nothing has arisen that would entitle them to maintain possession

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under their agreement, in fact, their whole course of conduct is opposed to that view. Taking this view, the cases cited by Mr. *Bodwell* are not of any assistance, and it becomes unnecessary for us to decide what effect section 17 of the Execution Act, Revised Statutes of British Columbia, 1911, chapter 79, might have upon the decisions in those cases.

There is one further point as to $1,200 worth of pipes seized by the sheriff, and which the claimants contend was paid for by them, and was never delivered to the Anderson Construction Company. The evidence of D. M. Rogers, president of The Uplands, Limited (the claimants), clearly shews that the pipe seized by the sheriff was ordered by the Anderson Construction Company from Balfour, Guthrie & Co., and had been delivered upon the premises before Anderson quit work. It is true this pipe was paid for afterwards by the claimants, but the consideration for the guaranteeing of payment by the claimants was a further delivery of pipe by Balfour, Guthrie & Co., ordered by the claimants and delivered after seizure. I think this pipe was the Anderson Company's property at the time of the seizure.

The appeal should be dismissed, with costs.

Appeal dismissed, Irving, J.A. dissenting.

Solicitor for appellant: *H. W. R. Moore.*
Solicitor for respondents: *F. Higgins.*

MOMSEN *ET AL.* v. THE AURORA.

MARTIN, LO. J.A.

1913

Aug. 19.

MOMSEN v. THE AURORA

Admiralty law—Equipping steamer with engine—Action for—Jurisdiction—The Admiralty Court Act, 1861 (24 Vict., Cap. 10, Sec. 4).

Under section 4 of The Admiralty Court Act, 1861, when a creditor finds a ship, or the proceeds thereof are under arrest of the Court in pursuance of its valid process, he may bring his action, and the Court acquires immediate jurisdiction over any claim for building, equipping or repairing the ship.

The burden is not cast upon the litigant to shew that the original action under which the ship was arrested must eventually succeed.

ACTION for the cost of equipping the Aurora with one engine, tried by MARTIN, Lo. J.A. at Vancouver on the 22nd of May, and at Victoria on the 28th of June and the 4th of July, 1913. Statement

E. A. Lucas, for plaintiffs.
Price, for defendant.

19th August, 1913.

MARTIN, Lo. J.A.: This is an action for the equipping of the Aurora with a 20 horsepower "Frisco" standard engine, for the price of $1,625. At the end of the trial judgment was given in favour of the plaintiffs on the facts, reserving for further consideration the point of law raised as to the jurisdiction of this Court to entertain the action; which point is based on section 4 of The Admiralty Court Act, 1861 (24 Vict., c. 10), as follows: Judgment

"4. The High Court of Admiralty shall have jurisdiction over any claim for the building, equipping, or repairing of any ship, if at the time of the institution of the cause the ship or the proceeds thereof are under arrest of the Court."

It is admitted that at the time this cause was instituted, the Aurora was under arrest of this Court in an action by one Oliver for seaman's wages, yet because Oliver's claim was for less than £50, it is submitted that his action should never have been brought, and therefore the ship cannot be deemed to have been legally under arrest at the time this present action was

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begun, since section 165 of the Merchant Shipping Act of 1894 provides that:

"A proceeding for the recovery of wages not exceeding fifty pounds shall not be instituted by or on behalf of any seaman or apprentice to the sea service in any superior Court of Record in Her Majesty's dominions, nor as an Admiralty proceeding in any Court having Admiralty jurisdiction in those dominions, except—

"(i) Where the owner of the ship is adjudged bankrupt; or

"(ii) Where the ship is under arrest or is sold by the authority of any such Court as aforesaid; or

"(iii) Where a Court of summary jurisdiction acting under the authority of this Act, refers the claim to any such Court; or

"(iv) Where neither the owner nor the master of the ship is or resides within twenty miles of the place where the seaman or apprentice is discharged or put ashore."

In answer to this contention it is first submitted (apart from other objections as to waiver, and the application of the said Merchant Shipping Act), that once the fact of the arrest by this Court is established, that of itself confers jurisdiction; and furthermore, as Oliver's action is coming on for trial, it is open to him to prove any one of the four exceptions to section 165, which would entitle him to maintain his action even though his claim is under £50. In my opinion, after a careful consideration of the matter, this submission should prevail. I think the clear intention of the statute, section 4, is that as soon as a creditor finds a "ship or the proceeds thereof are under arrest of the Court" in pursuance of its valid process issued to the marshal in that behalf, then he may without further ado bring his action for, and the Court acquires immediate and irrevocable jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew to this Court now that the original action under which the ship was arrested must eventually succeed. It would, indeed, be an anomalous position to place this Court in to require it now to attempt to decide in this action the prophetic question of fact as to whether or no Oliver will be able, when his action comes to be tried, to adduce evidence that will bring him, say, within the 4th exception of section 165, and therefore be entitled to maintain his action, as another seaman was able to do before me in the case of *Cable* v. *Ship "Socotra"* (1907), 13 B.C. 309. In short, it is the present fact of the arrest, and not the future

Judgment

result of the action, that determines the question of jurisdiction.

It follows, therefore, that the question of law is also decided in favour of the plaintiffs, and judgment will be entered for the full amount of their claim, with costs.

Judgment for plaintiffs.

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1913
Sept. 26.
MOMSEN v. THE AURORA

Admiralty law—Re-arrest of ship after judgment—Bail—Costs—The Admiralty Court Act, 1861 (24 Vict., Cap. 10), Secs. 15 and 22—Rule 39.

A warrant will be issued for the re-arrest of a ship, released on bail, to answer the amount of the claim and costs for which judgment has been recovered and remains unsatisfied.

APPLICATION for an order, under rule 39, for a warrant to issue for the re-arrest of the defendant ship, which had been arrested and released under a bail bond, and later judgment was recovered against her, with costs, but had not been paid, though execution had issued against the owner and sureties and been returned *nulla bona*. Heard by MARTIN, Lo. J.A. at chambers, in Victoria, on the 26th of September, 1913. Statement

E. A. Lucas, for the motion (no one contra): On the facts proved, the plaintiffs are entitled to the order: see sections 15 and 22, The Admiralty Court Act, 1861; Williams and Bruce's Admiralty Practice, 480, 571-2; the ship is still within the jurisdiction available to all process of the Court. Argument

Per curiam: There does not seem to be any valid reason why the order should not be granted. In *The Freedom* (1871), L.R. 3 A. & E. 495, the ship was re-arrested to answer the costs, though the damages had been paid to the full extent of the bail Judgment

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bond. Here nothing has been paid on either head, so I see no obstacle in the way. She can at least be arrested for costs, and there is nothing in *The Freedom* case to shew that she should not be arrested to answer the judgment in the present circumstances; the reasoning, indeed, in that decision is all in favour of such a course, though because no one has appeared to present an argument in support of a contrary view, I shall be prepared to listen to one should occasion arise.

Order accordingly.

MURPHY, J.
1913
Sept. 8.
SPARROW v. CORBETT

SPARROW v. CORBETT.

Banks and banking—Promissory note—Presentation—Promise to pay after falling due—Prima facie evidence of presentment.

A promise to pay a promissory note after it has fallen due is *prima-facie* evidence of presentment.

Deering v. *Hayden* (1886), 3 Man. L.R. 219, followed.

Statement

ACTION to enforce payment of a promissory note, tried by MURPHY, J. at Vancouver on the 8th of September, 1913.

A. H. MacNeill, K.C., and *Bird*, for plaintiff.
Woodworth, and *Creagh*, for defendant.

Judgment

MURPHY, J.: It is objected in this action that the plaintiff cannot succeed because no proof of presentation of the note was given. The case of *Deering* v. *Hayden* (1886), 3 Man. L.R. 219, and authorities there cited, shew that when a promise to pay has been made after the note has fallen due, that is *prima-facie* evidence of presentment. In this action, proof was given of such promise to pay, and, unless my memory fails me, proof was also given that some payments were made. At any rate,

it was proven that the defendant, after the due date, had made repeated promises to settle, and had requested time. That being so, I hold that the plaintiff is entitled to recover.

With regard to the set-off, the evidence was very unsatisfactory, and I am forced to state that I have to view with close scrutiny what was said by the defendant. When a man, in the face of the correspondence that was filed in this action, comes forward and states that the note here sued upon was an accommodation note, I think his evidence is of a character that requires consideration.

Apparently the plaintiff believes that the defendant has some sort of claim. With regard to his claim for wages, he admitted himself that it was an afterthought, and he could not even give me the date when he finally determined to make such charges. I entirely disallow these. With regard to the expenses, the evidence was so fragmentary that when it is remembered the onus is upon the defendant to prove this set-off, I am rather in a quandary what to do. I must state with regard to the claim of $45 for sending his son to Winnipeg, I disallow it, not giving credence to his evidence on that point. It seems, however, from the correspondence, that he did do some work, or at any rate make some attempts during the months that he charges for, to sell some of the books. Whilst I must admit that the matter is something of a guess, I believe that substantial justice will be done (especially in view of the attitude taken by the plaintiff), by allowing a set-off of $100. I give judgment for the amount of the note and costs, $100.

Judgment

The defendant will have any costs occasioned by establishing the amount of the set-off as allowed, the same to be set off against the costs of the action.

Judgment accordingly.

MURPHY, J.

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Oct. 1.

BOGARDUS v. HILL.

Costs of survey—Principle on which it should be taxed—Survey of railway belt—Fiat.

BOGARDUS v. HILL

The principle to be acted upon in dealing with allowances to witnesses for the expense of surveying is that all work should be allowed for which a reasonable man preparing for trial would feel bound to undertake in order to prove his case.

Statement

APPEAL from the registrar on the taxation of a bill of costs, heard by MURPHY, J. at Vancouver on the 1st of October, 1913.

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

MURPHY, J.: This is an appeal from the registrar on the taxation of a bill of costs.

As to the first contention, that the general costs of the survey should be appropriated proportionately in acordance with the number of the limits found within and without the railway belt, the answer is that the defendant, by his pleadings, contended that only 14 of the limits were in the railway belt, and the judgment has found that he was right. He has, therefore, succeeded on the whole of this issue, and I am of the opinion the general costs of the survey was necessary to such success. I therefore confirm the registrar's action.

Judgment

As to the second contention, that the expense of surveying from the railway to the limits was unnecessary, inasmuch as the northern boundary of the railway belt had been fixed by agreement between the Provincial and the Dominion Governments, and located by iron posts, I think the principle to be acted upon in dealing with allowances to witnesses for equipping themselves is that all work should be allowed for which a reasonable man, preparing for trial, would feel bound to undertake in order to prove his case. If this be correct, then I think the argument that took place before me as to whether the iron

posts could be taken, without further proof, as fixing absolutely the northern boundary of the railway belt is sufficient to shew that the running of a direct line from the railway itself was a reasonable precaution, particularly in view of the stand taken by myself at the time of the adjournment at Nelson. The defendant was then given clearly to understand that he must shew by strict survey, the truth of his allegations. I think, therefore, the registrar was right also on this phase of the question.

As to the contention that no fiat was obtained, in my opinion that can only apply to the cost of the maps, and as the allocatur has not yet been signed, I think it is still open to the Court to grant such fiat, and if it be necessary, in view of all the circumstances of this case, I do hereby so grant it.

Judgment

With regard to the quantum of the bill, I think it is a general principle that this is not usually interfered with on appeal, and in the particular case with which I am dealing the registrar was certainly in a better position to determine the amount than I can be, and I therefore do not interfere with his decision.

The appeal is dismissed, with costs.

Appeal dismissed.

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STINSON v. HOAR.

Vendor and purchaser—Contract for sale of land—Renunciation of contract by bringing action—Resale of land to third party before second payment due—Return of deposit on account of purchase price.

STINSON v. HOAR

The plaintiff agreed to purchase a piece of land from the defendant and paid $1,000 as a deposit in part payment of the purchase price, the second payment under the agreement being due and payable in 35 days. Thirteen days afterwards the plaintiff notified the defendant by letter that he cancelled the sale on the ground that it had been brought about by the defendant's misrepresentations, and demanded the return of the $1,000. The next day the defendant replied denying any misrepresentations on his part and stating that the plaintiff must either complete the transaction or forfeit the deposit. Seventeen days later the plaintiff commenced action for the cancellation of the agreement and the return of the $1,000. Four days later the defendant sold the property to another party. The trial judge found that there was no misrepresentation by defendant, but ordered the return of the $1,000 to the plaintiff and gave the defendant the costs of the action.

Held, on appeal, that the plaintiff having repudiated the contract by bringing his action, the defendant was at liberty to sell the property, and that plaintiff was not entitled to a return of the $1,000.

Howe v. *Smith* (1884), 27 Ch. D. 89, 53 L.J., Ch. 1,055, followed.

APPEAL from the judgment of MORRISON, J. in an action tried by him at Vancouver on the 10th of January, 1913. The facts are set out in the headnotes and reasons for judgment.

Statement

The appeal was argued at Vancouver on the 25th of April, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

Ogilvie, for appellant (defendant): There was an express refusal and repudiation of the contract by the plaintiff's letter, and the defendant accepted: *Hochster* v. *De la Tour* (1853), 2 El. & Bl. 67, 22 L.J., Q.B. 455; *Varrelmann* v. *Phœnix* (1894), 3 B.C. 135; *Danube and Black Sea Railway* v. *Xenos* (1862), 31 L.J., C.P. 284; *Frost* v. *Knight* (1872), L.R. 7 Ex. 111; *Wilkinson* v. *Verity* (1871), L.R. 6 C.P. 206, 40 L.J., C.P. 141; *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (1884), 9 App. Cas. 434. As to the right of the vendor to take the deposit under the contract on the default of the pur-

Argument

chaser, see *Ex parte Barrell* (1875), 44 L.J., Bk. 138; *Peirson* v. *Canada Permanent* (1905), 11 B.C. 139; *Sprague* v. *Booth* (1909), A.C. 576, 78 L.J., P.C. 164. On the question of whether the payment was a deposit or a part payment of the purchase price, see *Kilmer* v. *British Columbia Orchard Lands, Limited* [(1912), 17 B.C. 230], (1913), A.C. 319, 82 L.J., P.C. 77. Another question is that of election in cases of this nature. He has made his election and he is bound by it: Halsbury's Laws of England, Vol. 20, p. 738; *Clough* v. *London and North Western Railway Co.* (1871), L.R. 7 Ex. 26, 41 L.J., Ex. 17; *Howe* v. *Smith* (1884), 53 L.J., Ch. 1,055; *Hinton* v. *Sparks* (1868), L.R. 3 C.P. 161, 37 L.J., C.P. 81; *Lea* v. *Whitaker* (1872), L.R. 8 C.P. 70; *Thomas* v. *Brown* (1876), 1 Q.B.D. 714, 45 L.J., Q.B. 811; *Soper* v. *Arnold* (1889), 59 L.J., Ch. 214; *Rhymney Railway* v. *Bricon and Merthyr Tydfil Junction Railway* (1900), 69 L.J., Ch. 813; *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460, 55 L.J., Q.B. 162; *Collins* v. *Stimson* (1883), 11 Q.B.D. 142, 52 L.J., Q.B. 440.

Argument

Fillmore, for respondent (plaintiff): The appellant has by his own act accepted our rescission and put an end to the contract. We never made default: *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460, 55 L.J., Q.B. 162. When he has taken us at our word and sold the property, we are entitled to a refund of what we paid: *Howe* v. *Smith* (1884), 53 L.J., Ch. 1,055. The appellant failed to shew that he had a title to the property: *Langan* v. *Newberry* (1912), 17 B.C. 88; *Townend* v. *Graham* (1899), 6 B.C. 539.

Ogilvie, in reply: There was never any demand for title; it was never referred to until he filed his statement of claim. We say the plaintiff repudiated the contract; he sues for misrepresentation and he fails in his action.

Cur. adv. vult.

22nd July, 1913.

IRVING, J.A.

IRVING, J.A.: I would allow this appeal.

The purchaser having satisfied the defendant that he no longer intended to be bound, the vendor was, in my opinion, justified in taking him at his word and selling the property. A

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person who enters into a contract, as the defendant did in this case, has a right to something more than a performance of the contract when the time fixed for the next step (or completion) arrives. He has a right to have the contractual relationship maintained as well as to have the contract performed when the time for so doing has come. He is not to be cast adrift and then held to his bargain at the election of the person with whom he contracted. That person (the plaintiff in this case) having wholly renunciated his contract by letter, and having brought his action, the defendant was at liberty to sell the property, and if he had sustained damage, to bring his action for such damage. The plaintiff's conduct exonerated him from any further performance of his promise.

Mr. *Fillmore* contends that in these circumstances the plaintiff was entitled to receive the deposit back. *Howe* v. *Smith* (1884), 27 Ch. D. 89, seems to me a direct authority against this contention, and I would so hold. In that case (decided by the Court of Appeal on appeal from Kay, J.), the defendant had sold the property because the plaintiff had not been able to find the purchase money. The contract contained no clause at all as to what was to be done with the £500 if the contract was not performed. The plaintiff asked for the return of £500 which had been paid as a deposit and in part payment of the purchase money, but that was refused. Cotton, L.J.

IRVING, J.A.

pointed out that the mere fact that there had been a re-sale could make no difference, if the purchaser had made such default as precluded him from demanding the transfer of the estate. When the vendor sold the estate he was only selling that which the purchaser had no possible right to demand. He then quotes Lord St. Leonards's (Sugden) book on Vendors and Purchasers as an authority for the proposition that the re-sale of the estate after the purchaser's default cannot in any way affect the right of the vendor to retain the deposit, and then, on the authority of a decision by Pollock, B., and another by James, L.J., he says:

"If on the default ot the purchaser the contract goes off, that is to say, if he repudiates the contract, then, ... he can have no right to recover the deposit."

Bowen, L.J. at p. 98, says:

"It is quite certain the purchaser cannot insist on abandoning his con-

tract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."

And Fry, L.J. reached the same conclusion. In *Hall* v. *Burnell* (1911), 2 Ch. 551, 81 L.J., Ch. 46, the same principle was acted upon. There is no question of payment of instalments in this case, or relief from forfeiture, as there was no such claim put forward in the Court below.

As to the objection that on the day of the sale the vendor was not the registered owner, the case of *Langford* v. *Pitt* (1731), 2 P. Wms. 629, is a complete answer. The time for making a title had not yet arrived. A man may enter into a contract to sell a property of which he is not the registered owner. Mr. *Fillmore* argued that a contract would be void unless the purchaser could at once walk into the land registry office and find that the vendor was the registered owner. Section 104 of the Land Registry Act has not that effect.

Mr. *Fillmore* relied on *Johnstone* v. *Milling* (1886), 16 Q.B.D. 460, 55 L.J., Q.B. 162, but in that case the County Court judge did not find that the lessor had said that he would not perform his part of the contract; all he said, so the Court of Appeal thought, was that he was afraid he could not find the money. In that case, then, there was no repudiation by the lessor, nor was there any election by the lessee to accept such repudiation. Had there been a repudiation by the plaintiff, then that case would be very like this. The defendant could have adopted the repudiation just as a person accepts an offer, and then there would have been a completed contract between them.

IRVING, J.A.

I agree with the learned trial judge that the defendant was not guilty of misrepresentation. There seems to be something anomalous in holding that the plaintiff, who brought his action of misrepresentation to set aside the contract and thereby recover his deposit, should fail in proving the misrepresentation, and yet in some other way recover the deposit. The trial established that he was not justified in refusing to go on with his contract, yet he now claims that he is entitled to have his money back. To get his money back he would be compelled to shew that he had been always ready and willing to complete it, that

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there had been a total failure of consideration. There was not a total failure of consideration, because for several days he was the owner of the property. He could have sold it at a profit had the market been favourable, and the fact that he enjoyed that privilege prevents there being a total failure of consideration: see *Cornwall* v. *Henson* (1899), 2 Ch. 710, 68 L.J., Ch. 749.

There was some discussion before us as to relief against for-

IRVING, J.A.

feiture, but that was not asked for by the pleadings. In my opinion we are dealing with a question of deposit only.

MARTIN, J.A.: By an agreement evidenced by a written receipt, defendant agreed to sell a piece of property to the plaintiff on the terms [sufficiently stated in the headnote] and 13 days after, the plaintiff notified the defendant, in writing, that "he has cancelled and doth hereby cancel" the sale, on the grounds of gross misrepresentation, and "demands the immediate return to him of the $1,000 paid by him in respect of the said sale"; to which the defendant replied by letter on the next day that there was no misrepresentation, and that the plaintiff must either "complete the transaction or forfeit the deposit." Seventeen days after this letter the plaintiff began this action to cancel the said agreement, and for the return of

MARTIN, J.A.

the $1,000, "being deposit paid on account of purchase," whereupon, four days after, the defendant sold the land to a third party.

Taking the matter up step by step, I am of the opinion that after the receipt of the first letter the defendant could have taken the position that the plaintiff had definitely decided not to carry out his agreement, and therefore that it was open to the defendant to elect to "adopt the repudiation" (*Johnstone* v. *Milling* (1885), 55 L.J., Q.B. 162 at p. 168), in which case, as Lord Chief Justice Bowen puts it:

> "The rights of the parties under the contract culminate and are to be determined at the moment of repudiation, and the contract is to be treated as off, except to this extent, that the promisee may bring his action upon it as for a breach of the contract."

But instead of so doing, the defendant elected to hold the plaintiff to the contract, calling upon him either to complete or

forfeit the deposit. The effect of this was to leave the matter still open, and the plaintiff could have receded from his position and completed, but he did not do so, but concluded to maintain it, as evidenced by the beginning of this action (on the 14th of September, 1912), as aforesaid. This step, in my opinion, again gave the defendant the same opportunity for election that he had before, and this time he elected to "adopt the repudiation" and promptly sold the property, as above stated. Under this election, the rights of the parties have to be determined as on and of the 14th of September, 1912, and since the plaintiff does not, in this action, ask for specific performance, he is in the position pointed out by Lord Justice Fry in *Howe* v. *Smith* (1884), 53 L.J., Ch. 1,055 at p. 1,062 (a suit for specific performance), as one who has deprived himself

"of his right to specific performance and of his right to maintain an action for damages, and under these circumstances I hold that the purchaser has no right to recover his deposit."

This principle covers the case at bar exactly. Indeed, it is a stronger case, as time herein is stated to be "the essence of this agreement"—and I only add that whatever construction may be placed upon the recent decision of their Lordships of the Privy Council in *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), 82 L.J., P.C. 77, wherein a claim of forfeiture was met by a counterclaim for specific performance, it should not, according to *Quinn* v. *Leathem* (1910), A.C. 495 at p. 506, be extended to apply to such a very dissimilar case as this.

MARTIN, J.A.

The appeal should, I think, be allowed, and the judgment varied by striking out of it the direction that the defendant should pay the plaintiff the sum of $1,000.

GALLIHER, J.A.: I think there can be no doubt that this appeal should be allowed. The plaintiff brings his action to set aside an agreement for sale, to recover back $1,000 paid on account of said agreement (which is termed a deposit) on the ground of misrepresentation. The learned trial judge found no misrepresentation, but ordered the defendant to return the $1,000, and from this portion of the order the defendant appeals. There are a number of authorities on the point, but

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for the purposes of this case *Howe* v. *Smith* (1884), 53 L.J., Ch. 1,055, is sufficient. There was direct repudiation by the plaintiff in his letter of the 28th of August, 1912, in which the plaintiff, through his solicitor, notified the defendant that he cancels the agreement on the ground of misrepresentation, and demands back the $1,000 paid. To this the defendant, through his solicitor, wrote the plaintiff's solicitors on the following day, denying misrepresentation, and asserting that plaintiff will either have to complete the contract or forfeit the deposit. The answer to this is a writ, issued on the 14th of September, 1912, claiming in the terms of the plaintiff's letter.

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After the issue of the writ the defendant re-sold, and the plaintiff claims that as he was not in default in payment under the agreement at the time of the re-sale, and as the defendant had sold before default, he cannot retain the deposit. I cannot see upon what principle this can be maintained. The plaintiff is not seeking specific performance of the contract, but is repudiating it, and refusing to go on, and has failed on the grounds upon which he sought relief.

Appeal allowed.

Solicitors for appellant: *Ogilvie & Brown.*
Solicitor for respondent: *C. L. Fillmore.*

WANDERERS HOCKEY CLUB v. JOHNSON.

MURPHY, J.

1913

Sept. 30.

WANDERERS HOCKEY CLUB v. JOHNSON

Contract—Foreign judgment—Absence of personal service of process in foreign Court—Breach of agreement—Fraud on third party.

No action will lie on a foreign judgment on the face of which it appears that the defendant was not served with any process of the foreign Court and that he had no knowledge that proceedings had been taken against him.

An agreement, the carrying out of which is calculated to defraud or injure a third party, is illegal and void as between the parties to it.

ACTION upon a foreign judgment, or in the alternative for breach of contract, tried by MURPHY, J. at Vancouver on the 30th of September, 1913. Statement

W. S. Deacon, and *E. J. Deacon,* for plaintiffs.
S. S. Taylor, K.C., for defendant.

MURPHY, J.: In so far as this action is based on the foreign judgment, it was proved before me that the defendant was not served with any process of the foreign Court, nor had he any knowledge that proceedings had been taken against him. It is a fair inference, I think, from the evidence, that the plaintiffs knew where the defendant could have been found and, presumably, they could have obtained leave to serve him personally out of the jurisdiction. At any rate, they could have sued him in British Columbia. Under these circumstances, I am of the opinion that the judgment should not be acted on in our Court. It is laid down in Halsbury's Laws of England, Vol. 6, paragraph 423, that such judgment will not be acted upon when obtained without personal service, even though under the procedure of the foreign Court substitutional service is permitted, thus making the judgment effective in such foreign jurisdiction. In my opinion, therefore, the defendant can go behind the Montreal judgment. On the merits of the case, I find the facts to be that Patrick had a contract with Johnson for his services for the season 1912-13; that he, Patrick, communicated the fact Judgment

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of his having such contract to the plaintiffs; that the plaintiffs, subsequent to obtaining this information, influenced Johnson to enter into a contract with them by offering him a higher salary; that Johnson thereupon tore up his contract with Patrick and entered into the contract herein sued upon without in any way arranging for any release from his contract with Patrick. Under these circumstances, I think the axiom *ex turpi causa non oritur actio* applies. The nearest case I have been able to find in the English Courts is that of *Harrington* v. *Victoria Graving Dock Co.* (1878), 3 Q.B.D. 549, 47 L.J., Q.B. 594. In that case, though the jury found that the contract sued upon had not, in effect, influenced the employee in his relations to his employer, yet it was held that it might have had that effect and, consequently, was not enforceable in a Court of law. This case is much stronger, inasmuch as whilst the direct object of the contract sued upon was undoubtedly to obtain Johnson's services for the plaintiffs' club during the season 1912-13, yet it must have been obvious to both parties that such contract could not be carried out without breaking the existing contract between Patrick and Johnson.

The action is dismissed, with costs.

Action dismissed.

BAXTER v. BRADFORD *ET AL.*

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BAXTER v. BRADFORD

Vendor and purchaser—Contract for sale of land—Specific performance—Old age of vendor—Inadequacy of consideration—Affirmance of contract by demand for performance by vendor.

Where, in an action for specific performance, it appears that the vendor, after deliberation, had demanded of the purchaser that he carry out the contract in question, he (the vendor) cannot then plead inadequacy of consideration or unfair dealing on the part of the purchaser when the contract was entered into.

APPEAL by defendants from a judgment of MURPHY, J. in Vancouver, on the 19th of July, 1912, in an action for specific performance of a contract for sale of land. Plaintiff purchased from one of the defendants the land in question at $60 per acre for the purpose of obtaining gravel therefrom for building purposes, and paid a deposit on the purchase in March, 1910. Defendant, Rollo senior, who sold the land, refused to complete the sale, and subsequently sold to his son, in September, 1911, having in the month previous sold the gravel on the land to the defendant Bradford. There was some dispute as to boundary lines, and it was also set up at the trial that the bargain was an unconscionable one, it being (1) a sale of land for $180, which was presumably worth $6,000, and (2) it was made with a man too advanced in years to be capable of transacting business affairs, but the trial judge held that the agreement was a binding one, and gave judgment enforcing its performance.

Statement

R. M. Macdonald, for plaintiff.
W. J. Taylor, K.C., for defendants.

MURPHY, J.: Action for specific performance. The agreement evidenced by the receipt of the 3rd of March, 1910, was proved, but it was objected that said receipt did not comply with the Statute of Frauds, inasmuch as no particular three acres of land were specified thereon. I think this is met by the

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case of *Plant* v. *Bourne* (1897), 2 Ch. 281, which decided that parol evidence is admissible to shew what is the subject-matter of the contract. There is no difficulty here in identifying the land in question if such parol evidence is admissible. It is shewn that this land is a long dyke of gravel, bounded on one side by the sea, on the other by a lagoon at one end by a high rock bluff, and at the other by the line dividing defendant Rollo, senior's land from that of the Western Fuel Company.

Before the agreement was made, plaintiff and defendant Rollo, senior, went on the land, and this dividing line was pointed out by Rollo to plaintiff. The other natural boundaries were clearly visible to the eye, and a rough calculation of the acreage embraced was then made. I hold, therefore, that this defence fails. This practically disposes of the case as raised on the pleadings as against Rollo, senior. The only other defence set up was that no concluded bargain was made, and that though plaintiff was frequently requested to complete the negotiations he neglected to do so. This was clearly disproved by the evidence. A concluded bargain was made on the day the receipt was signed. The next day plaintiff engaged a surveyor, who surveyed the land. Within a very short time he offered the balance of the purchase money to Rollo, senior, pursuant to the agreement as sworn to by him, and which evidence is wholly uncontradicted. Plaintiff went on the land and carMURPHY, J. ried on operations for a considerable time without interference. At the trial, however, it was argued that the bargain was so unfair that specific performance ought not to be granted. Inasmuch as this defence is not raised on the pleadings, and no application to amend was made, I doubt that I should consider it. However, as some evidence was given without objection, tending to support it, possibly I should deal with it. The argument was that only $180 was to be paid for land admittedly worth $6,000, and that the bargain was made with a man almost 80 years of age. The authorities go to shew that specific performance will not be refused on the ground of inadequacy of consideration unless the disparity in price is so great as to shock the conscience and constitute in itself a badge of fraud. Stated baldly, as was done in argument, the bargain here does almost,

if not quite, go that length. Examination of the evidence, however, shews that the statement that the dyke contained 60,000 yards of gravel worth ten cents a yard *in situ* was only an estimate. True, plaintiff so estimated it at the time of making the bargain, but, as he states in evidence, there could be no certainty about this, as no one could tell whether the dyke was all gravel or not. He further stated that he would not have purchased on the basis of the estimate at the price of ten cents per yard. According to the corroborated and uncontradicted evidence, Rollo, senior, himself set the price at $60 per acre, which, after some bargaining, plaintiff agreed to. The only other offers were one for $100 per acre which it is true was made some years ago and was refused, and the agreement with defendant Bradford, by which he pays ten cents per yard for such gravel as he may remove. It is to be noted, however, that he is not compelled to take any specific quantity, and has, in fact, removed but little up to date. On the whole I think, under the law as it now stands, this evidence of disparity in price alone will not justify refusal of the decree. Does the added fact that Rollo was an old man make the contract unenforceable? If the evidence went the suggested length of shewing him incapable of transacting business, or that he was under the influence of liquor when the bargain was made, I would agree, but I do not think I can so hold on the record. The son, it is true, does suggest that both these conditions existed, but his evidence in no way proves anything as to liquor, as he was not present when the bargain was made and only saw his father later in the day. As to his father's incapacity, this evidence must, I think, be closely scrutinized, inasmuch as if the agreement sued upon is invalid, it is the son and not the father who will benefit, as the land has since been conveyed to him. The father was present in Court, but was not called as a witness. This, coupled with the fact that no suggestion of such incapacity appears anywhere on the record, compels me to hold that the onus of establishing the fact has not been satisfied. The bargain is undoubtedly a hard one, but I am reluctantly compelled to hold that the law as I conceive it to be, gives the plaintiff the right to obtain specific performance. As to the two other defendants, they

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acquired their rights with full knowledge of the plaintiff's claim and, indeed, subject to such claim if it turned out that it was enforceable at law. If, therefore, the decree must go as against Rollo, senior, it must also go as against them. Specific performance of the agreement is granted and there will be a reference to the registrar as to the damages suffered by plaintiff by reason of the removal of gravel by defendant Bradford, if the parties cannot agree on the quantity. Such gravel is to be paid for at the rate of ten cents per yard.

The appeal was argued at Victoria on the 23rd of June, 1913, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

W. J. Taylor, K.C., for appellants (defendants): There is want of certainty as to what land was actually sold. The receipt for the first payment shews that the land sold was on Le Boeuf bay, whereas at the time the agreement was entered into, the parties were on ground fronting on Lock bay, and the property on Lock bay was less than an acre in size, whereas the plaintiff purchased three acres. Extraneous evidence is allowed in certain cases to shew what land it was intended to sell, but the evidence is uncertain on this point. In an action for specific performance uncertainty of agreement is fatal: *Tapley* v. *Eagleton* (1879), 12 Ch. D. 683. The evidence shews there was grossly inadequate consideration, the plaintiff agreeing to pay $180 when the property was worth at least $6,000. This is coupled with the surrounding circumstances that the defendant was over 80 years of age and was addicted to drinking: see Fry's Specific Performance, 5th Ed., 221, paragraph 440.

Argument

[MACDONALD, C.J.A.: The defendant should have been put in the box. The trial judge would then have had an opportunity of knowing the state of the old man.]

As to the onus of proof being on the plaintiff, see Fry, p. 230, paragraph 459.

R. M. Macdonald, for respondent (plaintiff): The evidence shews, and the trial judge has found, that the parcel of land sold was definite, and the boundaries thereof clearly determined. The names "Le Boeuf" bay and "Lock" bay appear to have been loosely applied to the inlet, or to either of two

coves off the inlet. At all events, the parties went upon the land, and the specific parcel was pointed out. The price given was reasonable, and as much as had ever been offered. The value of $6,000 is calculated by the defendants on a number of false assumptions, *viz.*: that there is a known quantity of gravel there of a present specific value per yard. In point of fact, there is no market for any such quantity of gravel; and though that price per yard might be obtained from time to time for small quantities delivered in Victoria, any greater deliveries would be unsaleable. The pleadings and evidence shew that after the transaction was disclosed to the son, who is a co-defendant, the defendants insisted on the plaintiff completing the purchase, and indeed, they complain of his default in not carrying out the transaction.

Argument

Taylor, in reply.

Per curiam: We think the appeal must be dismissed. We have some doubt about the question of inadequacy of consideration as shewing unfair dealing on the part of the defendants, but in view of the fact alleged in the statement of defence, where the defendants say that the plaintiff refused to carry out the bargain when performance was demanded on their part, it seems to us that is an end of it. We cannot say they were taken advantage of when it appears that after the bargain, and when the father had had an opportunity of consulting his son, they said: "We wanted you to carry out this bargain and you did not do it."

Judgment

Appeal dismissed.

Solicitor for appellants: *W. J. Taylor.*
Solicitor for respondent: *C. Darling.*

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IN RE G. G. DUNCAN AND CARSCALLEN.

Practice—Solicitor and client—Taxation of costs—Legal Professions Act, R.S.B.C. 1911, Cap. 136, Secs. 76, 77, 78 and 79.

IN RE G. G. DUNCAN AND CARSCALLEN

The provisions of section 79 of the Legal Professions Act as to the payment of costs of reference when one-sixth is taxed off, applies to all references provided for in sections 76, 77 and 78 of the Act.

Statement

APPEAL from the ruling of the taxing officer, heard by MURPHY, J. at chambers in Vancouver on the 19th of September, 1913.

Fillmore, for appellant.
G. G. Duncan, in person.

Judgment

MURPHY, J.: In my opinion the registrar erred in holding the provisions of section 79 of the Legal Professions Act as to the payment of costs of reference when one-sixth is taxed off only applied to an *ex parte* taxation. The word "reference" in the fourth line means, I think, all the references provided for in sections 76, 77 and 78. Our statute is taken from the Ontario statute, and decisions of the Ontario Courts on this section make it applicable to taxations when both sides are present as well as to *ex parte* taxations: *Re Allison* (1887), 12 Pr. 6, and *Re Cameron* (1889), 13 Pr. 173. The only difference between the British Columbia section and the Ontario section is that after the words *ex parte* in the third line there is a semi-colon, and following it these words are inserted: "and in case the reference is made upon the application of either party and the party chargeable with the bill attends the taxation." The effect seems to be, first, that under both statutes an *ex parte* taxation may take place; second, in Ontario, if one-sixth is taxed off, the solicitor must pay the costs of the reference, provided the client attends on the taxation, whether the solicitor attends or not.

In British Columbia, if one-sixth is taxed off, the solicitor

must pay the costs of the reference, no matter whether the client attends on the taxation or not.

It appears, therefore, that the omission of the above-quoted words has the effect of making the British Columbia Act more stringent than the Ontario Act in the case stated, but that otherwise the law of the two Provinces is the same. As, therefore, the Ontario decisions support the view I have come to, on studying the British Columbia Act, I hold that as one-sixth has been taxed off this bill, the solicitor must pay the costs of the reference. The matter is remitted to the registrar to be dealt with by him on that basis. The appellant will get the costs of this appeal except the costs of the one abortive attendance, the costs of which are awarded to the respondent.

Order accordingly.

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Judgment

EX PARTE THE NATIONAL TRUST COMPANY, *IN RE* KINGHAM & COMPANY, *IN RE* THE PRODUCERS ROCK AND GRAVEL COMPANY, LIMITED.

HUNTER, C.J.B.C. (At Chambers)

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Oct. 15.

EX PARTE NATIONAL TRUST CO.

Winding up—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 23—Time from which winding-up order dates—Restraining execution and distress—Sheriff's fees.

Under the Dominion Winding-up Act there is but one winding-up order, and one date for the commencement of the winding up for the whole of Canada, and any execution or distress put in force after the date of the winding-up order, is void, irrespective of notice of the winding-up order, in whatever Province the winding-up order is made, and whether the execution or distress is put in force in that or any other Province, and the sheriff can recover no fees or charges or poundage in respect of such a void transaction.

APPLICATION made to HUNTER, C.J.B.C. at chambers, on the 15th of October, 1913, on behalf of the provisional liquidator, to restrain an execution and distress put in force against

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the assets of a Company in liquidation. The winding-up order was made in Ontario on the 19th of September, 1913, and produced to the registrar of the Supreme Court of British Columbia on the 15th of October, 1913; the execution was levied in Victoria, British Columbia, on the 26th of September, 1913; the distress was put in force against the effects of the Company on the 29th of September, 1913; the sheriff who levied the execution and distress had no notice at either time of the making of the winding-up order.

Argument

Mayers, for the provisional liquidator: In matters within the Winding-up Act, Revised Statutes of Canada, 1906, chapter 144, there are no longer any Provincial boundaries, but one territory, namely, Canada; there are no longer Provincial Courts, but one Federal Court with several branches; there is the one winding-up order, which has effect throughout Canada, and one *punctum temporis* for the commencement of the winding up. Any distress or execution put in force after that time is wholly void, irrespective of any notice of the winding-up order having been made: sections 13, 5, 23, 126 and 127. The order which is to be enforced by section 127 is the original order and not some subsidiary order made by the Court of the Province in which the winding-up order is sought to be enforced, as to which there is no provision in the Act. The territorial area to which the Winding-up Act applies is shewn by the case of *Baxter* v. *Central Bank of Canada* (1890), 20 Ont. 214, and *In re Tobique Gypsum Company* (1903), 6 O.L.R. 515. If the distress or execution is void, the sheriff can have no right to any fees: *res accesoria sequitur rem principalem*: *Sneary* v. *Abdy* (1876), 1 Ex. D. 299 at pp. 304 and 308; *Montague* v. *Davies, Benachi & Co.* (1911), 2 K.B. 595.

Bass, contra: It cannot be that a party in one Province is to be affected by notice of a winding-up order made in another Province, which may be at the other extremity of Canada; the date from which distress and execution in a Province are avoided must be the date when the order is registered in the Courts of that Province.

Judgment

HUNTER, C.J.B.C.: It is a great hardship on the sheriff that

the Legislature has omitted to provide for the case, but the Act makes void all distresses and executions from a particular date throughout Canada. Therefore, the execution and distress being void, the sheriff cannot be allowed his costs as against the liquidator for performing a void act: *ex nihilo nihil fit.*

Order accordingly.

BASTEDO v. THE BRITISH EMPIRE INSURANCE COMPANY, LIMITED.

Contract—Insurance—Horse—Untrue answer to question in application as to price paid for horse—Answer proposed by agent of insurers, he knowing it to be untrue—Authority of.

An application for insurance on a horse stated that the horse was of the value of $2,000, and in answer to the question "What did you pay for this animal?" was written: "Got in trade." The plaintiff testified that he had told the defendant Company's agent that he had paid $550 for the horse, and that the agent who was writing out the application said "I will put it 'got in trade,'" to which the plaintiff replied "All right. I do not care how you put it." The application and statements therein were part of the contract and the policy provided that the Company should not be liable where material statements in the application should be found to be untrue.

Held, that the untrue answer to the question "What did you pay for this animal?" amounted to concealment or misrepresentation of fact of such a character as to influence the mind of a reasonable and prudent insurer in accepting or refusing the risk.

Held, further, that a company is not to be held to have a knowledge of the truth when the applicant and local agent arrange together that the truth shall be suppressed in order that the insurance may be effected.

Judgment of GRANT, Co. J., reversed.

APPEAL from the judgment of GRANT, Co. J. in an action upon an insurance policy on a stallion, tried at Vancouver on the 28th of February, 1913. There was embodied in the

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written application for the policy the statement that the horse was of the value of $2,000, and the question: "What did you pay for this animal?" was answered by the words: "got in trade." The defendant alleged that this was false, as the plaintiff had about a month previous purchased the horse for $550, and contended that this was a material statement in the application. The application and the representations therein formed part of the contract, and the policy provided that the Company should not be liable for loss in any case in which material statements set forth in the application should be found to be untrue. The plaintiff was asked the question: "Now, if the agent asked you how you got it, what did you tell the agent?" to which he answered: "I started to tell him I gave so much cash and the pay for these four colts, $550 in all, and he just said, 'I will put it, got in trade.' I said, 'All right, I don't care how you put it.'" The trial judge found in favour of the plaintiff.

Statement

W. B. Farris, for plaintiff.
R. M. Macdonald, for defendant.

GRANT, Co. J.: In the directions given by the Company to their agents the following appears:

"Attach this when used to the back of regular application and have both signed. Do not be afraid of giving too accurate information. Have all questions answered in full or give reasons for not doing so, and write in such other information as the applicant can give regarding the history and description of the animal."

Those are the directions or instructions given by the Company to their agents, sending them out to solicit business, and they are requested to attach the description to the application, which was done in this particular case, and I have read it from that which is attached to the back of the application. One of the principal questions is: "Was there the utmost good faith shewn on the part of the insured in this matter?"

GRANT, CO. J.

If you take the particulars, the description of the animal, I do not see that anything more could be given than has been given, and no fault whatever is found, not a word of fault has been found as to anything in the whole matter, nothing expressed, not a single word other than "got in trade." The evidence before me is this, and according to the instructions given to the

agent it was his duty to take everything down and give full information, "do not be afraid of giving too accurate information," in other words, "get everything that you possibly can, bearing upon the matter," and the evidence of Mr. Bastedo is that he stated the matter fully to the agent and the agent said: "We will put it down 'got in trade.'" I cannot, from the evidence that has been given, find that there was one important fact withheld or one erroneous statement made. The only fault that could be found with him was this, that he did not insist that the agent should have been more accurate in carrying out the information that he got before he signed it, but what has he given? He has given the name of the horse, the age, the colour, class, height, weight, by whom bred, where bred, his value, the amount of indemnity, where registered, the name of the dam, how long he has had the animal, from whom he got it—everything, every bit of information that could have been given to enable the Company to trace up just what the horse was like; mentioned the fact that he was injured, that he is not a sound horse, had a broken ankle. These matters are all stated in full, and he gives the value of the horse at $2,000. He stated, as a matter of fact, to the agent the very amount he paid for the horse at the time he got it. That, in my judgment, is about all he had to do.

Now then, as to the value. What was the value of the horse? The evidence is, and there is no dispute about it, he was probably one of the very best-bred horses in Canada, and as far as a breeder was concerned, was not only a good foal getter, but that his lameness in no way detracted from the horse, the lameness arising from the accident and not from disease, and that the horse at that time was well worth $2,000. No man has put the value of the horse at less than that. I believe one said as high as $3,000 or $4,000, but certainly two of them mentioned the value of the horse at that time as $2,000 or $3,000. Now, it seems to me that there is a disposition on the part of insurance companies to always pay when nothing happens; they are willing to carry out their side of the contract under those circumstances. If the horse never died and there is no liability, it is a splendid transaction, but just the instant that there is not the revenue

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coming in, but a little going out, then every conceivable objection is raised. I think, in the circumstances, if ever there was a case in which a person was entitled to recover, it is this. I do not think that the least reflection can be made upon Mr. Bastedo's evidence, nor on that of Mr. Lawrence who was called here. These are the only two witnesses I have heard, and as far as the witnesses whose evidence was taken on commission, they seem to be worthy of confidence, and in the circumstances, I must find for the plaintiff in the sum of $1,000.

The appeal was argued at Vancouver on the 25th of April, 1913, before IRVING, MARTIN and GALLIHER, JJ.A.

R. M. Macdonald, for appellant (defendant): The action is for collecting $1,000 insurance from the defendant Company on a horse that was insured for that amount. The defence is that the policy was obtained through misrepresentation of facts in the application. In answer to the question: "What was the purchase price?" the plaintiff wrote: "got in trade," when, as a fact, $550 was paid for the horse.

W. B. Farris, for respondent (plaintiff): The representation was that of the agent of the Company and the policy was issued by the Company with a full knowledge of the facts: *Hastings Mutual Fire Insurance Co.* v. *Shannon* (1878), 2 S.C.R. 394; *Peoria M. & F. Ins. Co.* v. *Whitehill,* 25 Ill. 466; *Mahomed* v. *Anchor Fire and Marine Insurance Co.* (1912), 17 B.C. 517; *Connely* v. *The Guardian Ins. Co.* (1892), 20 S.C.R. 208. The misrepresentation complained of is not in the application, but in the document that is attached to the back of the application. The agent of the Company had knowledge of the actual cost of the horse, and that is knowledge of the Company. It is not a material misrepresentation that should void the policy; the true value of the horse is the important point, and the evidence shews clearly that the value of the horse was over $2,000.

Argument

Macdonald, in reply: That knowledge of the agent is knowledge of the Company has no bearing on this case, as it it not raised in the pleadings: *Kniseley* v. *British America Assurance Co.* (1900), 32 Ont. 376; *Chatillon* v. *Canadian Mutual Fire Ins. Co.* (1877), 27 U.C.C.P. 450; *Bawden* v. *London, Edin-*

burgh and Glasgow Assurance Company (1892), 2 Q.B. 534; *Carter* v. *Boehm* (1766), 1 W. Bl. 593. The cash market value is what the animal will bring on a sale; these witnesses base their value on what the horse brings in when used for stud purposes: *Western Assurance Co.* v. *Harrison* (1903), 33 S.C.R. 473; *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147; *William Pickersgill & Sons, Limited* v. *London and Provincial Marine and General Insurance Company, Limited* (1912), 3 K.B. 614, 82 L.J., K.B. 13; and *London Assurance* v. *Mansel* (1879), 11 Ch. D. 363.

20th May, 1913.

IRVING, J.A.: I would allow this appeal. In my opinion the untrue answer to the question: "What did you pay for this animal?" amounted to concealment or misrepresentation of a fact of such a character as would influence the mind of a reasonable and prudent insurer in accepting or refusing the risk. The Company apparently deem it of importance that they should know the value placed upon the animal by the last owner. This answer "got in trade," followed by a valuation of $2,000 was, in my opinion, designed to conceal the fact that whatever may be the opinion of the present owner, the last owner was willing to accept $550 for the animal.

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The answers are the answers of the applicant, and I do not think the Company is to be held to have a knowledge of the truth when the applicant and local agent arrange together that the truth shall be suppressed in order that the insurance may be effected: see *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147 at p. 173.

MARTIN, J.A.: It is admitted that the statement that the plaintiff got the horse "in trade," in answer to the question: "What did you pay for this animal?" is untrue, and was concocted by the Company's agent to the knowledge of the plaintiff, who thereby became a party to the deception, the result of which would be to tend to stifle inquiry upon a material point. In such case the plaintiff clearly cannot recover, and the decision in *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516

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(which I distinguished in *Mahomed* v. *Anchor Fire and Marine Insurance Co.* (1912), 17 B.C. 517), applies, and decides that in such case the Company is not responsible for the inventions of its agent.

GALLIHER, J.A.: I concur.

Appeal allowed.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Darling.*

Solicitors for respondent: *Russell, Macdonald, Farris & Hancox.*

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DOCTOR v. PEOPLE'S TRUST CO.

DOCTOR v. THE PEOPLE'S TRUST COMPANY, LIMITED (No. 2).

Company law—Contract with company through de facto managing director—Presumption of authority of—Articles of association—Companies Act, R.S.B.C. 1897, Cap. 44, Table A.

In dealing with a company in the ordinary course of business through the general manager, it may be assumed that he has the authority to act for the company if under the articles of association such powers can be conferred upon him. In the absence of notice that the director has not the powers which his co-directors might have conferred upon him, it is not necessary to inquire whether such powers have actually been conferred.

The plaintiff, an architect, sued the defendant Company for services rendered in preparing plans of a building they were about to erect for a safe-deposit business. The contract had been made by the plaintiff with a director who called himself general manager of the Company. The Company intended to carry on a safe-deposit business, and had the power to erect a building suitable for the purpose. Their articles of association were those of Table A of chapter 44, Revised Statutes of

British Columbia, 1897, with the exception of slight alterations that are not material in this case. By article 11 of these articles of association, any one of the directors might be authorized to act as the Company's agent. The Company's defence was that the contract was made with one who had no authority to bind the Company.

Held, that the subject-matter of the contract being within the ordinary business of the Company, and it having been entered into with a person to whom the power might have been given, it was binding upon the Company.

APPEAL from the judgment of MURPHY, J. in an action tried by him at Vancouver on the 14th of January, 1913. The facts are set out in the headnote and reasons for judgment.

A. H. MacNeill, K.C., and *Bird,* for plaintiff.
Wilson, K.C. and *A. S. Johnston,* for defendant Company.

18th January, 1913.

MURPHY, J.: In my opinion the sections of the Companies Act and of Table A., and the authorities cited by Mr. *MacNeill* entitle the plaintiff to judgment on the facts as found by me at the trial. There will be judgment for the plaintiff for $3,450, and costs. The matter of payment out of the moneys in Court must be spoken to again before any order is made.

MURPHY, J.

The appeal was argued at Vancouver on the 12th of May, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Wilson, K.C., for appellants (defendants): The real question is whether there was a contract or not, and that depends largely on the articles of association of the Company. Under his agreement with Cook, the general manager, the plaintiff was to receive $5,000 in cash and $5,000 in stock of the Company, but we submit that Cook, as general manager, had no authority to enter into such a contract. There were the two companies, The People's Trust Company, and The People's Trust Building Company. As far as this transaction is concerned, Cook was acting for The People's Trust Building Company in fact, although in his correspondence he used The People's Trust Company's paper. On the question of Cook's authority to bind the Company, the Company was incorporated under the Act of 1897. The burden is on the plaintiff to fix the liability on the

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Company by shewing that Cook had authority to act for them. The agreement between the Company and Cook gave him no specific authority. As to the power of a manager, he referred to *Gibson* v. *Barton* (1875), L.R. 10 Q.B. 329; *In re Cunningham & Co., Limited* (1887), 36 Ch. D. 532. The Act of 1897 does not give the directors authority to appoint a general manager: *Royal British Bank* v. *Turquand* (1856), 6 El. & Bl. 327; *Premier Industrial Bank, Limited* v. *Carlton Manufacturing Company, Limited, and Crabtree, Limited* (1909), 1 K.B. 106; *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629. It was incumbent on the plaintiff to satisfy himself that Cook had authority to make the contract that he did: *Boschoek Proprietary Company, Limited* v. *Fuke* (1906), 1 Ch. 148; *Irvine* v. *Union Bank of Australia* (1877), 2 App. Cas. 366 at p. 379; *Windsor* v. *Windsor* (1912), 17 B.C. 105. You must satisfy yourself from examining the memorandum of association and the articles of association that the person with whom you are contracting is clothed with authority to make the contract for the Company.

Argument

A. H. MacNeill, K.C., and *Bird*, for respondent (plaintiff): If the Company had the power, the directors had the power: see article 55, Table A, of the Companies Act, 1897. The directors there have authority to delegate those powers to one of their number (see section 68 of articles), and all it is necessary for the plaintiff to do is to find whether, under the articles of association, Cook could have the power: *Totterdell* v. *Fareham Brick Co.* (1866), L.R. 1 C.P. 674; *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869 at p. 893; *Biggerstaff* v. *Rowatt's Wharf, Limited* (1896), 2 Ch. 93 at p. 102; Lindley on Companies, 6th Ed., 211; Palmer's Company Precedents, 11th Ed., Part 1, 79 to 81; *National Malleable Castings Co.* v. *Smith's Falls Malleable Castings Co.* (1907), 14 O.L.R. 22 at p. 28; Halsbury's Laws of England, Vol. 5, p. 302; *Davies* v. *R. Bolton and Company* (1894), 3 Ch. 678.

Wilson, in reply: The *Totterdell* case is distinguishable; that was a jury case and the Court would not disturb it, as there was evidence by which reasonable men might come to the conclusion which they did.

Cur. adv. vult.

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MACDONALD, C.J.A.: I concur in the reasons for judgment of my brother IRVING.

IRVING, J.A.: The defendants are resisting a claim put forward by the plaintiff (an architect) for services rendered in preparing plans of a building to be erected in New Westminster. The defence is that the general manager had no authority to make the contract for the plaintiff's employment.

The rule for determining whether an officer of an incorporated company has authority to enter into a contract has been frequently laid down. I mention a number of cases to illustrate the application of the rule. First of all, in the case of *Smith* v. *Hull Glass Co.* (1849), 8 C.B. 668, (1852), 21 L.J., C.P. 106, an action for goods sold and delivered, it was decided in effect that a company which has appointed a manager of its business is bound by contracts made by him in the usual course of that business, although sufficient power has not been, in fact, delegated to him. In 1856, *Royal British Bank* v. *Turquand* in the Exchequer Chamber, 6 El. & Bl. 327, 25 L.J., Q.B. 317, Jervis, C.J. said that parties dealing with the directors of joint stock companies were bound to read the deed or statute limiting the directors' authority, but they were not bound to do more. The plaintiffs, therefore—assuming them to have read this deed —would have found not a prohibition to borrow, but a permission to borrow on certain things being done. He then states the rule in *Turquand's* case, so often cited. They have, he says, in my opinion, a right to infer that the company which put forward their directors to issue a bond of this sort had had such a meeting and such a resolution passed as were requisite to authorize the directors in so doing. *Mahony* v. *East Holyford Mining Co.* (1875), L.R. 7 H.L. 869, on appeal from an Irish Court, where bankers' honoured cheques were drawn by a self-appointed board, is to the same effect.

IRVING, J.A.

In *Davies* v. *R. Bolton and Company* (1894), 3 Ch. 678, 63 L.J., Ch. 743, the validity of a mortgage debenture given by the company was in question, the seal of the company having been affixed to the debenture in the presence of Bolton, as a director, and the secretary only, and no meeting of the directors had been

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held or summoned to sanction it, it was held that although the seal had not been affixed in the manner prescribed by the articles, that the matters objected to were irregularities, there being nothing on the face of the debenture to shew that the articles had not been complied with. The holder was not affected with notice of its infirmities by the fact of his solicitor having seen a print of the memorandum and articles of the company prior to the transfer to him.

In the *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Company* (1895), 1 Ch. 629, 64 L.J., Ch. 451, in the Court of Appeal before Lord Halsbury, Lindley and Smith, L.JJ., Lord Halsbury said persons dealing with a joint stock company were bound to look at what one might call the outside position of the company, that is to say, they must see that the acts which the company is purporting to do are acts within the authority of the company, and an outside person knowing nothing of the internal regulations, etc., was entitled to assume that that was the mode in which the company had the power to execute an instrument of that description.

In *Biggerstaff* v. *Rowa'l's Wharf, Limited* (1896), 2 Ch. 93, 65 L.J., Ch. 536, before Lindley, Lopes and Kay, L.JJ., one of the directors, Davey, signed a number of letters addressed to the different debtors of the company, telling them that all charges due or to become due on goods at the company's wharf were hypothecated to Harvey, Brand & Co. These letters were signed by Davey as managing director on behalf of the company, in the presence of one of the other directors and were given to Harvey, Brand & Co. Under the articles of the company the quorum was three, and the directors had power to appoint a managing director and to authorize him to exercise all their powers. There were three directors. There was no minute of any resolution of the appointment of Davey as managing director, but he appeared to have acted as managing director and to have been recognized as such by his co-directors. The question raised was whether or no the letters of hypothecation were binding on the company, having regard to the fact that Davey had not been formally appointed managing director when he purported to act in that capacity. Lindley, L.J., at p. 540 of the Law Journal report, said on that point:

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"Persons who deal with directors of companies must look to see what powers the directors have under their articles; and in this case the articles shew that the directors could appoint a managing director to exercise all their powers other than the signing of bills of exchange and promissory notes. So far, therefore, as the appellants knew, Mr. Davey had all the powers which he claimed. He was managing director and might have had those powers. They [*i.e.*, persons dealing with the company] were not bound to enquire into the books of the company to see whether his appointment was validly made. It is sufficient for persons who deal with the managing director of a company in the ordinary course of business and *bona fide* if the articles of the company shew that he might have the powers which he purports to have. In the absence of notice that he had not got the powers which his co-directors might have conferred on him, persons dealing with him would have a right to assume that he had such powers. That that is so is shewn by a long string of cases. I think the appellants were entitled to assume that Mr. Davey had the power which he exercised."

Lopes and Kay, L.JJ. both refer to *Smith* v. *Hull Glass Co., supra.* In the course of his judgment, Lopes, L.J. calls attention to the fact that the opinion of Maule, J. in *Smith* v. *Hull Glass Co., supra,* was an authority for the broad proposition that a company is bound by the acts of persons who take upon themselves, with the knowledge of the directors, to act for the company, provided such persons act within the limits of their present authority, and that strangers dealing *bona fide* with such persons have a right to assume that they have been duly appointed.

It is, therefore, necessary for us to examine the memorandum of association and the articles. Mr. *Wilson* concedes that the erection of the building in respect of which the plans were made was within the powers taken by the company in its memorandum of association. Turning to the articles to ascertain whether Mr. Cook might have had the power to make this contract, we find that the company is governed by Table A of 1897, very slightly altered, and those alterations do not affect articles 55, 66, 68 and 71, which are in point.

By article 55 the business of the company is to be managed by the directors; by 66 the directors may determine the quorum necessary for the transaction of business; by 68 they may delegate any of their powers to committees consisting of such member of their body as they think fit; any committee so formed shall, in the exercise of the powers so delegated, conform to any

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regulations that may be imposed on him by the directors; 71 relates to the validity of acts done by a committee.

By article 11 any of the directors may be appointed to act as agent for the Company. From these articles it is plain that the Company might have appointed Cook as their agent, and Cook might have had the authority which he proposed to exercise. It is not necessary to ascertain whether the appointment was in fact made, or that it was exercised in conformity, or that the powers exercised by Cook were in conformity with the terms, if any, given him by the directors. That would be indoor management. Nor do I think we should attach importance to the fact that Mr. Cook called himself general manager instead of agent, or committee. To him, as an individual, the power might have been given, and that seems sufficient.

I have referred to some of the cases which Mr. *Wilson* has cited to us. The case of *Premier Industrial Bank, Limited* v. *Carlton Manufacturing Company, Limited, and Crabtree, Limited* (1909), 1 K.B. 106, 78 L.J., K.B. 103, dealt with a particular section of a statute governing or regulating the acceptance of a bill in the name of a company. In his judgment, Pickford, J. set out most of the cases I have referred to and said those decisions did not affect that particular section of the statute he was considering.

IRVING, J.A.

In re Cunningham & Co., Limited (1887), 36 Ch. D. 532, 57 L.J., Ch. 169, North, J., in the winding up, lays down the rule by which you should determine whether an act falls within the authority of a general manager to bind a company where there is no express authority conferred upon the manager, and his whole authority is derived from his position as manager of the business. In that case the learned judge came to the conclusion that the giving of a promissory note as a counter security for a guarantee given by Simpson was not necessary for the purposes of the Company and was not within the ordinary business of the company. In this case we have The People's Trust Company about to launch into a safe-deposit business, with power to erect a building suitable as a safe deposit, and with the power to improve their properties. I see no reason

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for saying that the contract with the plaintiff Doctor was not within the ordinary business of a company of that kind.

The case of *Gibson* v. *Barton* (1875), L.R. 10 Q.B. 329, 44 L.J., M.C. 81, in my opinion, rather assists the plaintiff's case than that of the liquidator.

I would dismiss the appeal.

GALLIHER, J.A.: I concur.

Appeal dismissed.

Solicitor for appellant: *A. S. Johnston.*

Solicitor for respondent: *J. E. Bird.*

KERR *ET AL.* v. CANADIAN PACIFIC RAILWAY COMPANY.

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Fire—Destruction of timber—Origin of fire—Railway—Sparks from engine—Effect of windcurrents in a mountainous country—Spread of fire—Railway Act, R.S.C. 1906, Cap. 37, Sec. 298—Modern appliances—Damages—Inferences from evidence—Right of pre-emptor, and applicant to purchase, under Land Act, to recover damages.

The timber on the plaintiffs' property was destroyed by a fire that started close to the tracks of the defendant Company's railway. The fire was first seen about two o'clock in the afternoon, about half an hour after a freight train had passed. The engine of this train had started the day before from Cranbrook for Crow's Nest, and had undergone the usual examination and was found in good condition before starting. There was no evidence that the engine was again examined at Crow's Nest before leaving on the return trip.

Held, on appeal, affirming the judgment of CLEMENT, J., that the fire which destroyed the plaintiffs' property was caused by sparks from an engine of the defendants.

Per MACDONALD, C.J.A.: It is difficult for persons living in a level country to realize the frequent shifting and varying currents and cross-currents

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of the winds in localities where there are mountains, valleys, streams and canyons.

Per IRVING, J.A.: On an appeal from the findings of fact of the trial judge, without a jury, the case must be tried as it was tried by the judge.

Beal v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, approved.

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A pre-emptor in good standing has a right of action for the destruction of timber on his land.

A prospective purchaser under the Land Act, R.S.B.C. 1911, Cap. 129, Sec. 34, who had staked the ground he intended to purchase before the fire had destroyed the timber thereon, but had not made his application until after the fire, has no right of action for the timber destroyed.

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APPEAL from the judgment of CLEMENT, J. in an action tried at Fernie in December, 1912. The facts appear in the reasons for judgment at the trial.

W. A. Macdonald, K.C., Lawe, A. I. Fisher, H. W. Herchmer, and *A. B. Macdonald,* for the various plaintiffs.

Bodwell, K.C., and *S. Herchmer,* for defendant Company.

6th December, 1912.

CLEMENT, J.: The first question I have to decide is as to the origin of the fire. As to that I have no doubt in my own mind, and I find as a fact that this fire originated from engine No. 1,401. As I pointed out in the argument, neither in this case nor in any other case upon which I have ever sat, have I had the evidence of experts, scientific witnesses, to negative the igneous nature of the matter that is ejected from the smoke-stack of an engine when in travel. I have had evidence both ways. Some men say they have not found fire to come from these engines; others distinctly swear that they have had particles of igneous matter come from engines equipped in the very way this particular engine was, and alight on them and set fire to their clothing. I think it is a matter of which the Court may almost take judicial notice that the matter which is ejected from the smoke-stacks of these engines is such that under favourable conditions it will set fire to inflammable matter, along or in the neighbourhood of the track.

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I find as a fact here that the liability of the defendant Company is the statutory liability merely. That is, I find that they have brought themselves within the saving clause of the recent

enactments, so that their liability in any event in this case could not be more than $5,000. In that view it will be seen that the exact amount to be allowed to each of these claimants is of importance only with a view to its apportionment between them. However, in deciding as to the proper damages to allow in each case, I have proceeded apart from any idea in my mind as to the limitation of liability.

Having decided that the defendant Company is liable to the extent of $5,000 for loss occasioned by this fire, the next question is as to the amount of damage properly to to allowed. . . .

The result as to the figures is that there is a total allowance, including $500 already allowed to the former plaintiff, Farquharson, of $5,400. For reasons which I will state in a moment that has to be reduced by $300, which I fixed as the damage allowed the plaintiff White; that will reduce the actual amount of damages allowed up to date to $5,100. Under the statute there will have to be a proportionate reduction in respect of that $100, which will be a matter that can be mathematically worked out.

As to the legal questions arising in connection with the claims of Kerr and White, I have had time during lunch to consider those. No authorities have been cited to me; I think quite properly so, as it is a matter that depends on the statute.

Kerr is in the position of a pre-emptor, and I think his position is stronger than that of the mine locator whose case is discussed in *National Trust Co., Limited* v. *Miller* (1912), 46 S.C.R. 45. There, although there was an express reservation of the timber to the Crown, and the right of the mining locator was a limited right of usufruct only, the Supreme Court, by a majority, held that he had a sufficient possession of the soil to carry with it possession of the trees so as to entitle him to recover damages from a person who destroyed or deprived him of the trees. Applying that case here, I must hold that Kerr, as a pre-emptor, is entitled to recover. He had actual possession of the soil in this case, and on the authority of the Supreme Court of Canada, I think he is entitled to recover the full amount of the loss sustained.

As to White, the position, I think, is quite different. His rights depend entirely on the statute. He is a person who

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desired to purchase: see section 34 of the Land Act, chapter 129, Revised Statutes of British Columbia, 1911. The application in this case was admittedly made after the fire; the staking of the land was admittedly made before the fire, but under the statute an intending purchaser acquires absolutely no rights whatever in the land, and is not in a position to seek damages from anyone who destroys the timber upon it prior to his being actually accepted as the purchaser by the Crown. There is not a word all through these sections, as there is in the sections relating to a pre-emptor, conveying to or vesting in the proposed buyer any right of occupation of the land at all. As a matter of fact, there has been here no occupation of the land other than the temporary occupation during the time the land was being staked, and that is not sufficient possession of the soil to carry with it the possession of the trees. As to White's action, therefore, it must be dismissed, with appropriate costs.

The defendant Company appealed, and the appeal was argued at Vancouver on the 11th of April, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, J.J.A.

Bodwell, K.C. (*McMullen,* with him), for the appellants: The whole question in this case is the origin of the fire. This being a case of circumstantial evidence, there are not sufficient circumstances to enable the plaintiffs to succeed. The evidence shews that no spark can come out of an engine of such an inflammable character that it will go two hundred feet and start a fire, and the sparks must have gone against the wind in this case to start the fire. The trial judge held that the engine was in good condition. When the engine was examined the day before in Cranbrook, and found in order, it is in the highest degree improbable that any spark came from the engine that started this fire. The evidence must shew a preponderance of probability before you can find in favour of the plaintiffs. This case for the plaintiffs depends upon a coincidence, namely, that half an hour after an engine passed, a fire was seen. You have to find that a spark travelled two hundred feet against the wind and started the fire: *Moxley* v. *Canada Atlantic R.W. Co.* (1887), 14 A.R. 309; *Wakelin* v. *London and South Western*

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Railway Co. (1886), 12 App. Cas. 41; *Brown* v. *Waterous Engine Works Co.* (1904), 8 O.L.R. 37; *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502.

W. A. Macdonald, K.C. (*Anderson,* with him), for respondents: The evidence in this case is stronger than in the case recently heard in this Court with reference to this same fire: *Farquharson* v. *Canadian Pacific R.W. Co.* (1912), 20 W.L.R. 914. They cannot escape by shewing that they had the very best appliances and that the engine was in good condition.

Bodwell, in reply.

MACDONALD, C.J.A.: I would dismiss the appeal. I do not see any real distinction between this case and the case of *Farquharson* v. *Canadian Pacific R.W. Co.* (1912), 20 W.L.R. 914, that we have had before us. The only suggestion of difference in the evidence that is material, which would justify us in interfering with the judgment of the learned trial judge, is in connection with the condition of the engine. The *Farquharson* case did not depend very much on that.

I think, under the circumstances of the case, having regard to the fact that persons were passing up and down very frequently and no fire had been seen by anybody until about two o'clock on the afternoon of the 15th of June at that spot, or anywhere near it; having regard also to the fact that neither the engineer nor the fireman nor any of the train crew of the train that is supposed to have set this fire, that is, the one drawn by engine 1,401, had seen it, and the fact that 20 minutes afterwards, when the next train came by, there was a fire which was noticeable and seen by the engineer of that train, that the learned trial judge was justified in drawing the inference that this fire originated from a spark from engine 1,401.

I do not know whether any evidence was given as to the varying currents of wind there. It is somewhat difficult for persons living in a level country to realize the frequent shifting and varying currents and cross-currents of the winds in localities where there are mountains, valleys, streams and canyons.

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IRVING, J.A.: I am of the same opinion. On an appeal from the learned trial judge to this Court, we have to try the case just as it was tried by him. I think that rule is well laid down in *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502.

There was apparently no fire before two o'clock. There was no fire before the 13.45 train passed the place. Twenty minutes or half an hour later there was a fire.

Evidence as to the wind is always very unsatisfactory in a case of this kind. It is a difficult subject to remember. There are varying currents in different places, and I do not think one can attach very much importance to the evidence on that point. I do attach a good deal of importance to this fact, that it has not been shewn that the engine which passed at 13.45, and which is suspected of having emitted the sparks, had been examined at Crow's Nest.

I am satisfied with the decision of the learned trial judge.

GALLIHER, J.A.: I would dismiss the appeal.

Appeal dismissed.

Solicitor for appellants: *J. E. McMullen.*

Solicitors for the various respondents: *Lawe & Fisher; H. W. Herchmer; A. B. Macdonald.*

BLOOM v. NEW YORK TAILORING CO.

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BLOOM v. NEW YORK TAILORING CO.

Practice—Writ—Service of—One defendant out of jurisdiction—Leave to issue—Rules 6, 64, 69.

A writ was issued for service within the jurisdiction. Two defendants within the jurisdiction were served and an order was then taken out for leave to serve notice of the writ on a third defendant without the jurisdiction, who was then served with a copy of the order and the notice.

Held, that the order be set aside and that all proceedings thereunder were null and void.

It is a condition precedent to the service that leave be granted to issue the writ under Order II., rule 4, and that leave be granted for service out of the jurisdiction under Order XI.

APPLICATION for leave to set aside an order for leave to serve notice of a writ on the defendant Maslow in Seattle, Wash., U.S.A., the notice of the writ of summons pursuant thereto, the service thereof, and all subsequent proceedings as against Maslow. Heard by MORRISON, J. in Vancouver on the 28th of September, 1913. Statement

J. N. Ellis, for Maslow.
Hooper, for plaintiff.

MORRISON, J.: The writ herein for service within the jurisdiction was issued on the 15th of August, 1913. At that time one of the defendants, Maslow, was residing without the jurisdiction, in Seattle. The other two defendants were served within the jurisdiction. Thereafter, *viz.*: on the 2nd of September, 1913, an order was made by the judge at chambers, giving the plaintiff leave to serve notice of this writ on Maslow at Seattle, and accordingly, on the 8th of September, service of a copy of the said order and notice of said writ was effected on Maslow. There was no leave given to issue the writ nor to issue a concurrent writ. The present application is to set aside the order aforesaid, dated the 2nd of September, the notice of the writ of summons pursuant thereto, the service thereof, and all subsequent proceedings as against Maslow. Judgment

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The point urged for my consideration is whether what has been done is a nullity or an irregularity. I think it is a nullity. By order II., rule 4, no writ for service out of the jurisdiction can issue without leave. By order XI., rule 1, service may be allowed by the Court in certain specified cases. The subject-matter of the writ does not come within this rule. An application for leave to issue such a writ can be made alone under Order II., rule 4, but it is usually made together with an application for leave to serve the writ out of the jurisdiction, because leave to serve is required as well as leave to issue such a writ: Order XI. As soon as leave is thus obtained, and not before, the writ may be issued, and then it is permissible to proceed to serve it. This is when the defendant sought to be served is a British subject. But when such defendant is not a British subject and not within the jurisdiction, notice of the writ, and not the writ itself, is to be served: Order XI., rule 6.

It is a condition precedent to the service that leave as above stated be first obtained. The rules referred to herein form a code, and any step not sanctioned by these enactments is, in my opinion, a nullity.

Judgment

I reserved judgment owing to the well-put arguments of counsel, and to carefully read the authorities cited by them, *viz.*: *Hull* v. *Schneider* (1893), 3 B.C. 32; *Magheesh* v. *Blair*, a decision of Mr. Justice IRVING, not reported; *Smallpage* v. *Tonge* (1886), 55 L.J., Q.B. 518 at p. 521; *In re Eager* (1882), 22 Ch. D. 86; *Re Busfield* (1886), 32 Ch. D. 123; *Hewitson* v. *Fabre* (1888), 57 L.J., Q.B. 449; *Fry* v. *Moore* (1889), 58 L.J., Q.B. 382; *Wilding* v. *Bean* (1890), 60 L.J., Q.B. 10; *Smurthwaite* v. *Hannay* (1894), 63 L.J., Q.B. 737; *Anlaby* v. *Prætorius* (1888), 20 Q.B.D. 764; and *Dickson* v. *Law and Davidson* (1895), 2 Ch. 62 at p. 65.

Order accordingly.

HITCHIN v. THE BRITISH COLUMBIA SUGAR REFINERY COMPANY, LIMITED.

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HITCHIN v. B.C. SUGAR REFINERY CO.

Master and servant—Injury to servant—Falling of elevator in factory—Inspection of—Defective system—Common law liability—Factories Act, R.S.B.C. 1911, Cap. 81, Secs. 31, 32 and 49—Damages.

The plaintiff was permanently injured by the fall of an elevator in the works of the defendant Company, where he was employed, he being in the elevator at the time. The cable supporting the elevator broke from its fastenings, and although the elevator was provided with safety devices, as required by the Factories Act, they did not check the elevator in its fall. The system adopted by the defendant Company provided for a monthly inspection of the elevator. There was evidence that the elevator should have been inspected twice a week, as the sugar which was carried in open barrels escaped and mixed with the grease and oil in the working parts of the elevator and prevented the safety devices from working properly. In an action by the plaintiff the jury found there was negligence on the part of the defendants in construction of repairs, and owing to inadequate inspection of repairs and the safety device, and gave damages in $12,000.

Held, on appeal, that there was evidence upon which the jury might find the adoption by the defendants of a defective system, the result of which was the injury to the plaintiff. The plaintiff was therefore entitled to recover at common law, and it was not open to the defendants to answer that the accident resulted from the negligence of a fellow servant.

Ainslie Mining and Ry. Co. v. *McDougall* (1909), 42 S.C.R. 420, followed.

APPEAL by defendant Company from the judgment of MURPHY, J. and the verdict of a special jury at Vancouver on the 28th of March, 1913, in a negligence action for personal injuries sustained by the plaintiff while in the employ of the defendant Company, or in the alternative for damages under the Employers' Liability Act. Plaintiff, a workman engaged in the refinery, was injured by an elevator in which he was riding in the discharge of his duties, falling from the fifth to the bottom floor. The allegation was that the equipment of the elevator was not strong enough for the work, and also that it was defectively attached. The defence was a denial generally, and an allegation of contributory negligence, in that the plaintiff

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was injured while riding on a freight elevator not intended for the use of the employees, and as to the charge of negligence, that if there was any negligence, it was that of a fellow servant. Further, that plaintiff undertook the employment with full knowledge of the risk he ran; that he did not give notice within twelve weeks of the accident, and also did not commence the action within six months after the occurrence complained of. In the alternative, without admitting any liability, the defendants paid into Court the sum of $2,700 as full satisfaction of any claim the plaintiff might establish. The jury found the Company had been negligent as to the construction and repair of the elevator, in the use of inferior metal as babbitt, and of an inadequate system of inspection of repairs and of the safety device, and gave damages in $12,000.

The appeal was argued at Victoria on the 16th and 17th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

L. G. McPhillips, K.C., for appellants: The accident occurred on the 8th of October, 1912, through the fall of an elevator containing three men, one of whom was the plaintiff, and six barrels of sugar, the steel chains from which the elevator suspended being pulled out of the babbitt by which it was held at the top of the elevator shaft. As to the safety appliances, the question is whether we are bound to have them inspected by the inspector and whether, in case of an accident, we would be liable under the Act if they were not inspected. The burden of proof of non-inspection is on the plaintiff, and there is no evidence of non-inspection. As the Act was passed for the benefit of a certain class of persons, there is a civil liability: *Groves* v. *Wimborne* (1898), 2 Q.B. 402; *Love* v. *Fairview* (1904), 10 B.C. 330; Factories Act, Revised Statutes of British Columbia, 1911, chapter 81, sections 31, 32 (*d.*), and 49. The burden should not be on the Company, as they cannot give in evidence receipts of the work having been done, and under the Act the inspector cannot give evidence, so the Legislature has taken from us all means of proving that we have complied with the statute. In this case it is a special, particular inspection of the safety

device. The onus is on the plaintiff. Our Factories Act is taken from the Ontario Factories Act: *Black* v. *Ontario Wheel Co.* (1890), 19 Ont. 578; *Britannic Merthyr Coal Company, Limited* v. *David* (1910), A.C. 74, and *Watkins* v. *Naval Colliery Company (1897), Limited* (1911), 2 K.B. 162, (1912), A.C. 693, can be distinguished. On the question of the chain not being in order, see *Murphy* v. *Phillips* (1876), 35 L.T.N.S. 477; *McDonald* v. *B.C. Electric Ry. Co.* (1911), 16 B.C. 386; Halsbury's Laws of England, Vol. 21, p. 439, note (*m*); *Paterson, Widow and Children* v. *Wallace & Co.* (1854), 1 Macq. H.L. 748; Labatt's Master and Servant (1904), 2,298. They will contend we should have told the plaintiff what was the capacity of the elevator: *Cribb* v. *Kynoch, Limited* (1907), 2 K.B. 548; *Young* v. *Hoffman Manufacturing Company, Limited, ib.* 646. Where the duty is delegated, on the question of liability, see Halsbury's Laws of England, Vol. 20, pp. 129, 130. As to the effect of the delegation, see Halsbury's Laws of England, *ib.*, p. 131. In this case it is quite clear that we have a competent superintendent: *Smith* v. *Howard* (1870), 22 L.T.N.S. 130; Beven on Negligence, 3rd Ed., p. 648; Beven's Employers' Liability, 4th Ed., p. 23. The onus is on the plaintiff to shew there is some evidence: *Skerritt* v. *Scallan* (1877), Ir. R. 11 C.L. 389; *Edwards* v. *The London and Brighton Railway Company* (1865), 4 F. & F. 530. As to the question of what our responsibility is when competent men are employed and the accident is due to their negligence, see Beven on Negligence, p. 629; Halsbury's Laws of England, Vol. 20, p. 131; *Canadian Asbestos Co.* v. *Girard* (1905), 36 S.C.R. 13; *Ormond* v. *Holland* (1858), E. B. & E. 102; *Allen* v. *New Gas Company* (1876), 1 Ex. D. 251; *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326 at p. 344; *McKelvey* v. *Le Roi Mining Co.* (1902), 32 S.C.R. 664, [9 B.C. 62]; *Hastings* v. *Le Roi* (No. 2) (1903), 34 S.C.R. 177 [10 B.C. 9]; *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424. We are not responsible for a defect in the working system: *Root* v. *Vancouver Power Co.* (1912), 17 B.C. 203 at p. 205.

Argument

S. S. Taylor, K.C., for respondent (plaintiff): The defend-

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ants are out of Court on section 32 of the Factories Act. The elevator fell because the safety device did not work properly: *Watkins* v. *Naval Colliery Company (1897), Limited* (1912), A.C. 693 applies and they are bound to have a proper inspection, and a proper system of inspection as to keeping the safety device clean. Under the Factories Act they are bound to have an inspection. Their inspection took place once a month, whereas the evidence is clear that they should have had an inspection twice a week with relation to the safety device.

McPhillips, in reply.

MACDONALD, C.J.A.: I think the appeal should be dismissed. I place my judgment on this short ground: the statute requires proper safety devices on elevators of this character. We have the evidence of Mr. Mathers, and I think the admission of Mr. *McPhillips*—if I am wrong he may correct me—that the system of inspection adopted by this Company was a monthly inspection of the elevators. Mr. Mathers says that in the conditions under which this elevator was operated there should be an inspection twice a week. The reason given is a very sensible one, that where sugar in open barrels is being carried up and down frequently on the elevator, the sugar gets into the grease and oil on the working parts of the elevator, and combining with it, forms a sticky substance which prevents the safety devices from performing their function. If that evidence be accepted, and I think it was accepted by the jury, as indicated by their findings of fact, then there can be no doubt that there was a breach of its duty in this case, that is to say, there was the adoption by the Company of a defective system. As a result of that defective system the injury to the plaintiff occurred. The plaintiff, accordingly, is entitled to recover at common law. It is, therefore, not open to the defendants to answer that the accident, if it resulted from any negligence at all, resulted from the negligence of a fellow servant.

MACDONALD, C.J.A.

Under these circumstances, I think the verdict ought not to be interfered with. I am not sure whether Mr. *McPhillips* is insisting upon the question of excessive damages or not. I rather gather that he is not. I think this case clearly falls

within *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, in the Supreme Court of Canada, and the cases in which that case has since been followed.

IRVING and GALLIHER, JJ.A. concurred with MACDONALD, C.J.A.

Appeal dismissed.

Solicitors for appellants: *C. W. Craig & Co.*

Solicitors for respondent: *Taylor, Harvey, Grant, Stockton & Smith.*

McKISSOCK v. McKISSOCK.

Husband and wife—Handing over of husband's earnings to wife—Investment of savings by wife—Husband's interest in investments. Practice—Pleadings—Amendment of at trial—Should be written.

A husband who hands over all his earnings to his wife upon an agreement between them that any balance saved from the cost of living be invested in real estate for their mutual benefit, share and share alike, is entitled, in the event of a separation, to an undivided half interest in all investments so made.

Per IRVING and MARTIN, JJ.A.: Where leave to amend is granted at the trial, the terms of the amendment ought to be written out for the benefit of the Court of Appeal, if for no other reason.

APPEAL by the defendant from the judgment of HUNTER, C.J.B.C. in an action tried at Vancouver on the 5th of December, 1912. The plaintiff, after his marriage in 1906, gave all his earnings to his wife on the agreement that their savings should be invested in real estate for their mutual profit, share and share alike. The wife made investments, putting the same in her own name, and in January, 1912, left her husband without accounting for his share. In an action for an accounting and for a mandatory order compelling the wife to transfer to the plaintiff his share of the properties standing in her name, the learned trial judge came to the conclusion, on the evidence, that there was an under-

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standing between the husband and wife by which the money in the possession of either should be used as one fund, and any investment made with such money should be for their joint benefit. He was, therefore, of the opinion that the husband (plaintiff) was entitled to a declaration that the wife held an undivided half interest in the property in question for the plaintiff. Defendant Mrs. McKissock appealed.

The appeal was argued at Victoria on the 13th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

R. M. Macdonald, for appellant (defendant): The judgment of the trial judge is based upon an alleged partnership, which he finds to have existed between the plaintiff and defendant, but no such case is alleged on the pleadings. The plaintiff's case as originally launched, merely alleged that he was the co-owner with the defendant in one specific lot of land, having joined with her in the purchase. This the defendant denied. After obtaining discovery, the plaintiff amended his claim, setting up an entirely new cause of action, which, in effect, charged that he had advanced all the purchase moneys for all the properties which the defendant had ever acquired since their marriage, and asking for a declaration that he was the owner on the principle of a resulting trust.

Argument

No amendment was ever ordered, or, indeed, asked for, alleging a partnership agreement. It is, therefore, not open to the Court to find such an agreement, and, indeed, the fact that after twice preparing his case the plaintiff made no such allegation, ought in itself to sufficiently disprove the existence of any such agreement. To establish such an agreement there must be evidence that both parties understood that such an agreement was being entered into. In other words, there must be the *animus contrahendi.* The evidence, so far as it goes, rebuts the idea of a partnership. Both husband and wife bought and sold independently of the other. Each had a separate bank account, and neither claimed any right to interfere in the transactions of the other. Such money as the defendant invested apart from what she commenced with of her own, was either given to her by her husband, or saved, with his knowledge, out of housekeeping

expenses, or procured from keeping boarders. He referred to *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110 at p. 119; White and Tudor's Leading Cases, 8th Ed., 838; *In re Whittaker* (1882), 21 Ch. D. 657; *Glegg* v. *Bromley* (1912), 81 L.J., K.B. 1,081 at p. 1,084; *Sanderson* v. *McKercher* (1886), 13 A.R. 561, (1887), 15 S.C.R. 296.

J. H. Senkler, K.C., for respondent (plaintiff): The argument at the trial was on the question of what evidence should be believed, and the learned judge held in our favour. On the question of the amendment, although the transcript does not shew that the application to amend was granted, the note of the trial judge, made before the notice of appeal was served or filed, proves that the application was granted; and the nature of the proceedings after the application was made shews clearly that the application was granted. If it were necessary, and we submit it is not, we could apply to amend now: *Winter* v. *B.C. Electric Ry. Co.* (1910), 15 B.C. 81.

Argument

Macdonald, in reply: The pleadings as amended shew a resulting trust. We are entitled to a new trial on proper pleadings. The onus in this case is on the plaintiff to prove the money given by him to the defendant was expended for property bought under an agreement.

Cur. adv. vult.

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MACDONALD, C.J.A.: I would dismiss the appeal. The rights of the parties depend largely on the facts, and these upon the credence given to the conflicting testimony of the parties who were the principal witnesses. I cannot say that the conclusion arrived at by the trial judge was wrong. I think there is quite sufficient evidence to support it.

MACDONALD, C.J.A.

IRVING, J.A.: I would dismiss this appeal.

As to the ground that the pleadings will not support the judgment, the pleadings were amended—or taken as amended—at the trial so as to include the ground upon which the learned Chief Justice proceeded.

IRVING, J.A.

Where leave to amend is given at the trial, the terms of the amendment ought to be written out: see *Hyams* v. *Stuart King*

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(1908), 2 K.B. 696, a rule of practice that has been recommended by members of this Court on more than one occasion. It is a matter of regret that more care is not observed in these matters. Proceedings should be conducted in one Court with due regard to the fact that later on they may be inquired into by a different Court. Lord Cranworth, who had been a Baron of the Court of Exchequer, a Vice-Chancellor and a Lord Justice of Appeal, and was then the Lord Chancellor, said:

> "I will remark, even at the hazard of that obloquy which attaches in the present day (1854) and not improperly attaches to mere formalists, that I should be glad to see strictness and accuracy and precision of statement in all pleadings, as being in my opinion alike conducive to the benefit of litigants, and furtherance of public justice, and the great convenience of Courts of justice."

The application to amend was made before the cross-examination of the plaintiff, practically at the beginning of the trial, and I think all parties proceeded on the assumption that the amendment had been allowed. It is not difficult to draw the inference that the amendment was allowed, as no objection was made, and as it would have been impossible, in my opinion, for the learned judge to have refused to allow it. As to the proper time to ask for an amendment, see *Rainy* v. *Bravo* (1872), L.R. 4 P.C. 287 at p. 298; *Edevain* v. *Cohen* (1889), 41 Ch. D. 563, affirmed by the Court of Appeal, 43 Ch. D. 187.

IRVING, J.A.

The disputes between husband and wife over savings accumulated whilst they were living together are difficult cases to deal with. I had to try one in 1907—*Dudgeon* v. *Dudgeon*. The reported cases on the subject, as may be imagined, run a long way back, but I shall content myself with citing two or three cases only. *Slanning* v. *Style* (1734), 3 P. Wms. 334, 2 Eq. Ca. Abr. 156: The husband's executors brought a bill against the wife for discovery of his personal estate, and the wife brought a cross bill and insisted upon being admitted a creditor for £100 lent her husband, which she had acquired by her frugality, for the husband, allowing a certain sum for housekeeping, agreed by parol that what she could save out of that allowance, and out of the profit of all butter, eggs, pigs, poultry and fruit beyond what was used in the family, she might apply to her own use, and the agreement being proved, and also the lending of the money, the Lord Chancellor (Talbot) decreed that she was a

creditor, and entitled to the money—the text adds "especially there being no creditor of the husband to contend with."

The leading authority appears to be *Barrack* v. *M'Culloch* (1856), 3 K. & J. 110, 26 L.J., Ch. 105, where Page Wood, V.C., afterwards Lord Chancellor Hatherley, said that money received by a married woman out of the proceeds of her husband's business, or saved by her out of moneys given to her by him for household purposes, dress, or the like, and invested by her in her own name, belongs to her husband. *Secus* as to moneys saved by her out of the income of her separate estate, and so invested.

This case was recognized in *Brooke* v. *Brooke* (1858), 25 Beav. 342, 27 L.J., Ch. 639; and followed in *Birkett* v. *Birkett* (1908), 98 L.T.N.S. 540, where the husband, when in England, was in the habit of giving his wife all he earned, receiving back such sums as he required when he asked her for money; that after he went out to South Africa he remitted money to her for the maintenance of herself and family without any instructions as to what she should do with the surplus. Later they separated. It was held that the savings from the moneys remitted from South Africa belonged to the husband.

IRVING, J.A.

MARTIN, J.A.: This appeal turns, in my opinion, upon the question of fact as to whether or no the amendment was allowed at the trial, which the respondent now relies upon; if it were not the judgment clearly cannot be supported. Both counsel were positive on the point, taking, unfortunately, exactly opposite views of what occurred. The official stenographer's report (under section 62 of the Supreme Court Act) of what took place shews that the amendment was asked for, but there is nothing there to shew that it was granted, and no inference against the appellant can fairly be drawn from her counsel's cross-examination, because the pleadings at the time of trial were such that all the questions that were asked could properly be asked upon them, apart from any amendments at the trial. The statement of the trial judge, made, as he says, when the case was in this Court, is of so inconclusive a character that it does not assist the respondent. But there is, however, a note of what occurred in a discussion on costs, after judgment was given, which is of con-

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siderable importance, and I think settles the matter. The following is the note:

"Mr. *Macdonald*: As to the costs of the action, my Lord, if this is a partnership, I take it that this is a partnership action, and the costs would have to be paid out of the partnership fund.

"COURT: Why?

"Mr. *Macdonald*: Because it it a necessary proceeding to wind up the partnership.

"COURT: They had to come to the Court and get a declaration and you disputed the fact that a partnership existed, and so why should you not pay the costs? I suppose it does not matter very much, because it will come out of the one fund in any event. I do not see any reason for departing from the usual rule."

Here the fact that the question of a partnership had just been in controversy is alleged by the learned judge, and is admitted practically by the defendant's counsel, yet that could not have been the case unless the amendment had been granted. We were not referred to this conclusive note by either counsel, it doubtless having escaped their attention and recollection, and I only discovered it to-day (August 21st, 1913), when, in the course of writing my promised reasons for the dissenting judgment I delivered on the 22nd of July last, which judgment was arrived at in ignorance of this crucial fact, new to this Court. In the face of it I cannot persist in the opinion I formed during the argument that there was no amendment, and in that case I do not think we should be justified in disturbing the judgment. In such very exceptional circumstances the only proper course for me to adopt is to now withdraw my dissenting opinion and concur with my learned brothers in dismissing the appeal. I entirely agree with what my brother IRVING has said about the necessity of amendments being reduced to writing and filed without delay, thereby avoiding these regrettable and unseemly disputes that have arisen before us more than once.

MARTIN, J.A.

GALLIHER, J.A.: I see no reason to interfere with the findings of the learned trial judge, who, in my opinion, came to the right conclusion.

GALLIHER, J.A.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *MacNeill, Bird, Macdonald & Bayfield.*

Solicitors for respondent: *Senkler, Spinks & Van Horne.*

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Master and servant—Contract to strengthen poles and string wires—Independent contractor—Lineman employee of contractor—Injured while stringing wires—Liability of owners—Negligence.

The defendant Company had erected a line of poles for stringing electric wires. A contract was entered into with L. to string the wires, but before this work was commenced the defendants, finding that the poles had become unsafe chiefly through the action of water in a ditch that ran parallel with and close to the line of poles, made an additional contract with L. to have the poles strengthened. It appeared that L. was an experienced and competent man in the work which he contracted to do, and it was admitted that he was an independent contractor. The plaintiff was employed by L. as a lineman to string the wires. After he had climbed one of the poles, it fell, and he was injured. In an action for damages the jury brought in a verdict for the plaintiff.

Held, on appeal, *per* MACDONALD, C.J.A. and IRVING, J.A. (following *Murray* v. *Currie* (1870), L.R. 6 C.P. 24), that the plaintiff had no cause of action against the defendant Company.

Per MARTIN and GALLIHER, JJ.A. (following *Marney* v. *Scott* (1899), 1 Q.B. 986): The defendants owed a duty to those who came upon their property for the purpose of work in which they were entrusted, to see that the property and appliances were in a safe condition, and the duty was not discharged by contracting with a competent person.

The Court being equally divided, the appeal was dismissed.

APPEAL from the judgment of MURPHY, J. and the verdict of a jury in an action tried by him at Vancouver on the 10th of January, 1913. The jury found in favour of the plaintiff in the sum of $3,200 damages, for which judgment was entered. The facts are set out in the headnote and reasons for judgment. Statement

The appeal was argued at Vancouver on the 22nd of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Sir C. H. Tupper, K.C., for appellants (defendants): The defendant Company had contracted with one Lockwood to strengthen the poles and string the wires. Lockwood employed the plaintiff as one of his men for carrying out the contract. The evidence shews clearly that this is a case of *volens*, and a motion was made to withdraw the case from the jury. The Argument

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judge, in charging the jury, said that we should have had the poles in a reasonably safe condition, but he was wrong in this, as we knew they were not safe, and it was part of the contract that Lockwood should make them safe. The jury, when giving their verdict, did not answer the question as to *volens*. The defect in the grading and material holding up the poles was quite apparent, and there is evidence of instructions given the plaintiff to see that the poles were safe, and that if they were not, to have them made safe: see *Dart* v. *Toronto R. Co.* (1912), 8 D.L.R. 121; Halsbury's Laws of England, Vol. 21, p. 473, paragraphs 795 to 797. The owner cannot escape liability by employing an independent contractor to conduct dangerous work unless the owner takes proper precautions in letting the contract: Halsbury's Laws of England, Vol. 20, p. 119, paragraph 234; *Bergklint* v. *Canada Western Power Co.* (1912), 17 B.C. 443.

Argument

Mowat, for respondent (plaintiff), referred to *Heaven* v. *Pender* (1883), 11 Q.B.D. 503 at p. 515; *Marney* v. *Scott* (1899), 1 Q.B. 986 at p. 991; Pollock on Torts, 5th Ed., 477; *Valiquette* v. *Fraser* (1907), 39 S.C.R. 1; *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, (1867), L.R. 2 C.P. 311. Juries in Ontario are bound to answer questions, whereas in British Columbia they are not. In this case Lockwood had the two contracts, first, to strengthen the poles; second, to string up the lines; but the defendants did not see that the first contract was properly done until the contractor hired men to complete the second contract: *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314. It was the duty of the defendants to see that the pole was safe. The torrent was running for two weeks before the accident, and if they had taken reasonable care they would have found out that the water had undermined the pole. On the question of the liability of the owner, even although he employs a competent person to perform the work, he referred to *Longmore* v. *J. D. McArthur Co.* (1910), 43 S.C.R. 640; *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335; *Penny* v. *Wimbledon Urban Council* (1899), 2 Q.B. 72; *Holliday* v. *National Telephone Company, ib.* 392; *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730; *Smith* v. *London and Saint Katharine Docks Co.* (1868), L.R. 3 C.P. 326; *Fallis* v. *Gartshore, Thompson Co.* (1902), 4

O.L.R. 176; *Holmes* v. *North Eastern Railway Co.* (1869), L.R. 4 Ex. 254; *Francis* v. *Cockrell* (1870), L.R. 5 Q.B. 501.

Tupper, in reply.

Cur. adv. vult.

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MACDONALD, C.J.A.: The facts of this case are very simple. The defendants had erected a line of poles upon which they intended to string their electric wires. Before the time arrived for stringing the wires some of the poles had become insecure by reason of the action of water or otherwise. They made a contract with one Lockwood to make these poles secure and to string the wires. It was conceded by respondent's counsel that Lockwood was an independent contractor. The plaintiff was employed by Lockwood in stringing wires on said poles, and after climbing one of them it fell, causing the injuries for which this action was brought. This was one of the poles which should have been made secure by Lockwood before attempting to string the wires. Instead of suing his employer, Lockwood, the plaintiff brought this action against the defendant Company, and the jury found a verdict in his favour. The evidence discloses the fact that Lockwood was an experienced and competent man in the work which he contracted with the defendants to do.

In these circumstances I am of the opinion that the plaintiff had no cause of action against the defendants. The evolution of the law on the question of liability where a contractor is employed is traced in Beven on Negligence, 3rd Ed., pp. 597 to 607.

The respondent relies upon *Heaven* v. *Pender* (1883), 11 Q.B.D. 503; *Marney* v. *Scott* (1899), 1 Q.B. 986; and *Penny* v. *Wimbledon Urban Council* (1899), 2 Q.B. 72; but I think all these cases are distinguishable from the case at bar. Here the negligence was Lockwood's, and unless the law is that the defendant owes a duty to Lockwood's employees to see that Lockwood does his duty towards them, then the plaintiff cannot succeed. The question may not be quite free from doubt, but I think I should be going beyond the authorities if I were to hold that, except where the duty is statutory or of the class specially owed to the public, or by occupiers of property to

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persons coming there by invitation, or on business, a corporation letting work of the nature in question to a competent contractor, had failed in its duty to the contractor's servants when, having ascertained the defects, it did no more than to employ that contractor to remedy them.

I would allow the appeal and dismiss the action.

IRVING, J.A.: The plaintiff, who was in the employ of one Lockwood, sustained injuries when acting as an employee of Lockwood, brought this action against the Power Company, because he sustained the injuries in consequence of one of their poles—which he had ascended for the purpose of stringing wires thereon—falling with him.

Lockwood was an independent contractor employed by the defendants to erect and strengthen a certain line of power poles, many of which were known to be undermined by water. He was also to string them with wires. The operations were being carried on by Lockwood; the pole in question had not been strengthened by the erecting gang before the plaintiff ascended it for the purpose of attaching to its cross-arms the wires. Having regard to the circumstances of this accident, I do not think the plaintiff has a cause of action against the defendants. There was no contractual relationship between him and them. They owed him no duty to warn him, or to see that the poles were firmly erected, before he ascended to string the wires.

IRVING, J.A.

There is a duty imposed by law on the occupiers of buildings and structures intended for human use or occupation, but the extent of that duty varies very much. It may vary with regard to the class of structure or with regard to the persons to whom it (the duty) is owed. In certain cases the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the selection of that contractor. To an action by a passer-by—one of the public—who had sustained injuries by one of these poles falling upon him, it would be no answer to say: I had selected a very careful, competent contractor. *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730, illustrates that line of law very well, but the plaintiff in this case was not a passer-by.

He was employed by Lockwood, who had contracted to erect and to wire the poles. As a general rule, the master's duty to his servant, which duty is independent of contract, is the same as that owed by an occupier of property towards any member of the public coming by invitation on his premises on business of common interest, except in so far as the contract of hiring and service implies a special acceptance of risk. Fellow servants of his—possibly in a different department—had been guilty of negligence, and he therefore could not succeed in an action against Lockwood, his employer.

Mr. *Mowat's* contention is that there was an absolute duty on the defendants to the plaintiff. What duty? To warn him that the gang which ought to precede him and make the pole firm had not done so. *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, is pressed too far. The duty is to warn against *unusual* danger. See the summing up of Erle, C.J., and observe that the measure of liability was discussed only incidentally. The chief point under discussion was as to the plaintiff being a licensee.

I have read all the cases to which Mr. *Mowat* has referred us. I cannot agree that there was any absolute duty on the defendants which would prevent the operation of the rule of common employment, if that rule were applicable. Most of the cases cited turn on the duty of occupiers of premises, or on nuisance to the public, but I do not think they are applicable to this case, because the persons in possession of this structure, if it can be regarded as a structure, were at the time of the accident not the defendants, but Lockwood, the contractor. The basis of the duty to take care is founded on the theory that there is an invitation, expressed or implied, or holding out that the place is safe. How can there be any such holding out to a workman in the employ of the contractor who had to make the place safe? Or how can the workman who has received an express invitation from Lockwood attribute any representation to the defendants?

IRVING, J.A.

The case of *Murray* v. *Currie* (1870), L.R. 6 C.P. 24, seems to me in point. There, Kennedy had a special contract, employing plaintiff and one Davis and several other men, and doing the work of stevedoring for the defendant, but quite independently of

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the defendant. Davis was negligent, and in consequence plaintiff was injured. Plaintiff got a verdict, but was not allowed to hold it. Willes, J. said:

"I apprehend it to be a clear rule, in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself [*cf. Lees* v. *Dunkerley Brothers* (1911), A.C. 5 at p. 8] or to the first person in the ascending line who is the employer and has control of the work. You cannot go further back, and make the employer of that person liable."

I would allow the appeal.

MARTIN, J.A.: A contractor erected for the defendant a line of poles on a rural highway, and a few months afterwards the same contractor agreed with the said defendant to string wires on the same poles to complete the line. Very shortly thereafter it was discovered by the defendant that some of the poles were in an unsteady and unsafe condition, so the contract was expanded and its price increased to include the strengthening of such poles, the work to be done concurrently—as the superintendent of the Company puts it:

"I instructed Lockwood (the contractor) to go out there and string the wires, and while stringing the wires to put the poles in good shape. I also instructed Campsie (the line foreman) to make sure that the poles were in good shape."

This contract was made about a week before the accident, and Campsie pointed out to the contractor the poles that required strengthening. The plaintiff is a lineman, and suffered serious injury by one of the unsafe poles falling when he was on it engaged in stringing wires. There is no evidence of the steps, if any, taken by the contractor to make the poles safe, and the plaintiff swears positively that he got no such instructions. At the same time he admitted that if he thought a pole was unsafe it was always his duty to guy it before climbing it, but that he had no such suspicion in this instance; and the circumstances of the case were such on the evidence, that the jury were fully entitled to find as they did, that the plaintiff was not guilty of contributory negligence; the evidence of the witness Hogarth, in particular, as to the pole standing in a four-foot crust of earth which, however, had become undermined by water, is in his favour. It is urged that as the defendant employed an independent contractor, admittedly competent, to make the poles safe as

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well as string the wires, it is relieved of liability. But, after considering carefully many authorities, I am of the opinion that it cannot escape, and is liable on the principle laid down in *Marney* v. *Scott* (1899), 1 Q.B. 986, which not only has never been questioned, but is cited with approval in *Valiquette* v. *Fraser* (1907), 39 S.C.R. 1 at pp. 3-4, and is the nearest English case to the one at bar that I have been able to find. It is said, pp. 989-90, by Bigham, J.:

"I think that a man who intends that others shall come upon property of which he is the occupier for purposes of work or business in which he is interested, owes a duty to those who do so come to use reasonable care to see that the property and appliances upon it which it is intended shall be used in the work are fit for the purpose to which they are to be put, and he does not discharge this duty by merely contracting with competent people to do the work for him. If the parties with whom he so contracts fail to use reasonable care, and damage results, the occupier still remains liable. I think that this is the true effect of the cases which were cited to me in argument."

See also p. 992 for the adoption of the rule in Pollock on Torts, 5th Ed., 477, also approved in *Valiquette* v. *Fraser, supra,* p. 4. That was a case of the charterer of a ship being held responsible to one of the servants of a stevedore (the contractor to load the ship), who was injured by a defective ladder leading into the hold, and though there was no question of the employment of a competent person to inspect, yet the decision is apart from the line of cases relating to injuries caused to the public by the carrying out of works on a highway, wherein it is settled that the owner cannot escape liability by the employment of a competent contractor, such as *Tarry* v. *Ashton* (1876), 1 Q.B.D. 314; *Hardaker* v. *Idle District Council* (1896), 1 Q.B. 335; *Penny* v. *Wimbledon Urban Council* (1899), 2 Q.B. 72; *Holliday* v. *National Telephone Co., ib.* 392; and *Kirk* v. *City of Toronto* (1904), 8 O.L.R. 730. Here, the defendant's property —the pole line— was to its knowledge in a very dangerous state for anyone to string wires on, and it was its duty to see that no one was allowed to climb up on its poles for that purpose till the line had been made safe, and it is not a case where the liability could be avoided by attempting to delegate the duty to another, however competent. In circumstances of this class the owner, if he lets a contract to make the premises safe, must also

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see that it is carried out. The cases of *Valiquette* v. *Fraser, supra,* and *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424, directly support this view, particularly the latter at pp. 430-6, wherein the distinction that applies to defective premises is explained. And the same distinction is pointed out in *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420 at pp. 424-8.

With respect to the objection taken to the learned judge's charge, it is sufficient to say that if I am right in the view I have taken, it is substantially correct.

As to the fact that the jury did not answer the question on *volens,* the answer is that while the learned judge did submit questions to them, he did so in such a way (very regrettably I think, with all respect, in view of the opinion expressed repeatedly by this Court as to his duty in negligence cases, the proper discharge of which is of great assistance to us in case of an appeal), and they consequently returned a general verdict (apart from answering five of his questions), as follows: "Verdict is declared in favour of the plaintiff for $3,200," which is sufficient on the evidence. I remark that the learned judge was in error in saying that the question he submitted thus: "Did the plaintiff voluntarily assume the risk?" was "the usual *volens* question" and "embodies the doctrine of *volens.*" The full and proper form of question on that point is to be found in *Wood* v. *Canadian Pacific Railway Company* (1899), 6 B.C. 561; 30 S.C.R. 110.

MARTIN, J.A.

I refer to the similar case of *Slater* v. *Vancouver Power Co.* [(1913), 18 B.C. 429], in which we are delivering judgment to-day, and the authorities there cited.

The appeal should, in my opinion, be dismissed.

GALLIHER, J.A.: If the defendants are liable in law, I think the jury's finding of fact cannot be assailed. I think we must regard these poles upon which the defendants' wires were to be strung as a structure.

GALLIHER, J.A.

The defendants say: We are not liable because we employed, or rather contracted with, Lockwood, a competent man, for whom the plaintiff worked, to string the wires on the poles, which

included the one that fell with and injured the plaintiff. In going over the line with Lockwood previous to the stringing of the wires, Campsie, a foreman of the defendants, says several of the poles which had been erected some time previous were not secure, and instead of fixing them himself, he made a verbal contract with Lockwood to do so. It does not appear from the evidence that these poles were fixed by Lockwood.

It was the duty of the Company, in providing a structure upon which workmen would have to go, and which structure they themselves knew to be defective, to see that the structure was put in a fit and proper condition, and they cannot free themselves by delegating that duty to another. I regard the plaintiff as being there at the invitation of the defendants within the meaning of the decision in *Marney* v. *Scott* (1899), 1 Q.B. 986. It is quite a different case from that where a Company provide fit and proper plant and machinery and then employs competent foremen to run it. Here the plant or structure itself is defective.

I would dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

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July 22.

PICARD v. REVELSTOKE SAWMILL COMPANY, LIMITED, *ET AL.*

Principal and agent—Option to purchase properties of Companies—Granted by managing director—Authority of—Sale brought about by agent's efforts—Agent's commission—Representation of authority—Personal liability of individual assuming authority.

Practice—Appeal books—Compilation of.

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The defendant L., representing himself as managing director of one of the defendant Companies, gave an exclusive option to the plaintiff to purchase the two defendant Company's properties, the option to remain in force until the vendor gave written notice of cancellation, subject to the purchaser having a reasonable opportunity to complete any negotiations he might have in progress towards carrying out the agreement. The purchaser was to receive a nine per cent. commission in the event of a sale going through. L. in fact was not the managing director of one of the defendant Companies, having resigned shortly prior to his signing the option. He was, however, president of one of the companies and a shareholder in the other. Upon obtaining the option the plaintiff arranged with brokers, who then communicated with one Ward. Ward then entered into an arrangement with two men in April, 1910, who eventually brought about a sale of the two properties. L. wrote the plaintiff on the 27th of May, 1910, cancelling the option. The trial judge dismissed the action.

Held, on appeal, that L. had no authority to bind either Companies.

Held, further (MARTIN, J.A. dissenting), that the plaintiff brought about the sale; that he undertook the work of procuring a purchaser on the strength of the option under which he was to obtain a commission, and that L. was liable on the implied contract that he had the authority to bind the Company, and was not relieved by his notice of cancellation of the option.

Collen v. *Wright* (1857), 27 L.J., Q.B. 215, followed.

Judgment of MORRISON, J. varied.

Per curiam: All appeal books should be in one volume except where they are too voluminous, in which event the paging in the second book should follow along consecutively.

Statement

APPEAL from the judgment of MORRISON, J. in an action tried at Vancouver in November, 1912. The facts are set out fully in the judgment of the trial judge.

Bodwell, K.C., and *D. A. McDonald*, for plaintiff.

S. S. Taylor, K.C., for defendant Lindmark.

McCarter, for defendant Companies.

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MORRISON, J.: In this action the plaintiff claims a commission from the defendants upon the sale of certain properties. The action was launched against the defendants the Revelstoke Sawmill Company, Limited, Yale-Columbia Lumber Company, Limited, Charles F. Lindmark, William A. Ward, Dominion Saw Mills & Lumber, Limited, and General Agency Corporation, Limited, but was discontinued as against all of them except the three first named.

The properties involved consist of sawmills and timber limits situate in British Columbia. The instrument in writing upon which the plaintiff claims his commission is dated the 29th of November, 1909, and is made between Charles F. Lindmark, who is described as managing director of the Revelstoke Sawmill Company, Limited, of the one part, and the plaintiff of the other. Supplemental to this agreement was the following letter, addressed to the plaintiff and signed by Lindmark, to which the plaintiff appended his name as agreeing to its terms:

"To Edmond Picard:

"Sir:—Regarding the option of purchase of the property of the Revelstoke Sawmill Company, Limited, and the property of the Yale-Columbia Lumber Company, Limited, at Westley, given you this day, it is understood and agreed that in the event of your bringing about a completed sale and purchase of the said properties or either of them you will receive and be paid a commission of nine per cent. upon the purchase price, if and when received by the vendor and not otherwise. In the event of a sale being arranged and completed with a customer found or introduced by you directly or indirectly although for a less price than that mentioned in the option, your commission shall nevertheless be nine per cent. of the selling price if and when received by the vendor. Should it happen that a sale be made by you for more than $220,000 for the Yale-Columbia property and for more than $375,000 for the Revelstoke Sawmill property you will be paid in addition to your commission of nine per cent. on selling price mentioned in the option the whole of the surplus obtained over and above the said option price.

"Dated at Revelstoke, B.C., this 29th November, 1909.

"Chas. F. Lindmark,
"Vendor.

"I agree
"Edmond Picard.

"Witness to signatures:
"W. I. Briggs,
"Notary Public. [Notary's Seal]"

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The plaintiff, who is a broker and lives in France, whilst on a voyage across the Atlantic fell in with one Andre Weill, another

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gentleman of France, who it seems had an agreement, which has been referred to as an option, from the defendant Lindmark, covering substantially the above properties. The plaintiff and Weill became friends, and upon arrival in New York at once began collaboration on this option. In due course the plaintiff came in touch with Lindmark, who apparently was not impressed by Mons. Weill, the result being that Weill was, as far as Lindmark was concerned, eliminated from the negotiations, and the plaintiff solely remained dealing with Lindmark, who, during the period relative to this suit, lived at Revelstoke, B.C., to which place the plaintiff came, and would remain for considerable time, off and on negotiating with Lindmark. Interviews and correspondence took place and were maintained between them. The plaintiff gravitated between Paris, London, New York, Michigan, Chicago, Seattle, Vancouver and Revelstoke, apparently in search of a buyer under this option, but no result followed. The plaintiff impressed me as an exceedingly intelligent person, and I am bound to say that very little information could escape him relating either to the companies in question or to the persons who were most interested in the disposal of their assets, so that it is a matter of comment that of all points of negotiation and inquiry in the East frequented and canvassed by him, Minneapolis, the home of Mr. Bowman, who was a controlling spirit in the companies concerned, was the one place he seemed to

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have overlooked and avoided, although frequently and for considerable periods in the vicinity, and doubtless always or occasionally passing through that city en route east and west. Lindmark more than once during their intercourse referred to the "eastern interest" in a manner which should have caused a less astute person than Picard to see the advisability of communicating with Mr. Bowman at certain junctures. For example, on the 17th of November, 1909, Picard wired Lindmark that an option for 60 days, with owner's signature, was required. This was from Chicago. But notably the incident of the postscript to the option of the 29th of November, 1909, Picard admits Lindmark asked to have this clause cancelled in case the eastern owners would not agree. On the 29th of November, 1909, the very day the option was signed, Mr.

Bowman wrote Lindmark that an option was not wanted. I accept the evidence of Bowman, Hess and Poole, that they did not know of any authority to Lindmark as claimed, and that as a matter of fact none was given him. I also accept their evidence that they did not know of any option from Lindmark to Picard at any time during the period material to this action, and that Mr. Picard was unknown to them even by name, as they allege. I find that Mr. Picard had no contractual relationship whatever with the defendant Companies. He neither got in touch with them nor attempted to do so.

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I cannot, therefore, accede to the contention on behalf of the plaintiff that I may infer authority on Lindmark's part to sell the assets of the defendant Companies. That such authority ought to be implied in the circumstances of this case is, in my opinion, even more hopeless. I do not think that the doctrine annunciated and alleged as being found in articles 95 and 100 of the articles of association, relied upon by Mr. *Bodwell* on the question of authority, and paraphrased by him as follows, namely: "That the directors can do anything which the Company can do except such matters as would have to be decided in meetings, and further, that they can employ agents to sell property and delegate to any one their authority," help me on this point of implied authority to wipe the Companies out of existence. It seems to me that the "sale" of substantially the whole of the Company's assets is not a matter that has any relation to the carrying on of the Company's business. Such a "sale" was not within the scope of any implied authority (assuming any implied authority existed), given him for the purpose of managing and conducting their business, so that the plaintiff must, in such a case, prove affirmatively that Lindmark, whom he contends affected to bind the Companies, had been authorized to do so: *Smith* v. *Hull Glass Co.* (1849), 8 C.B. 668 at p. 677. But Lindmark was not, at the date of the option nor for some months before, managing director. As against the defendant Companies I therefore dismiss the action.

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Alternatively, it is further claimed that there should be in any event judgment against Lindmark personally. I think that the plaintiff fails as against him also. Lindmark, as far back

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as the 19th of April, 1909, suggested withdrawing from their then arrangement owing to delay. The work being done by the plaintiff all along was purely tentative. There was no more reason for Lindmark to suppose that Picard's efforts would result conclusively at or about the time that the letter of cancellation was despatched, than previously. Under all the circumstances of this particular case, I think Lindmark was justified in taking the course he did. Picard's efforts covered a wide field, and he came in contact with many people who dealt in the kind of proposition (business) he had in hand. Unquestionably it is work requiring ability of a sort, persistence and diplomacy. Picard, I find, entered into the agreement in question with his eyes open. I do not think, from his ability to appreciate the exact relation which Lindmark bore to the properties involved, he could have been in any way misled by Lindmark. Had Lindmark chosen to have given notice of cancellation at any previous juncture (when Picard was dealing with Spry, for instance), he might with equal plausibility have contended that it was premature, and that he should have had time to consummate his dealings. I do not think the fact that he could shew that ultimately Spry had in fact bought would affect the notice of cancellation. The giving of this notice of cancellation was a contingency never remote during the pendancy of Picard's negotiations. He chose deliberately and voluntarily to specify

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a certain particular address to which such notice would have to be sent. To that address it was sent, and I do not think Picard should now be heard to complain of that. I accept Lindmark's evidence as to his reasons for cancelling the option. There are several incidents which, though in my opinion of secondary importance, yet, because they have been emphasized, I shall deal with. For instance, in the recital to the option of the 22nd of November, 1909, Lindmark is put down as being managing director of the Revelstoke Company. This, I think, was simply copied from the earlier option to Weill, when he was in fact managing director. The solicitor, or his clerk, doubtless so described him. Of course he did not sign the document as such. Again, when the clause after the signature to this option was scored out, doubtless Lindmark was confident he could get his

people in the east to confirm his arrangements with Picard in the case of a *bona-fide* sale, which sale all the defendants were willing to effect.

Then, as to the appearance in the negotiations of those people, some of whom became interested in the sale which ultimately took place, it seems to me that it was quite open to Lindmark to anticipate Picard's failure to consummate a sale through them, assuming he knew that Picard was negotiating with them (which he says he did not), and to cancel his option with a view of concluding a sale himself, or through some one else. He gave Picard a fair trial and was not satisfied. I cannot find that in the course he took Lindmark acted fraudulently, or with a view to defeat Picard's commission, unless I do so by a process of what might even be good guessing. I find the contractual relations between the plaintiff and Lindmark were, pursuant to their agreement, ended by the letter of cancellation.

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The action is therefore dismissed, with costs.

The appeal was argued at Vancouver on the 14th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellant (plaintiff), asked leave to put in a statement of the items in the evidence he wished to refer to.

[*Per curiam*: Our experiences of written arguments have not been at all happy. We wish at the same time to state that all appeal books should be put in one volume except when it is too voluminous, in which case the paging in the second volume should follow along consecutively.]

The first question is whether Lindmark was authorized by the Companies to make a sale. He referred to *In re Barr's Trusts* (1858), 4 K. & J. 219 at p. 236. It is only necessary to prove that the appellant had authority as agent to make arrangements for the sale of the property. We had an arrangement with Belmur & King, of Seattle, who saw W. A. Ward, who made an arrangement with Cecil Ward and Blaylock, the two latter having eventually brought about the sale. Picard, therefore, found the purchaser, and, under the agreement, he is entitled to his commission: *Biggerstaff* v. *Rowatt's Wharf,*

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Limited (1896), 2 Ch. 93. We do not have to shew that Lindmark had authority to bind the Company. If he makes an arrangement with an agent and if a sale takes place by the Company to a purchaser obtained by the agent, the Company is liable for the commission. A contract to employ an agent to find a purchaser need not be in writing. Lindmark had been managing director up to May, 1909, and in November, when the contract was made, he was a director. The directors could do anything which the memorandum of association of the Company authorizes and the question is: Did Lindmark represent his authority, and did Picard deal with him in that capacity? See *Smith* v. *Hull Glass Co.* (1849), 8 C.B. 668, (1852), 11 C.B. 897; *Duck* v. *Town Galvanizing Co.* (1901), 2 K. B. 314; *Royal British Bank* v. *Turquand* (1855), 24 L.J., Q.B. 327. The denial in Lindmark's evidence amounts to and should be construed as an admission. If he did not have the authority, he at least represented himself to have the authority: Halsbury's Laws of England, Vol. 1, p. 221, paragraph 466; *Vallen* v. *Wright* (1857), 8 El. & Bl. 647.

S. S. Taylor, K.C., for respondents (defendants): The question resolves itself as follows: First, the liability of the Revelstoke Company.

[*Per curiam*: We do not require to hear you as to the Yale-Columbia Company.]

Argument

Second, the liability of Lindmark personally; and third, whether the plaintiff had anything to do with bringing about the sale. As to the Company, they cannot be liable unless they have expressly given Lindmark authority, or by standing by, have acquiesced so as to create an estoppel. A man who is merely a director cannot involve the Company. There is positive testimony that the plaintiff obtained the agreement from Lindmark simply to use it for the purpose of trying to get a purchaser. Lindmark says that he gave him the document for a specific purpose, he (the plaintiff) knowing that Lindmark did not have the authority to bind the Company: *Redgrave* v. *Hurd* (1881), 20 Ch. D. 1. The plaintiff must introduce the purchaser and must carry through the transaction. The fact of the plaintiff introducing a man who eventually pur-

chased is not sufficient; he must do something more in the way of carrying through the sale. As to Lindmark, he cancelled the contract in accordance with the conditions thereof, and cannot be held liable.

Bodwell, in reply.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: I would allow the appeal in part, that is, as against the defendant Lindmark.

IRVING, J.A.: We have already determined that the plaintiff had no case against the Yale Company. I am satisfied that the plaintiff brought about the sale, and that he undertook that work on a commission promised him by Lindmark, the president of the Revelstoke Company, but I am not able to say his apparent authority could bind that Company.

As Lindmark had no authority to bind the Revelstoke Company, he himself would be liable on the doctrine of *Collen* v. *Wright* (1857), 7 El. & Bl. 301, 26 L.J., Q.B. 147; and in the Exchequer Chamber, 8 El. & Bl. 647, 27 L.J., Q.B. 215, if he exceeded his real authority, as without doubt he did. In my opinion he is liable on the implied contract that he had authority to bind the Company, and that, too, independently of any question of fraud.

I would allow the appeal as against Lindmark, and dismiss it as against the other two respondents.

MARTIN, J.A.: In view of Lindmark's express denials, which the learned judge below was entitled to, and did credit, I think his decision should be upheld in this as in other respects.

GALLIHER, J.A.: In the face of the evidence I think it impossible to fix liability on the Company. As to them this appeal fails. On the evidence I would find that the sale was brought about through Picard, or his agents, bringing the property to the attention of Cecil Ward and to Blaylock, to whom an option was given, July 25th, 1910, which led up to the sale eventually effected. I do not think any useful purpose would be served by dealing with this evidence at length. Suffice it

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to say that it points clearly to the fact that the property was first introduced to Blaylock and his associates through Picard's agents, and although they afterwards refused to recognize Picard in the matter, that does not affect his position.

Two things have to be considered in regard to Lindmark's liability. Did he hold himself out to Picard as having authority to deal with this property, and if so, would the notice of cancellation, dated the 27th of May, 1910, relieve him? The evidence of Picard is very explicit as to assurances being given him from time to time by Lindmark that he, Lindmark, had such authority. Mr. Briggs, a solicitor at Revelstoke, who drew up the option, acting for both parties, is called for the purpose of strengthening this, but his evidence does not carry us much further. His recollection of what was alleged to have been said in his office as to authority is not at all clear, and the farthest he will go is to say that it left an impression in his mind that Lindmark conveyed the idea that he had authority.

I do not think Picard acted very prudently in not seeing to the nature of Lindmark's authority. Still, we find Lindmark described in the option as the managing director of the Revelstoke Sawmill Company, although he signed simply "Chas. F. Lindmark," and he was also mayor of the city, and according to Picard, when approached on the subject to have the option confirmed by the directors, stated that it was all humbug, was not necessary, to go ahead and put the deal through and never mind details. Considering all this, if these facts were uncontradicted, there would undoubtedly be a holding out of authority which Picard might reasonably accept as a fact, and which would justify him in proceeding as he did. On the other hand, Lindmark flatly contradicts this, and says that Picard knew, and he frequently told him he had not authority, and that he never represented himself as having authority. The learned trial judge has taken Lindmark's version of the matter, and with that I would not interfere were it not for some significant facts appearing from the documents and correspondence.

Take the option in question. It purports to deal with two properties, *viz.*: the Revelstoke Company and the Yale-Columbia Company. At the bottom of that document, after discus-

sion between Lindmark and Picard, the following memorandum was made and signed:

"It is understood that the option above given on the Yale-Columbia property is contingent upon the vendor obtaining the sanction of the eastern owners of the property."

That, to my mind, has a two-fold significance: that as to the Revelstoke property Lindmark required no confirmation, but as to the Yale-Columbia he did. Picard went on to Seattle, and not receiving any word from Lindmark as to confirmation by the Yale-Columbia people, went back to Revelstoke about a week after the 6th of December, 1909, being the date he wired Lindmark as to confirmation, and there saw Lindmark, who first told him he had wired for confirmation but received no answer, and then next day said he had received confirmation. At all events, they went down to Mr. Briggs's office, cancelled the memorandum calling for confirmation and initialled it, thus leaving the option not subject to confirmation in any respect. After reading this document and the correspondence between Lindmark and Picard, taken in conjunction with the evidence of Picard and that of Briggs (slight though it may be), I have come to the conclusion that there was a holding out by Lindmark as of one having authority.

As to the notice cancelling the option. It is given under a clause in the option, as follows:

"It is agreed that the aforesaid property will not be optioned or sold to other parties or this option cancelled without the vendor first giving to the purchaser written notice to the address hereinafter mentioned and affording the purchaser reasonable opportunity to complete any negotiations he may have in progress towards carrying out this agreement. Such notice shall be sufficiently given by mailing the same postpaid and registered, addressed to Edmond Picard at 128 Faubourg Poissonniere, Paris, France."

I interpret this to mean that the notice should specify a time reasonable for the purpose of concluding any *bona-fide* negotiations under way after which it would take effect, or at all events, that it should not take effect until such reasonable time had elapsed.

W. A. Ward's evidence shews that during the latter part of April, 1910, he and O'Brien, who were both acting for Picard, brought the property to the notice of Blaylock, and gave him

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information regarding it. During January, February, March and April, Picard was in communication with Lindmark, from which Lindmark knew that Picard had clients with whom he was negotiating.

On the 27th of May, Lindmark sent Picard the following notice of cancellation:

"I hereby give you formal notice that the option granted you on the 29th of November, 1909, for the purchase of the properties of the Revelstoke Sawmill Company, Limited, and the Yale-Columbia Lumber Company, Limited, is hereby cancelled. This notice is given in pursuance of clause three of the option agreement of Nov. 29th, 1909."

This notice was sent to Paris, and only reached Picard, who was in Seattle, on the 3rd of July, 1910, when the following letter was written to Lindmark:

"Seattle, U.S.A.,
"3rd of July, 1910.

"C. F. Lindmark, Esq.,
"Revelstoke Saw Mill Co., Ltd.,
"Revelstoke, B.C.

"Dear Sir,—I have just been advised from Paris that you sent me a letter cancelling the option you gave me last November.

"But I am very pleased to let you know that I have a party in hand with whom we are in full negotiations for the sale of the Revelstoke and Westley properties.

"Meanwhile I remain
"Very respectfully yours,
"Edmond Picard.

"Registered P.O. Seattle, Wash.
"No. 257, 4th July, 1910."

And again, on the 6th of July:

"Seattle, Washington,
"July Sixth,
"Nineteen hundred and ten.

"C. F. Lindmark, Esq.,
"Revelstoke Saw Mill Co., Ltd.,
"Revelstoke, B.C.

"Dear Sir,—I beg to confirm my registered letter of the 3rd inst. I am glad to state that an English company advised us by cable the day their agent left England and that we are expecting him west about the first of next week. This agent represents a firm to which we put up the sale of Revelstoke and Westley properties about two months ago. By former correspondence they know all about the deal, and we have a great chance to close it with him.

"On the other hand, I have been advised by another party by letter of July 2nd, that the representative in the United States of another English company had forwarded that same day to his principals in London, further

and fuller particulars of R. and W. properties (proposition put before them many months ago). He asked them to answer by cable and that within two or three weeks we shall have the final answer.

"As stated above, we will have to meet first party in a very few days, probably the end of this week.

"I shall keep you posted without losing one day, of the principal matters of these negotiations.

"I feel confident that you will recognize not only that I am in full accordance with the option you kindly accorded me last November, but that sometimes perseverance must be rewarded.

"Very respectfully yours,
"(Sd.) E. P.
"c/o Hotel Washington."

And again, on the 13th of July:

"Seattle, July 13, 1910.

"C. F. Lindmark, Esq.,
"Revelstoke Saw Mill Co., Ltd.,
"Revelstoke, B.C.

"Dear Sir,—I beg to confirm my letter of the 6th inst. I am glad to state that I have just received the following telegram:

" 'London parties not here yet. Stopping over at Toronto a few days. Expect them daily. Will advise you immediately upon their arrival. Think we have a good chance for business.'

"I want to add that the party to whom I referred to you in my registered letter of April 6th last and who did let the matter drop, has nothing to do with the two parties mentioned in my letter of the 6th inst.

"As you can see, we expect the English party every day, and I shall write you accordingly.

"Very respectfully yours,

"P.S.—Your registered letter of May 27th was received in Paris on the 20th day of June, and I was surprised that you did not send it to Seattle."

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And again, on the 26th of July:

"Vancouver, B.C.,
"July 26, 1910.

"C. F. Lindmark, Esq.,
"Revelstoke Saw Mill Co., Ltd.,
"Revelstoke, B.C.

"Dear Sir,—I beg to confirm my registered letter of the 3rd inst., and also my letters of the 6th and 13th inst.

"I am glad to state that Mr. Cecil Ward, manager and director of the Dominion Land, Timber and Saw Mill, Ltd., of London, and of the Brazilian, Canadian and General Trust Co., Ltd., of London, etc., etc., has been considering the purchase of the Revelstoke and Westley properties and seems to be willing and ready to close the deal.

"This present proposition has been put to above Mr. C. Ward by the Pretty's Timber Exchange, of Vancouver, on the date of May 16th last and they have sufficient acknowledgement of it in their correspondence.

"The said Pretty's Timber Exchange were acting under agreement I made with them on the day of February 8th last and by which they were author-

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ized to find a purchaser, *viz.*: under the option you gave me on the 29th of November, 1909.

"This is to inform you that as soon as Mr. Cecil Ward or the Dominion Land, Timber & Saw Mill, Ltd., of London, or one of the different companies in which he is connected or any one of the different companies under control of his directors or partners or any person or persons connected with him or with them, have completed the purchase of the Revelstoke and Westley properties I shall be entitled to my commission as mentioned in the option you granted me last November.

"Very respectfully yours,
"Edmond Picard.
"c/o Washington Hotel, Seattle, Wash.
"Registered P.O. Vancouver, B.C.
"No. 482, 27th July, 1910."

Lindmark was present at a meeting of the directors of the Revelstoke Sawmill Company on the 25th of July, 1910, when a resolution was passed authorizing the entering into an option with Blaylock for the property, when he had full knowledge of the negotiations being carried on by Picard, as detailed in his letters of the 3rd, 6th and 13th of July.

On July 28th, Lindmark, without referring to above letters, replied as follows:

"Revelstoke, B.C.,
"July 28th, 1910.

"Edmond Picard, Esq.,
"Washington Hotel,
"Seattle, Wash.

"Dear Mr. Picard,—Yours of the 26th to hand and I am sorry to inform you that the whole plant at the Big Eddy was burned to the ground within the last week. As I had previous to this given you due notice that the deal was off on account of you not being able to close the deal that I have given you from time to time.

"As it now stands the deal is off on account of the destruction of the plant by fire.

"Yours truly,
"Chas. F. Lindmark."

In my view of the effect of the clause under which notice of cancellation was to be given, and of the above recited facts, I hold that Picard's option was improperly cancelled.

The appeal should be allowed as to Lindmark.

Appeal allowed as against Lindmark, Martin, J.A. dissenting.

Solicitors for appellant: *Craig, Bourne & McDonald.*
Solicitors for respondents: *Harvey, McCarter & Pinkham.*

SLATER v. VANCOUVER POWER COMPANY *ET AL.*

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SLATER v. VANCOUVER POWER CO.

Master and servant—Death of servant—Common employment—Negligence of fellow servant—Competent foreman—Working in "defective place"—Action against two defendants—Discontinued against one—Pleadings not amended.

The defendant Construction Company agreed with the defendant Power Company to set up and string with wire, poles in the Power Company's right of way in holes that the Power Company had dug for the purpose. The holes were supposed to be finished and ready for the insertion of the poles, the earth being left close by for filling in. Some of the holes were made in an old "fill in," where the ground was loose (in one of which the pole was inserted that fell, causing the accident). The Construction Company did not themselves oversee the work, but committed the duty of setting and making firm the poles to a foreman, competent for the work. After the pole in question had been set for two days the deceased ascended to attach the cross-bars, when it fell with him.

Held, per MACDONALD, C.J.A. and IRVING, J.A., that the accident was due to the negligence of a fellow workman in not filling in the hole with proper material and in not excavating to a sufficient depth, and that the doctrine of common employment was a bar to the action: *Priestley* v. *Fowler* (1837), 3 M. & W. 1, followed.

Per MARTIN and GALLIHER, JJ.A.: As the pole line constituted a "defective place" in which the plaintiff was called upon to work in his employment as a lineman, fixing cross-arms on the poles, the master could not set up the defence of common employment, and the appeal should be dismissed. *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420, followed.

The Court being equally divided, the appeal was dismissed.

APPEAL by the defendants, the Waugh Milburn Construction Company, from the judgment of MORRISON, J. and the verdict of a jury, in favour of the plaintiff in an action for damages for the death of a workman employed by the appellant Company, owing to the negligence of the Company. The facts appear fully in the headnote and reasons for judgment. Statement

The appeal was argued at Vancouver on the 30th of April and 1st of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Ritchie, K.C., for appellants (defendants): This action was brought under the Families Compensation Act, on an allegation Argument

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that Slater was employed by both defendant Companies; there is no alternative action. They obtained a judgment against the Waugh Milburn Construction Company alone, without amending. An action against A and B is not an action against A: *Laird* v. *Briggs* (1881), 19 Ch. D. 22; *In re Bowden* (1890), 45 Ch. D. 444. As to the finding of the jury, they have not found a defective system; they find there was negligence, as the poles were not planted deep enough or rigidly enough. The plaintiff must prove negligence and establish a finding not only that there was default, but that the default caused the accident: *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. When the evidence is as consistent with one state of facts as it is with another, then they cannot succeed: *Quebec and Levis Ferry Co.* v. *Jess* (1905), 35 S.C.R. 693; *Wigmore* v. *Jay* (1850), 5 Ex. 354; *Lovegrove* v. *London, Brighton and South Coast Railway Co.* (1864), 16 C.B.N.S. 669; *Wilson* v. *Merry* (1868), L.R. 1 H.L. (Sc.) 326. It is the duty of the employer, in the first instance, to provide a safe place for his men to work: *Bergklint* v. *Canada Western Power Co.* (1912), 17 B.C. 443, 3 W.W.R. 145; *Dominion Iron and Steel Co.* v. *Day* (1903), 34 S.C.R. 387; *Davidson* v. *Peters Coal Co.* (1912), 23 O.W.R. 25; *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155.

Argument

Macdonell, for respondent (plaintiff): The complaint is that the fellow workmen did not fill in the earth properly around the pole. The Company instructed the men what to do, the holes having been there and the material for filling in being there.

Ritchie, in reply.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The only point in this case which suggests difficulty is that of common employment. The deceased, the jury have declared, was not an independent contractor. He was a fellow servant with those who insecurely set the pole. The defendants employed a competent foreman and workmen to do the work, the setting up of poles for transmission of electricity. The appellants have shewn that they had an exper-

ienced and competent man in charge of the work, and having regard to its character, I feel myself impelled to the conclusion that the verdict cannot be sustained.

I would allow the appeal.

IRVING, J.A.: The action, as originally launched, claimed damages under the Families Compensation Act, against the Vancouver Power Company and the Waugh Milburn Construction Company for their joint negligence, but the plaintiff at the trial released the Power Company, and no amendment was made. There was no claim in the alternative against each of the defendants for their separate negligence.

The case proceeded against the Waugh Milburn Construction Company, and on questions left, the jury found that Slater, the deceased, was an employee of the Waugh Company, and that he had not been guilty of negligence, and that the Waugh Company was guilty of negligence in that it had failed to plant the poles sufficiently deep, and in that they failed to fill in the holes with suitable material, and that the proximate cause of the accident (whereby Slater met his death) was this negligence.

The facts not in dispute establish that the Waugh Company had taken a contract from the Power Company under which the Waugh Company were to set in holes already dug by the Power Company, and string with wire certain poles for the Power Company. The Waugh Company did not themselves oversee the work of setting and firming the poles; that duty was committed to a foreman, against whose fitness for the job not a word has been said. The pole was set on a Monday, and on Wednesday, when the plaintiff ascended to rig the cross-arms, it fell with him. No question of the competency of the other men was raised.

The learned judge, in my opinion, should have withdrawn the case from the jury. The accident took place by reason of the negligence of the fellow workmen not filling in the hole with proper holding material, and not excavating to a sufficient depth. The defendants themselves were not shewn to have been guilty of any negligence.

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IRVING, J.A.

The case of *Priestley* v. *Fowler* (1837), 3 M. & W. 1, covers this case. In giving judgment, Lord Abinger, C.B. at p. 5, said:

"If the master be liable to the servant in this action, the principle of that liability will be found to carry us to an alarming extent. He who is responsible by his general duty, or by the terms of his contract, for all the consequences of negligence in a matter in which he is the principal is responsible for the negligence of all his inferior agents. If the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage, may have an action against his master for a defect in the carriage, owing to the negligence of the coach-maker, or for a defect in the harness arising from the negligence of the harness-maker, or for drunkenness, neglect, or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable to the servant for the negligence of the chambermaid, for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead, whereby he was made to fall down while asleep and injure himself; for the negligence of the cook, in not properly cleaning the copper vessels used in the kitchen; of the butcher, in supplying the family with meat of a quality injurious to the health; of the builder, for a defect in the foundation of the house, whereby it fell, and injured both the master and the servant by the ruins."

Ainslie Mining and Ry. Co. v. *McDougall* (1909), 42 S.C.R. 420, was referred to, but I do not think the duty of a master to furnish a fit and proper place to work upon can be regarded as a standard in a work of the character under consideration.

I would allow the appeal and dismiss the action.

MARTIN, J.A.: With respect to the first point taken by appellants' counsel as to the several liability of one joint tort feasor sued jointly with the other, against whom the action has been discontinued, I observe, in the first place, that, as pointed out in *Marney* v. *Scott* (1899), 1 Q.B. 986 at p. 988, the liability would really appear to arise from the contract; and in the second, that the judgment of Mr. Justice Idington in *Longmore* v. *J. D. McArthur & Co.* (1910), 43 S.C.R. 640, in effect covers the point.

MARTIN, J.A.

Then as to the facts. The case is peculiar in this, that the defendant contracting Company agreed with the defendant Power Company, the owner of the electric line, to set up the

poles on the Power Company's right of way in the holes that the Power Company had dug for them. This is made clear by the evidence of Waugh, the directing partner (for this contract), that "the holes were supposed to be finished," and "we were to accept the holes" as given to them by the Power Company, and to set up the poles therein. These poles were very high, about 60 feet (the one in question being 58 feet 2 inches), and it is obvious that if they were not properly set, the line would be a most unsafe place to work on, but there is abundant evidence to shew that several of the holes in a bad place, 300 to 400 feet long in a "file," were not dug deep enough to warrant the jury's finding that the pole in question was not set sufficiently deep, or the hole "filled with sufficient material to ensure safety." It was sought to excuse this negligence by attributing it to the Construction Company's foreman's failure to do his duty, but as the contract required that the holes should be accepted as dug, I cannot accede to this view, because it was obviously no part of his duty to dig a hole deeper. This particular hole was only between five and six feet deep, though it was dug in such loose, peaty and leafy soil that it should have been nine feet deep, according to trustworthy evidence, because the soil could not be tamped. Nor in any event, and apart from the question of the depth of the holes, is there any evidence to shew that as regards the tamping, any effort was made to supply proper material or plant for that purpose. It is apparent to me at least, from the evidence, that the gang of seven or eight men who were setting up the poles were using, and were expected to use, as a matter of course, the material that was at hand at each hole, and it was no part of any one's duty to see that material was brought to the holes from any other place, nor was anyone expected to transport material for that purpose, nor is there any evidence to shew that trucks or barrows or any other plant or tools were provided for that purpose; but shovels and tampers were provided for use on the spot to fill the holes with the material at hand, and were used for that purpose where possible. These facts, in my opinion, bring the case within the reasoning of *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420 at pp. 424-8, as the pole line constituted a "defective place" in which the

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plaintiff was called upon to work in his employment as a lineman fixing cross-arms on the poles, and, therefore, the master cannot set up the defence of common employment as an excuse for the following reason, given in the *Ainslie* case, p. 424:

"In other words, I hold that the right of the master, whether incorporated or not, to invoke the doctrine of common employment as a release from negligence for which he otherwise would be liable, cannot be extended to cases arising out of neglect of the maters' primary duty of providing, in the first instance at least, fit and proper places for the workmen to work in, and a fit and proper system and suitable materials under and with which to work. Such a duty cannot be got rid of by delegating it to others."

I refer to the judgment we have just delivered in *Velasky* v. *Western Canada Power Co.* [(1913), 18 B.C. 407]. It is only necessary to add that the contention that the deceased acted recklessly with a knowledge of the circumstances, and the case should have been withdrawn from the jury, is clearly not supportable. The evidence of Evans alone would justify the jury in the view they took of the matter.

MARTIN, J.A.

The appeal, in my opinion, should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A. concurred with MARTIN, J.A.

Appeal dismissed.

DUNSMUIR *ET AL.* v. THE OTTER.

MARTIN, LO. J.A.

1909

March 9.

DUNSMUIR v. THE OTTER

Admiralty law—Salvage—Meritorious service—Award—Value of res—Percentage of yearly depreciation—Practice.

The O., a freight steamer, fully laden with coal, had gone ashore on Danger reefs, at the northerly end of Thetis island, and about seven and a half miles, by ship's course, from Ladysmith, B.C. She had sprung aleak and the water had put out her fires. About 10 feet of her forefront was on the rock, while her stern was in deep water. The P. sighted the stranded vessel in the night time and went to her relief, taking in a hawser passed to her by the O., and waiting for the tide and daylight. Just before 6 o'clock in the morning the P. started to pull straight ahead at full speed, and shortly succeeded in getting the O. off the reef. The P. then cut the O.'s hawser, so as to lose no time, backed up to the O. and made fast to her with the P.'s hawser, and succeeded in towing her under forced draft into Ladysmith, where the O. was tied up to a wharf in a position of acknowledged safety.

Held, that the services performed by the P., while without the specially meritorious features of saving human life or danger to herself and crew, were as skilfully conducted as the nature of the case permitted, and valuable, and as such were entitled to corresponding recognition, even though they were of short duration. Salvage awarded in an amount of $2,200.

In finding the value of the ship and cargo, the district registrar allowed a yearly depreciation in the value of the ship of 7 per cent., following a practice with reference to wooden vessels said to prevail in British Columbia.

Held, that whatever may be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she had subsequently received but, in any event, it could not be applied to the ship in respect of which salvage services were rendered in this case, as she is a better built ship than the average, and has been well cared for and maintained.

ACTION for salvage services rendered by the tug Pilot, of which the plaintiffs are the owners.

Statement

The trial took place before MARTIN, Lo. J.A. at Victoria, on the 10th, 12th and 14th of February, 1908, and was adjourned until report made by the district registrar as to the value of the Otter. On the 7th of April, 1908, the district registrar filed

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Argument

his report, and both sides having filed objections to said report, argument to vary report and on the whole case took place on the 29th of April, 1908.

Bodwell, K.C., for plaintiffs, cited *The Antilope* (1873), L.R. 4 A. & E. 33, and *The Vermont Steamship Co.* v. *Ship Abby Palmer* (1904), 8 Ex. C.R. 446.

McMullen, for the Ship, cited, as to value: *The Harmonides* (1903), P. 1; *The Hohenzollern* (1906), P. 339; Sedgwick on Damages, 8th Ed., Vol. 2, p. 229; as to salvage: *The Werra* (1886), 12 P.D. 52; *The Amerique* (1874), L.R. 6 P.C. 468; *The Chetah* (1868), L.R. 2 P.C. 205; and *The Lancaster* (1883), 8 P.D. 65, 9 P.D. 14.

9th March, 1909.

MARTIN, LO. J.A.: This is a claim for salvage services rendered by the tug Pilot (136 feet long) to the steam freighter Otter (232 tons, net) on the morning of the 27th of September, 1907, at which time, about half past one or two, the Pilot, on her way from Nanaimo to Victoria, sighted the Otter aground on Danger reef, at the northerly end of Thetis island, and about seven and a half miles, by ship's course, from Ladysmith. The Otter was laden with a full cargo of 292 tons of coal, and about ten feet of her forefront were on the rock, with her stern in deep water, and the water from the leaks rose so high in her engine-room that it put out the fires. The night was calm, but dark and misty, and the sea smooth; the tide had begun to flow shortly before the Pilot arrived, but it was too dark to do anything except to take in a six-inch line which the Otter passed to her, and anchor, after putting the stern of the Pilot as near the stern of the Otter as possible. The vessels were kept in that position till daylight, just before six o'clock, when, after the tide had risen considerably, the Pilot began to pull straight ahead on the hawser at half speed, and after doing so for about a quarter of an hour, more or less, the Otter came off, and the master of the Pilot immediately cut the Otter's hawser, so as to lose no time, backed up to the Otter and made fast to her with the Pilot's hawser and started to tow her to Ladysmith under forced draught, and did succeed in bringing her up alongside

Judgment

the city wharf at that place at a quarter to eight, where, after being tied to the wharf, she was in a position of acknowledged safety, because the water was so shallow that she could not sink much lower, even if she filled (as her master admits), there being only 18 to 19 feet of water at that wharf at high tide. During this run, the chief engineer of the Otter admits that she sank lower in the water by four or five inches, and when she reached Ladysmith there were between seven and eight feet of water in the engineroom.

After thus accomplishing her object, the Pilot left the Otter, and the master of the latter put a sail over her bows to stop the leak as well as possible, and about half an hour later the steamer Trader came alongside and began to siphon out the Otter and unload her cargo, and though the Otter was rising in the water as the result of the Trader's operations, yet about an hour later a small steamboat, the Stetson (17 tons) also was engaged to assist in and expedite the work, by means of her siphon. Still later, about 6.30 the same evening, a third steamer, the Salvor (561 tons), which is always kept ready for salvage purposes and equipped with a salvage plant, arrived from Esquimalt, and put a large pump to work, with the result that the Otter was pumped dry next morning at eleven o'clock.

Since the trial I have carefully re-read and reconsidered all the evidence, and I am satisfied, without here entering into particulars, that the matter must be dealt with by me on the assumption that had not the Pilot given the Otter the assistance she did, the latter would have sunk in deep water. It is true that as the Pilot was towing the Otter to Ladysmith she met the Stetson, with a scow, about two miles from Danger reef, on the way to the Otter's assistance, in response to a request sent by a boat from the Otter, but I am clearly of opinion that the Otter was, in view of all the circumstances, in such a dangerous position that her master pursued the only proper course in trusting himself to the Pilot and making the attempt, successful as it turned out, to reach Ladysmith. It then remains to be decided what is the proper amount to be awarded to the Pilot for her valuable services. So far as the other vessels are concerned, they have already been settled with by the Otter's

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owners before this action was begun, as follows: Trader, $600; Stetson, $400; Salvor, $1,500. But I can derive practically no assistance from that settlement, because, in the first place, this Court had nothing to do with it, and in the second place, I think it was wrong in principle, for the services rendered by the Stetson and Salvor, however valuable they might have been, clearly do not properly partake of the nature of salvage at all, whatever may be said of those of the Trader, into which it may be possible that some element of salvage may enter, though it is not necessary to decide that point. Therefore, I shall proceed to make my award without regard to the said unsatisfactory settlement and apportionment, and deal with the Pilot's claim on its own merits, without reference to others. Now, while the services she rendered were without those specially meritorious features of saving human life, or danger to herself or crew, yet they were as skilfully conducted as the nature of the case permitted of, and valuable, and are entitled to corresponding recognition, even though they were of short duration. I am informed that the Otter's owners tendered the sum of $1,500 in satisfaction of said services, but, in my opinion, that sum is not sufficient, and should be increased by $700, making the award amount to $2,200, for which sum let judgment be entered, the costs following the event.

Judgment

In arriving at this conclusion I have taken into consideration the value of the ship, which was fixed by the registrar, under order of reference, at $18,346.94, and the cargo, 292 tons of coal, at $3.50, $1,022, in all, ship and cargo, valued at $19,386.94. Objection is taken to the fact that in arriving at the value of the Otter, the registrar, in his report, allowed a yearly depreciation of seven per cent. Now, whatever may be said of the allowance of such a depreciation in the case of wooden vessels on this coast as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she has subsequently received. In the case of the Otter I do not think such a rule could be fairly applied. She is, according to the evidence, a better built ship than the average, and has been well cared for and maintained. She cost, in 1900, $41,128, and at the time of the accident, I

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am satisfied by the evidence as a whole, that for the purposes of this award, her value must be taken to be at least $30,000, even after giving due, but not unreasonable weight to the evidence on behalf of her owners that she is a vessel of a type which is not so profitable, under existing conditions, to operate on this coast as others of more recent construction, which fact would, of course, affect her market value. The further fact that she is insured for six thousand pounds is a useful guide to her owners' opinion. Taking this view, it is not necessary to consider the other objections to the registrar's report.

Judgment accordingly.

McDERMOTT v. COATES.

HUNTER, C.J.B.C. (At Chambers)

1913

Oct. 17.

MCDERMOTT v. COATES

Principal and agent—Architect—Accounts—Form of order.

An architect is bound to render to the building owner an account of all moneys expended under the architect's certificate, notwithstanding that the certificate is made final as between the building owner and contractor.

Statement

MOTION for an account under Order XV., before HUNTER, C.J.B.C. at Victoria on the 17th of October, 1913.

Argument

Mayers, for the plaintiff, the building owner: The plaintiff asks for a detailed account shewing the various appropriations of the sums expended by the plaintiff on the certificate of the defendant, the architect. The finality of the certificate does not bind the building owner as regards the architect: *Badgley* v. *Dickson* (1886), 13 A.R. 494.

W. J. Taylor, K.C., for defendant, the architect: The duty of the architect was to supervise, and not to render accounts. If

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the building owner desires accounts, he must employ a clerk of the works; there is no authority to shew that an architect is bound to keep any accounts. His certificate is final and binding on both parties, as appears by the contract between the plaintiff and the contractor.

HUNTER, C.J.B.C.: I do not think an architect performs his duty towards the building owner by merely issuing certificates for lump sums. He should be prepared to shew the materials from which he calculated the sums for which he issued the certificates. The object of employing an architect is to protect the interests of the owner, and I do not see how that duty can be performed unless the architect keeps accurate accounts of the various sums expended for labour and material. The architect's position under the contract between the owner and the contractor cannot affect his duties as agent to his principal. The order will go for the account, as prayed.

Judgment

Order accordingly.

The following was the order as issued:

"It is ordered that the defendant do within ten (10) days from the date of this order make and file an account verified by affidavit of all moneys which the defendant has disbursed or directed or authorized to be disbursed by certificate or otherwise, as agent for the plaintiff, distinguishing between moneys expended for work done and moneys expended for materials supplied, shewing the different classes of work done and of material supplied with the amounts paid in respect of each item of each class, and the dates when such work was done or material supplied, shewing what work was done and material supplied in accordance with the contract between the plaintiff and one Thomas L. Crosson, and what work was done and what labour supplied as extras to the said contract, together with a statement shewing the value of the work performed upon the said buildings by the said contractor, and the cost of replacing any work performed by the said contractor and condemned by the defendant."

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CITY OF NEW WESTMINSTER v. STEAMSHIP MAAGEN.

CITY OF NEW WESTMINSTER v. STEAMSHIP MAAGEN.

Admiralty law—Shipping—Collision between vessel and bridge—Negligence—Regulations—Obstructions placed across navigable waters—Right to damages—"Railway bridge."

Apart from any statutory regulations as to lights, those who place obstructions across navigable waters, though lawfully authorized to do so, cannot complain if damage is done to their works by collision brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstructions.

Bank Shipping Co. v. *City of Seattle* (1908), 10 B.C. 513, distinguished.

Quaere, whether a bridge not originally built for railway purposes, but over which rails were laid (it was not known by whom) and used by a street railway company occasionally for construction purposes, is to be regarded as a "railway bridge" under the provisions of the order in council of the 29th of June, 1910 (Statutes of Canada, 1911, cxii.).

ACTION for damages arising out of a collision between the defendant's ship and a bridge belonging to the plaintiff Corporation. The facts appear in the reasons for judgment. Statement

The case was tried at Vancouver before MARTIN, Lo. J.A. on the 10th and 11th of September, 1912.

McQuarrie, for plaintiff.

C. M. Woodworth, for the ship.

30th November, 1912.

MARTIN, Lo. J.A.: This is an action for damages for injury done by the steam tug Maagen (65 ft. long; 18 ft. beam), with a scow 92 x 32 feet in tow, laden with gravel, to the plaintiffs' bridge, commonly known as the North Arm bridge, connecting Twelfth street and Lulu island, such injury being alleged to be due to the negligent and improper navigation of the Maagen. Judgment

The defences set up were: (1) That the bridge was placed in an improper manner across the stream, so that the span and openings were not in the centre of the channel; (2) that the bridge was not properly lighted.

With respect to the first defence, it is sufficient to say that no evidence to which any weight could be attached was submitted in support of it.

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With respect to the second, reliance was placed by plaintiffs' counsel on the order in council of the 29th of June, 1910 (Statutes of Canada, 1911, p. cxii.), establishing "Regulations to govern draw or swing bridges over navigable waters other than railway bridges," and the point is taken that this is a railway bridge and therefore excepted from the regulation requiring certain lights to be exhibited as therein specified.

There were cited the following references on the difficult question as to what is meant by a "railway bridge" in this regulation, no definition of it being given: British Columbia Railway Act, Revised Statutes of British Columbia, 1911, chapter 194, section 28; Stroud's Judicial Dictionary, 2nd Ed., Vol. 3, p. 1,648; *Toronto Railway Co.* v. *The Queen* (1896), A.C. 551; chapter 28, sections 6 and 21, Statutes of Canada, 1909, and the Railway Act, Revised Statutes of Canada, 1906, chapter 37, sections 230-4. The evidence here does not shew that this bridge was built for railway purposes, though there are rails laid across it which have been used occasionally by the B.C. Electric Railway in running gravel cars over it for construction purposes on their suburban line. No other railway company, electric or otherwise, is shewn to have made use of it, nor is there any evidence as to who put down the rails, or of their nature. On such evidence I should hesitate to say this was a railway bridge within the meaning of the regulations. But it is not necessary to decide the point from the view I take of the matter, which is, shortly, that on the evidence before me, no negligent or improper navigation has been established.

Judgment

The evidence of the master of the Maagen on this point, which has not been displaced in essentials, and which was reasonable and consistent, discloses nothing on which I can place my finger and say that in this or that respect he was guilty of negligence. The night was dark and he was and had been proceeding with due care and caution, but despite that, he made a slight miscalculation, very pardonable in the circumstances, of his true distance from the north abutment and was carried across by the current to the main abutment, with which the scow collided. The truth is, apart from all regulations, that if there had been

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a light at the north abutment, he would have been able to approach closer to it with safety, and the accident would have been avoided. Quite apart from any statutory regulations as to lights, those who place obstructions across navigable waters, even although lawfully authorized to do so, cannot complain if in the carrying out of their powers damage is done to their works by the fact that a collision occurs owing to a prudent navigator, proceeding with due care, being unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstruction. The case of *Bank Shipping Co.* v. *City of Seattle* (1903), 10 B.C. 513, is clearly distinguishable from this one, which is really a case of inevitable accident on the part of the master.

Judgment

There will be judgment in favour of the defendant.

Judgment accordingly.

REX v. LAITY.

HUNTER, C.J.B.C.

1913

Sept. 10.

REX v. LAITY

Constitutional law—Sunday observance—Imperial Acts—English Law Ordinance, 1867—British North America Act, 1867, Sec. 91, Subsec. 27—Provincial and Dominion legislation—Construction of statutes—Tradesmen selling wares on Sunday.

The prohibition of 29 Car. II. chapter 7, against the pursuit of their ordinary callings by tradesmen on the Lord's Day, and the exposure of merchandise for sale was, under the English Law Ordinance, 1867, in force over the whole of British Columbia at the time of Confederation. The Sunday Observance Act, Consolidated Statutes of British Columbia, 1888, chapter 108, by which the application of the Imperial Act was limited, is *ultra vires*. The effect of section 16 of the Dominion Lord's Day Act, Revised Statutes of Canada, 1906, chapter 153, was to leave any valid Provincial law in force. It did not adopt or confirm any *ultra vires* legislation.

If the revised statute of 1911 (Sunday Observance Act) is not to be regarded as new legislation, but as the old consolidated Act of 1888,

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being carried on in subsequent revisions, the case is governed by the Imperial Acts which were introduced by the English Law Ordinance of 1867; if, on the other hand, the revised statute of 1911 is to be regarded as new law, enacted after the passage of the Dominion Act, then the case is governed by the general prohibition contained in section 5 of the Dominion Act: and in either event, speaking generally, a tradesman who sells his wares on Sunday violates the law.

CASE STATED by the police magistrate at Victoria under section 769 of the Criminal Code, heard by HUNTER, C.J.B.C. on the 10th of September, 1913. In the case stated, the police magistrate set out the facts and questions as follows:

"The Attorney-General authorized the commencement of proceedings against Dudley Laity that he did on the 22nd day of June, 1913, being the Lord's Day, at Victoria, B.C., in the exercise and carrying out of his ordinary calling of a tobacconist, sell two cigars.

"I was of opinion that the Lord's Day Act did not apply to Vancouver Island and dismissed the information for the following reasons: Section 16 of the same Act provides that 'nothing herein contained shall be construed to repeal or in any way affect any provisions of any Act or law relating in any way to the observance of the Lord's Day in force in any Province of Canada when this Act comes into force.' It must be apparent that the Parliament of Canada intended to preserve to the Provinces of the Dominion the laws in force in the different Provinces regarding the observance of the Lord's Day at the time of the passing of the Act and that, having in view the different conditions and customs prevailing in the several Provinces, Parliament intended to preserve in some measure the regulation by the Provinces of Sunday observance within their own territory.

Statement

"In 1863 the Governor of the Crown Colony at the time, issued a proclamation bringing into force in British Columbia the statutory law existing in England, and particularly the statutes of Charles I. and II. and their statutory enactments regarding the observance of the Lord's Day in England.

"In 1888 the Provincial Legislature passed an Act wherein it was provided that those Imperial statutes should apply only to that portion of the Province comprised in the former separate colony of British Columbia and thereby excepting, of course, Vancouver Island. That statute is in the Revised Statutes of 1897 and 1911, the last revision being subsequent to the passing of the Lord's Day Act. It therefore follows that there is a statute in this Province governing the observance of the Lord's Day, and that that statute was in force when the Lord's Day Act was passed. That being so, I have come to the conclusion that the Lord's Day Act does not apply.

"Counsel for the informant desires to question the validity of the said determination on the ground that it is erroneous in point of law, and the question for the opinion of this honourable Court is whether my said determination was erroneous in point of law."

C. L. Harrison, for the Crown: The Lord's Day Act, Revised Statutes of Canada, 1906, chapter 153, applies to the whole of British Columbia, including the former separate colony of Vancouver Island. There being no provision exempting that portion, the magistrate should have convicted.

Higgins, for defendant: The charge against the defendant is for carrying on his ordinary trade or calling on the Lord's Day. It is submitted that the defendant has not violated the provisions of the Lord's Day Act of Canada, as sections 5 and 16 provide that the defendant is not liable to conviction if it can be shewn that there is a Provincial statute which in effect makes it lawful for him to carry on his trade or calling on Sunday. By subsection (*g.*) of section 2 of the same Act, "Provincial Act" is defined as any public Act of any Province passed before or after Confederation. By Provincial legislation in force at the time of the passage of the Dominion Lord's Day Act, it was lawful for a person to carry on his ordinary trade or calling on Vancouver Island for the reason that at the time of Confederation and down to 1888, Sunday trading was prohibited in the whole of the Province by the introduction into the Province of 29 Car. II., chapter 7, but in the Consolidated Statutes of 1888 the Legislature inserted in the statute that introduced the statute of Charles, the following section: "This Act applies only to the portion of this Province comprised in the former separate colony of British Columbia," and thereby made lawful that which was formerly unlawful to do on Vancouver Island.

Argument

As the Lord's Day Act, in express terms, excepts localities where it is lawful to trade by virtue of Provincial legislation, the defendant is not liable to conviction.

As to the constitutionality of the amendment to the Provincial Act of 1888, it must be noted that the Lord's Day Act specifically declares that the term "Provincial Act" mentioned in sections 5 and 6 means an Act of a Province whether passed before or since Confederation. Since the decision of the Privy Council in *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524, that Sunday legislation is criminal law, and therefore, solely within the powers of the Dominion Parliament,

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some of the judges of the Supreme Court of Canada, in *Ouimet* v. *Bazin* (1911), 46 S.C.R. 502, hold that Provincial legislation permitting Sunday trading is *intra vires*. The amendment in the consolidated statute of 1888 clearly permits Sunday trading on Vancouver Island; therefore, it was competent for the Provincial Legislature to pass this legislation.

Harrison, in reply: The Sunday Observance Act, Revised Statutes of British Columbia, 1911, chapter 219, is also in force in the whole of British Columbia, including the former separate colony of Vancouver Island. On the 6th of August, 1866, the former colony of Vancouver Island joined British Columbia (see British Columbia Act, 1866), and on the 6th of March, 1867 (Revised Laws of British Columbia, 1871, chapter 70), the colony of British Columbia brought into force the criminal laws of England as they existed on the 19th of November, 1858, and in particular the statutes 1 Car. I., chapter 1; 3 Car. I., chapter 1; 29 Car. II., chapter 7; 1 and 2 Will. IV., chapter 32; 13 and 14 Vict., chapter 23.

Argument

After Confederation (1870), the local Legislature purported to limit the operation of these statutes (see Consolidated Statutes of British Columbia, 1888, chapter 108, section 2) to that portion of the Province comprised in the separate colony of British Columbia. Sunday observance being a matter of criminal law, the Provincial Legislature had no power to alter the same. The limitation was *ultra vires*: *Attorney-General for Ontario* v. *Hamilton Street Railway* (1903), A.C. 524; *Ouimet* v. *Bazin* (1911), 46 S.C.R. 502. Both Acts being in force, the prosecution is at liberty to proceed under either Act by virtue of the provisions of section 16 of the Lord's Day Act.

10th September, 1913.

HUNTER, C.J.B.C.: By the English Law Ordinance, 1867, passed by the old united colony of British Columbia, the civil and criminal laws of England, as they existed on the 19th of November, 1858, so far as not from local circumstances inapplicable, became the law of the colony, subject to any modifying legislation that had been previously passed by the separate colonies. No such modifying law was ever passed by the Vancouver Island colony in respect of the Imperial Acts respecting

Judgment

the Sunday laws. It therefore follows that these last-mentioned Acts were in force over the whole Province at the time of Confederation, except in so far as any particular enactment was by reason of local circumstances inapplicable, and while several of such enactments were no doubt inapplicable, such, *e.g.*, as those providing for the use of the stocks, there seems no room for doubt that the prohibition of 29 Car. II., chapter 7, against the pursuit of their ordinary callings by tradesmen, etc., and of the exposure of merchandise for sale was not inapplicable by reason of local circumstances.

Now, legislation of this character has been finally decided by the Privy Council to be within the exclusive jurisdiction of the Parliament of Canada, and therefore it was not competent to the Legislature of British Columbia to pass the consolidated Act of 1888, which limits the application of the Imperial Acts to the old colony of British Columbia, and which has been maintained in the official editions of the statutes ever since.

To put it shortly, as the tree fell at the time of the entry of the Province into Confederation, so it lay until the passage of the Dominion Act, called the Lord's Day Act, being chapter 153 of the Revised Statutes of Canada, 1906.

I do not see how it can be successfully maintained that this Act, in terms, adopted the various Provincial enactments throughout Canada, whether they were or were not *intra vires*, and adoption or ratification is a different thing from non-interference. All that is done by section 16 is to leave any valid Provincial law in force; if it had been intended otherwise, one would have expected to find a distinct declaration that any such *ultra vires* Acts were to be the law of the particular Province. The phrase "in force" must mean "validly in force" if such an expression is not really tautological; otherwise two different meanings must be assigned to the word "force," which appears twice in the same section. How can any Act passed by an impotent Legislature be said to be "in force"? Nor can any real aid be derived from subsection (8) of the interpretation section, which declares the phrase "Provincial Act" to include Acts passed since Confederation, as no doubt there are numerous such Acts, as for instance those which prohibit the selling of

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liquor on Sundays, which are *intra vires*. Nor do I think that section 5 is to be construed as adopting and confirming at the time of the passage of the Act of 1906, the *ultra vires* legislation of the Province which was then pre-existent.

That leaves only the question as to what effect is to be assigned to the maintenance of the consolidated Act of 1888 in the Revised Statutes of 1911, as chapter 219, which I think the Legislature, by virtue of section 5 of the Dominion Act had been delegated the power to pass if it saw fit. In my opinion, the declaration of the Legislature that the Imperial Acts are to apply only to the mainland is not strong enough to prevent the application to the island of the new general prohibition enacted by section 5 of the Dominion Act, there being no necessary inconsistency or repugnancy.

Judgment

To recapitulate: If the revised statute of 1911 is not to be regarded as new legislation, but as the old consolidated Act of 1888 being carried on in subsequent revisions, the case is governed by the Imperial Acts which were introduced by the English Law Ordinance of 1867; if, on the other hand, the revised statute of 1911 is to be regarded as new law, enacted after the passage of the Dominion Act, then the case is governed by the general prohibition contained in section 5 of the Dominion Act, and in either event, speaking generally, a tradesman who sells his wares on Sundays violates the law. The Court is not concerned with either the policy of the law as it stands, or of the prosecution.

The case is referred back to the magistrate to act in conformity with this opinion.

Order accordingly.

NOSLER v. THE AURORA.

MARTIN, LO. J.A.

1913

Nov. 12.

NOSLER v. THE AURORA

Admiralty law—Practice—Action in rem—Wages—Judgment in default of appearance—Waiver of proceedings.

In an action *in rem* for seaman's wages wherein no appearance has been entered, and the ship is in the marshal's hands for sale in another cause, all preliminary proceedings may be waived and judgment entered forthwith.

MOTION in an action *in rem* for seaman's wages for judgment in default of appearance, heard by MARTIN, LO. J.A. at Vancouver on the 12th of November, 1913.

The plaintiff filed his affidavit verifying the cause of action and shewing that no appearance had been entered though two weeks had elapsed since the filing of the warrant, and also that the ship was now in the marshal's hands for sale in another action in this Court. He further deposed "that before I commenced this action I was advised by the owner of the Aurora to come up town and see if I could not get my wages out of the ship." The plaintiff's solicitor filed an affidavit stating that "I am informed by (A.B.), solicitor for the owner of the ship Aurora that it is not intended to dispute the plaintiff's claim."

Statement

Sears, on behalf of the plaintiff, cited rule 115, Howell's Admiralty Practice, 54-5; and *The Julina* (1876), 35 L.T.N.S. 410, and asked for an order for immediate judgment.

Argument

No one, *contra.*

Per curiam: In the special circumstances of this case, wherein the debt is practically admitted and the ship now in process of sale by the marshal, I see no reason why an order should not be made waiving all preliminary proceedings and directing judgment to be entered forthwith. This case is stronger, if anything, than *The Julina, supra.*

Judgment

Order accordingly.

COURT OF APPEAL

1913

May 20.

McPHEE v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Negligence—Employer and workman—Engineer on steam-shovel—Risk voluntarily incurred—Volenti non fit injuria—Employers' Liability Act, R.S.B.C. 1911, Cap. 74.

McPHEE v. ESQUIMALT AND NANAIMO RY. CO.

The plaintiff had been engaged on a steam-shovel of the defendant Company for six years, during the latter two and a half of which he had acted as engineer. The steam-shovel, which travelled by its own power on the track at about three miles an hour, had a cab in front for operating the engine and another at the back for firing. The boiler stood between the cabs and its back portion was between two water tanks about seven inches from its outer bulge four feet above the deck, the engine being below the boiler. A break staff stood about 15 inches in front of the tank to the right of the boiler, and about two feet out from a pinion that was connected with a gear-wheel in front, by which the machine was moved on the tracks. The lubricator was about three and a half feet back of the pinion, between the boiler and the water-tank. In order to get to the lubricator from the front cab, the engineer had to pass between the gear-wheel and the break staff and then between the boiler and the water-tank. While the steam-shovel was in motion, the plaintiff went from the front cab to the lubricator and after adjusting it was backing out, when his overall caught between the pinion and the gear-wheel, and his arm being pulled in, it was crushed between the wheels, necessitating amputation. It was the duty of the engineer to report what was necessary in the way of repairs or improvements to the steam-shovel, but the plaintiff had never requisitioned for a guard or other protection on the gear-wheel. On the trial the jury found in favour of the plaintiff for $5,000 damages, for which judgment was entered.

Held, on appeal, that the defence arising from the maxim *Volenti non fit injuria* applied in this case, and the plaintiff was not entitled to recover.

Appeal allowed and verdict set aside.

Statement

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action for damages for injuries sustained by the plaintiff while in the employ of the defendant Company, or in the alternative, for damages under the Employers' Liability Act. Heard at Vancouver on the 16th of September, 1912. Upon the case going to the jury, they were asked to

answer certain questions. The questions and answers were as follow:

"(1) Was the plaintiff guilty of negligence? No.

"(2) Was the defendant guilty of negligence, and if so, what was it? Yes; in not furnishing a guard on the gear.

"(3) What was the proximate cause of the accident? The uncovered condition of the gear.

"(4) Amount of damages, if any? $5,000.

"(5) Did the plaintiff know and appreciate the risk and danger, and did he voluntarily encounter them? (No answer.)"

The facts are set out shortly in the headnote.

Statement

The appeal was argued at Vancouver on the 10th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C. (*McMullen,* with him), for appellants (defendants): There are two reasons why the verdict should be set aside. First, the plaintiff, who was the engineer on the shovel, had been there for years, knowing the risk, and could have had the protection he now contends he should have had, if he had asked for it. He voluntarily undertook the risk. Second, he could have shut off the machine when adjusting the lubricator, but did not take the trouble to do so. When the plaintiff enters on a position that is risky, knowing the defects, and makes no complaints, he voluntarily accepts the position and makes the maxim *Volenti non fit injuria* applicable in his case. He referred to *Smith* v. *Baker & Sons* (1891), A.C. 325 at p. 337, and the cases therein cited.

Argument

On the second point, as to contributory negligence, he could have stopped his engine while adjusting the lubricator and thus have avoided any risk, but he did not do so. In fact, he was continually running this risk from day to day: see *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; Beven on Negligence, 3rd Ed., 635; *Dynen* v. *Leach* (1857), 26 L.J., Ex. 221; *Walsh* v. *Whiteley* (1888), 21 Q.B.D. 371 at p. 378; *Membery* v. *Great Western Railway Co.* (1889), 14 App. Cas. 179 at p. 185; *Clarke* v. *Holmes* (1862), 7 H. & N. 937.

S. S. Taylor, K.C., for respondent (plaintiff): On the question of *volens,* where the jury have not answered questions, but have given damages, it must be assumed that they answer all

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the questions in favour of the plaintiff: *King Lumber Co.* v. *Canadian Pacific Ry. Co.* (1912), 17 B.C. 502. Where the jury gives damages, it must follow that they have not found *volens*. The plaintiff knew it was dangerous in going past the gear-wheel, but it was the duty of the defendants to supply proper machinery and place proper guards on it. On the question of contributory negligence, there must be affirmative testimony that the plaintiff should not go in to adjust the lubricator while the machine is in motion. *Smith* v. *Baker & Sons* (1891), A.C. 325, expressly overrules *Yarmouth* v. *France* (1887), 19 Q.B.D. 647; it is the principal case and final word on the subject. See also *Canada Woollen Mills* v. *Traplin* (1904), 35 S.C.R. 424 at pp. 430-32.

Bodwell, in reply.

Cur. adv. vult.

20th May, 1913.

Judgment

Per curiam: We have come to the conclusion that the appeal should be allowed, on the ground that the defence arising from the maxim *Volenti non fit injuria* applies in this case, and the plaintiff is not entitled to recover.

Appeal allowed.

Solicitor for appellants: *J. E. McMullen.*

Solicitors for respondent: *Taylor, Harvey, Baird, Grant & Stockton.*

SMITH *ET AL.* v. ANDERSON.

MORRISON, J.

1913

Oct. 20.

SMITH *v.* ANDERSON

Statutes, construction of—Taxation Act Amendment Act, 1913, B.C. Stat. 1913, Cap. 71, Sec. 14—Taxes paid by assignee of purchaser at tax sale —Recovery of taxes from declared owner when tax sale set aside.

The purchaser of certain land at a tax sale sold in 1907 to the plaintiffs, who paid the taxes for four years. The original owner, the defendant, brought action and obtained judgment in 1911, setting aside the tax sale and declaring him the owner. The plaintiffs sought to recover from him the amount of the taxes paid, relying on section 14 of chapter 71 of the statutes of 1913.

Held, that the section is not retroactive, and the provisions thereof do not entitle the plaintiffs to recover.

ACTION to recover the amount of certain taxes paid by the plaintiffs on certain land subsequently adjudged to be the property of the defendant, tried before MORRISON, J. at Vancouver on the 20th of October, 1913.

Statement

Section 14 of chapter 71 of the statutes of 1913 reads as follows:

"In any case where a sale of lands for arrears of taxes, whether made before or after the passing of this Act, is set aside or declared illegal or void, the purchaser shall have a lien on the lands for the purchase-money paid by him in respect of the said lands, with lawful interest thereon, and for the amount of all taxes paid by him since the sale, with lawful interest thereon, which may be enforced against the lands in such proportions as regards the various owners of the lands and in such manner as the Supreme Court thinks proper."

Fraser, for plaintiffs.
Darling, for defendant.

MORRISON, J.: The plaintiffs claim repayment to them of the amount of taxes paid in the years 1908 to 1911 in respect of certain lots in South Vancouver purchased by them under agreement of sale in 1907 from a Mrs. Fleming, who, it appears, had previously acquired this property through a tax sale. About the time that the plaintiffs so purchased, an action was commenced by the defendant, the original owner, to set aside this

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tax sale, and in 1911 he succeeded in setting it aside and being declared the owner. During the pendency of this litigation, of which the plaintiffs had knowledge, they paid the taxes to the Municipality of South Vancouver. They now allege that the said taxes were paid by them at the request and with the knowledge of the defendant. In the alternative, that he stood by and allowed them to so pay the said taxes and that he is now estopped by his alleged conduct from denying his liability as claimed. In support of their case they mainly rely upon chapter 71, section 14 of the Statutes of British Columbia, 1913, which they submit is retroactive, and which reads as follows: [set out in statement.]

Judgment

There does not seem to me to be anything intractable or ambiguous in the words employed in this paragraph. I do not think it is retroactive. As the plaintiffs relied upon this section as their sheet anchor, I dismiss the action, with costs.

Action dismissed.

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REX v. BONNER

REX v. BONNER.

Criminal law—Prosecution under section 111 of the Criminal Code—Justification under section 16—Wilful use of explosives—Colour of right—Grand jury—Jurors Act, R.S.B.C. 1911, Cap. 121, Schedule B.—Number of jurors to be summoned.

Upon the sheriff summoning thirteen grand jurors, Schedule B of the Jurors Act is complied with in that portion of the Province to which it applies.

Per MACDONALD, C.J.A.: The schedule was passed not only for the purpose of permitting the sheriff to summon aliens and those without property qualification, but to summon less than the customary number.

Per MARTIN, J.A.: Assuming the existence of a *bona-fide* belief in a claim of right, that does not justify the employment of the means prohibited by section 111 of the Code in an attempt to exercise that right, and section 16 did not justify or excuse the accused in what he did.

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APPEAL by way of a case stated from GREGORY, J. and the verdict of a jury in a trial under section 111 of the Criminal Code, held at the Clinton spring assizes on the 6th of June, 1913. The accused, who was mining engineer for the Lightning Creek Mining Company, carrying on mining operations at Stanley, British Columbia, having had a dispute with one John Hopp, a miner in the same locality, over priority of rights in the water of Lightning Creek, by using dynamite blew the side out of a portion of a ditch controlled by Hopp. Upon a charge made under section 111 of the Criminal Code, the accused was sent up for trial. Upon the trial he was found guilty. The trial judge then reserved the following questions for the consideration and judgment of the Court of Appeal:

Statement

"(1) Was I right in the circumstances of the case in not laying greater stress upon the relevance of the title or ownership of the ditches in question?

"(2) Was I right in charging the jury that the intent with which the act was committed was not an indictment under section 111 of the Code, and essential part of the crime?

"(3) Was 13 the right number to summon for a grand jury? Thirteen only were summoned and thirteen were sworn and deliberated."

The appeal was argued at Victoria on the 8th of July, 1913, before MACDONALD, C.J.A., MARTIN and GALLIHER, JJ.A.

W. J. Taylor, K.C., for the prisoner: The charge is brought under section 111 of the Criminal Code, but it is contended we were justified in our action and have a good defence under section 16. What the accused did does not justify a criminal prosecution, as there is at least a colour of right: *Rex* v. *Rutter* (1908), 73 J.P. 12; *Fletcher* v. *Calthrop* (1845), 9 Jur. 205; *James* v. *Phelps* (1840), 11 A. & E. 483; *Reg.* v. *Matthews and Twigg* (1876), 14 Cox, C.C. 5; Russell on Crimes, 7th Ed., Vol. 2, p. 1,807.

Argument

Stuart Henderson (on the same side): The sheriff only summoned 13 jurors. We are governed by the common law as modified by Schedule B of the Jurors Act, Revised Stautes of British Columbia, 1911, chapter 121, which is the Douglas proclamation of 1860. Under the common law it was necessary to summon 24 for the grand jury: this is not modified by the

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Argument

Schedule. The statute of 1899 made the number thirteen, but that statute was repealed, as it was not included in the Revised Statutes of 1911: *Rex* v. *Hayes* (1902), 7 Can. Cr. Cas. 453; *Rex* v. *Belanger* (1902), 6 Can. Cr. Cas. 295; *Reg.* v. *Cox* (1898), 2 Can. Cr. Cas. 207; *Reg.* v. *Girard, ib.* 216.

Maclean, K.C., for the Crown: The question of the number of jurors is a matter that should have been raised at the trial: Crankshaw, 3rd Ed., 951; Criminal Code, section 899, subsection 2; *Rex* v. *Hayes* (1903), 11 B.C. 4; *Rex* v. *Sheridan and Kirwan* (1811), 31 How. St. Tri. 544 at p. 572. The objection must be raised by plea before the trial proceeds. Section 11 of the Interpretation Act says the repeal of an Act shall not revive any Act or provision of law.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The question submitted is: "Was thirteen the right number to summon for a grand jury? Thirteen only were summoned and thirteen were sworn and deliberated."

The judicial district in which the true bill in this case was found is not included in those parts of the Province to which the Jurors Act, except Schedule B, applied. The question, therefore, must be considered with reference to the common law as modified by the said schedule. There are no other statutory enactments affecting the matter in this Province. The schedule was first given the force of law by proclamation of the late Governor, Sir James Douglas, in 1860, and has been acted upon in those parts of the Province to which it applies ever since, with this qualification, that in 1899 a statute was passed declaring that in all parts of the Province 13 grand jurors should be summoned and that seven might make a presentment. This provision was left out of the Revised Statutes of British Columbia, 1911, and hence we are thrown back to the law as it was before 1899. The object of the schedule was to vary the then existing requirements of the English laws relating to the summoning, qualification, and disqualification of grand jurors, and it was recited in said Schedule that

"Whereas many of the provisions of the statutes relating to the sum-

moning, and qualifications, and disqualifications of jurymen, cannot be complied with in British Columbia, and it is expedient to make other provisions in respect thereof . . ."

And it was enacted that

"(1) The Acts of Parliament enumerated in the Schedule hereto, and all other Acts of Parliament (if any) in that behalf, shall, so far as the same relate to the qualification, and summoning, and returning of jurymen, and challenging of jurymen, except for favour, be repealed, and of no further application in the said Colony.

"(2) It shall be lawful for the sheriff, or his deputy . . . to summon, in addition to such British subjects as he may be able conveniently to summon, such additional grand and petit juries [jurors] as he may think fit, to serve upon grand and petit juries, whether British subjects or not, without regard to any property qualification."

Among the repealed Acts was a number of earlier Acts relating to juries in England, and also "so much (of 6 Geo. IV., c. 50) as relates to the qualification, summoning, returning of jurymen and challenging of jurymen except for favour." Nothing is said in the schedule as it now stands with respect to the number to be summoned or the number which should constitute a legal grand jury, though originally it declared 12 to be the number required to constitute it. The only question here is: Was it necessary that the sheriff should *summon* more than 13?

It is stated in Chitty's Statutes, 6th Ed., Vol. 6, p. 740 (note (*x*), referring to the writ of *venire facias juratores* mentioned in section 13 of the Act of 6 Geo. IV., that

"Although the words of the writ be 12, yet by the ancient course the sheriff had to return 24, for the expedition of justice; for if 12 only should be returned, there would seldom a full jury appear; and in this case usage and custom make the law (2 Hale, P.C. 263).

"'The general precept, that issues before a sessions, is to return 24, and commonly the sheriff returns upon that precept 48.' (2 Hale, P.C. 263)."

MACDONALD, C.J.A.

The appellant's contention is that Schedule B does not change this custom or usage, and that it is imperative that the sheriff shall summon 24, so that from those a legal jury of at least 12 and not more than 23 might be sworn and empanelled: see *Rex* v. *Marsh* (1836), 1 N. & P. 187. It is not contended in this case that the indictment was not found by the requisite 12, the whole point being that 24 were not summoned or returned.

I have no doubt, even if it were certain, which I do not think it is, that at common law a presentment by 12 would be bad

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where less than 24 were summoned, that under Schedule B the sheriff was not obliged to adhere to the English practice. I think that schedule was passed not only for the purpose of permitting him to summon aliens and those without property qualification, but to summon less than the customary number. The law was called into being, *inter alia,* because of the sparsely settled condition of portions of the Province and the difficulty of obtaining the requisite number of jurors. The intention was to introduce a new system of constituting juries, both grand and petit. The condition of the country made this almost imperative, and I think the language above quoted is sufficient to justify the construction which I have placed upon it.

MACDONALD, C.J.A.

I would, therefore, answer the question in this way: Thirteen was a sufficient number to have summoned.

Objection was taken by counsel for the Crown that the question before us could be raised only by plea before the trial proceeded. In view of the opinion above expressed, it becomes unnecessary to decide this point.

MARTIN, J.A.: On the argument on the points reserved, the discussion was directed to the summoning of the grand jury, the point being taken that under the proclamation of 1860 it was the duty of the sheriff to summon for the assizes in the County of Cariboo, 24 jurors, as that is the number, it is contended, that by the common law or statute law of England should have been summoned, though no more than 23 should have been sworn:

MARTIN, J.A.

Rex v. *Marsh* (1836), 6 L.J., M.C. 7, 1 N. & P. 187, 6 A. & E. 236, the first mentioned report being the best. But as he only summoned 13, it is contended that under my decision in *Rex* v. *Hayes* (1902), 9 B.C. 574, on the amending Act of 1899, chapter 35, the 12 grand jurors who did assemble under that Act did not form a grand jury at all, because the proper number (13) not having been summoned, they merely formed "a collection of persons unknown to the law and have no 'constitution' in a legal sense," and, therefore, could not have made a presentment, and so the necessary indictment has not been found against the accused, without which he could not have been put upon his trial.

Now I am prepared to assume for the purpose of this appeal, that the matter is to be decided, as contended, upon said proclamation, and it follows that we must view the matter in the light of the conditions of the colony at its date, 1860, when almost the whole of the mainland of this vast Province was in a wild and extremely sparsely settled state (with literally no white people in many thousands of square miles), and very few and difficult means of communication. It is in the light of these most special circumstances that the proclamation has to be interpreted, and in this relation I make the following reference to the remarks of Gwynne, J., at a period of nearly 30 years later, on the Water Ordinance of 1866, in the case of *Martley* v. *Carson* (1899), 20 S.C.R. 634 at p. 658, on appeal from the old Full Court of this Province:

> "That the statute should be construed as an encroachment upon that venerable embodiment of all wisdom, the common law, is really no hardship but quite the reverse in a country of such modern origin and of such peculiar conformation as British Columbia. The Legislature of that country are the best judges of what is most suitable to the condition of that country, and they have, in my opinion, in clear language enough expressed their intention to be as above stated."

I think that a careful reading of the proclamation is alone sufficient to speedily settle all doubts as to what was intended, because the recitals in the preamble and the references to the English statutes shew clearly that the practice in England, founded on statutes or otherwise, as to the "qualification and summoning and returning of jurymen" was deliberately abolished, and a new procedure adopted to meet the exigencies of justice in new and totally different circumstances. I entertain no doubt at all that the intention was to give the sheriff or his deputy full discretion to summon as many grand jurors as he conveniently could, and that both as to their number and desirability (fitness) he had full discretion "as he may think fit" in returning the panel, subject only and always to this, that unless twelve at least were sworn no presentment would be made, as it is conceded that that number would be the minimum under the proclamation, as well as at common law. Holding this view, it would be superfluous to consider the vexed question of the number it would have been essential to "summon" according to

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the law in England at that period (indeed, I refrain from so doing as I should like to hear further argument on the point, on which, I may say, I have consulted many authorities), and therefore, the question now reserved should be answered in the affirmative.

I only wish to add, in view of some doubt which arose on the point in the argument, that, apart from the proclamation, it has been directed by statute in this Province, since 1883 at least, and up to 1899, chapter 35, when 13 were authorized, that 15 grand jurors only need be summoned. See Jurors Act, 1883, chapter 15, section 32; Consolidated Statutes of British Columbia, 1888, chapter 64, section 38; Revised Statutes of British Columbia, 1897, chapter 107, section 30.

With respect to the construction that was sought to be put upon section 111 on the unsuccessful motion to state a case, I think it desirable to give here my views, expressed orally at the time we delivered judgment.

MARTIN, J.A.

Assuming the existence of a *bona-fide* belief in a claim of right, that does not justify the employment of the highly dangerous means prohibited by the section in an attempt to exercise that right, and section 16, in view of the exception at the end thereof, does not justify or excuse the accused in what he did. He admittedly comes within a technical breach of the section, as the language is wide enough to cover the wilful causing of "serious injury" to any property, including his own, but in this case he has also substantially offended against the spirit of the section. Wilfully does not mean "maliciously" in this section, but "deliberately."

As a matter of precaution, and to answer a point attempted to be made, I add that the use of explosives in land clearing or mining operations, or, *e.g.*, to remove useless buildings, does not, as conducted in the usual way, cause an explosion "likely to . . . . cause serious injury to property," to quote the words of the section, but, on the contrary, is "likely" to improve it.

GALLIHER, J.A.

GALLIHER, J.A.: I concur.

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DICKINSON v. HARVEY

Malicious prosecution—Reasonable and probable cause—Weight of evidence —New trial—Judge controlling counsel as to repetition of questions.

In an action for malicious prosecution in which the verdict of the jury was in favour of the plaintiff, the case centred on what took place at a certain interview between the plaintiff and the defendant, at which the defendant promised to give the plaintiff a certain sum of money, namely, whether the money was promised voluntarily or in consequence of the plaintiff's threats. The defendant's evidence was corroborated by a witness, who overheard what took place at the interview, and by the plaintiff's admissions at the time of his arrest. The surrounding circumstances also appear to favour the truth of the defendant's story.

Held, on appeal (MARTIN, J.A. dissenting), that the verdict of the jury should be set aside and a new trial ordered.

The trial judge is within his rights in controlling counsel in respect to the repetition of questions concerning matters not really in dispute.

APPEAL from the judgment of MORRISON, J. and the verdict of a jury in an action for malicious prosecution, heard at Vancouver on the 5th of November, 1912. It appeared from the evidence that the plaintiff, becoming suspicious, accused his wife of improper relations with the defendant. This she admitted, the result being a separation. Shortly afterwards the plaintiff, going to where the defendant was at work on the construction of a building, asked him to come to his house, saying he wanted some work done. They went to the plaintiff's house, and when inside the plaintiff locked the door. According to the defendant's story, the plaintiff worked himself into a fury, accused the defendant of breaking up his home, and demanded that he (the defendant) should pay him $5,000, or he would shoot him, the plaintiff having his hand in his pocket as though he had a revolver concealed. Under the threat, the defendant promised to pay the $5,000, and would bring him $1,000 on the following Saturday, paying the rest later. He then left the house and went at once to his solicitor and later consulted the police department. He went to the plaintiff's house, according to the appointment, on the following

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Saturday with two detectives, they remaining outside while he went in. He told the plaintiff he could only pay him $300, which, after making the same threats as he had on the former occasion and using abusive language, he accepted in part payment. The defendant then left the house and the detectives entered and arrested the plaintiff who, on being tried on the charge that he did, with menaces, demand from the defendant $5,000, with intent to steal the same, was acquitted. The defendant's story was corroborated by a witness who was on the steps of the house and heard most of the first interview, also by statements made by the plaintiff to the detectives after his arrest. The plaintiff, on the other hand, swears that after explaining the breaking up of his home owing to the defendant's conduct, he (the defendant) voluntarily offered to pay him $5,000 in compensation for what he had done, and that there was no coercion on his part. On the trial the jury gave a verdict for the plaintiff for $3,000, for which judgment was entered. The defendant appealed on the ground that the judgment was against the law, evidence, and the weight of evidence, that the learned trial judge erred in the admission and rejection of evidence, and on other grounds.

The appeal was argued at Vancouver on the 5th and 6th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

W. A. Macdonald, K.C., for appellant (defendant): This is an action for malicious prosecution. As a matter of fact, the jury tried a different action, desiring to inflict a penalty on the defendant on account of the relations between the defendant and the plaintiff's wife. It is submitted, first, that the charge to the jury was such that the defendant is entitled to a new trial; second, there was an improper trend the whole way through the trial, the learned trial judge not keeping the jury on the real point at issue and not giving the defendant's counsel sufficient latitude on the cross-examination of witnesses: *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247.

Ritchie, K.C., for respondent (plaintiff): There is a discretion in the judge to stop cross-examination, although counsel has,

no doubt, great liberty (see Halsbury's Laws of England, Vol. 13, p. 598), but that the trial judge did not give him freedom on cross-examination is not in itself ground for a new trial. On the question of misdirection, he must state in his notice of appeal particulars of the misdirection: *Pfeiffer* v. *Midland Railway Co.* (1886), 18 Q.B.D. 243. On the point of non-direction, he referred to *Nevill* v. *Fine Art and General Insurance Company* (1897), A.C. 68. There was nothing improper in the way we went into our case; it was necessary to go into the relations between Harvey and the plaintiff's wife. We submit there is no ground for finding fault with the judge's charge. As a matter of fact, it was more favourable to them than to us. It is a matter for the jury to decide who to believe, even in the case of two being on one side and one on the other. The general rule should be followed that the Court will not set aside the judgment or grant a new trial unless substantial injustice has been done.

Argument

MACDONALD, C.J.A.: Since the adjournment last evening, I have read all the evidence and the judge's charge, and I have come to the conclusion that the verdict of the jury is against the overwhelming weight of the evidence and is perverse.

It is only material to consider what took place at the crucial interview in the house on the 6th of September, when the threats are said to have been made. The defendant's story is very clear and is ample to sustain the charge which was laid against the plaintiff. It is not only so, but it is the only reasonable story. He was taken by the plaintiff to the plaintiff's house and the moment he got inside the door the door was locked and he only got out after he had agreed to pay $5,000 to the plaintiff. It is said by a witness that when he came out he was pale, and he at once went to consult his friends and his solicitors. Now, to say that he voluntarily agreed to pay $5,000 to the plaintiff, ostensibly for the purpose of hushing the matter up, and immediately afterwards proceeded to publish it to the world seems to me to be wholly unreasonable. The defendant's story is the reasonable story. The story is supported by the evidence of Reynolds, who overheard what took place in the house. Rey-

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nolds's story is believed by the learned judge. In fact, he told the jury that he did not see how they could disbelieve that evidence, and after reading it it has convinced me just as it convinced the learned trial judge, and if Reynolds's testimony is true, then, unquestionably, the plaintiff cannot succeed in his action.

The case does not, however, depend entirely upon the evidence of the defendant and Reynolds. We have the evidence of the three police officers. There is the evidence of Deputy Chief of Police Mulhern, who says that a friend of the plaintiff came to see him at the police station just after his arrest, and that the plaintiff told his friend that he had demanded this money from Harvey, and when, in rebuttal evidence, the plaintiff is asked to deny this, he will put in no stronger than: "I do not think I said that." In fact, his rebuttal evidence very materially weakens his evidence in chief. Then we have the evidence of the inspector of detectives, Jackson, who says that he overheard the same conversation between the plaintiff and his friend, Watkins, and that the plaintiff told Watkins that he had demanded this money from Harvey and that he was sorry that he had not shot him. McLeod, another police officer, said that the plaintiff stated, and I refer specifically to the evidence of McLeod because it is very strong, "When Mr. Dickinson took the $300 out of his pocket, he said, 'That is the money that Harvey gave me. I demanded $5,000 from him for the support of my children or I would kill him. I am sorry I didn't kill him.'" And again, "I did demand $5,000 from Mr. Harvey for the keep of my children. I think, if he didn't give it to me I would kill him. I am sorry that I didn't kill him."

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Now, in rebuttal, we have both the plaintiff and Watkins giving evidence. Watkins is uncertain. His memory is very bad. He does not want to remember, apparently, what took place. He is first asked about his recollection. He says: "I have a dim recollection of it. I went into the station, when I seen him there I asked him what he was up against. I asked him what he was up against. He says, 'I guess it is all up with me now, Bill.'"

Now, the plaintiff himself, in rebuttal, when asked if he had his hand in his pocket, and if he pretended, or had said that he pretended, that he had a revolver in his pocket, says that he does not think so. That is, he does not think that he pretended he had a revolver in his pocket, but he admits that he had his hand in his pocket during that interview, just as the defendant says he had. Then he makes this statement, it being brought out by his own counsel in answer to the question: "The defendant states you said, 'Do you think a judge or jury would find me guilty if I shot you right here in cold blood?'" "Well, I may have said that, because I told him if I had been able to get out of bed (referring to a prior occasion), I certainly would have shot him." And again, he was asked this: "Did you say that if he got out of the chair you would blow the head off him?" and his answer is: "No, I don't think I said any such thing as that." Then, further on, he is asked again: "Did you on that occasion use the expression, 'I will blow your head off?'" and his answer is: "No, I don't think so." He repeats that again, "I don't think so." That is the strongest way he would put it.

As to his demanding the money, which he, in his evidence-in-chief, said he did not demand, he qualifies in this way in his rebuttal: "Then did you, yourself, say—you didn't say on that occasion at all that you demanded this money? No, I don't think so, no. Did you say, as McLeod states, 'I did demand $5,000 from him or I would kill him?' No, I don't think so. I told Mr. McLeod, I suppose I did, that I should have shot him."

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Taking all this evidence, all consistent with the defendant's story and quite inconsistent with the plaintiff's story, I think it is overwhelmingly in favour of the defendant's story. If that be so, there was no want of reasonable or probable cause in laying the charge which he did lay.

I am not disposed to find any fault with what took place at the trial in respect either of the admission of evidence or of the judge's charge because, while there was a great deal of evidence put in that ought, perhaps, strictly to have been excluded, yet, it was not objected to in the main, and counsel for the defendant examined and cross-examined along the same lines.

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With regard to the charge of the learned judge, I think if the whole is read, it will be seen that the matter was fairly put to the jury. It may have been that one of the questions, *viz.*: that by which the jury was asked if the defendant had taken proper care to inform himself, was confusing. The real question was: Was the defendant's story of what took place at the crucial interview in the house on the 6th of September true or not true? If that story, in their opinion, was true, then the defendant had ample justification in laying the charges. If, on the other hand, it was untrue, then the verdict ought to have been for the plaintiff, because, if it were untrue, the defendant had no reasonable and probable cause.

I think, therefore, there ought to be a new trial. The costs of the appeal will go to the successful appellant, and the costs of the first trial will abide by the result of the new trial.

IRVING, J.A.: I agree that the verdict is against the weight of evidence, the first ground of appeal taken. That seems to have been the opinion of the learned judge from the way he expressed himself after the verdict was brought in.

IRVING, J.A.

I agree with what the learned Chief Justice has said, that the learned trial judge was within his rights in controlling counsel in respect to the repetition of questions covering matters not really in dispute. I do not want to say anything more than that, because it is a delicate subject—the question of degree as to how far a judge should go, when he should stop counsel. As a rule, it is a thing to be avoided by a trial judge, but, on the other hand, he has charge of the case and he is pressed with business, he knows other cases are coming on and the time, as he thinks, being wasted, and the jury getting confused. When these things occur, it is his business to interfere.

As to the charge, I think it might have been simpler. I think it was unduly prolonged by introducing two questions taken from the judgment in the case of *Abrath* v. *North Eastern Railway Co.* (1886), 11 App. Cas. 247—two questions which the judge there required to be answered for his own information, in order that he might determine whether there was want of reasonable and probable cause. There Abrath, who was a doc-

tor, was accused of conspiring with some men who had been injured in a railway accident, to defraud the company. It was necessary for the judge to ascertain whether the railway company, when they brought their charge of conspiring to defraud the company, had taken the trouble to collect the evidence fairly and whether they honestly believed in the case when they laid the charge. Now, in this case everything was in the breast of Harvey himself and, therefore, these two questions could very well have been eliminated. On the whole, I am satisfied that the jury understood what they had to decide with reference to the other two questions, and their verdict, as I have already stated, was against the weight of the evidence. I think the judge, having regard to the circumstances of the case, should have stated the grounds upon which they should proceed in assessing the damages. On the whole I think the judge was not unfair to either side.

IRVING, J.A.

I agree that there should be a new trial, on the ground that the verdict was against the weight of evidence.

MARTIN, J.A.

MARTIN, J.A.: I agree that the learned judge was justified in the course he took tending to restrain the unnecessary repetition of questions, and also that his charge is not open to sound objection. But I think that there was evidence upon which the jury could have reasonably returned their verdict, and, therefore, the appeal should be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I think there should be a new trial.

New trial ordered, Martin, J.A. dissenting.

Solicitor for appellant: *Alan C. Mackintosh.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

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VERMA v. DONAHUE

VERMA v. DONAHUE *ET AL.*

Vendor and purchaser—Agreement for sale by instalments—Default in payment of an instalment—Time of the essence of the contract—Specific performance—Relief against forfeiture clause—Laches.

Where a purchaser under an agreement for sale, by which the purchase price is paid by instalments, is wilfully negligent and indifferent in making his payments, or holds off with the intent to pay if the market continues strong and to abandon should the market drop, a Court of equity will not decree specific performance. The relief granted is limited to the remission of the penalty imposed by a forfeiture clause.

APPEAL from the judgment of GRANT, Co. J. in an action tried by him at Vancouver on the 10th of April, 1913. The defendant Donahue, by an agreement for sale of the 14th of March, 1912, agreed to purchase certain land in Vancouver from the plaintiff. The agreement contained a clause making time the essence thereof, also a clause providing for forfeiture of all moneys paid thereunder upon default in payment of any instalment after 30 days' notice thereof. The first instalment was paid, but there was default in payment of the second instalment. The plaintiff thereupon issued a cancellation notice and entered into possession. After the cancellation by Verma, the defendant Donahue assigned the land to the defendant Pelletier, who assigned in turn to the defendant Depiesse. An application was then made for the registration of the assignments in the Land Registry office.

Statement

The plaintiff, by his plaint, sought cancellation of the original agreement and the applications for registration, and the defendants set up a tender to the solicitors of the plaintiff, as they were unable to find the plaintiff personally, and by counterclaim prayed to be relieved from forfeiture and cancellation.

Upon the trial an order was made for the cancellation of the agreement, and the counterclaim was dismissed. The defendants appealed.

The appeal was argued at Victoria on the 5th of June, 1913,

before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

H. R. Bray, for appellants: We contend there are grounds in this case for equitable relief: *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319; *Butchart* v. *Maclean* (1911), 16 B.C. 243. In a case of this nature, under an agreement for sale where certain payments have to be made from time to time, the vendor is practically in the position of a mortgagor and the purchaser in the position of a mortgagee: *Ecclesiastical Commissioners* v. *Pinney* (1899), 2 Ch. 729; *Crockford* v. *Alexander* (1808), 15 Ves. 138, 33 Eng. Reports, 707. The excuse given by the defendant as to non-payment of the instalment is that he was unable to find the plaintiff. The notice of cancellation served demanded more interest than the plaintiff was entitled to, and was not given in the manner prescribed in the agreement. This is fatal: see *Brown* v. *Roberts* (1912), 1 W.W.R. 987; *March Bros. and Wells* v. *Banton* (1911), 20 W.L.R. 322, 45 S.C.R. 338; *Vosper* v. *Aubert* (1908), 7 W.L.R. 758; *Pentland* v. *Mackissock* (1913), 22 W.L.R. 947.

Argument

Fillmore, for respondent: It was not until five months after the payment became due that the money was paid into Court. There is a discretion in the judge to so decide when the circumstances of the case justify a declaration of abandonment: *Cornwall* v. *Henson* (1900), 2 Ch. 298; *In re Dagenham (Thames) Dock Co. Ex parte Hulse* (1873), 8 Chy. App. 1,022.

Bray, in reply: There is not sufficient evidence to justify the finding of abandonment.

Cur. adv. vult.

4th November, 1913.

MACDONALD, C.J.A.: The judgment of the Judicial Committee of the Privy Council in *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319, was relied upon by the appellants' counsel as in effect deciding that, given an agreement, executory except as to a down payment in cash, for the purchase and sale of land, containing stipulations that time should be of the essence of the agreement, and that on default of subsequent payments of purchase money, and after thirty days' notice in writing to the purchaser to make good his default, the vendor

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should have the right to cancel the agreement and retain so much of the purchase money as had already been paid, the Court is bound to relieve, not only against the forfeiture of purchase money, but as well against the cancellation of the agreement; that specific performance must be decreed in such a case without reference to the circumstances of the case, or the purchaser's own conduct, short of actual or implied abandonment of the purchase. This contention is based upon some observations of their Lordships from which we are asked to infer that the circumstances surrounding the default are of no consequence.

In the case at bar, two equitable doctrines have to be considered in relation to (1) relief from a money penalty, and (2) specific performance of a contract. It may well be that the conduct of a party seeking the remission of a penalty, such as the forfeiture of a sum of money, which bears no just relation to the breach, is of little or no relevance to the issue. Our Courts are opposed to penalties as such, and relieve against them because of their penal nature, and not out of sympathy with the party penalized. Such penalties are regarded as unconscionable, and will not be allowed to prevail, even where the conduct of the party seeking relief is open to grave censure.

Different considerations, I apprehend, present themselves when the question is: shall specific performance be decreed at the instance of the defaulting party? Fry on Specific Performance, 5th Ed., at p. 540, says:

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"The doctrine of the Court thus established, therefore, is that laches on the part of the plaintiff (whether vendor or purchaser), either in executing his part of the contract or in applying to the Court, will debar him from relief. 'A party cannot call upon a Court of equity for specific performance,' said Lord Alvanley, M.R., 'unless he has shewn himself ready, desirous, prompt, and eager.'"

Lord Chelmsford, in *Lamare* v. *Dixon* (1873), L.R. 6 H.L. 414 at p. 423, said:

"Now, my Lords, the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court—not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration."

And in *Oxford* v. *Provand* (1868), L.R. 2 P.C. 135, Sir William Erle said, at p. 151:

"It is clear that the Court may exercise a discretion in granting or withholding a decree for specific performance; and in the exercise of that discretion, the circumstances of the case, and the conduct of the parties, and their respective interests under the contract, are to be remembered."

If the agreement here were stripped of the articles which impose the forfeiture of the money and which empower the vendor to declare the agreement at an end because of the purchaser's default in observing the times of payment, a Court of Equity would, I think, refuse a decree of specific performance if it appeared that the party seeking it had been guilty of wilful or reprehensible delay to which the vendor in no way contributed. In that result, the Court, in effect, declares the agreement at an end. By the breach of it the purchaser forfeits at law his right to call upon the vendor to perform his part, and by his conduct he in equity disentitles himself to relief. That the contract contains a stipulation agreeing to a like result cannot, it seems to me, make the purchaser's case better, or the vendor's case worse. Then, have the defendants shewn themselves ready, desirous, prompt and eager to carry out their part of the agreement?

The plaintiff's brother, acting for him, called on defendant Pelletier, who was the assignee of Donahue, the purchaser, and demanded payment of the first instalment of $250. He was put off with an excuse, and an appointment was made with him to call at said defendant's office on another day. He called not only on that, but on many subsequent days, but was unable to find the defendant, or to get any satisfaction from his clerk. From the evidence, I am convinced that the defendant deliberately broke his appointment, and from time to time avoided the plaintiff's said agent. After his patience was exhausted, the plaintiff served the notice provided for in the agreement, and on the expiration of the period of grace, namely, 30 days, served formal notice of his election to treat the agreement as at an end. It was only when the plaintiff brought this action to clear the title of the cloud which was placed on it by the defendant, who applied for registration of his agreement, that the defendant tendered the long delayed instalment and asked for specific performance. The purchaser was not in possession of the land, and the transaction was purely speculative.

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I do not go to the length of saying that defendant actually abandoned the purchase, but I do think there was such laches as disentitle him to specific performance. It was a default for which no reasonable excuse has been offered. Defendant said he had the money with which to pay; there was, therefore, the less excuse for his conduct in not paying. He was either grossly negligent and indifferent, or he was holding off with the intent to pay if the market continued strong and to abandon should the market drop.

It may perhaps be said with truth that the judgment in the *Kilmer* case, *supra,* indicates that the words "ready, desirous, prompt and eager" are not to be taken too literally. The Court would relieve where there had been some default, but where the purchaser is in possession and his default had been of short duration, and attributable rather to misfortune or misadventure than to wilful negligence or indifference, relief by way of specific performance will be decreed; but without something more than appears in the observations above referred to, I am not convinced that under circumstances such as we have in this case, relief should be given beyond the remission of the penalty.

MACDONALD, C.J.A.

The circumstance that the purchase money was payable in instalments does not, I think, make it incumbent on the Court of necessity to grant specific performance, though it may well enter into the consideration in relation to the hardship or otherwise of granting or refusing such a decree. Default in payment of an instalment might more easily be condoned than default in payment of the whole purchase money, and the fact of its being an early or a late instalment would greatly and properly influence the decision: *Barclay* v. *Messenger* (1874), 43 L.J., Ch. 449.

I would allow the appeal to the extent of relieving the appellant from the forfeiture of the $250, and as the appellant has partly succeeded and partly failed, there should be no costs of this appeal, and the order as to costs below should stand.

IRVING, J.A.
MARTIN, J.A.
GALLIHER, J.A.

IRVING, MARTIN and GALLIHER, JJ.A. agreed.

Appeal allowed.

Solicitors for appellants: *Henderson, Tulk & Bray.*
Solicitors for respondents: *Fillmore & Todrick.*

IN RE FORT GEORGE LUMBER COMPANY.

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IN RE FORT GEORGE LUMBER CO.

Company law—Winding up—Assets—Sale of by liquidator—Ship included in assets—Mortgage on—Maritime liens of seamen for wages—Liens first charge on proceeds of sale of ship—Winding-up Act, R.S.C. 1906, Cap. 144, Sec. 77.

The liquidator in a winding-up proceeding, sold, under order of the Court, all the assets of a company, including a ship, for $67,500, of which $5,000 was for the ship. A bank held a mortgage upon the ship, and certain seamen were entitled to maritime liens for wages. As between vendor and purchasers, the ship was sold free from encumbrances. Shortly after it was taken over by the purchasers it was destroyed. The bank claimed the $5,000, the purchase price of the ship in the hands of the liquidator, the lien holders on the other hand claiming a first charge against the fund.

Held, on appeal (IRVING, J.A. dissenting), that both the bank and the lien holders had the same rights in the fund as they had in the ship before the sale, and that the lien holders were therefore entitled to a first charge upon the fund.

Orders of CLEMENT, J. affirmed.

APPEAL by the Traders Bank of Canada from three orders made by CLEMENT, J. on the 15th, 23rd and 24th of January, 1913. The Fort George Lumber Company was ordered into liquidation on the 4th of January, 1911, under the Winding-up Act, Revised Statutes of Canada, 1906, chapter 144. On the 5th of March of the same year, the liquidator was authorized by an order of the Court to sell the assets of the Company for $67,500. The sale included the steamer Chilco, the price of which was fixed at $5,000, this amount being included in the total mentioned. The Traders Bank held a mortgage upon this ship for $10,000, and a number of seamen, to whom wages were due, were entitled to maritime liens against the ship. There was no evidence that the ship was sold subject to the mortgage or the liens, and some time after the sale and transfer, the ship was destroyed. The question before the Court was the distribution of the $5,000, the purchase price of the Chilco, in the hands of the liquidator. By the order of CLEMENT, J. of the 15th of January, 1913, the liens were held to be chargeable upon

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the proceeds of the sale of the steamer Chilco. By the order of the 23rd of the same month, the wage-earners were declared to be entitled to a first charge upon said proceeds, and on the 27th of the same month an application to order the liquidator to pay the appellants $5,000, the amount received on the sale of the Chilco, was refused. This appeal was taken from the three orders above referred to.

The appeal was argued at Vancouver on the 12th of May, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Ritchie, K.C., for appellants: The case arises out of the ownership of the steamer Chilco, which was sold on March 3rd and afterwards was lost. The Traders Bank had a mortgage on the ship for $10,000. The lien holders had their liens against the ship, but they had never given up their liens, and when the ship was destroyed the lien was gone: *McDonald* v. *Cummings* (1894), 24 S.C.R. 321.

[MACDONALD, C.J.A.: The liquidator sold, and was it not open to the lien holders to elect whether they would claim against the ship or the money in the liquidator's hands?]

The sale by the liquidator was for $5,000, subject to the lien holders. He held the money when the lien holders made up their mind to claim the amount of their liens from the funds: *Re Clinton Thresher Co.* (1910), 20 O.L.R. 555; *Mitford* v. *Mitford* (1803), 9 Ves. 87 at p. 100; *The Charles Amelia* (1868), L.R. 2 A. & E. 330; Abbott on Merchant Ships and Seamen, 14th Ed., 1,039; Palmer's Company Precedents, 10th Ed., 385.

Argument

Wintemute, for respondents (wage-earners), contended that the proceeds stood in the place of the ship, and that the position of the claimants was the same as it was before the ship was destroyed: *In re Australian Direct Steam Navigation Company* (1875), L.R. 20 Eq. 325; *In re Rio Grande Do Sul Steamship Company* (1877), 5 Ch. D. 282; *Re The Great Eastern Steamship Co.* (1886), 53 L.T.N.S. 594. The claims were put in the liquidator's hands on the 3rd of April and the ship was destroyed on the 27th of April. The lien holders having sent in their claims, they are bound by the action of the liquidator:

see section 80, subsections (*a.*) and (*b.*) of the Winding-up Act. We are entitled to the protection given us under this section: *Re Dawson* (1851), 17 L.T. Jo. 100.

N. R. Robertson, for respondent (the liquidator): We consider the learned judge was correct in his judgment. The sale cannot affect the rights of the lien holders: Abbott on Merchant Ships and Seamen, 14th Ed., 1,039.

Ritchie, in reply, on the question of procedure, referred to *In re B.C. Tie and Timber Co.; Colan* v. *The Ship Rustler* (1909), 14 B.C. 204. It is not a case of election as to the lien holders; they were purporting to sell the Traders Bank claims only. Such a sale as this cannot be ratified unless both article and money are available.

Argument

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: On the 4th of January, 1911, the Company was ordered to be wound up under chapter 144, Revised Statutes of Canada, 1906. About the 5th of March of the same year, the liquidator was authorized by the Court to sell all the assets of the Company, including the steamship Chilco, for $67,500, of which $5,000 was for the Chilco. The Traders Bank of Canada held a mortgage upon this ship, and there were wages due to seamen, for which they were entitled to maritime liens. There is no pretence that the ship was sold as between vendor and purchaser, subject either to the mortgage or to the liens. Sometime after the sale and delivery to the purchaser the ship was destroyed. The contest now is for the purchase money of $5,000. After the sale, the bank valued its security at $5,000 and claims that the sum above mentioned received for the ship belongs to it. The seamen contend that the liens against the ship were a first charge upon the said sum. It is not contended by the appellant that the liens would not be payable in priority had it been sought to enforce them against the ship itself, but they contend that the proceeds of the sale did not stand in the place of the ship; that the sale did not affect the seamen's liens or their remedy against the ship, and did not, as it were, work a transfer of the liens from the

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ship to the proceeds of its sale. In the case of an ordinary sale of a ship subject to maritime liens, the liens are not affected, nor would they in this case unless the seamen assented either before or after the sale. But this was a sale by a liquidator, acting for all the creditors and under the instructions of the Court. The ship having been sold free from all encumbrances, the liquidator was, in the circumstances, bound to protect the purchaser by satisfying the encumbrancers, and the proper fund was the proceeds of the sale. I think both the Bank and the lien holders have the same rights in the fund as they had in the ship. Neither party could take proceedings against the ship after the winding up without the consent of the Court. The lien holders might have applied in the liquidation proceedings to have their liens satisfied, or to be otherwise secured: see *In re Australian Direct Steam Navigation Company* (1875), L.R. 20 Eq. 325; *In re Rio Grande Do Sul Steamship Company* (1877), 5 Ch. D. 282.

I would, therefore, dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: In my opinion, the appeal should be allowed.

The seamen's lien was not destroyed by the sale of the ship by the liquidator. See the case of *The Fairport* (1882), 8 P.D. 48, 52 L.J., P. 21, where the ship was sold in October, 1881, by Roy & Sons; a month later the former master of the ship began an action *in rem* to recover a sum of money for which he, in order to provide necessaries for the vessel, had become liable whilst he was master.

The defence (or one of them) was that if there was a maritime lien, the plaintiff was precluded by his own laches from enforcing it against a *bona-fide* purchaser for value. Sir R. Phillimore, in giving judgment, said, in effect, that although a maritime lien is not indelible, where reasonable diligence is used, *i.e.*, by those claiming it, and the proceedings are had in good faith, the lien travels with the thing, into whatsoever possession it may come.

The seamen's lien in this case was not, in my opinion, released by the sale. On the other hand, the mortgagees, who were ignorant of the men's claims, intended to release their mortgage

and accept the $5,000 in lieu thereof. It was a convenient way of closing out their account, and it afforded a chance to the other creditors of making something over and above the $5,000. The loss of the ship in the hands of the purchaser may prevent the seamen deriving any advantage from their lien, yet that loss does not give them a right to the money which the liquidator should pay to the Bank on the realization by him of their security, under section 77 of the Winding-up Act. The liquidator, under section 82, is only required to procure the authority of the Court where he proposes to consent to the creditor retaining the security. If he intends to require from the creditor an assignment and delivery of the security, no application to the Court is necessary.

The men must look to the 70th section of the Act for their relief. I cannot see that they have any claim on the proceeds of the security.

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

Appeal dismissed, Irving, J.A. dissenting.

CARLIN v. THE RAILWAY PASSENGERS ASSURANCE COMPANY.

Insurance—Principal and agent—Imputed notice.

The plaintiff applied to the defendants' agent for insurance against his liability as employer. The plaintiff was engaged in waggon-road making, in the course of which it was necessary to use a certain amount of explosives. The defendants' agent was aware that the use of explosives was necessary in road construction. The plaintiff filled up and signed an application form, leaving a blank against the question which asked "are machinery, boilers or explosives to be used?" The plaintiff's reason for not answering this question was that there was no intention of using any machinery or boilers, but there was an intention to use explosives. The plaintiff explained this circumstance to the defendants' agent, asking the agent to answer this question

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correctly, who, however, for some unexplained reason, wrote the word "no" against the above question. The policy contained the usual clause making the application the basis of the contract and declaring the contract void if there were any material omission or any misrepresentation in the application. An accident happened owing to the use of explosives, and the defendant Company refused to indemnify the plaintiff against his liability to make compensation.

Held, that the defendants were bound by the knowledge of their agent, and that there was no omission or misrepresentation in the application so as to prevent the plaintiff from recovering.

Statement ACTION tried at Victoria on the 13th of October, 1913, before HUNTER, C.J.B.C. without a jury.

Mayers, for the plaintiff: The plaintiff relies on the ordinary principle that the Company is bound by the acts, representations and knowledge of its agent, acting within the scope of his authority: *Bawden* v. *London, Edinburgh and Glasgow Assurance Company* (1892), 2 Q.B. 534; *Holdsworth* v. *Lancashire and Yorkshire Insurance Company* (1907), 23 T.L.R. 521; *The Guardian Ins. Co.* v. *Connely* (1892), 20 S.C.R. 208; *Graham* v. *Ontario Mutual Ins. Co.* (1887), 14 Ont. 358.

Argument *W. J. Taylor, K.C.*, and *R. H. Pooley*, for the defendants, contended that by leaving a blank in the form signed by himself, the plaintiff had made the agent his own agent to fill up the blank. They cited *Biggar* v. *Rock Life Assurance Company* (1902), 1 K.B. 516; *Imperial Bank* v. *Royal Insurance Co.* (1906), 12 O.L.R. 519; *The Provident Savings Life Assurance Society of New York* v. *Mowat* (1902), 32 S.C.R. 147; and *Joel* v. *Law Union and Crown Insurance Company* (1908), 2 K.B. 431.

Mayers, in reply: The *Biggar* case is an instance of the exception to the general rule, *viz.*, that the principal is not bound where the agent is acting in fraud of the principal.

Judgment HUNTER, C.J.B.C.: I am much indebted to counsel on both sides for the exhaustive manner in which they have brought to my attention the law on this subject. I have no doubt what should be the decision of the Court in this case. As to the essential facts, there does not appear to be any serious dispute. Shortly put, it seems to be that Mr. Carlin, through the medium

of Mr. Burdick, made application to the defendant Company for an indemnity policy in connection with his undertaking on the Malahat road. I cannot see there has been any misrepresentation, either active or passive, on the part of Mr. Carlin. He had signed a blank form and the answer to the material question —at all events, the answer to the question complained of—was not filled in by him, or by his instructions, but by the agent of the Company.

There is no doubt that the intention of Carlin to use explosives was communicated to Currie, the agent of the Company, and that Currie stated to Burdick, after he was so informed, that he "would fix it." Currie also knew perfectly well that in the construction of almost any road on this island explosives would have to be used. He admits he had some knowledge of the locality and he knew perfectly well that explosives, in the necessity of the case, would have to be used in that district.

Now, the cases cited by Mr. *Taylor* undeniably lay down the principle that where a man authenticates a document after the answers have been filled in by himself or another person, whether that other person is the agent of the Company or not, he cannot be heard to say afterwards he did not authorize the statement. In other words, if he signs a document after it has been filled in by another person with his consent, he is bound in exactly the same way as if filled up by himself. But I do not see how that principle has any application to the case here. The document was altered by the agent of the Company after it was signed and authenticated by the applicant for insurance. If the agent, having a personal knowledge of the facts—as I find in this case—fills in the answer according to his own judgment, he is not the agent of the party applying for the insurance; he is the agent, for the purpose of that transaction, of the Company. If that were not so, it would be open always to a Company to repudiate a policy when they ascertained that some statement had been made, by the consent or authority of the agent, which did not exactly square with the facts.

Judgment

There is no dispute about the amount involved. I think judgment ought to go for the plaintiff.

Judgment for plaintiff.

MORRISON, J. 1913

Oct. 24.

IN RE WALKER AND SOUTH VANCOUVER

IN RE WALKER AND MUNICIPALITY OF SOUTH VANCOUVER.

Municipal law—Statute—Interpretation—General and special legislation. Arbitration and award—Streets—Damage to property by change of grade —Remedy of owner—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 394, 513—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 8.

If there is an inconsistency between a general and a subsequent special Act, the latter must prevail. Accordingly, the provisions of section 8 of the Arbitration Act, R.S.B.C. 1911, chapter 11, providing for the appointment of an arbitrator by the Court on the default of the opposite party to make an appointment, do not apply in the case of an arbitration of the claim of an owner against a municipality for damages to his property owing to the regrading of a street.

In the case of default by a municipality to name an arbitrator under section 394 of the Municipal Act, R.S.B.C. 1911, chapter 170, the proper procedure is by way of *mandamus* against the municipality.

Statement

MOTION by a property owner, under section 8 of the Arbitration Act, for the appointment by the Court of an arbitrator for the Municipality on the refusal of the latter to do so. Heard by MORRISON, J. at Vancouver on the 24th of October, 1913.

Alfred Bull, for applicant
Ritchie, K.C., for the Municipality.

Judgment

MORRISON, J.: The applicant, Dora Walker, was, at the time material to this matter, owner of property situate at the corner of Euclid avenue and Maple street in the Municipality of South Vancouver. The Municipality, pursuant to its statutory powers, regraded those streets, causing, as it is alleged, between May and August, 1912, certain damage to the said property.

On the 27th of May, 1912, she made a claim to the Municipality for such damage, and again, on the 27th of May, 1913, her solicitor presented her claim therefor. On the 4th of July following, the Municipality denied liability and declined to arbitrate. On the 10th of July, without having selected her arbitrator, the applicant requested the Municipality to appoint

theirs. Again the Municipality declined to do so. Then, on the 5th of August, the applicant notified the Municipality of her selection of an arbitrator and requested them to appoint theirs, pursuant to the 8th section of the Arbitration Act. The Municipality still declined, whereupon the present application, pursuant to section 8, *supra,* was launched on the 10th of September, ultimo.

In limine, Mr. *Ritchie,* for the Municipality, invokes section 513 of the Municipal Act, contending that the application should have been brought within a year from the date on which the damage was caused. He substantively contended, in the second place, that the Arbitration Act does not apply. With this contention I agree. The Municipal Act is a special, or particular, Act dealing with municipal corporations. The Arbitration Act is a general Act. The general maxim *Generalia specialibus non derogant* applies. Montague Smith, J., in *Conservators of the Thames* v. *Hall* (1868), L.R. 3 C.P. 415 at p. 421, says:

"The rule, as laid down by Sir Orlando Bridgman is, that 'the law will not allow the exposition to revoke or alter by construction of general words, any particular statute, where the words may have their proper operation without it.'"

Judgment

I agree, as has been submitted, that section 394 of the Municipal Act, aided by proceedings by way of *mandamus* to compel the selection of an arbitrator, furnishes a code which must in cases of this kind be adhered to.

Coming to the first point as to the applicant being out of time, the evidence is not satisfactory, but I incline to the view that she is too late. I have always understood that the point of these clauses limiting the time within which an action for damages, such as is the present one, must be brought, was to ensure prompt disposal and thus enable the municipality to regulate their rates, etc., for the current year.

The application is refused.

Application refused.

COURT OF APPEAL

1913

Nov. 4.

BECK v. GUTHRIE, McDOUGAL & CO.

Master and servant—Negligence—Injury to servant—Defective system—Volenti non fit injuria—Withdrawal of case from jury.

BECK v. GUTHRIE, McDOUGAL & CO.

The defendant Company, in carrying on blasting operations after drilling, first blasted the bottom of the holes with a small amount of powder in order to widen them for the reception of sufficient powder for the main blast. This operation is known as "springing" holes. After the springing operation the hole is charged with powder for the main blast. While the plaintiff, a workman employed by the defendants, was engaged in the final loading of a hole, the "springing" of other holes was being carried on close to where he was working. An explosion in the springing operation caused the blast at the hole where the plaintiff was working to go off, and he was injured. There was evidence of a warning of the blast for "springing" being given, which the plaintiff, who was a foreigner, did not hear. The trial judge took the case from the jury and dismissed the action.

Held, on appeal (MACDONALD, C.J.A. dissenting), that the trial judge properly withdrew the case from the jury and dismissed the action, that the particular thing that caused this accident was the failure of the plaintiff to hear the warning (if given), and if not given, it was the neglect of a fellow servant.

Per IRVING, J.A.: The plaintiff was not only *sciens*, but *volens*, in that he undertook the risk as part of his business. The Court is justified, under certain circumstances, in withdrawing a case from the jury, even although the defence of *volens* be raised.

Smith v. *Baker & Sons* (1891), A.C. 325, discussed.

Per MACDONALD, C.J.A.: The opinion of the jury should be taken as to whether the plaintiff consented to run the risk, knowing the danger, he being a young foreigner with a limited knowledge of English.

APPEAL by plaintiff from the judgment of MORRISON, J. at Vancouver, on the 11th of February, 1913, in an action for personal injuries sustained by the plaintiff while in the employment of the defendant Company; or, in the alternative, for damages under the Employers' Liability Act. MORRISON, J. took the case from the jury and dismissed the plaintiff's claim.

Statement

The appeal was argued at Victoria on the 16th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Argument

McTaggart, for the appellant: The defendants had a system

of making small holes called "spring holes." A small amount of powder was put in these, and when they were set off it made the hole large enough to put in sufficient powder for a heavy blast. The defendants were negligent, first, that the "spring holes" were set off when the men were allowed to work at holes that were "sprung," in charging them with powder for the main blast; second, they should have had some person to warn the men working at the large holes when a blast for springing was about to take place. The defendants raise two defences: first, that the plaintiff voluntarily incurred the risk, knowing the danger, and second, that the man who set off the battery without warning the plaintiff was liable, he being a fellow servant: see *Fakkema* v. *Brooks Scanlan O'Brien Company, Limited* (1910), 15 B.C. 461, (1911), 44 S.C.R. 412; *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420. On the question of the plaintiff voluntarily incurring the risk, see *Smith* v. *Baker & Sons* (1891), A.C. 325, by which, if followed, our case should have been submitted to the jury.

S. S. Taylor, K.C., for the respondents: There are three points at issue; first, as to defective system; second, was the plaintiff *volens?* third, was the accident attributable to the action of a fellow workman? We had a proper system for the safety of the labourers in having a man to warn them when a shot was to go off, and the plaintiff admits it is the system used all over in blasting operations. The evidence shews he was *volens,* but, even failing on this point, the fact of his not hearing the warning is due to the fault of a fellow workman: *Sword* v. *Cameron* (1839), 1 Dunlop 493 (Ct. Sess.).

Argument

McTaggart, in reply, referred to Beven's Employers' Liability, 4th Ed., 32, note (*d*), and *Williams* v. *Birmingham Battery and Metal Company* (1899), 2 Q.B. 338, 68 L.J., Q.B. 918.

Cur. adv. vult.

4th November, 1913.

MACDONALD, C.J.A.: The learned trial judge withdrew the case from the jury and dismissed the action on the ground that no evidence fit to be submitted to a jury had been adduced by the plaintiff of negligence on the defendants' part. The whole

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point in the case (as was admitted by Mr. *Taylor* in his argument at the trial) is as to whether or not the work was being done under a negligent system.

There were two operations being carried on concurrently, one called "springing" a hole, and the other "loading" it for the purpose of the main blasting operation. The plaintiff defines springing a hole as "blasting the bottom of a hole wider to make room for more powder." This may not be very clear, but whatever it is, it appears to be a preliminary to the final operation of loading a hole and setting off a main blast. What happened here was that while the plaintiff was performing, or assisting in performing the final loading of a hole, the preliminary operation of springing other holes was being carried on in close proximity to him. An explosion in this springing operation caused the blast at the hole where the plaintiff was working to go off, thus injuring him. In his pleadings and particulars, the plaintiff alleges defective system "in that loading holes were being prepared at the time when spring holes were being fired." I think there is evidence to sustain that allegation.

There was evidence that this sytem of putting off blasts was not in vogue elsewhere, and that it was unnecessarily dangerous.

Then again, the plaintiff claims that the system of giving warning to those engaged as he was, was a negligent one.

MACDONALD, C.J.A.

No person was specially charged with the duty of giving warning; the practice was for the workman who happened to be nearest to the battery which fired the charges to call out to his fellow workmen some sort of warning. I think it was for the jury to say whether or not the system of carrying out the work was negligent, having regard to the dangerous mode of loading holes while other holes were being fired, coupled with the system of warning to which I have adverted. In view of the fact that, in my opinion, there should be a new trial, I shall not say anything further with regard to this phase of the case.

While the question of *volens* was not raised in argument at the trial, nor referred to by the learned judge, it was raised in the statement of defence and in the argument on appeal, and hence it ought to be considered, because, if on the evidence it is quite clear that the jury could come to no other proper con-

clusion than that the plaintiff voluntarily agreed to accept the risk, in the sense in which that term is understood in this class of case, it would be idle and unjust to both parties to send the case back for a new trial.

The plaintiff is a young Finlander, 20 years of age. He had been engaged on and off for three years as a labourer in employment similar to that with the defendants. He admits that he knew that in springing holes in close proximity to loaded holes, there was a danger of the loaded hole being affected. If his evidence be taken literally it amounts to this, that he knew the system was a dangerous one and made no complaint, but continued to work on notwithstanding. Could a jury properly say that this youth—apparently unable even to converse with the foreman, except possibly in very broken English—appreciated in fact the exceptional risk to which he was being subjected, not only by springing holes in the manner followed here, but by failure to safeguard the men where that exceptionally dangerous mode of conducting the work was being pursued, by an adequate system of warning? After a careful consideration of the oft-quoted authorities on the question, I have come to the conclusion, but not without some doubt, that the opinion of the jury ought to have been taken.

MACDONALD, C.J.A.

I would allow the appeal and order a new trial, costs of the first trial to abide the result of the new trial, and the costs of this appeal to go to the appellant.

IRVING, J.A.: I would dismiss this appeal. The particular thing that caused the accident was the failure of the plaintiff to hear the warning (if given) or, if not given, it was the neglect of a fellow servant. The plaintiff, according to his own evidence, was not only *sciens* but *volens,* in that he undertook the risk of a particular thing as part of his business, and if the jury had found that he was not *volens,* I would be prepared to say that it was against the evidence, and against the weight of evidence. Therefore, I think the judge, under such circumstances, was justified in refusing to allow the case to go to the jury. We have had our attention called to a statement in Beven's Employers' Liability, 4th Ed., p. 33, that since the decision

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of *Smith* v. *Baker & Sons* (1891), A.C. 325, *volens* is never withdrawn from the jury. Nevertheless, in *Smith* v. *Baker & Sons* there are expressions used which shew that a judge would be justified in withdrawing it under certain circumstances. In particular, Lord Herschell at p. 360. In that case the defendants wished to push their argument too far. They said that the mere continuance in service, with knowledge of the risk, precluded the employee from recovering damages, and that plaintiff, having admitted these facts, ought to be nonsuited. In this case the evidence of *volens* goes much further.

IRVING, J.A.

When an injured man testifies that the defendants used the same methods of warning that other contractors used in warning workmen when they were blasting, and the only thing that he complains of in his particular case is that he did not get or hear the warning, and says that he understands the work, that he knew it was dangerous work, and he knew that if while he was working loading a hole, as he was in this case, and a hole was sprung, there was danger of the hole at which he was working being fired by concussion, and that they had been carrying on this system of work in which he was engaged for six weeks and there was no protest, that man, in my opinion, must be held to have voluntarily undertaken the risk.

GALLIHER, J.A.

GALLIHER, J.A. concurred with IRVING, J.A.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitor for appellant: *E. A. Dickie.*
Solicitor for respondents: *R. P. Stockton.*

WINTER *ET AL.* v. GAULT BROTHERS, LIMITED.

CLEMENT, J.

1911

March 2.

COURT OF APPEAL

1913

June 18.

WINTER v. GAULT BROTHERS, LIMITED

Bill of sale—Security for advance of money and goods—Assignment for benefit of creditors—Taking possession under bill of sale—Effect of—Affidavit of bona fides—Sufficiency of—Bills of Sale Act, B.C. Stats. 1905, Cap. 8, Sec. 8, Subsec. 7—After-acquired goods—Onus of proof.

In an action by an assignee for the benefit of creditors of an insolvent firm to have a bill of sale made by the firm in favour of the defendants declared void, it appeared that the bill of sale was given both to secure an advance of money by the defendants to the insolvent firm to enable them to purchase the stock in trade in a "going concern," and also to secure future advances in money and goods, and that in the affidavit of *bona fides* the defendant did not in terms swear that the grantors were justly and truly indebted to the grantees in the sum mentioned.

Held, that the bill of sale being security for a debt, and not being verified by an affidavit of *bona fides*, was void.

Held, further, that the onus was on the defendants to prove what goods were supplied the insolvent firm after the bill of sale was executed, and having failed to prove that there were such goods by identification, they could not attach their bill of sale to any of them.

Judgment of CLEMENT, J. affirmed.

APPEAL by defendants from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 9th of February, 1911. Plaintiff was assignee for the benefit of creditors of Franklin & Nixon, under an assignment dated the 27th of October, 1909. On the day before the assignee took possession, but after the execution of the assignment, the defendants took possession of the stock in trade. Their right to possession was asserted under a bill of sale dated the 20th of September, 1907, made to them by Franklin & Nixon, and this bill of sale the plaintiff sought to have declared void, not only as a fraudulent preference, but also for failure to comply with certain provisions of the Bills of Sale Act. The learned trial judge held that the bill of sale was void, in that the affidavit of *bona fides* was defective, and therefore, the goods in question could not be said to be covered by the instrument.

Statement

R. W. Hannington, and *Claughton,* for plaintiff.

Sir C. H. Tupper, K.C., and *Griffin,* for defendants.

CLEMENT, J.

1911

March 2.

COURT OF APPEAL

1913

June 18.

WINTER v. GAULT BROTHERS, LIMITED

2nd March, 1911.

CLEMENT, J.: The plaintiff is assignee for the benefit of creditors of Franklin & Nixon, under an assignment executed by them on the 27th of October, 1909. On the same day, before the assignee took possession, but after the execution of the assignment, the defendants took possession of the stock in trade, trade fixtures and other goods which, up to that moment, had been in the possession of Franklin & Nixon, at their store premises on Hastings street, Vancouver. The defendants' right to possession was asserted under a bill of sale bearing date the 20th of September, 1907, made to them by Franklin & Nixon. This bill of sale, the plaintiff seeks in this action to have declared null and void, not only as a fraudulent preference, but also under the Bills of Sale Act, British Columbia statutes, 1905, chapter 8, for failure to comply with certain of the provisions of the Act.

On the evidence adduced at the trial it clearly appeared that the transaction, resulting in the impugned bill of sale, was in no sense a fraudulent preference, but a perfectly honest and legitimate business arrangement, under which the defendants assisted Franklin & Nixon to purchase the stock in trade, etc., of a "going concern," taking the bill of sale in question as security for repayment of the money then or to be thereafter advanced.

The attack, therefore, was confined, on the argument, to the Bills of Sale Act, and it was urged: (1) That the bill of sale in question here did not set forth the true consideration for which it was given; (2) that the affidavit of *bona fides* was not made by anyone duly authorized under the Act, or otherwise, to make it; (3) that certain material statements required by the Act were omitted from the affidavit of *bona fides*.

These objections were met at the threshold by the contention that any such defects, if they existed, were cured, as the expression is, by the defendants taking possession before the plaintiff. In my opinion, this contention is answered by the very terms of section 7 of the Bills of Sale Act. Omitting immaterial phrases, that section provides:

"Every bill of sale to which this Act applies shall be duly attested and registered under this Act in the manner and within the time hereinafter prescribed, and shall set forth the true consideration for which the bill of sale was given, otherwise such bill of sale as against all assignees . . . .

under any assignment for the benefit of the creditors of such person . . . . shall be null and void to all intents and purposes whatsoever, so far as regards the property in or right to the possession of any chattels comprised in such bill of sale, which at or after the time of the execution by the debtor of such assignment for the benefit of his creditors . . . . shall be in the possession, or apparent possession, of the person making and giving such bill of sale . . . ."

In this case it cannot be denied that the defendants' right to possession could be based only upon the bill of sale, and it is as to that very right to possession that the bill of sale is "null and void to all intents and purposes whatsoever," so that as against the assignee there was no right to possession. Had the defendants taken possession before the execution of the assignment—in such fashion, I mean, that the goods should have ceased to be in the possession, or apparent possession, of Franklin & Nixon—the Act clearly would have had no application. But the language of the section is too specific and definite to admit of doubt that as to goods in the possession, or apparent possession, of Franklin & Nixon at the time of the execution by them of the assignment for the benefit of their creditors, no right to possession thereof could afterwards be asserted by the defendants if in truth their bill of sale were null and void under the Act. The Ontario cases cited are of no direct application on this point, and it seems needless to refer to them further, when we have authority of later date in the decisions of the English Court of Appeal upon the corresponding provisions of the English Bills of Sales Acts. Of course, one must bear in mind the difference between the Acts of 1878 and 1882. The later Act avoids absolutely as against everyone, including the grantor, the bills of sale to which it applies; the earlier Act, speaking roughly, is the same as our own as to what goods and as against what parties the instrument is to be void. Read with this distinction in mind, *Ex parte Parsons; In re Townsend* (1886), 16 Q.B.D. 532, 55 L.J., Q.B. 137, and *Newlove* v. *Shrewsbury* (1888), 21 Q.B.D. 41, 57 L.J., Q.B. 476, are, I think, clear authority for the proposition that if this bill of sale is null and void as against the plaintiff, "it cannot be cited in support of the possession. The possession was unauthorized."

It becomes necessary, therefore, to consider the grounds taken

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on behalf of the plaintiff. Firstly, does this bill of sale set forth the true consideration for which it was given? If not, it is null and void as against the plaintiffs, irrespective of any question of registration. What was the true consideration? This inquiry lets in, of course, any evidence necessary to determine the question without regard to the fact that the agreement between the parties was reduced to writing: *In re Watson* (1890), 25 Q.B.D. 27, 59 L.J., Q.B. 394. But it seems desirable to examine first the consideration set forth in the bill of sale. What benefit received or to be received by Franklin & Nixon is disclosed by the instrument itself? The defendants had advanced part of the purchase price of the stock in trade, etc., bought by Franklin & Nixon from one Horner, and had indorsed their notes given to Horner for the balance. All this clearly enough appears. But this is all that appears. No further obligation is disclosed so far as the defendants are concerned. The bill of sale, it is true, is to stand as security not merely for the money already paid and for moneys to be paid in the future (possibly or probably) on the notes given for the balance of the purchase money, but also for repayment of any future advances, either in cash or goods. But no obligation is imposed upon the defendants to make any further advance, either in cash or goods. Reading the bill of sale all through, one would say that Franklin & Nixon were content to rely upon the motive power of self-interest being sufficiently strong to induce the defendants to make subsequent advances, particularly of goods, in order that the business might be run on the best business lines and its stock in trade kept abreast of customers' demands. Nevertheless, the instrument itself does not disclose the slightest obligation assumed by the defendants along this line. Had such an obligation been assumed and embodied in the bill of sale, it seems to me it would have been part of the consideration which moved to the grantors and led them to mortgage not merely their present stock in trade, but all goods subsequently purchased in any quarter. What a deterrent such a mortgage would be to other wholesale merchants; they would hardly sell on credit, knowing that the goods sold would at once fall within the maw of this bill of sale. Naturally, therefore,

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one would expect that the closing of other avenues for buying would be recompensed by some promise of supply from the grantees, and if such promise were given, it would, as I have said, have formed a very important part of the consideration for which this bill of sale was given. No such consideration appears anywhere within the four corners of the instrument. Was there such a consideration in fact?

The negotiations for the purchase of the Horner business and for the defendants' assistance in that connection lasted over some two or three months. Franklin & Nixon were to enter Horner's employ and assist in reducing stock to about the figure at which it was ultimately bought. When matters were ripe for closing, about the middle of September, 1907, it appeared that further stocking up for the fall trade was necessary or desirable, and a few days before the purchase from Horner was completed and the bill of sale was given to the defendants, Franklin & Nixon selected over $2,700 worth of goods at the defendants' place of business, the goods were set aside for them, and it was definitely agreed that immediately upon the execution of the bill of sale these goods would be (and they were, in fact) delivered to Franklin & Nixon; and the bill of sale, according to its purport, would attach to them and be security for payment of their price. All this is definitely stated by the defendants' acting manager to have been part and parcel of the arrangement existing at the moment the bill of sale was executed. If so, I should say it was part of the true consideration for the bill of sale—to my mind, as I have tried to point out, a very important part—and not being set forth in the bill of sale, the document would be null and void as against the plaintiff.

It further appears that on the 20th of September, 1907, when the transaction was about to be closed, this further development had arisen, namely, that Horner had ordered goods in certain quarters, which goods had not yet gone into stock, and for their price he was personally liable. To meet this situation, the defendants agreed to indemnify him, or in other words, guaranteed that Franklin & Nixon would pay the various vendors for the goods thus ordered by Horner, and they, the defendants, signed a letter to that effect addressed to Horner. This, again,

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the defendants' manager says, was part and parcel of the arrangement as it existed at the moment the bill of sale was executed. In what respect does this transaction differ in principle from the defendants' indorsement of the notes given by Franklin & Nixon for the balance of the purchase price? Horner insisted on the one just as clearly as on the other, and if the defendants' indorsement was part of the consideration, so was their agreement to indemnify Horner. Not being set forth in the bill of sale, that instrument would be null and void as against the plaintiff. On this branch of the case I refer to *Hamilton* v. *Chaine* (1881), 7 Q.B.D. 319, 50 L.J., Q.B. 456; *Richardson* v. *Harris* (1889), 22 Q.B.D. 268; *Sharp* v. *McHenry* (1887), 38 Ch. D. 427, 57 L.J., Ch. 961; *Ex parte Johnson; In re Chapman* (1884), 26 Ch. D. 338, 53 L.J., Ch. 762; *Ex parte Firth; In re Cowburn* (1882), 19 Ch. D. 419, 51 L.J., Ch. 473; and *Ex parte Popplewell; In re Storey* (1882), 21 Ch. D. 73, 52 L.J., Ch. 39. In all these cases, except the last cited, the complaint was that the grantee had received less than the consideration stated in the bill of sale, but as Cave, J. says in *Hamilton* v. *Chaine, ubi supra,* "the principle would be the same if it had happened to be a larger sum than was given." But in *Ex parte Popplewell; In re Storey, ubi supra,* the decision of the Court of Appeal was that a promise by the grantee not to register the bill of sale, in consideration

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of which promise the grantor agreed to pay a larger bonus for the loan, was not part of the consideration for the giving of the bill of sale, but was a matter entirely collateral; and after much deliberation, I find that I must bow to that decision, as I cannot distinguish it in principle from the case before me. One must feel very great hesitation and distrust of one's own view in suggesting doubt as to any proposition laid down by those great judges, Sir George Jessel and Lindley, L.J.; but there certainly are some expressions in the judgments in *Ex parte Popplewell; In re Storey, supra,* which run counter to my notion as to what constitutes consideration. I have always understood that in any contract all that the one party gets or is promised is the consideration, both in law and in fact, for what the other gets or is promised; but Sir George Jessel says:

"The agreement not to register was the motive which induced the grantors to pay an additional bonus, but it was not part of the consideration for the deed. If it had been inserted at all in the deed it would have been by way of a covenant by the grantee not to register the deed. It might as well be argued that every covenant in a deed is part of the consideration for it."

It seems strange to me to describe something for which a man pays as a motive rather than a consideration for his payment, and but for what is said in the passage I have quoted, I would submit, with considerable confidence, that every covenant in a deed is part of the consideration moving to the party taking benefit from the covenant. And again, Lindley, L.J. says (speaking of the promise not to register):

"It was part of the bargain between the grantor and the grantee which resulted in the consideration being given, but it was not part of the consideration itself."

I must confess I cannot follow the distinction. The grantor in that case mortgaged his goods as security for payment of £342, and promised to pay that sum. For what? What was the consideration for which he gave that security and that promise? Admittedly £342 cash advanced, plus the grantee's promise not to register. That was the antecedent bargain, and the grantor's performance of the whole bargain on his part is provided for by the instrument; *aliter* as to the grantee.

I have gone carefully through the authorities as to collateral contracts: *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70, 40 L.J., Ex. 46; *Erskine* v. *Adeane* (1873), 8 Chy. App. 756, 42 L.J., Ch. 849; *Mann* v. *Nunn* (1874), 43 L.J., C.P. 241; *Angell* v. *Duke* (1875), L.R. 10 Q.B. 174, 44 L.J., Q.B. 78, 32 L.T.N.S. 320; *De Lassalle* v. *Guildford* (1901), 2 K.B. 215, 70 L.J., K.B. 533; *Bristol Tramways, &c., Carriage Company, Limited* v. *Fiat Motors, Limited* (1910), 2 K.B. 831, 79 L.J., K.B. 1,107. They are thus summarized by Farwell, L.J. at pp. 838 and 1,110 respectively in the case last cited:

"There are, no doubt, cases where evidence may be given to shew that a contract was entered into in consideration of a collateral antecedent contract between the parties, as in *Erskine* v. *Adeane* (1873), 8 Chy. App. 756, and *Morgan* v. *Griffith* (1871), L.R. 6 Ex. 70, but no subsequent contract, founded only on the same consideration as the principal contract, can be given in evidence, for it obviously cannot form the consideration of the main contract, which was complete before it came into existence, and it cannot add to or vary such contract without infringing the elementary rules of evi-

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dence, and unless it can form part of such contract it has no consideration to support it."

This to my mind emphasizes, what I think all those cases shew, that the collateral antecedent promise was part and parcel of the consideration for the main contract. The exact point under discussion here is not, of course, touched in these cases, as the main contracts were not in question, and there was no statute requiring the true consideration to be set forth.

However, as I have said, I must follow *Ex parte Popplewell; In re Storey, ubi supra,* and hold that the two transactions above described were collateral to the main contract, and not, in law, part of the consideration for which this bill of sale was given.

The second ground taken on behalf of the plaintiff, namely, that the affidavit of *bona fides* was not made by anyone having authority to make it, was disposed of at the hearing. The deponent, Mr. McHattie, was *de facto* manager of the defendant Company at the time the bill of sale was executed, and, indeed, acted for the Company in closing the transaction, and as such manager, in fact, he had a statutory right to make the affidavit: section 7, subsection (7).

The third ground of objection, *viz.*: that in the affidavit of *bona fides* the deponent did not, in terms, swear that the grantors were justly and truly indebted to the grantees in the sum mentioned in the bill of sale as having been actually paid by the grantees to Horner is, I think, fatal to the validity of the document. *Quoad* that sum, the bill of sale constituted "security for a debt." I cannot see any reason for limiting the application of that clause in section 7, subsection (8) to bills of sale given to secure past indebtedness only and denying its application to such a case as the present, where the debt and the security for its payment spring into existence simultaneously. That, indeed, is the usual position where a bill of sale is given for money lent, and on such a transaction, I think it clear that the second limb of section 7, subsection (8) is the proper one to be used. As a matter of fact, indeed, this bill of sale recites that the money had been paid—a past transaction and, on a strict construction, an antecedent debt.

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The result so far, therefore, is that this bill of sale must be

declared null and void as against the plaintiff. But there is a further question not raised at the hearing, and upon which no direct testimony was adduced. The evidence suggests clearly enough that some part of the goods in the possession of Franklin & Nixon at the date of the assignment to the plaintiff consisted of after-acquired goods, that is to say, goods acquired by Franklin & Nixon after the giving of the impugned bill of sale. As to such goods, is the instrument operative, and if operative, is it a bill of sale within the Bills of Sale Act? If not, what is the position? The case will go again upon the trial list to be spoken to by counsel upon this point, in reference to which, see *Traves* v. *Forrest* (1909), 42 S.C.R. 514.

The appeal was argued at Victoria on the 18th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Sir C. H. Tupper, K.C., for appellants (defendants): The burden should be on the plaintiffs to shew that the goods were not acquired after the bill of sale was executed, and whether they were acquired afterwards or not, our bill of sale did state the true consideration, and the affidavit of *bona fides* substantially complies with the Act: *Traves* v. *Forrest* (1909), 42 S.C.R. 514. They claim we are holding the goods under a void bill of sale. We say, first, that all the goods are validly held under the bill of sale; second, if the bill of sale is void as to the first acquired goods, we are entitled to hold all the goods acquired after the execution of the bill of sale; third, assuming the bill of sale to be bad as to goods acquired both before and after its execution, we are in possession and entitled to hold the goods. We took possession under the bill of sale before the assignee came into possession, but after the assignment: Halsbury's Laws of England, Vol. 13, p. 433, paragraph 606; Maxwell on Statutes, 6th Ed., pp. 337-340; Encyclopædia of the Laws of England, Vol. 9, p. 236, Vol. 12, p. 435. As to the difference between "null and void" and "fraudulent and void," see Parker's Frauds on Creditors, pp. 238-241; *Clarkson* v. *McMaster* (1895), 25 S.C.R. 96. Being in possession, we are, in the circumstances, entitled to retain the goods: see *Morris* v. *Delobbel-*

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Flipo (1892), 2 Ch. 352; *Newlove* v. *Shrewsbury* (1888), 21 Q.B.D. 41; *Ex parte Parsons; In re Townsend* (1886), 16 Q.B.D. 532; *In re Burdett; Ex parte Byrne* (1888), 20 Q.B.D. 310; Halsbury's Laws of England, Vol. 3, p. 54, paragraph 102. On the question of where the consideration is for a collateral agreement, see Halsbury's Laws of England, Vol. 3, pp. 32 and 33, paragraphs 60 and 61; *Ex parte Popplewell; In re Storey* (1882), 21 Ch. D. 73; *In re Wiltshire; Ex parte Eynon* (1900), 1 Q.B. 96; *National Mercantile Bank* v. *Hampson* (1880), 49 L.J., Q.B. 480. Illustrating the object of our Act to prevent fraudulent accounts being put in the bill of sale, see *Hamlyn* v. *Betteley* (1880), 49 L.J., C.P. 465; *Credit Co.* v. *Pott* (1880), 6 Q.B.D. 295; *Ex parte Challinor; In re Rogers* (1880), 16 Ch. D. 260; *Ex parte Firth; In re Cowburn* (1882), 51 L.J., Ch. 473; *Roberts* v. *Roberts* (1884), 13 Q.B.D. 794; *Ex parte Johnson; In re Chapman* (1884), 26 Ch. D. 338; *Ex parte Stanford; In re Barker* (1886), 17 Q.B.D. 259; *Hughes* v. *Little* (1886), *ib.* 204, 18 Q.B.D. 32; *Sharp* v. *McHenry* (1887), 57 L.J., Ch. 961; *Heseltine* v. *Simmons* (1892), 2 Q.B. 547; *Ormsby* v. *Jarvis* (1893), 22 Ont. 11. With respect to what rights an assignee has, see Barron and O'Brien on Chattel Mortgages, 2nd Ed., pp. 55 and 56; *Bell* v. *Lafferty* (1894), 3 Terr. L.R. 263; *Hyman* v. *Cuthbertson* (1886), 10 Ont. 443; *Parkes* v. *St. George* (1884), 10 A.R. 496.

Upon the question of after-acquired goods and whether the right is an equitable or a legal one, he referred to *Congreve* v. *Evetto* (1854), 10 Ex. 298; *Hope* v. *Hayley* (1856), 25 L.J., Q.B. 155; *Carr* v. *Allatt* (1858), 27 L.J., Ex. 384; *Chidell* v. *Galsworthy* (1859), 6 C.B.N.S. 470; *Re Thirkell. Perrin* v. *Wood* (1874), 21 Gr. 492; *Canada Permanent Loan and Savings Co.* v. *Todd* (1895), 22 A.R. 515 at p. 520; *Brantom* v. *Griffits* (1876), 1 C.P.D. 349; *Holroyd* v. *Marshall* (1861), 10 H.L. Cas. 191, 10 Camp. R.C. 473; *Reeves* v. *Barlow* (1884), 12 Q.B.D. 436; *Tailby* v. *Official Receiver* (1888), 13 App. Cas. 523 at p. 546, 10 Camp. R.C. 445; *In re Burdett; Ex parte Byrne* (1888), 20 Q.B.D. 310; *Cayne* v. *Lee* (1887), 14 A.R. 503; *Goulding* v. *Deeming* (1887), 15 Ont. 201;

Horsfall v. *Boisseau* (1894), 21 A.R. 663, 26 S.C.R. 437; *Traves* v. *Forrest* (1909), 42 S.C.R. 514 at p. 518; *Clancy* v. *Grand Trunk Pacific Ry. Co.* (1910), 15 B.C. 497 at p. 505; *Thomas* v. *Kelly* (1888), 13 App. Cas. 506.

M. A. Macdonald, for respondent (plaintiff): As to the burden of proof, we set up our claim under a statutory title; they rely on a chattel mortgage. We say the chattel mortgage is void. It is clear under the authorities in Halsbury's Laws of England, Vol. 13, p. 443, paragraph 606, that the burden of proof is upon them. They have not shewn that there are any after-acquired goods. If the burden of proof were on us, the registrar should take cognizance of our evidence. In the report of the registrar he does not find that there were any after-acquired goods, and the report was subsequently confirmed.

Argument

R. W. Hannington, on the same side: With relation to the sufficiency of *bona fides,* we claim that subsection (7) of section 8 of the Bills of Sale Act has not been complied with by the defendants.

Tupper, in reply.

MACDONALD, C.J.A.: I think the appeal should be dismissed. No doubt, when the transaction was entered into by the defendants with the assignees and the creditors, it was *bona fide* in every respect. Unfortunately, however, the proper affidavit of *bona fides* was not made. The statute requires that in case of security for a debt, an affidavit that the grantor is justly and truly indebted to the grantee in the sum therein mentioned should be made.

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What the defendants undertook here to do was to advance a certain sum of money to pay off a creditor of the mortgagor, to pay off certain promissory notes, and for other purposes. So far as the advance of money is concerned, it was in the nature of a loan, and the chattel mortgage was taken as a security for that. That is to say: it was a debt in the true sense of the word, and should have been verified by the affidavit, as required by section 7, subsection (8).

It was contended by *Sir Charles Hibbert Tupper* that, even if the mortgage be void under the Act, it was good in so far as

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goods afterwards supplied by the defendants Franklin & Nixon are concerned. We are not, it seems to me, called upon to decide that question, for the reason that the learned trial judge referred it to the registrar to ascertain whether or not any of the goods which are now in dispute were goods of that character. He declared that the onus of proving their existence, by segregating them from others which were not of that character, was on the defendants. The defendants declined to undertake that proof. The registrar, in the absence of evidence of that character, reported that there were no after-acquired goods.

I think the onus was upon the defendants to shew that there were after-acquired goods, by identifying them; that is to say, segregating them from the others not of that character. Having failed to do this, they cannot succeed in attaching their mortgage to any of the goods in question.

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IRVING, J.A.: I agree. I am of opinion the $9,483.86 was the debt in respect of which the security was given; the affidavit of *bona fides* should have included the words which are referred to in the second limb of the section.

As to the $2,700, there was a contractual agreement between the parties for the sale thereof. The mere pretending by them that it was not a sale cannot make any difference. In my opinion, it was a sale in fact.

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With reference to the onus of proof, I am of the same opinion as the learned trial judge.

GALLIHER, J.A.: I agree. It seems to me there are only two points in this matter. In the first place, as to whether what is termed the second limb in the affidavit of *bona fides* is the one to be applied in a case of this kind. The affidavit of *bona fides* first referred to in section 7, subsection (8) of the Bills of Sale Act, 1905, chapter 8, is applicable where it is an out-and-out sale, but in cases where the bill of sale is given as security for a debt, as I hold is the case here, then the second affidavit is the proper one to use.

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The second point in the case is the right to after-acquired goods. I do not think I can usefully add anything to what has been said by the learned Chief Justice. It seems to me the

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matter was rightly referred by the learned trial judge, and that being so, the registrar, in the absence of proof, which the defendants declined to furnish, was justified in finding that there was no after-acquired goods to which the mortgage attached.

Appeal dismissed.

Solicitors for appellants: *Tupper, Kitto & Wightman.*
Solicitors for respondent: *Russell, Mowat, Hancox & Farris.*

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Landlord and tenant—Breach of covenant to pay taxes—Action to recover possession—Counterclaim—Rectification of lease—Costs.

The plaintiff brought action to recover possession of leasehold premises for breach of covenant to pay taxes. The lease was in the short form and contained in the printed form a covenant "to pay taxes." There was also a later covenant in writing "to pay taxes on any building that he (the lessee) may hereafter see fit to erect." The trial judge found that the first covenant (in print) had been retained in the lease by mistake, and that when the lease was entered into the terms were reasonable and neither party could foresee that three years later property would have become so valuable that taxes would be increased tenfold.

Held, on appeal (MARTIN, J.A. dissenting), that the action should be dismissed and that the lease be rectified by striking out the printed words "and to pay taxes."

APPEAL by plaintiff from the judgment of GREGORY, J. in an action tried at Victoria on the 3rd of March, 1913. The facts appear in the reasons for judgment. Statement

Mayers, for plaintiff.
D. S. Tait, for defendant.

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GREGORY, J.: The plaintiff's claim is to recover possession of premises for breach of covenant to pay taxes, or, in the alternative, damages.

It appears to me that, in the circumstances of the case, it is hardly susceptible of argument that the plaintiff is entitled to possession, for, in addition to other circumstances, she acknowledged the tenancy by accepting rent up to within a few days of issuing her writ.

The lease in question is in the short form, and contains in the printed form a covenant "to pay taxes," and also a later covenant in writing to pay the taxes "on any building that he (the lessee) may hereafter see fit to erect." The later covenant would appear to restrict the generality of the earlier one, but even if it does not, the defendant counterclaims to rectify the lease by striking out the first covenant, on the ground that it was included by the draughtsman's mistake, he not having struck it out, as it had been mutually agreed that the only taxes the defendant should pay would be any additional taxes caused by any new buildings he might see fit to erect. This the plaintiff denies, and if the matter stood on their evidence alone, I could not, in the state of the law, give effect to the defendant's contention. But that is not the case. I regret to say that I am unable to place any reliance whatever on the plaintiff's testimony, not because I think she deliberately stated what is untrue, but because of her advanced age, her general frailty, the position she finds herself in, and her own admissions as to her defective memory. I am convinced she has now no clear recollection of what took place.

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Nor can I accept the testimony of her son. He was called after recess, the plaintiff's case having been closed before adjournment. From whatever cause, nervousness, forgetfulness, or whatever it may have been, I was not favourably impressed. There is hopeless contradiction between him and his mother in several instances.

The defendant testifies positively that he refused to agree to pay the general taxes, and that the plaintiff agreed to this and to renew his lease for ten years if he would pay an additional

rent, and pay the taxes on any new buildings he put up. This is incidentally supported by the evidence of Johnston, Gower and Cashmore, and seems to be strongly supported by the undisputed fact that the plaintiff herself paid the taxes up to the beginning of the year 1913 without ever asking the defendant to refund them or even mentioning the subject to him, or, I must hold, anyone on his behalf. When the matter was first mentioned to him by plaintiff's son in February, 1913, he stoutly maintained that there was no clause in the lease requiring him to do so, and he gave a detailed account of his interview with the son, which the son did not deny in a single particular when he gave his evidence. Neither the plaintiff nor her son appear to have had the slightest idea that the defendant was to pay taxes generally until after a friend who had seen the lease told them of it. Their conduct throughout is consistent with the defendant's story and not with their own, and leaves no doubt in my mind that it was mutually agreed as contended for by the defendant.

I have examined all the cases referred to by plaintiff's counsel, but they do not appear to me to meet the circumstances of this case, and the plaintiff's argument is based upon the false assumption that I have nothing before me but the assertion of defendant, contradicted by the plaintiff, and upon the like assumption that the defendant has in some way taken advantage of the plaintiff.

When the lease was entered into, the terms of it, as contended for by either plaintiff or defendant, were quite reasonable, and neither of them could then foresee that three years later the property would become so valuable that the taxes would be increased ten-fold.

To require the plaintiff to pay the taxes is to ask her to pay in taxes double the amount she receives in rent, and in the early part of the trial I expressed the opinion that that was unfair or dishonest on the part of the defendant; but I must say that it seems equally unfair for the plaintiff to ask defendant to pay ten times (and more) taxes than it was even in the contemplation of either party he should pay, particularly when all the increased value in the property goes to the plaintiff. I unsuc-

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cessfully tried to induce the parties to come to a settlement. I have no jurisdiction to make a new contract for them to meet the new conditions which have arisen, and must, therefore, leave them where they stand at law. The action will be dismissed and defendant will succeed on the counterclaim; the lease must be rectified by striking out the printed words "and to pay taxes" in the first covenant thereof.

As the action was caused by the defendant's own neglect in not having the first covenant as to taxes struck out of the printed form, and as he did not counterclaim until the morning of the trial, he is only entitled to the costs of and subsequent to the trial.

The appeal was argued at Vancouver on the 3rd and 4th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Bodwell, K.C., for appellant (plaintiff): The plaintiff is entitled to a declaration for forfeiture of the lease, on the ground that the lessee has not paid the taxes, as provided in the lease. In order to make rectification, there must be proof of both parties making a mistake; it must be found as a fact that Mrs. Booth (the plaintiff) was mistaken. Not only must there be a mistake by both parties, but it must be proved by irrefragable evidence, that is, not only evidence that cannot be refuted, but of which there can be no doubt that both parties have made a mistake. There must be some evidence in writing that there was a mutual mistake: *Mortimer* v. *Shortall* (1842), 2 Dr. & War. 363, 59 R.R. 730 at p. 737; *Alexander* v. *Crosbie* (1835), 46 R.R. 183. Parole evidence alone is not sufficient to rectify a mistake in a lease: *Fowler* v. *Fowler* (1859), 4 De G. & J. 250 at p. 263; *Attorney-General* v. *Sitwell* (1835), 1 Y. & C. 559; *Garrard* v. *Frankel* (1862), 30 Beav. 445 at p. 458. The plaintiff asks that the agreement be reformed and then completed. This can only be done by a decree of a Court of equity, and a Court of equity will not act unless the plaintiff does equity. The defendant cannot enforce his contention at law. In this case, if the relief is given by changing the lease, it gives an unreasonable advantage to the defendant: *Mortlock* v. *Buller*

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(1804), 10 Ves. 291 at pp. 304-5; *Twining* v. *Morrice* (1788), 2 Bro. C.C. 326; *Falcke* v. *Gray* (1859), 4 Drew. 651; *Bentley* v. *Nasmith* (1912), 46 S.C.R. 477 at p. 490.

D. S. Tait, for respondent: The evidence clearly shews a mistake was made by both parties. The plaintiff's evidence and that of her witnesses is contradictory. The law applicable to marriage settlements is precisely the same as the case at bar. *Alexander* v. *Crosbie* (1835), 46 R.R. 183, is as far against us as any. He cited *Welman* v. *Welman* (1880), 15 Ch. D. 570 at p. 578; *Johnson* v. *Bragge* (1901), 1 Ch. 28 at p. 36; *Murray* v. *Parker* (1854), 19 Beav. 305 at p. 308; *Cogan* v. *Duffield* (1875), L.R. 20 Eq. 789 at p. 799; *Bentley* v. *Mackay* (1862), 4 De G.F. & J. 279 at p. 286; *Baker* v. *Paine* (1750), 1 Ves. Sen. 456; *In re Boulter* (1876), 4 Ch. D. 241; *Ball* v. *Storie* (1823), 1 L.J. (o.s.), Ch. 214; *Cowen* v. *Truefitt, Limited* (1899), 2 Ch. 309 at p. 312; Kerr on Fraud and Mistake, 4th Ed., 500 and 501. Courts of equity do equity along certain principles. At the time the lease was signed the rent was reasonable, and it was fair that the plaintiff should pay the taxes. Subsequently conditions very much changed, owing to the great increase in the value of property. On the question of a Court of equity granting relief, where by so doing it will work a hardship on the party, see *Blackwood* v. *Paul* (1854), 4 Gr. 550 at pp. 554-5. In the event of the Court considering there is not sufficient evidence to rectify, there is the document itself; the two clauses with reference to taxes are inconsistent: *Robertson* v. *French* (1803), 4 East 130 at p. 134; *Glynn* v. *Margetson & Co.* (1893), A.C. 351 at p. 357; *Strickland* v. *Maxwell* (1834), 2 C. & M. 539 at pp. 550-53; *Western Assurance Company of Toronto* v. *Poole* (1903), 1 K.B. 376 at p. 388; *Dudgeon* v. *Pembroke* (1877), 2 App. Cas. 284 at p. 293.

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Bodwell, in reply: The Courts refuse to grant relief for breach of covenant except in the case of payment of rent or to insure: see Woodfall's Landlord and Tenant, 19th Ed., 378 and 384; Sugden on Vendors and Purchasers, 14th Ed., 605; Fry on Specific Performance, 5th Ed., 210-11; Halsbury's Laws of England, Vol. 21, p. 21, paragraph 38; *Peacock* v. *Penson*

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(1848), 11 Beav. 355; *Howard* v. *Fanshawe* (1895), 2 Ch. 581 at pp. 586-7; *McLaren* v. *Kerr* (1876), 39 U.C.Q.B. 507.

Cur. adv. vult.

COURT OF APPEAL
June 26.

26th June, 1913.

BOOTH v. CALLOW

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would affirm the judgment of the learned trial judge. The defendant counterclaimed for a rectification of the lease on the ground of mutual mistake. To get such rectification, he must make out a clear case, and if I had any doubt that there was a mutual mistake, I should not uphold the judgment. The learned judge heard the witnesses, and, while casting no reflection upon the honesty of the plaintiff, who was an old lady in frail health and of admittedly poor memory, thought that the plaintiff's evidence and that of her witnesses was not entitled to much weight. Perhaps if the case rested on the oral testimony it would be unsafe to decree rectification, but it does not so rest. The lease itself contains cogent evidence of the mistake; the plaintiff's own conduct also furnishes strong evidence of the same. She paid the taxes, which she now claims ought to have been paid by the defendant, for two or three years without making any demand upon him for repayment to her. In the absence of a satisfactory explanation, which was not given, this is consistent only with the defendant's story that she was to pay the taxes, except the taxes on new buildings which might be erected by him. I am not only unable to say that the learned judge was wrong, but I go further and express the opinion that he was right.

The appeal must, therefore, be dismissed.

IRVING, J.A.

IRVING, J.A.: I would dismiss the appeal. The lease shews on its face that a mistake has been made. What the true contract was is shewn by the conduct of the parties. There was a genuine agreement between the parties to the lease. Owing to a mistake, the terms employed in the lease do not convey the meaning of the parties.

MARTIN, J.A.

MARTIN, J.A.: I regret that I have to differ from my learned brothers in the view they take of the evidence in this unusual

case, which is of such a nature that the defendant is required to support by irrefragable proof his counterclaim for rectification of the lease he himself drew up, and read to, and obtained the execution by, this old and infirm woman, with no one to assist and advise her. I shall content myself by saying that on the defendant's own shewing, the circumstances are such that a Court should exercise the greatest caution in giving effect to his request, and I am quite unable to rid my mind of that feeling of fair and reasonable doubt which it is incumbent upon him to remove before I could give judgment in his favour. The written provision for taxes for future buildings might very well, in the circumstances, be regarded by Mrs. Booth as additional to the prior covenant "to pay taxes." The witness Gower does not suggest that there was any discussion on this vital point, where the minds of the parties would obviously fail to meet unless it was explained.

GALLIHER, J.A.: I agree that the appeal should be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for appellant: *Bodwell, Lawson & Lane.*
Solicitors for respondent: *Tait, Brandon & Hall.*

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NOV. 28.

IN RE NARAIN SINGH

IN RE NARAIN SINGH *ET AL.*

Constitutional law—Statute, construction of—The Immigration Act, Can. Stat. 1910, Cap. 27, Secs. 13, 14, 18, 19, 23, 33, 37 and 38—Orders in council—Validity of—Deportation—Habeas corpus.

Where the prohibition of an order in council exceeds that contained in the statute by which it is authorized, the order in council is *ultra vires*.

Where certain immigrants from Hindustan were ordered to be deported under orders in council so held to be *ultra vires*:—

Held, that they were entitled to be discharged, upon *habeas corpus*, from confinement under the deportation order.

Upon it being urged that these persons were also detained because of misrepresentations, but the deportation order did not so state, although it made a reference to section 33 of the Act:—

Held, that as the section contains a number of clauses prohibiting different acts, it is not a proper compliance with the Act to refer generally to the section as a reason for deportation; a reason so stated is not a good return to a *habeas corpus*.

APPLICATION for a writ of *habeas corpus*. Heard by MURPHY, J. at Victoria in November, 1913.

The applicant had applied for entry into Canada, and had attended before the board of examination under the Immigration Act, but his answers not being considered satisfactory, a further examination was held. At his first examination he had stated that he was just returned to Canada after an absence, and that he had worked in sawmills and cement works in Canada. At his second examination he stated that these answers were not true; that he had been posted to make them; but he now claimed the right of entry, as the orders in council passed in pursuance of the statute were *ultra vires*. These orders in council were numbers 920 and 926.

Statement

"No. 926: His Excellency in Council is pleased, under the authority of section 37 of the Immigration Act of 9 and 10 Edward VII., to make, and doth hereby make the following regulation:—

"No immigrant of Asiatic origin shall be permitted to enter Canada unless in actual and personal possession in his or her own right of two hundred dollars, unless such person is a native or subject of an Asiatic country in regard to which special statutory regulations are in force or

with which the Government of Canada has made a special treaty, agreement or convention.

"No. 920: His Excellency in Council is pleased, under the authority of subsection 1 of section 38 of the Immigration Act of 9 and 10 Edward VII., to make, and doth hereby make the following regulation:—

"From and after the date hereof, the landing in Canada shall be and the same is hereby prohibited, of any immigrants who have come to Canada otherwise than by continuous journey from the country of which they are natives or citizens, and upon through tickets purchased in that country or purchased or prepaid in Canada."

Bird, for the applicant: These orders in council are *ultra vires,* inasmuch as section 37 of the statute only authorized the Governor in council to fix the minimum amount which an immigrant should be possessed of on arrival in the immigrant's own right, whereas the order went beyond, in providing that the immigrant must be in actual and personal possession in his own right of the minimum fixed; further, that the order in council provided that the minimum mentioned should be possessed by the immigrant unless such immigrant was a native or subject of an Asiatic country in regard to which special statutory provisions were in force by an Imperial Act, whereby East Indians were entitled to certain rights and privileges, and that, therefore, the applicant comes within the provision of the order in council to that extent. Further, that section 37 only authorized the Governor in council to vary the minimum according to the race of the immigrant, while the order in council declared that no immigrant of an Asiatic origin should be permitted to enter Canada; that the term "origin" is of wider significance than the term "race." These objections are applicable to order number 926. With regard to order number 920, passed under section 38, which authorizes the Governor in council to prohibit the landing of immigrants who have come to Canada otherwise than by continuous journey from the country of which they are natives or citizens, either by birth or naturalization, the order in council purports to prohibit the landing of immigrants otherwise than by continuous journey from the country of which they are natives or citizens, omitting the word naturalized, and in that respect the order exceeds the powers conferred by the statute. Further, it is impossible to purchase in India, or pre-

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pay in Canada, for a continuous journey from India to Canada.

W. J. Taylor, K.C., and *Wootton, contra*: Sections 13 and 14 of the statute provide for the appointment of a board of inquiry for the summary determination of all cases of immigrants seeking to enter Canada. Section 14 particularly confers on such board power to determine whether the immigrant shall be allowed to enter or remain; section 18 provides that there shall be no appeal from the decision of such board with regard to certain classes of immigrants; in all other cases, by section 19, an appeal is provided to the minister. Section 23 provides that no Court or any officer shall have power to review, quash, reverse or restrain, or otherwise interfere with any proceeding, decision or order of the minister, or any board of inquiry, or any officer thereof, had or made in accordance with the provisions of the statute relating to the detention or rejection of any immigrant. This section, therefore, deprived the Court of power to interfere where a board, duly appointed, had considered the particular case, and that *habeas corpus* proceedings would only lie in cases where the board had not been duly and properly appointed. If section 14 stood alone, there could be no question that the board of inquiry was the sole tribunal for the determination of the right to land in Canada. But no such right exists either by common or any other law; it is only by the grace of any country that outsiders are permitted to enter. In any event, in the case here, the applicant had made untrue answers to the questions that, by section 33, subsection 2, he was obliged to answer. So far as the orders in council were concerned, the board of inquiry had power to exclude the applicant without them, and in so far as such orders in council extended beyond the specific words of the statute, sections 37 and 38, the Court was not called upon to determine, inasmuch as the applicant's case rested upon grounds which clearly came within the powers of the Governor in council. The orders, while they might be good in part and bad in part, were, in fact, good so far as the applicant based his right of entry. As to the argument that through tickets to Canada could not be purchased in India, or prepaid for in Canada, while that might be a hardship, it was not an argument for the invalidity of the orders in council.

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MURPHY, J. refused the writ, and the applicants then applied to HUNTER, C.J.B.C. at Victoria, on the 28th of November, 1913, when the same arguments were submitted.

HUNTER, C.J.B.C.: *Habeas corpus* proceedings to test the legality of the detention of 39 Hindus held under deportation orders.

As to four of the Hindus, their counsel, Mr. *Bird,* abandoned proceedings, so that the question now concerns the other 35. The main dispute was as to the validity of the orders in council known as P.C. No. 926 and No. 920, passed on the 9th of May, 1910.

At the outset, Mr. *Bird* vehemently urged that Parliament knew that it was impossible for Hindus to come to a Canadian port by a continuous journey and that it had employed a subterfuge to place a ban on Hindus as a race, and that, therefore, the Court ought to be astute, if possible, to defeat the alleged injustice. As to this, it seems necessary once more to point out that in dealing with Acts of Parliament, the Court is not concerned with questions of expediency or good faith, but only with their validity and interpretation.

To consider the two orders in council: As to No. 926, it is objected that the expression "Asiatic origin" is used, whereas the statute uses "Asiatic race." It is obvious that the word "origin" includes more than the word "race." A person born in India of British parents domiciled there would be of Asiatic origin, but not of Asiatic race. The prohibition in the order in council, therefore, exceeds that contained in the statute itself and is, accordingly, *ultra vires.* Again, the order in council requires the immigrant to have $200 in his own right in actual and personal possession, whereas the statute does not require that the money shall be in actual and personal possession. If an immigrant had the money in his own right in a Victoria bank at the time of his arrival, he would satisfy the requirements of the statute, but not those of the order in council. The order in council is, therefore, bad on this account. Other objections were also urged, but it is unnecessary to deal with them.

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As to the order in council No. 920: This order in council

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has already been declared invalid by MORRISON, J. in *In re Rahim* (1911), 16 B.C. 471, on the ground that it omitted the qualifying word "naturalized" before the word "citizens," in conformity with the amending Act, and, no doubt, as he says, the fact of the change in the statute had been overlooked, and I might add that the amending Act was assented to only four days before the order in council was passed.

Mr. *Taylor,* however, urged that the order in council might be upheld in part, so far as regards the requirements about natives. The difficulty is that the word "native" is used as a noun in the order in council and would, therefore, include persons of British race born in India, which it is difficult to suppose Parliament intended, whereas in the statute it is used as an adjective, qualifying the word "citizens," and it is obvious that the expression "native" includes more than the expression "native citizens."

The Court having concluded that the persons detained were entitled to their discharge on these grounds, it was then urged by Mr. *Taylor* that they were also held because of misrepresentations. But the order for deportation does not state that this was a reason for detention. The only reason, so-called, assigned, which could have any bearing on the matter, is given as "section 33." This section contains a number of subsections prohibiting different acts, and I do not think it is a proper compliance with the Act to refer generally to the section in this way as a reason for deportation. Common justice requires, and I think Parliament intended, that when a person is ordered to be deported out of the country, the reason for so doing should be clearly stated, in order that he might at least know what was the reason, and, in any event, a reason stated in such a fashion would not constitute a good return to a writ of *habeas corpus.*

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Reference was also made to section 23, which purports to limit the jurisdiction of the Court to interfere with deportation proceedings. It is, however, specifically enacted, that such restriction applies only to proceedings "had under the authority and in accordance with the provisions of this Act," and it would, indeed, be strange to find that the doors of the Court

were shut against any person of any nationality, no matter what the act complained of might be.

Application granted.

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VICTORIA MACHINERY DEPOT COMPANY, LIMITED v. THE CANADA AND THE TRIUMPH.

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Sept. 24.

VICTORIA MACHINERY DEPOT CO. *v.* THE CANADA AND THE TRIUMPH

Admiralty law—Practice—Affidavit leading to warrant—Rules 35, 36 and 37—Allowing in supplemental affidavits to shew jurisdiction—Domicile of company—Mortgagees—Material men—Statutory lien—Priority—Promissory notes in part payment—Notes dishonoured.

Upon an application to vacate warrants issued against a ship under arrest in an action *in rem* for necessaries, although it appeared that on the facts disclosed in the affidavits filed before the registrar, the Court would not have jurisdiction to issue the warrant for arrest, the plaintiffs were allowed to file supplementary affidavits to shew that there was jurisdiction to issue the warrants and that the case was one in which the discretion of the registrar could be properly exercised.

A company whose head office is in England and is licensed and registered to carry on business in British Columbia is not "an owner domiciled within Canada" within the meaning of subsection (*b.*) of Rule 37 of the procedure in Admiralty cases.

A plaintiff who has supplied necessaries in British Columbia to a ship which is away from its home port and has no owner domiciled in British Columbia, has acquired a statutory lien for such necessaries when the ship is arrested under the warrant of the Court, and the lien may be enforced either upon the trial or on a subsequent motion.

A party supplying necessaries to a foreign ship, and taking promissory notes in payment, is entitled, if the notes are dishonoured, to sue the ship for the original debt; if the notes are in part payment only, he may sue the ship for the balance owing.

MOTIONS heard by MARTIN, LO. J.A. at chambers in Victoria on the 3rd of September, 1913, in an action *in rem* for necessaries on behalf of the receiver and manager of The British

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Columbia Fisheries, Limited (the owners of the steamships Canada and Triumph), and of the trustees of a debenture mortgage covering said ships, to vacate the warrants issued against the ships under arrest of the marshal. The particulars are set out fully in the reasons for judgment.

W. J. Taylor, K.C., for the application.
Bodwell, K.C., and *Moresby, contra.*

24th September, 1913.

MARTIN, LO. J.A.: These are two separate motions on similar material, heard together for convenience, on behalf of the receiver and manager (appointed on the 13th of August, 1913, by the High Court of Justice in England) of The British Columbia Fisheries, Limited (owners of the steamships Canada and Triumph), and of the trustees of a debenture mortgage covering said ships, to vacate the warrants issued against the said ships now under arrest of the marshal, on the grounds that the affidavits to lead to warrant do not comply with Rules 35 and 36, it not being stated therein, (a), what the "nature of the claim" is, but only that:

"2. The plaintiff has, at the request of the defendants or their agents, done work and rendered services to the Canada, a British vessel belonging to the port of Grimsby, England, to the amount of $3,217.37";

and, (b), if it can be assumed that the action is for necessaries, the domicile of the owner within Canada is not deposed to; and, (c), if it can be assumed that the action is for building, equipping or repairing, the fact that the ship is under the arrest of the Court is not deposed to. My recent decision in *Letson* v. *The Tuladi* (1912), 17 B.C. 170, on the power of the registrar, under Rule 39, to dispense with certain "prescribed particulars" in the affidavit, was relied upon by the plaintiff in answer to these objections, but it was submitted by the defendants, in reply, that though the registrar may so dispense, yet my decision does not go to the length of holding that such dispensation would confer upon this Court a jurisdiction which it did not in fact possess. This submission is, I think, correct, and according to the facts disclosed in the affidavits filed before the registrar and in support of this motion, this Court would not have jurisdiction to issue the warrant for arrest. But an application was

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made by the plaintiff, on the return of the motion, to file supplemental affidavits to prove such facts as would shew that in reality there was jurisdiction, and that the case was one in which the discretion of the registrar could be, and was, properly exercised, and I allowed the affidavits to be read for that purpose, and they did establish jurisdiction, shewing that the claim, or at least, a large portion of it, was for necessaries (as defined by, *e.g., Webster* v. *Seekamp* (1821), 4 B. & Ald. 352; *The Two Ellens* (1871), L.R. 3 A. & E. 345, (1872), L.R. 4 P.C. 161; and *The Riga* (1872), *ib.* 516, 1 Asp. M.C. 246, approved in *Foong Tai & Co.* v. *Buchheister & Co.* (1908), A.C. 458 at p. 466, and that "no owner or part owner of the ship (was) domiciled within Canada at the time of the institution of the action," because the owning company, having its head office in London, England, has its domicile there within the meaning of the authorities, which will be found conveniently collected in *Pearlman* v. *Great West Life Insurance Co.* (1912), 17 B.C. 417, where the question was recently considered. I have not overlooked the fact that this company is licensed and registered to carry on business within this Province, under section 152 of the Companies Act, Revised Statutes of British Columbia, 1911, chapter 39, and that it has "the same powers and privileges in this Province as if incorporated under the provisions of this Act," but that language does not change or alter its constitution or domicile, and it is not one of the "privileges" enjoyed by British Columbia companies that they should have two head offices, one of which could, *e.g.*, be used as a means to pursue its debtors, and the other to evade its creditors. The distinction between the "head office of the company" (*i.e.*, its "home") and the "head office of the company in the Province" is preserved in the form of the licence and of certificate given in sections 154 and 160, subsections (*b.*) and (*c.*).

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But it is further contended, in support of the motion, that since at the time of arrest the ships were in the possession of the said receiver, under the said debenture mortgage, duly registered in the Port of Grimsby, England, the registered port of the defendant ships, therefore, as the lien for necessaries is not a maritime one, and the possessory lien has been lost, there is no

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other lien that can be enforced in the circumstances, and the arrest is of no avail.

While it is true that the plaintiff herein has no maritime or possessory lien, yet, since he has supplied necessaries here to a ship which (I assume for the purposes of the argument, see *The Ocean Queen* (1842), 1 W. Rob. 457) though not a foreign one, is yet away from its home port and has no owner domiciled in British Columbia (which under section 2, subsection (3*a.*), of the Colonial Courts of Admiralty Act, 1890, 53 & 54 Vict., chapter 27, must be substituted for "England and Wales" in The Admiralty Court Act, 1861 (Imperial), section 5), he had acquired a statutory lien for such necessaries when the ship was arrested under the warrant of this Court. The fact that it may turn out that such lien may be postponed to a prior charge or charges, by way of lien or mortgage, or to the claim of a *bona-fide* purchaser of the ship for value, does not prevent its enforcement so far as may be lawful upon the facts to be hereafter established either upon the trial or upon a subsequent motion furnishing "the necessary materials for a judgment," as has been done in many cases, *e.g., The Scio* (1867), L.R. 1 A. & E. 353. See also the following authorities, which justify my view: Abbott's Merchant Ships and Seamen, 14th Ed., 42, 183, 1,023; Maclachlan's Merchant Shipping, 5th Ed., 115-20; Williams & Bruce's Admiralty Practice, 3rd Ed., 198; *The Troubadour* (1866), L.R. 1 A. & E. 302; *The Pacific* (1864), Br. & Lush. 243; *The Aneroid* (1877), 2 P.D. 189; *The "Rio Tinto"* (1884), 9 App. Cas. 356 at pp. 362-3; *Foong Tai & Co.* v. *Buchheister & Co., supra,* and lastly and chiefly, *The Cella* (1888), 13 P.D. 82, applying the decisions in *The Two Ellens* (1871), L.R. 3 A. & E. 345; (1872), L.R. 4 P.C. 161; *The "Pieve Superiore"* (1874), L.R. 5 P.C. 482; and *The Henrich Bjorn* (1886), 11 App. Cas. 270; thus at p. 87, in *The Cella*:

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"They shew that though there may be no maritime lien, yet the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant."

And p. 88:

"It appears to me that so long as 1842, Dr. Lushington, in *The Volant*, 1 W. Rob. 383, explained the principle upon which the Court proceeds, when he said that 'an arrest offers the greatest security for obtaining substantial justice, in furnishing a security for prompt and immediate

payment.' The arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment. That is Dr. Lushington's decision, and I think it is a right one."

With respect to the objection taken that promissory notes had been accepted for the amount of the claim, the answer is, first, that the affidavits shew that the notes are only for a part thereof, the sum of $2,224.98 not being covered thereby; and, second, since the notes have been dishonoured, the ship may be sued for the original debt: *The N. R. Gosfabrick* (1858), Swabey 344.

The result is that the motions will be dismissed, with costs to the plaintiff in any event.

Motions dismissed.

VICTORIA MACHINERY DEPOT COMPANY, LIMITED v. THE CANADA AND THE TRIUMPH. (No. 2).

Admiralty law—Necessaries—Repairs—Alteration in structure and equipment—The Admiralty Court Act, 1861 (24 Vict., Cap. 10, Sec. 5).

Alterations in the structure and equipment of a fishing vessel for the purpose of making her fit to engage in fishing with dories, instead of as a trawler, are "necessaries," under section 5 of The Admiralty Court Act, 1861 (24 Vict., chapter 10).

Williams v. *The Flora* (1897), 6 Ex. C.R. 137, and *The Riga* (1872), 1 Asp. M.C. 246, L.R. 3 A. & E. 516, followed.

ACTION for the price of necessaries in the way of work done and material furnished the ship Canada in the spring of 1913. Heard by MARTIN, LO. J.A. at Victoria on the 28th of October, 1913. Statement

Bodwell, K.C., and *E. B. Ross*, for plaintiffs.

Maclean, K.C., and *M. B. Jackson*, for defendants.

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Oct. 28.

VICTORIA MACHINERY DEPOT CO. *v.* THE CANADA AND THE TRIUMPH

MARTIN, LO. J.A.: At the hearing, judgment was given against The Triumph for $906.25 for what could only, according to the evidence, be regarded as necessaries, but the claim for necessaries against The Canada was reserved for further consideration so far as it relates to the work done and materials furnished in the spring of 1913; no objection can be taken to that part of the claim which relates to charges for repairing and making her seaworthy in October, 1912, after her arrival in Victoria *via* Cape Horn. She was brought here to engage in fishing as a trawler, but it was decided, after some experience in that work, to change the method of fishing and fit her out to fish with boats—dories. This necessitated certain alterations and additions to bunks, for increased accommodation for her crew, and otherwise, and it is objected that this work being to some considerable extent, at least, of a structural nature, cannot properly be classed as necessaries. In the judgment I delivered on the interlocutory motion herein on the 24th of September last (*ante,* p. 511), I cited the principal authorities on this question, and I now refer to them, adding thereto the case in this Court of *Williams* v. *The Flora* (1897), 6 Ex. C.R. 137, and noting with approval the statement in Roscoe's Admiralty Practice, 3rd Ed., 265, that the term necessaries, "though primarily meaning indispensable repairs . . . . has now, it is clear, a wider signification, and has been and is being gradually amplified by modern requirements."

Judgment

The position of the ship at bar is that her owners having engaged her in a particular service (fishing), in a particular way, found it desirable to continue her in the same service in another way, and to do so it became necessary to make certain alterations in her structure and equipment. Now, the general rule is that which was established in *The Riga* (1872), 1 Asp. M.C. 246, L.R. 3 A. & E. 516 at p. 522 (one of the cases above referred to), as follows:

> "I am of opinion that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered if present at the time, comes within the meaning of the term 'necessaries,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable."

I am unable to see why this rule does not apply to what was

done here. Surely, if a ship carrying a cargo of grain came to this port and got a charter to carry long sticks of timber, which necessitated the cutting of new ports to get them into her hold, such alterations, structural though they would strictly be, could only be said to be necessaries. And here it was necessary, for the effective business of fishing, to turn this trawler into a dory fisher, just as it was to turn the grain ship into a lumber carrier. In the case of *Williams* v. *The Flora, supra,* a passenger steamer, her owners were without means to fit her out or operate her, so they entered into a contract with a railway company, which agreed to advance the money to fit her out to carry freight and passengers for the season of 1897, and the sum of "$2,000 was expended in painting, repairing, furnishing and outfitting the steamer," and it was held, on the authority of *The Riga,* that what was done came within the definition of necessaries. There is no substantial distinction between that case and this, and I see no obstacle to prevent judgment being entered in favour of the plaintiff against The Canada for the full amount of the claim, $3,217.37, all of which I hold to be necessaries in the circumstances.

Judgment

Judgment accordingly.

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HINRICH v. CANADIAN PACIFIC RY. CO.

HINRICH v. THE CANADIAN PACIFIC RAILWAY COMPANY.

Railways—Negligence—Injury to person on track by train—Contributory negligence—Licensee.

The deceased, while crossing the tracks of the defendant Company, was struck by a train travelling at an excessive speed, and instantly killed. The railway at this point ran due east and west, and deceased was walking across in a north-westerly direction, with his back half turned to the approaching train. The engineer first saw deceased when about 500 feet away. He whistled continuously until about 100 feet from deceased, when he reversed and put on the brakes, but not in time to avoid the accident. The deceased was 31 years old, his hearing and eyesight being good. The accident took place about 10 o'clock in the morning, the weather being bright and fair.

Held, on appeal, reversing the judgment of the trial judge, and restoring the verdict of the jury, that although the plaintiff was guilty of negligence in not ascertaining that the train was coming, the engineer saw the danger in time to have slowed up and avoided the accident, and the defendant Company was, therefore, responsible for his negligence.

Statement

APPEAL from the judgment of MORRISON, J. in an action under the Families Compensation Act, tried at Vancouver on the 14th of December, 1912.

Macdonell, for plaintiff.
McMullen, for defendant Company.

2nd January, 1913.

MORRISON, J.

MORRISON, J.: In the hope of obviating a new trial should I be found to be mistaken in the view I had formed, after argument, as to the plaintiff's case, I reserved my decision on the motion to dismiss, and allowed the case to go to the jury. I now give effect to Mr. *McMullen's* contention, and dismiss the action.

The locality and conditions in question were familiar to the deceased. On this particular occasion, as appears from the evidence of Thomas, the deceased man was with him when he, Thomas, heard a train whistle. They were then standing near

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the railway track. Shortly after the deceased had left Thomas to proceed on his way, Thomas again heard two short whistles, and, upon looking, saw the train approaching. Thomas says that the deceased could not help seeing the approaching train, had he looked east. The deceased might have crossed the track immediately, instead of proceeding along it. Or he might have kept on what I shall call his own side until he came opposite the point of the foreshore to which, apparently, he was going. In both of these cases he would not, by the exercise of the most ordinary care, have come in contact with the train. He was a comparatively young man, apparently in possession of his proper faculties of hearing and sight. I am of opinion that the inference to be drawn—and the only inference to be fairly drawn—from the evidence adduced on behalf of the plaintiff, is that the deceased was killed through his own negligence, and that there was no evidence to go to the jury which would shew any legal liability.

MORRISON, J.

Counsel for the plaintiff argued forcibly on the assumption that leave and licence were given. Even on that assumption, there was no right created. The grant of the licence to go on the Company's right of way (of which, by the way, there was no evidence sufficient to be left to the jury), would only afford an answer to a claim for trespass: *Bolch* v. *Smith* (1862), 7 H. & N. 736 at p. 745. It is a mere permission, and those who take it must take it with all chances of meeting with accidents: *Binks* v. *South Yorkshire Railway Co.* (1862), 3 B. & S. 244 at p. 252.

The appeal was argued at Vancouver on the 19th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

Macdonell, for appellant (plaintiff): The jury gave a verdict for the plaintiff but, on the defendants' motion to dismiss, the learned trial judge reserved judgment until after the jury had given their verdict, when he dismissed the action. It is submitted the learned trial judge was wrong, first, because the question of contributory negligence should have been left to the jury, and, second, as to whether the plaintiff was a trespasser

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should have been left to the jury. In conjunction with this, there is the evidence that there was no fence west of Campbell street along Powell street. This train was exceeding the speed limit, and on this question the jury should have determined: *Tabb* v. *Grand Trunk R.W. Co.* (1904), 8 O.L.R. 203; *The Halifax Electric Tramway Company* v. *Inglis* (1900), 30 S.C.R. 256; *Tinsley* v. *Toronto Railway Co.* (1908), 17 O.L.R. 74.

Argument

McMullen, for respondents: The engineer saw the deceased when he was 500 feet away, but the learned trial judge held that the accident was entirely due to the deceased's carelessness: see *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155. This man is a bare licensee: *Nightingale* v. *Union Colliery Co* (1903), 9 B.C. 453; *Harrison* v. *The North Eastern Railway Company* (1874), 29 L.T.N.S. 844. He was on the track in contravention of a statutory prohibition: *Grand Trunk Ry. Co.* v. *Haines* (1905), 36 S.C.R. 180. The engineer was justified in assuming that the man would take reasonable care of himself: Elliott on Railways, Vol. 3, p. 1,959.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I think the appeal should be allowed and the verdict of the jury restored. It is apparent to me, at all events, that the public had been using the place where this accident occurred as a crossing for a long time, to the knowledge of the Company, and that, therefore, the deceased had leave and licence to cross there. Assuming, although I think the contrary is found by the jury, that the plaintiff was guilty of some negligence in not ascertaining that the train was coming, still I think, from the evidence of the engineer himself, as well as from other evidence corroborating it to a certain extent, that it was quite apparent that the engineer saw the danger of an accident to the deceased in time to have slowed up his train, which was running at an excessive speed, a speed contrary to the provisions of the Railway Act, that he could have slowed up his train in time to have prevented the unfortunate occurrence; that that being so, the defendants are responsible for his negligence in not avoiding what he himself anticipated might have resulted to the deceased.

IRVING, J.A.: I agree. I think the judge should have left the case to the jury. There was, undoubtedly, strong evidence of negligence on the part of the Company. There was also evidence of contributory negligence on the part of deceased. The judge seems to have done exactly right, leaving it to the jury in this way: "The deceased may have been negligent, yet if the defendant Company could, by taking ordinary care, have avoided the accident, then the deceased's negligence would be no defence to the lack of care on the part of the defendant Company. The fact of the deceased being careless and negligent does not relieve the Company from exercising ordinary care."

I think, with deference, the judge was mistaken in giving a direction of the kind sanctioned by Lord Cairns in *Dublin, Wicklow, and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155. What the Court was there speaking of was of a case where the ultimate negligence could not arise; it took place all in an instant. It would be utterly impossible in a case of that kind for the engineer to stop his train or for a question of ultimate negligence to arise.

IRVING, J.A.

MARTIN, J.A.: I agree. I think the case turns upon the question of ultimate negligence, of which there is ample evidence.

MARTIN, J.A.

GALLIHER, J.A.: I agree.

GALLIHER, J.A.

Appeal allowed.

Solicitor for appellant: *D. G. Macdonell.*
Solicitor for respondents: *J. E. McMullen.*

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1913

July 22.

McELMON v. B.C. ELECTRIC RY. CO.

McELMON *ET AL.* v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Destruction of building by fire—Electricity—Excessive voltage —Two wires strung on same line of poles—Evidence—Inference.

The plaintiff M., the owner of a sawmill in which was installed a complete electrical system, properly insulated, was supplied with electric power by the defendants. The power was supplied over a low potential wire carrying a maximum of 2,300 volts, which was strung below a high potential wire, carrying 40,000 volts, on the same line of poles from the power house to within a short distance of the sawmill. There was no fuse for protection at the point where the wire ran from the service line into the mill. About 4 o'clock in the afternoon of the 22nd of August, 1911, lightning struck and shattered one of the defendants' poles, causing the upper wire to fall on the lower. The damage was repaired and the current again turned on about 7.30 in the evening; at 9 o'clock the mill took fire. Shortly before 9 o'clock the wires above the switchboard in the mill were observed to become incandescent, and immediately afterwards there was an explosion in the oil-switch in the mill, from which the fire resulted. In an action for damages for destruction of the mill by the defendants' negligence, the jury returned a verdict for the plaintiff, upon which judgment was entered.

Held, on appeal, that there was evidence which could not properly have been withdrawn from the jury, and that the jury's verdict for the plaintiff should not be disturbed.

Per MACDONALD, C.J.A.: Expert evidence shewed that what happened in the mill might happen by reason of very high voltage in the wires, and it did not matter whether it was destruction of the insulation or defective insulation in the mill which caused the fire if, but for the abnormal voltage, that result would not have been brought about. The jury were entitled also to find that a fuse at the point where the wires ran from the service line into the mill was required for the plaintiff's protection, and that had there been a fuse there, the fire would not have occurred.

Per IRVING, J.A.: It is unnecessary for the trial judge to invite the jurors to decline to answer questions he is about to submit to them. Jurors are a part of the Court, and it should be assumed that they desire to do their duty and assist the Court in rightly deciding the case.

Statement

APPEAL from the judgment of HUNTER, C.J.B.C. and the verdict of a jury in an action for damages tried at Vancouver

on the 8th of October, 1912. The facts are set out in the headnote and reasons for judgment.

The appeal was argued at Vancouver on the 28th and 29th of April, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellants (defendants): Although one does not ask for a new trial in his notice of appeal, the appeal includes a motion for a new trial under the Court of Appeal Act, Revised Statutes of British Columbia, 1911, chapter 51, section 15, subsection (3), which says that every appeal includes the right for a new trial. On an appeal, if the Court comes to the conclusion that a new trial should be ordered, they may do so under this section.

The plaintiffs contend the fire started by the explosion of the oil-switch, but there is evidence that the fire was seen before the oil-switch blew up.

The line giving power to the plaintiffs carried 2,300 volts, and the high-voltage line carried 40,000. The evidence shews that it requires 100,000 volts to cause an explosion. The jury should have found that the mill was already burning when the explosion took place. We say the fire was caused by the arc-ing of two wires and a fire might start under these circumstances with 50 volts. They must make the jury believe there was 100,000 voltage on the line before we can be held liable. The fire was caused by the plaintiffs' own defective installation, namely, by the arc-ing of the two wires.

Argument

S. S. Taylor, K.C., for respondent McElmon (plaintiff): The defendants were negligent in two ways: first, they should not have allowed a high-power wire to come in contact with a 2,300 voltage wire; secondly, their system was faulty in not having a proper fuse block on the pole at the track, as they had both a high and a low-power line on the same pole. The defendants did not know how much voltage was going over the line that night, so they had no means of measuring.

Mowat, for respondents, the Insurance Companies.

McPhillips, in reply.

Cur. adv. vult.

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22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: After a careful perusal of the evidence, some of it several times, I have come to the conclusion that the verdict of the jury ought not to be disturbed. Certain facts are well ascertained. The plaintiff's electrical system was properly installed and his wires protected by insulation. The defendants' high-potential and low-potential wires were strung upon the same poles, the high above the low. There is evidence that while this in some sections of the country would not be a good practice, yet, having regard to the character of the locality, the sparseness of settlement, and the impracticability, because of expense, of providing two lines of poles, the stringing of the wires was not negligent.

At about 4 o'clock on the 22nd of August, 1911, lightning struck the appellants' wires, shattering a pole, and causing the high-potential wire, which was charged with 40,000 volts, to fall on the low potential or service wire, which was ordinarily charged with 2,300 volts, and which was the wire from which the plaintiff took electricity into his mill. The effect of what happened was to put the lines out of business, as it was expressed in the evidence. The damage was repaired during the afternoon, and the current was on again at 20 minutes past seven in the evening. Two witnesses who were in charge of substations say that the system was normal after that time. At about nine o'clock the same evening the plaintiff's mill took fire. Brightness was observed at the point where the wires entered through the wall of the mill. The wires appear to have become incandescent from heat, causing a bright light, and shortly afterwards an explosion occurred in what is known as the oil-switch in the mill, and the fire resulted. I think it can be gathered from the evidence, and I think the jury were entitled to conclude that the incandescent condition of the wires in the mill was the result of an overload of electricity on the wires. High voltage alone will not cause incandescence or heat in the wires; to produce heat there must be amperage. The one has been described as pressure, the other as current. There must be current, or flow of electric fluid to produce heat, and as the oil-switch, which corresponds to the throttle of a steam engine, was open, thus dis-

connecting the current from the motor, it was contended by the appellants that there could be no path for the current, and even if high voltage were admitted, which was not, it could do no harm, there being no path beyond the oil-switch. The fact, however, is that there must have been a path somewhere, otherwise there could have been no incandescence in the wires. High voltage will find a path where low voltage will not, if I rightly understand the evidence of Higman. Now, it may be said that there was no excess of voltage in this service wire just before or at the time of the fire. There is no question of lightning or atmospheric causes after the line was repaired in the evening; the lightning occurred before that. If, therefore, the appellants' system was normal from 20 minutes past seven until the time of the fire, how could the excessive voltage be found to exist? The only explanation of it is that the jury did not accept the evidence of those who stated that the system was normal after 7.20, and I think there was reason for that refusal. No records were kept after 7.20, and the only way the witness at one of the sub-stations had of telling whether the system was normal or not was by its effect on the electric lights. He says he did not notice irregularity in the lights.

The jury had before them the evidence of a properly installed mill system, I mean the electrical part of it, running safely and properly under normal conditions which existed before four o'clock on that day. They had also evidence of abnormal conditions affecting the appellants' system after four o'clock on that day. I can find no sufficient evidence that these abnormal conditions were completely cured before the damage was done to the mill. I think once it was shewn that the appellants' system was out of order, it was incumbent upon them to prove with reasonable certainty that it had been put in good order and made safe for connection with the works of their customers. The evidence that the system was working normally after 7.20 is unsatisfactory and unconvincing. That the service wires had been surcharged with a high voltage at and after four o'clock I think the jury might properly infer; in fact, it was not, as far as I can see, contested. The expert evidence shews that what happened at the mill might happen by reason of very high

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voltage in the wires, that is to say, a voltage very much greater than 2,300. That was the voltage that the defendants were, I think, bound not to exceed. Hence it does not matter whether or not it was the destruction of the insulation, or defective insulation in the mill which caused the fire, if but for the abnormal voltage that result would not have been brought about.

Then as to the substitution of a copper wire for the fuse at the point where the wires ran from the service line into the mill. While there is some evidence that the fuse was for the defendants' protection, and not for the plaintiff's, yet the jury was entitled to find that it was, having regard to the danger of operating with one line of poles, required for his protection as well; in other words, that under the conditions in evidence, it was the duty of the defendants to maintain that fuse, and that, had there been a fuse there, the fire would not have occurred.

I would dismiss the appeal.

IRVING, J.A.

IRVING, J.A.: I would dismiss the appeal. The charge seems to me to be unobjectionable, and there is no ground for interfering with the jury's decision.

As to the motion for nonsuit, I do not think the judge would have been justified in withdrawing the case from the jury. The case of *McArthur* v. *Dominion Cartridge Company* (1905), A.C. 72, teaches us to be slow to stop a case of this kind. Then, having got past that stage, and the defendants having called evidence, Courts of Appeal will not overrule the trial judge because they think he ought to have granted a nonsuit, if in the opinion of the Court the conclusion is correct: see *Groves* v. *Cheltenham and East Gloucestershire Building Society* (1913), 2 K.B. 100, 82 L.J., K.B. 664.

In this case, I think the failure on the part of the Company to have a proper means of preventing an excess of current getting past the fuse-box on the pole near the track, gave the jury an opportunity to find as they did. I agree with the learned Chief Justice that cases of this character could be more satisfactorily tried by a judge with assessors than with a jury.

On the subject of putting questions to a jury, my own view is that the form of the charge is a matter for the judge's dis-

cretion. In England I see that the judge's charge is, as a rule, very much shorter and simpler than those delivered in this Province. This Court, or at any rate, a majority of the judges of this Court, having expressed the opinion that questions should be left to the jury where practicable, I venture to say, with every deference to the learned Chief Justice, that if questions are put, it is unnecessary for the trial judge to invite the jurors to decline to answer the questions he is about to submit. I have already expressed the opinion that counsel would not be justified in interfering to suggest to jurors that they are at liberty to act as they please. Jurors are a part of the Court, and we should assume that they desire to do their duty and assist the Courts in rightly deciding the case.

IRVING, J.A.

GALLIHER, J.A.: I find this a rather difficult case to decide upon the evidence, which is mostly of a highly technical nature. That the mill was burned either through some fault in the inside installation or through the high-power wire coming in contact with the secondary wire is beyond question. The evidence is conflicting, and, on the part of the plaintiff's expert witnesses, largely theoretical. It is urged that the jury have simply guessed at the cause, and if this were so, the plaintiff would not be entitled to maintain the verdict. The duty is upon the plaintiff to establish his case, and this must be done by evidence. After carefully reading and weighing the evidence, I still have sufficient doubt in the matter to preclude my saying that there were not facts and circumstances proved upon which the jury could have come to the conclusion they did. I would dismiss the appeal.

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellants: *McPhillips & Wood.*
Solicitors for respondents: *Ogilvie & Brown.*

CLEMENT, J.

1913

Jan. 13.

IN RE LAURSEN AND THE CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER. (No. 1).

IN RE LAURSEN AND SOUTH VANCOUVER

Arbitration—Stated case—Contents of—Must be based on facts admitted or ascertained—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 22.

The words "special case" in section 22 of the Arbitration Act have the same meaning as in marginal rule 389 of the Supreme Court Rules, and a "stated case" thereunder must be based on a statement of fact, either admitted or judicially ascertained. It is not the province of a Court to advise parties what their rights would be under a hypothetical case. All the facts must be stated, as facts admitted or ascertained necessary to raise the question of law upon which the opinion of the Court is asked.

CASE STATED by arbitrators for the opinion of the Court, pursuant to section 22 of the Arbitration Act, for the determination of certain questions arising in the course of the reference. Heard by CLEMENT, J. in Vancouver on the 6th of January, 1913.

The facts were: The applicant was the owner of certain lands on the south-east corner of Twenty-ninth and Fraser streets in the Municipality of South Vancouver, having a frontage of about 270 feet on the east side of Fraser street.

Statement

The respondent Corporation, in the year 1911, carried on extensive street grading operations along Fraser street, in the front of and for a considerable distance on both sides of the applicant's property, in order to establish a uniform grade along the said street. In the course of such operations the street grade in front of the applicant's property was lowered, and a cutting made, varying from nil to about eight feet, or about ten feet below the former or natural grade (the stated depth of such cutting depending on whether or not a slight prior cutting was taken into consideration). The applicant claimed compensation, under section 394 of the Municipal Act, against the respondents, for injuriously affecting his lands. The applicant gave evidence in support of his claim of the estimated cost of excavating and

removing the amount of soil required to be removed in order to reduce the surface of his land to the level of the present street grade, and also claimed to recover the cost of similarly lowering the residence and outbuildings on the said lands. The respondents contended that no proper claim could be based upon such excavating and lowering, or the costs thereof. The lands are, and were prior to the grading operations, occupied and used by a tenant for residential and gardening purposes, and no such excavating has actually been done by the applicant. The respondents contended that neither the selling nor rental value of the lands had been diminished by reason of the grading operations, and that the selling value of the property (as well as neighbouring property) had actually been enhanced thereby, and evidence had been given in support of this contention. The respondents also claimed that such enhanced value (if any) of the lands constituted an advantage which the applicant had derived from the work in question, within the meaning of said section 394, and should have been taken into consideration by the arbitrators, whether or not the arbitrators found that such enhancement in value is dependent upon the grade of the property being lowered to reduce the surface thereof to the level of the present street grade. Applicant claimed that no benefit or advantage to the applicant from the work in question was advantage derived from the work, or advantage which the arbitrators could consider, except benefit to the applicant's property in its condition as injuriously affected by such work, and only benefit to such property in such condition which could be definitely ascertained and was not of a speculative character. The respondents further claimed that the arbitrators should also have taken into consideration any enhancement in value of the property (if any) derived from the work in question, notwithstanding that such enhancement in value (if any) was one common to all the property affected by said grading operations.

Statement

The questions for the opinion of the Court were:

"(a) Whether or not the cost of excavating and removing the said soil and lowering said buildings is the proper basis on which to determine the applicant's claim for compensation.

"(b) Whether or not evidence of such cost is admissible evidence proper for the consideration of the arbitrators in determining the applicant's claim for compensation.

CLEMENT, J.

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"(c) Whether or not the arbitrators should determine the applicant's claim on the basis of the depreciation (if any) in the sale value or rental value (or both) of the said lands, by reason of said grading operations.

"(d) Whether or not the respondent is entitled to offset against any damage sustained by the applicant (however arrived at) the enhancement (if any) in the sale value of the applicant's said lands derived from said grading operations along said street.

"(e) Whether or not the respondent is entitled to offset against any damages sustained by the applicant (however arrived at), or considered in making their award, any benefit or advantage derived from the work in question except benefit to applicant's property in its condition as injuriously affected, such benefit being definitely ascertained, and not of a speculative character, and whether any advantage which applicant may derive from the work in question is to be considered which is not a benefit to his property in the condition in which it was before the execution of the work in question.

Statement

"(f) Whether or not the respondent is entitled to offset against any such damage (however arrived at) the enhancement (if any) in the value of the applicant's lands derived from the said grading operations, notwithstanding that such enhancement (if any) is one common to all the property affected by said grading operations.

"(g) Whether if it is proven that the difference in the value of the property before the grading operations and the value of the property after the grading operations is the cost of reducing the property to the level of the street in its new condition, in such case is not such cost of removal the true measure of damage."

Reid, K.C., for applicant.

R. W. Hannington, for the Corporation.

13th January, 1913.

CLEMENT, J.: Under section 22 of the Arbitration Act, an arbitrator may, at any stage of the proceedings, state, in the form of a special case, any question of law arising in the course of the reference. In my opinion, the words "special case" in this section bear the same meaning as they do in Order XXXIV., rule 1, of our Supreme Court Rules; and I have already held, in *National Trust Co.* v. *Dominion Copper Co.* (1909), 14 B.C. 190, that a stated case under that rule must be based upon a statement of facts either admitted or judicially ascertained. And it is not the province of a Court of law to advise parties what their rights would be under a hypothetical case: *Glasgow Navigation Company* v. *Iron Ore Company* (1910), A.C. 293, 79 L.J., P.C. 83. It would seem to follow as a logical result that all the facts necessary to raise the question

Judgment

of law upon which the opinion of the Court is asked must be stated, as facts admitted or ascertained.

It is in this last respect particularly that the case stated by the arbitrators upon this reference fails. There is, I hope, no disposition upon my part to shirk judicial work properly falling upon my shoulders, but I do object to writing a treatise upon a fairly large branch of the law of compensation. There is not one of the questions propounded upon which I could express an opinion without taking hypotheses, suggesting additional facts which may or may not exist. In fact, the value of my opinion would depend upon how far I could anticipate all possible variations in the facts as they may be brought out before the arbitrators. For example, and without attempting to suggest all or even any of the possible variations, there is nothing stated as to the character of Fraser street. It may be a carriage drive through a rural or residential district; or it may be a business thoroughfare through a district of retail stores or wholesale warehouses. The land in question, it is true, is said to be (at all material times up to the present) occupied as a residential and garden lot; but this may or may not be the use to which an owner could and, perhaps, should put it, acting with due regard to its environment and capabilities.

Judgment

In short, I cannot pretend to give, on the facts as stated, any statement of the law without such additions, qualifications, provisoes, etc. (all founded upon unascertained hypotheses), as would, as I have said, compel me to write a treatise on the law of compensation as it relates to grade lowering.

I may point out that rule 2 of Order XXXIV. does permit a judge to order that questions of law be decided before the facts are ascertained, but this is by way of exception to the general rule, and is intended, in my opinion, as ancillary to Order XXV., "Proceedings in lieu of demurrer." And even under that rule, all the facts necessary to raise the question of law must be stated as facts capable of proof.

I must, therefore, respectfully decline to make any attempt to answer the questions propounded.

Application refused.

MURPHY, J.

1913

Sept. 13.

COURT OF APPEAL

Nov. 21.

IN RE LAURSEN AND SOUTH VANCOUVER

IN RE LAURSEN AND CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER. (No. 2).

Arbitration—Award—Grounds for setting aside—Mistake in law—Waiver—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 394, 396—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 22.

An award being good on its face, cannot be set aside on the ground that the arbitrators have made a mistake in law.

The parties to an arbitration, even by mutual consent, cannot re-open the matter before the Court to review rulings on points of law after the arbitrators have made and published their award.

Section 396 of the Municipal Act limits the grounds upon which an award can be set aside for misconduct and compensation on a wrong principle.

Statement

APPEAL from the judgment of MURPHY, J. pronounced in Vancouver on the 13th of September, 1913, dismissing the respondent Corporation's application to set aside or remit to the arbitrators the award of the majority of said arbitrators whereby they awarded to the applicant $3,615.84 as compensation and damages to certain lots belonging to the applicant by reason of the Corporation cutting down or grading the street fronting on said lots. The arbitration was brought under section 394 of the Municipal Act, and after concluding the taking of evidence, the arbitrators, in pursuance of section 22 of the Arbitration Act, stated a case for the opinion of the Court. This stated case came up for hearing before CLEMENT, J., who declined to answer the questions submitted (see *ante,* p. 528). Upon the matter again coming before the arbitrators, counsel for the Corporation asked that they submit a further case for the opinion of the Court in the form prescribed for in the judgment given on the submission of the first stated case. This the majority of the arbitrators refused to do, and after hearing argument they reserved judgment. Subsequently the majority (one arbitrator dissenting) handed down their award, fixing the

compensation to which the applicant was entitled at $3,615.84, without giving reasons for so finding.

The grounds upon which the application was made to set aside or remit the award were: First, that a majority of the arbitrators were guilty of misconduct in refusing to state a further special case for the opinion of the Court upon it being drawn to their attention that the said Court declined to pronounce judgment upon the special case which had been stated by said arbitrators, or to answer the questions submitted thereby, and upon being requested by counsel for said Municipality to state a further special case for the opinion of the Court covering the defects or objections suggested by the said judge; second, in neglecting or refusing to state in their award the principle upon which they had proceeded in arriving at their award and the compensation thereby awarded; third, that as a fact they proceeded on a wrong principle in basing their award upon the estimated cost of excavating the surface of the plaintiff's property down to the grade of the street without taking into consideration the difference between the value of the property before the street grading was commenced and after it was completed, by reason of the grading. The respondent Corporation filed on the motion an affidavit by the dissenting arbitrator setting out his reasons for dissenting from the award, in answer to which the applicant filed affidavits by the arbitrators who made the award setting out the reasons for their finding. Upon the dismissal of the motion the Corporation appealed upon the grounds submitted on the motion.

Statement

R. W. Hannington, for the Corporation.
L. G. McPhillips, K.C., for applicant.

MURPHY, J.: This award being good on its face, it is hardly argued that under the general law and the Arbitration Act it can be set aside on the ground here set up, *viz.*: that the arbitrators have made a mistake of law. But it is said, first, that Laursen has waived this ground because of affidavits filed by him, made by the arbitrators, setting out how, in fact, they did apply the law, and second, that section 396 of the Municipal Act alters the law. As to the first contention, I do not think,

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as a matter of fact, Laursen intended any waiver. The affidavits were filed merely to meet those filed by the Corporation, in case it should be held the Court could go behind the award. Again, I think it extremely doubtful that parties to an arbitration can by agreement alter the law. There is a method provided, by means of a case stated, which arbitrators can be compelled to give, whereby the ruling of the Court on any point of law can be obtained. If this is not adopted, I question whether parties, even by mutual agreement, can reopen the matter before the Court to review rulings on points of law after the arbitrators have made and published their award. This virtually amounts to an appeal, and that right, I think, can only be given by express legislation.

As to the second ground, this is based on the argument that section 396 is an enabling and not a restrictive enactment. In my view, its object is to cut down the grounds on which an award may be set aside, and not to alter the practice as laid down by judicial decisions dealing with such applications. It expressly states that applications to set aside awards in the Act provided

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for may be made "on the following grounds and no others," namely, misconduct, and compensation on a wrong principle. Now, both these were, apart from this section under the general law and the Arbitration Act, grounds on which an award could be set aside, the first without reference to the form of the award, and the second if it so appeared on the face thereof. There were, apart from the section, other grounds for such setting aside, for instance, if the arbitrators had made a mistake and so requested, or on the discovery of new evidence, etc. Section 396 seems to me, as stated, to be aimed at eliminating such other grounds, and as making the award final beyond question, except on the grounds stated. This being my view, I hold I cannot go behind the award, and that it must stand.

The appeal was argued at Vancouver on the 21st of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

R. W. Hannington, for appellant: The judge in the Court below erred in holding that he is not at liberty to go behind the

face of the award, and we contend that we are entitled to go behind the face of the award for the following reasons:

Section 396 of the Municipal Act provides an express statutory ground for setting aside the award which never existed before, namely, that the award proceeded on a wrong principle. The Arbitration Act (section 14), which is the basis of the various decisions holding that the Court cannot go behind the face of the award, contains no such provision as that of section 396, and provides only in express terms for setting aside the award for misconduct. Consequently, section 396 provides a ground which never existed apart from that section, and is not confined to errors appearing on the face of the award. Accordingly an additional right is given to enquire whether or not the award is, in fact, based on a wrong principle.

Unless some meaning is given to the provision of section 396, any arbitrator is at liberty to nullify the statutory remedy provided by section 396, by the omission (whether intentional or not) of anything shewing on what principle the award is based.

Even under section 14 of the Arbitration Act, the Courts have, in the exercise of their inherent powers to prevent injustice, assumed and exercised the right to set aside awards: (a) where there is error on the face of the award; (b) where there is an admitted mistake; (c) where there is fraud, and (d) where new evidence is discovered.

Argument

The trial judge erred in refusing to consider the affidavits made by the arbitrators themselves on our application to set aside the award. The respondent (Laursen) himself filed affidavits by the majority of the arbitrators on that application, and we say he has himself elected to go behind the face of the award, and has waived any objection which he might otherwise have had to an investigation of the principle upon which the award was based. In any event, apart from waiver, the affidavits are properly receivable on an application to set aside the award: see *Duke of Buccleuch* v. *Metropolitan Board of Works* (1872), L.R. 5 H.L. 418; *In re Dare Valley Railway Co.* (1868), L.R. 6 Eq. 429; *Re Scott and the Railway Commissioner* (1889), 6 Man. L.R. 193 at p. 209; Russell on Arbitration, 7th Ed., 680; Halsbury's Laws of England, Vol. 1, p. 486.

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In Halsbury, p. 477, the *Duke of Buccleuch's* case is erroneously cited in support of a statement that the arbitrator's affidavit cannot be used to explain an award, on a motion to set it aside. We contend that the decision in that case is exactly the reverse of the text in Halsbury.

He referred also to the following cases: *Re Davies and James Bay R.W. Co.* (1910), 20 O.L.R. 534 at pp. 542, 549 and 550; *Re Ketcheson and Canadian Northern Ry. Co.* (1913), 13 D.L.R. 854 at p. 856; *Wadham* v. *North Eastern Railway Co.* (1885), 16 Q.B.D. 227; *Kent* v. *Elstob* (1802), 3 East, 17; *Allen and another* v. *Greenslade* (1875), 33 L.T.N.S. 567; *Mills* v. *The Master, &c., of Society of Bowyers* (1856), 3 K. & J. 66. *Dinn* v. *Blake* (1875), 44 L.J., C.P. 276, is distinguishable as the arbitrator's statement was only verbal and there was no waiver by the other side, and that case was not decided under any statute corresponding with our section 396 of the Municipal Act. In any event, we contend that the arbitrators were guilty of misconduct: (a) in not stating a further special case for the opinion of the Court as requested by appellant's counsel (after the special case which had been stated had been held insufficient by CLEMENT, J.); (b) in neglecting to shew the principle on which the award was based, although expressly so requested by counsel on the arbitration: see Russell on Arbitration, 9th Ed., 367; Halsbury's Laws of England, Vol. 1, p. 466; *In re Palmer & Co. and Hosken & Co.* (1898), 1 Q.B. 131; *Re False Creek Flats Arbitration* (1912), 17 B.C. 282.

Argument

The affidavit of MacMillan, the minority arbitrator, states that the award is based solely on the estimated cost of excavating the property to the new street grade, and that the question of diminished value was not considered by the arbitrators. The affidavits of the two majority arbitrators do not question his statement that the award is based solely on the estimated cost of excavating the property, but simply states that there was no tangible increase in value resulting from the grading of the street.

The result is that the majority have awarded the cost of a possible future excavation (which the material shews has never been carried out), and have ignored the question of whether or

not the value of the property was diminished by reason of the grading, notwithstanding the evidence of expert real-estate valuers shewing that the value of the property had not only not been diminished, but had actually been increased by reason of the grading operations.

We claim that the true measure of compensation is the diminished price (if any) on a sale of the property: see *Wadham* v. *North Eastern Railway Co.* (1884), 14 Q.B.D. 747, affirmed (1885), 16 Q.B.D. 227; Arnold on Damages and Compensation, 1913, p. 233; Halsbury's Laws of England, Vol. 6, p. 49; *Re Harvey and Parkdale* (1888), 16 Ont. 372; *Re Pryce and City of Toronto* (1889), *ib.* 726.

Ritchie, K.C., for respondent, was not called upon.

Argument

Per curiam: Our view of the affidavits of the majority arbitrators (assuming, though not conceding, that we have the right to examine them), is that they must have taken into consideration the question of whether or not the value of the property had been diminished by reason of the grading, and must have arrived at their award on that basis. We have no power to review their decision on the facts upon the evidence before them. The appeal, therefore, must be dismissed.

Judgment

Appeal dismissed.

Solicitors for appellants: *Harris, Bull, Hannington & Mason.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

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May 15.

WATSON *ET AL.* v. BOOKER *ET AL.*

Negligence—Death of independent contractor—Defect in machinery—Evidence of knowledge of defendants.

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Deceased, while working on a building as an independent contractor, was struck and instantly killed by the falling of the boom of a derrick that had been erected on the building by the defendants, who were the building contractors. The evidence shewed that the machine was of the best type and in good repair, and was operated by a competent man, who was not guilty of any negligence or misconduct. The plaintiffs alleged that there was a defect in the machine, in that the dog did not fit properly in the cog-wheel and at times slipped. The only evidence of knowledge of the alleged defect by the defendants was that of two witnesses, one of them stating that the operator of the hoist told him, after the accident, that the machine was defective and that he had notified the defendants of the defect prior to the accident, and that this statement was made by the operator 15 or 20 feet from the defendant W. (one of the members of the defendant firm), who did not contradict the statement. The other witness, who stood beside W. at the time the statement was made, testified that he heard what the operator said. The plaintiffs contended that when W. did not contradict the operator's statement, the evidence was admissible as an acquiescence by W. in the statement. The evidence was allowed in on the trial and the jury returned a verdict for the plaintiffs.

Held, on appeal, reversing the judgment of the trial judge and setting aside the verdict of the jury, that the evidence that W. heard the statement was of the vaguest character; that the remark was not addressed to him; that the allegation was not that he, but the firm (of which he was a member), had been notified, as to which he may have had no knowledge, so that even if he heard what the operator said, he may not have been in a position to contradict it. In view, therefore, of the loose character of all this evidence, it should not have been admitted, and without it the plaintiff should not succeed.

Statement

APPEAL by defendants from the judgment of MORRISON, J. and the verdict of a jury in an action brought under Lord Campbell's Act, tried at Vancouver on the 23rd of December, 1912. The facts are set out in the headnote and reasons for judgment.

The appeal was argued at Vancouver on the 15th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

S. S. Taylor, K.C., for appellants: The boom of the derrick fell, striking Watson and killing him, but there is no satisfactory evidence to shew what defect there was in the machinery that resulted in the falling of the boom. The plaintiff must make out a case of breach of duty on the part of the defendants: *Coughlin* v. *Gillison* (1899), 1 Q.B. 145 at p. 147; *MacCarthy* v. *Young* (1861), 6 H. & N. 329; *Blakemore* v. *Bristol & Exeter Railway Co.* (1858), 8 El. & Bl. 1,035 at p. 1,051. The dog on the machine is the only part that the plaintiffs allege was defective, and there is no evidence of the dog working defectively before the accident. The dog was criticized in that the jammer was too tight for the teeth, but the evidence on this point should have been rejected: see Taylor on Evidence, 10th Ed., pp. 424-427, par. 601-605.

[He was stopped.]

C. W. Craig, for respondents: The evidence is that the dog did not work properly before the accident. After the accident the crane man said, within hearing distance of Whipple (one of the defendants), that he had warned the defendants of the defective dog, but they had paid no attention to it. If Whipple heard what the crane man said and did not answer, that is evidence upon which the jury can draw the inference that the defendants were warned of the defect, as he did not deny it. Where a man's employee makes a statement in the presence of his employer, implicating the employer, it is right for the judge to allow the jury to decide whether the defendants had knowledge of the defect. This machine was handled and operated by the jury, and it was not in order and did not operate properly. If it can be shewn that it was a defective machine, and had been continuously for some months before the accident, the defendants should have known that it was a defective machine. On the question of the admissibility of the evidence, see Wigmore on Evidence (1905), p. 1,253, and *Reg.* v. *Smith* (1897), 18 Cox, C.C. 470.

Argument

Taylor, in reply: The boom could not have fallen unless the dog came out of the wheel. It is contended, first, there was *volens;* second, there was contributory negligence, as Watson was standing under the boom for ten minutes, and in such a way

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as to constitute contributory negligence. In order to make out a case, he must shew: (1) a defect; (2) that the defect was the cause of the accident; and (3) that we knew of the defect. Watson's knowledge of the defect brought him under the doctrine of *volens*: *The Canada Paint Co.* v. *Trainor* (1898), 28 S.C.R. 352; *The Montreal Rolling Mills Co.* v. *Corcoran* (1896), 26 S.C.R. 595.

MACDONALD, C.J.A.: I think I would allow the appeal and dismiss the action, on the ground that the plaintiffs have failed to shew that if there was a defect, as claimed, in the cog-wheel or dog, that was brought to the notice of the defendant. The evidence shews that the machine was of the best type manufactured. It was almost new, in perfect repair, and if there was a defect, as the plaintiffs' witnesses suggest, it was not a defect of which we could charge the defendants with notice. Now, if it was a patent defect, or one that indicated itself to the operator, there is no evidence (apart from that which I shall refer to in a moment) to shew that the defendants had notice of it. It is practically common ground that the operator of the machine was a competent man, so it comes to this, that the defendants supplied the best type of a machine, in perfect repair, with no defect, unless it was a latent defect, and operated by and in charge of a competent man, who was not shewn to be guilty of any negligence or misconduct.

MACDONALD, C.J.A.

The only evidence that is suggested of knowledge on the part of the defendants of this alleged defect is that given by the witnesses McDougall, senior and junior. That evidence, in my opinion, was not admissible. It was evidence of an alleged statement made by Willman, the operator of the hoist, to young McDougall, that the machine did not work well; that the dog did not fit properly into the cogs, and that he had notified the defendants of that prior to the accident. It has been suggested by him that a member of the defendant firm, Whipple, was 15 or 20 feet away, on a lower level of the building, that is, on a platform, a place some six feet below where McDougall and Willman stood when this alleged conversation took place. The elder McDougall was called to prove that he was standing near

Whipple on this occasion, and that he heard the remark that was made to Willman. And he says that Whipple was within hearing. I forget just now the expression that he did use. At all events, that is what he meant; that he was within hearing of the remark. It is said, because Whipple did not immediately repudiate any such notice, that the evidence was admissible as an acquiescence in the statement. Now the circumstances, in my opinion, were not such as called for repudiation by Whipple. The remark was not addressed to him. The evidence that he heard it is of the vaguest possible character, but assuming that he heard it, it was not addressed to him, and it was not an allegation that he had been notified. But it was an allegation that his firm had been notified, as to which Whipple may not have had any knowledge at all, and, therefore, may not have been in a position to contradict it at the moment. The evidence of McDougall, senior, does not indicate who of defendants' firm was charged by Willman as having been notified. In view of the loose character of all that evidence, I am clearly of the opinion that the learned trial judge ought not to have admitted it; and without the admission of that evidence, the plaintiff can not, I think, succeed in the action.

MACDONALD, C.J.A.

IRVING, J.A.: In my opinion, the statement of Willman ought not to have been allowed to go to the jury in order that they might draw from the silence of Whipple the inference that he, Whipple, acquiesced in the statement that he had knowledge of the defect; for this reason, the statement of Willman was too vague as to whom he (Willman) had made the report. He said that he had made it to "the firm," without particularizing which member of the firm. If he, Willman, had said: "I told Whipple," then from Whipple's silence an inference might have been drawn. I think there was no evidence to go to the jury that the defendants were aware of the fact that there was anything wrong with the machine. The judge, therefore, should have granted a nonsuit.

IRVING, J.A.

MARTIN, J.A.: I confirm my view, expressed during the argument when Mr. *Craig* said to me that this evidence in regard to

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the statement made in the presence of Willman should not have gone to the jury, by the case of *Child* v. *Grace* (1825), 2 C. & P. 193; and the case of *Bessela* v. *Stern* (1877), 2 C.P.D. 265 —decisions of Cockburn, C.J. and Bramwell and Brett, L.JJ. The point therein taken, it seems to me, is very apt. The statement must be one which was made to the person himself. Whipple's silence it is proposed to turn into acquiescence.

I am inclined to think, on the authority of said cases, that even if the statement had been made by Willman that he had told Whipple the complaint had been made, directing the statement not to Whipple himself, but to another, that Whipple was not called upon, in those circumstances, to answer.

MARTIN, J.A.

In other respects I agree with what the Chief Justice has said.

GALLIHER, J.A.: The mode of getting this evidence in is, to my mind, more or less significant. Here is the evidence at first hand, about which there can be no dispute at all. The man was sitting in Court, so we are informed (and that is not contradicted), who could give that evidence, and one naturally wonders why that man was not called. The suggestion is made that he was in the employ of the defendant Company. Well, that should not detract from his honesty as a witness, and I think he would be putting himself in a very awkward position if he denied having made any such statement, in view of the fact that three witnesses swore that he did make that statement. So then, instead of the evidence being procured in a direct way, and in the way, to my mind, it should have been procured, we find a circuitous method adopted, namely, the calling of witnesses to say that at a certain time this foreman (or whatever he was) had stated that he had informed these people of the defects of the machine. Now, I think that evidence ought to be brought home in the clearest and strongest way that it possibly can to the man Whipple. There may be a doubt in our mind as to whether, supposing it was said, that Whipple heard it, even though a man swears that he was standing near Whipple and heard it. It is quite possible that Whipple might not have heard it. Now, that might have been sufficient if it were

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not for the fact, as I say, you find this circuitous method of bringing out this evidence adopted, instead of direct evidence, which was at hand. And for that reason, I think it would be dangerous for this Court, or any other Court, to encourage the adoption of evidence of a character of that kind, in the circumstances of this particular case.

I agree with my learned brothers that the nonsuit should have been granted by the trial judge.

Appeal allowed.

Solicitors for appellants: *MacGill & Grant.*
Solicitors for respondents: *McCrossan & Harper.*

RICH v. NORTH AMERICAN LUMBER COMPANY, LIMITED.

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1913

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RICH v. NORTH AMERICA LUMBER CO.

Contract—Agreement for sale of timber—Novation—Condition as to payment—Timber lost—Impossible to carry out condition—Best evidence as to quantum sold.

Under an agreement whereby the defendants purchased all timber on the plaintiff's land, to be paid for after the defendant had removed the timber and had had it scaled by a Government official scaler, the defendants loaded a scow with timber, which was allowed to drift away and was lost before an official scaling could take place.

Held, that as the failure to scale was the fault of the defendants, they could not set that up as an answer to an action for the recovery of the price of the timber.

APPEAL from the judgment of McINNES, Co. J. in an action tried by him at Vancouver on the 26th of March, 1913. The plaintiff, the owner of a lot in the Municipality of Delta, entered into an agreement with the Vancouver Timber and Trading Company on the 18th of March, 1910, whereby he sold to the Company all cedar growing or lying on the ground on said lot

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Statement

that could be made available for logs or shingle bolts at 50 cents per cord, said payments to be made as fast as bolts were removed or placed on scows and scaled by Government official scaler, the final scale to be final as to the quantity removed. The Vancouver Timber and Trading Company assigned all rights under the agreement to the defendant Company, who assumed all liabilities thereunder. The defendants then sold their rights under the agreement on a commission basis to the Norwood Lumber Co., who took the shingle bolts from the property in question in the presence of plaintiff's representative. The first lot of bolts taken away, after having been officially scaled, were duly paid for by the defendants. The next lot, taken on a scow, the quantity of which was sworn to by the plaintiff's representative, and over which the action arose, was never officially scaled, as the scow upon which it was loaded was allowed to drift away, and the bolts were lost. MCINNES, Co. J. held that as the bolts had never been scaled by the Government official scaler, and the plaintiff should have had this done prior to the demand for payment, he was not entitled to recover, and dismissed the action, with costs.

The appeal was argued at Vancouver on the 13th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant (plaintiff): The timber was taken away by the defendants and it is submitted, when taken away, the property passed to the defendants, so they must pay for the timber and there must be an estimate of the amount taken: see *Periard* v. *Bergeron* (1912), 47 S.C.R. 289; *Cuddy* v. *Cameron* (1913), 5 W.W.R. 56.

Argument

C. W. Craig, for respondents (defendants): There was no contractual relationship between the parties to this action, and the defendants did not get these bolts, although they turned over the contract to the Norwood Company. It is the custom in such cases for the vendor to see that the timber is scaled.

Ritchie, in reply, referred to Halsbury's Laws of England, Vol. 7, p. 506; and *Scarf* v. *Jardine* (1882), 7 App. Cas. 345.

23rd November, 1913.

MACDONALD, C.J.A.: I think the appeal should be allowed.

As there is no question about the amount, assuming the plaintiff is entitled to succeed at all, we are relieved from any inquiry as to whether or not the amount sued for is the right one. There are only two legal questions involved in this appeal: first, was there a novation, so as to enable the plaintiff to sue? The defendant Company's president in effect says that there was. The plaintiff himself has acknowledged that, by bringing this action against these defendants. The question of novation, it seems to me, is settled by the conduct of the parties.

Then as to the scaling: if the failure to scale was the fault of the defendants, they cannot set that up as an answer to an action for the price of the goods; if it were the fault of the plaintiff, then I think the plaintiff could not succeed. It does not appear in this case that it was the fault of the plaintiff. The bolts were placed upon the scows of the defendants by the defendants themselves; they took possession and had the property in their possession at the time they were lost. I gather from what counsel has said in the case, that the failure to scale was caused by misadventure; the scow drifted away and the bolts were lost, therefore it became impossible to scale according to the contract. In such a case the best evidence that can be got outside of that provided by the contract should be accepted of the measurement or quantum of timber.

MACDONALD, C.J.A.

IRVING, J.A.: I agree.

IRVING, J.A.

MARTIN, J.A.: I agree, though there is some difficulty about the case in view of the somewhat loose way in which it was presented in the Court below.

MARTIN, J.A.

GALLIHER, J.A.: I agree, shortly, on the grounds which have been put by the learned Chief Justice. I think there is, all told, sufficient evidence on the point of scaling, although on that I am not absolutely clear. I also think there is sufficient evidence, by conduct, upon which we may say there has been a novation.

GALLIHER, J.A.

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McPHILLIPS, J.A.: I agree with the reasons for allowing the appeal as stated by the Chief Justice.

Appeal allowed.

Solicitor for appellant: *D. S. Wallbridge.*
Solicitor for respondents: *A. W. V. Innes.*

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July 22.

TEMPLE v. NORTH VANCOUVER

TEMPLE v. MUNICIPALITY OF NORTH VANCOUVER *ET AL.*

Municipal law—Assessment and taxation—Meetings of council—Court of revision—Meetings held outside limits of municipality—Sale for arrears of taxes—Construction of statutes—R.S.B.C. 1897, Cap. 144, Secs. 243 and 244—B.C. Stats. 1901, Cap. 31, Sec. 3—Statutory relief—Limitation of action.

The plaintiff's land was sold for taxes by the Municipality of North Vancouver in 1897, for arrears 1894 to 1897. The defendant Municipality bought in the property at the sale, and in 1903 sold to the defendant Ross. On Ross applying for registration of the tax-sale deed from the Municipality to itself and the further deed from the Municipality to himself, the registrar, after serving the plaintiff with notice of the application, as required by the Land Registry Act, and he not appearing, issued a certificate of title to Ross. The plaintiff brought action in 1911 to set aside the sale, on the grounds that the meetings of the Council and of the court of revision, without the required authority of a resolution of the Council, were held outside the limits of the municipality (*i.e.*, in the City of Vancouver); that no resolutions were passed by the court of revision passing and confirming the assessments, and no assessment by-law was passed for the year 1897. The main defences were, first, that the plaintiff not having taken action when served with notice by the registrar on the defendant Ross's application for a certificate of title, he was barred from asserting any claim by section 3, chapter 31, British Columbia

Statutes, 1901; second, that he not having brought action within one year from the time the cause of action arose, he was barred by sections 243 and 244 of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144.

Held (MARTIN, J.A. dissenting), that the appellant was estopped and debarred from asserting any claim whatever to the land in question by section 3, chapter 31 of the statutes of 1901.

Per IRVING, J.A.: The Corporation having taken the land over under the authority of the statute which enabled it to bid the property in, they would be necessary parties to the action. The plaintiff's cause of action arose at the latest in 1903; the writ was issued in 1911. Under sections 243 and 244 of the Municipal Clauses Act, actions must be commenced against a municipality within one year from the time the cause of action arose.

Anderson v. *Municipality of South Vancouver* (1911), 45 S.C.R. distinguished.

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 13th of February, 1913.

S. S. Taylor, K.C., and *Stockton*, for plaintiff.

E. P. Davis, K.C., and *Bond; Arnold; Burns; J. A. Russell*, and *Mowat; J. Sutherland Mackay;* and *Findlay*, for the various defendants.

CLEMENT, J.: This is an action brought by the plaintiff Temple to set aside a tax sale occurring in the year 1897, if I have not forgotten the date. In its facts it is very like the case of *Anderson* v. *Municipality of South Vancouver* (1911), 16 B.C. 401, 45 S.C.R. 425, which was tried by me, and in which I expressed my views on the various questions of law which arose in that case.

I trust that I shall always loyally follow the judgments of the Courts to which appeal is taken from my judgment. In this particular case I do see, to my mind, a very distinct difference in the facts, a difference which, to my mind, is sufficient to entitle me to say that there is here a distinct abandonment.

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I have expressed my views with regard to the position of the ordinary Canadian in connection with tax-sale proceedings leading up to tax sales. I might add to that, that we know that

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municipal burdens throughout Canada are and have been in every Province, without exception, met by taxation upon land; that the owner of land anywhere in Canada knows, as a member of the municipal community or the municipality, that he is supposed to bear his share of municipal burdens, and that he has to bear them in the shape of municipal taxation upon the land he owns. For that reason, it seems to me that the same principle is to be applied as in the case of *Jones* v. *North Vancouver Land and Improvement Co.* (1909), 14 B.C. 285, (1910), A.C. 317. Jones there was a shareholder, and Temple here was a municipal shareholder, if I may use that expression. The principle, I take it, is as laid down by Duff, J. in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425 at p. 451. He speaks of the question as to whether the word "abandoned" is the proper word to use, and he goes on to say:

"The principle applicable to this branch of the case appears to be this: An owner of land in fee simple may be precluded by his silence or inaction from denying the authority of a third person to deal with his property, although this latter is a mere stranger and has no interest in the property and in law and in fact no authority whatever in respect of it; but in such a case inaction and silence in themselves are not sufficient to deprive the owner of his property unless, at all events, his conduct in the circumstances amounted to a representation to those dealing with the property that he would not assert his rights, and they have acted on that representation, or his subsequent assertion of his rights would constitute a fraud on his part. That such is the principle is, I think, clear from the authorities."

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Then, referring to *Jones* v. *North Vancouver Land and Improvement Co., supra,* and *Prendergast* v. *Turton* (1843), 13 L.J., Ch. 268, he quotes, at pp. 454-5, from the decision in *Clarke and Chapman* v. *Hart* (1858), 6 H.L. Cas. 633 at p. 670, where Lord Wensleydale says:

"Now it appears to me that the principle to be deduced from the cases of *Prendergast* v. *Turton* and *Norway* v. *Rowe* (1812), 19 Ves. 144, is, that if a party lies by, and by his conduct intimates to the other partners in the concern that he has abandoned his share, they may then deal with it as they please; if his conduct amounts to a representation of that sort, he is estopped by it and cannot afterwards complain. Then the question is, whether upon the facts stated in this case the respondent is in that situation. . . . . In that case the interpretation put upon the conduct of the parties . . . . was, that they had laid by and pursued a course which

was tantamount to saying, You may go on with the concern at your own risk and for your own benefit; I will have nothing more to do with it. If the conduct of the party has amounted to that, it is no doubt a perfectly just principle that he shall be held estopped, and not afterwards be entitled to claim a share of the profit made by those persons to whom he has made that representation."

It seems to me that that language is applicable here. The Municipality sent him notice that they had bought this piece of land at this tax sale and he duly received also the statutory notice that they were proceeding (and, of course, at some expense) to register their title. He knew, as any ordinary intelligent Canadian would know, that from that time on, so long as the Municipality held the land, the burden on the other tax payers would be greater, and that when the Municipality sold the land, as under our law they would have to within a certain time, the buyers of that land would have to take up the burden which he, as an honest man, should have borne if he still asserted ownership. If that is not tantamount to saying: "You may go on with it at your own risk and for your own benefit; I will have nothing more to do with it," I do not know what action or inaction would be tantamount in using that language.

I do not think that I need add anything further than to repeat the language of the Privy Council in the case of *Toronto Corporation* v. *Russell* (1908), A.C. 493. That case, of course, in one sense is stronger than this, because Russell was himself a member of the municipal corporation; but that, in my mind, does nothing more than sheet home to him more completely knowledge of the proceedings leading to the sale of his property. As against that, there is no doubt that Temple knew of these various proceedings. He got his assessment notices. He got notice that his taxes were so much, and he failed to pay them. The next year he got notice again that the taxes for that year, amounting to so much, were unpaid, and that the arrears for the previous year were so much, and so on to the end.

"Unless, therefore," I may say, in the language of the Privy Council, " it be a merit in a citizen of a municipality not to pay his debts to the corporation of which he is a member, this is,

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on the part of the plaintiff, the most unmeritorious proceeding that could well be conceived."

I dismiss the action, with costs.

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The appeal was argued at Vancouver on the 15th and 16th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

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S. S. Taylor, K.C., for appellant (plaintiff): The void features of this tax sale are as follows: There was no resolution by the municipal council in 1894 allowing the holding of meetings outside the municipality, but such a resolution was passed in 1895. All the courts of revision were held outside the municipality. No resolutions were passed by the court of revision passing and confirming the assessments in any of the years in question. No assessment by-law was passed in 1896 for 1897, and although there was a rate by-law, there was no assessment or assessment by-law in 1897. The tax-sale by-law was not reconsidered and passed after the lapse of a day in 1897, as required. The defence rely on three main points, namely, (1) that the void tax sale has been cured by a notice served under the Land Registry Act Amendment Act, 1901, British Columbia Statutes, 1901, chapter 31, section 3; (2) the limitation sections of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144, sections 243 and 244, excuses; and (3) that we abandoned our property on the property being sold for taxes. He relied on the judgment of the Supreme Court of Canada in *Anderson* v. *Municipality of South Vancouver* (1911), 16 B.C. 401, 45 S.C.R. 425. The learned trial judge in this case gave judgment on the ground of our abandonment. It is submitted the plaintiff never knew until a year before this action that the Municipality had taken over the property. There was no sale *de jure,* but they claim there was a sale *de facto.* Before a municipality can buy, they must have their officers present at the sale to buy. A notice of the application for an order confirming the sale must be served, and the

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order must also be served on the former owner: *Re South Vancouver* (1901), 9 B.C. 572. The plaintiff received a letter in 1897, regarding the sale, and did nothing until 1903, when he wrote asking whether he could get his property back.

Davis, K.C., for respondent Burmeister: We have a good defence to this action on three grounds: first, there was an abondonment by the plaintiff in fact; second, there was an abandonment in law, by estoppel or bar. We rely on section 3, chapter 31, British Columbia Statutes, 1901. Third, we have the statutory defence of the limitation of actions, under sections 243 and 244 of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144. With reference to the sale, the clerk was there who bid in for the municipality in each case, by saying the word "municipality," when no person else bid. As to the second defence, under section 3 of chapter 31 of the statutes of 1901, this is a statutory abondonment, a statutory estoppel or bar. Under this section it is necessary to send a notice to all parties interested. If they do not appear, a certificate of title may be issued and then the former owners are all barred from any interest in the land whatever. The plain English words must be given their fair construction, and if that is done, both irregularities and nullities are done away with: *Kilmer* v. *British Columbia Orchard Lands, Limited* (1913), A.C. 319, 82 L.J., P.C. 77. The cause of action arose more than a year prior to the action being brought. The question was not raised in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425. If there is no action against the Municipality, there is no action against those to whom the Municipality has sold.

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Mowat, for respondent Ross, in support of the contention that the plaintiff is debarred by the Land Registry Act Amendment Act, 1901, British Columbia Statutes, 1901, chapter 31, section 3: Our Act is more drastic than in the other Provinces. He referred to *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420; *Whelan* v. *Ryan* (1891), 20 S.C.R. 65. On the point as to limitations of actions, see *Wilson* v. *Delta Corporation* (1913),

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A.C. 188. The taxes in 1895 and 1896 were regularly assessed: *McKay* v. *Crysler* (1879), 3 S.C.R. 436. The *Anderson* case, *supra,* is distinguishable.

Taylor, in reply: There was no resolution passed confirming or passing the assessment roll. It is contended in this case there was no tax sale as there were no taxes: *Blakey* v. *Smith* (1910), 20 O.L.R. 279; *Boland* v. *City of Toronto* (1900), 32 Ont. 358; *The Town of Trenton* v. *Dyer* (1895), 24 S.C.R. 474; *Alloway* v. *St. Andrews* (1906), 16 Man. L.R. 255; *Johnson* v. *Kirk* (1900), 30 S.C.R. 344 at p. 356. The limitation sections of the Municipal Clauses Act apply to municipalities only, and the Municipality is not a necessary party to this action: see Wood on Statute of Frauds (1884), p. 150, section 94, and Black on Tax Titles, 2nd Ed., sections 497 and 498. On the question of quashing the by-law, this would only go to the tax-sale by-law: see *Sutherland* v. *The Municipal Council of East Nissouri* (1853), 10 U.C.Q.B. 626; *Sisters of Charity of Providence* v. *City of Vancouver* (1910), 44 S.C.R. 29 at p. 34.

Argument

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss this appeal, on the ground that by section 3 of chapter 31 of the statutes of British Columbia, 1901, the appellant is estopped and debarred from asserting any claim whatever to the land in question. The statutory notice was duly given and no action was taken thereon by the appellant. After the expiration of the time fixed by said section for the filing of a *lis pendens* or *caveat,* the title was duly registered. I have not overlooked the references to "irregularities" in the earlier part of the section. The section, in my opinion, was not meant for the curing of irregularities, but was meant to bar the person whose lands had been sold at a tax sale from disputing the sale unless he complied with the section with respect to the filing of a *lis pendens* or *caveat.* There was a sale *de facto,* and it was for the appellant to call upon the Municipality, within the time limited by that section, to prove that the sale was a valid one, or lose his right to question it on any of the grounds relied on by him in this action.

IRVING, J.A.: This action is to set aside a tax sale made in 1897 for taxes alleged to be due from the plaintiff for the years 1894, 1895, 1896 and 1897, and to set aside a deed dated the 21st of October, 1902, by which the defendant Municipality purported to convey to itself, as purchaser at the said tax sale, a lot, known as 813, group 1, Westminster district, of which lot the plaintiff was the registered owner in fee simple at the time of the sale in 1897.

Many of the points raised are covered by the decision in the Supreme Court of Canada in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425, on appeal from this Court, reported in 16 B.C. 401.

Two points are raised in this action which were not available to the defendants in the *Anderson* case. The first is as to the effect of section 3 of chapter 31, statutes of British Columbia, 1901, providing for the giving of a notice to the original owner of any land sold at a tax sale of any application made by the purchaser at the tax sale to register his tax-sale title, and declaring that in default of the original owner contesting the claim of the tax purchaser, or of redemption of the land sold, the owner shall be forever estopped and debarred from setting up any claim to the land so sold for taxes.

Mr. *Taylor's* contention was that this section did not apply to the sale now under consideration, as there were no taxes due, and therefore, no tax sale; that the section only professed to cure "irregularities," and was of no effect where the foundation was void. If his argument is right, the section cannot assist the plaintiff. The use of the word "irregularity" in the earlier part of the section, where the duties of the registrar are laid down, certainly does help Mr. *Taylor's* argument, but, on the other hand, the latter portion of the section, dealing with the effect of failing to contest, is in very strong language, and would include a *de facto* sale.

It is to be noticed that the amendment now under consideration was passed shortly after the decision in *Kirk* v. *Kirkland et al.* (1899), 7 B.C. 12, and was upheld by the Supreme Court of Canada in *Johnson* v. *Kirk* (1900), 30 S.C.R. 344. The argument in *Kirk* v. *Kirkland* before me at the trial, and

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afterwards before the Supreme Court of Canada, was as to the effect of the certificate of title held by the tax purchaser, the tax purchaser contending that by virtue of section 13 of the Land Registry Act, the production by him of his later certificate made it unnecessary for him to prove compliance with the conditions of the statute governing taxation. Mr. Justice Gwynne pointed out that section 13 dealt with the examination of a title which depended upon deeds given by a previous registered owner, and that section 13 could have no application to a case of a tax-sale deed, which would be executed by an outsider acting under statutory authority, and, therefore, the certificate of title held by the tax-sale purchaser derived no support from section 13. This decision was given in June, 1900, and in August the Act of 1900, chapter 15—to cure the defect shewn to exist in the Land Registry Act—was passed, and in May, 1901, the section under consideration, amplifying the Act of 1900, was passed.

It seems to me that having read the judgment of Gwynne, J. of June, 1900, we can see exactly how the directions to the registrar came to be inserted in the earlier part of the section passed in August, 1900, and the conclusion I have reached is that those directions as to what the registrar shall do, do not control the plain language used in the later part of the section to the effect that failure by the owner, after notice served on him, to contest the tax sale within the time limited, is an absolute final bar to his right. With this section must be read the other clauses of the Land Registry Act, as to the effect of a certificate of title granted under the Land Registry Act. I would dismiss the appeal on this ground.

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The other point is that the action is too late, under chapter 144 of the Revised Statutes of British Columbia of 1897, sections 243 and 244. In the *Anderson* case, *supra,* this point could not very well be raised in the Supreme Court of Canada, because the action had been discontinued as against the corporation before the trial.

The plaintiff's cause of action arose in October, 1897, when the tax sale was held—certainly when the tax title was attempted to be registered, and notice served upon the plaintiff on the 30th of May, 1903. The writ was not issued till the 7th of Sep-

tember, 1911. As the Corporation took the land over, under the authority of the statute which enables it to bid the property in, they would be necessary parties to this action. On this point, reference may be made to two judgments in our own Courts: *Lasher* v. *Tretheway* (1904), 10 B.C. 438; and *The Queen* v. *Corporation of Mission* (1900), 7 B.C. 513.

On this ground also I would dismiss the action.

MARTIN, J.A.: This appeal is concluded by the decision in *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425, unless the respondents can escape therefrom by invoking section 3 of the Land Registry Act Amendment Act, 1901, chapter 31, or the "Limitation of Actions" sections, 512-13, of the Municipal Act, Revised Statutes of British Columbia, 1911, chapter 170.

With respect to the first, the failure of the plaintiff to take action after receipt of the registrar's notice is relied upon as evidence of abandonment, in addition to his being "forever estopped and debarred," but I am of the opinion that whatever the effect of the section may be when applied to other circumstances, it has no application to the present case, because it obviously relates to and is legislation in respect of the condition or subject-matter of "irregularity," and not to such a case as the present, where there is literally no foundation upon which the null and void acts of the Municipality can rest. The history of this tax-sale litigation shews that for many years the highest Courts of Canada have been careful to put bounds to the limits of the sweeping language of these would-be curative sections, and the spirit in which they must be construed has been clearly and often and finally laid down. I refer particularly to the leading cases in the Supreme Court of Canada of *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420; and *Whelan* v. *Ryan* (1891), 20 S.C.R. 65. In the former, Strong, J. says, p. 424:

"The general principles applicable to the construction of statutes imposing and regulating the enforcement of taxes for general and municipal purposes are well settled. Enactments of this class are to be construed strictly, and in all cases of ambiguity which may arise, that construction is to be adopted which is most favourable to the subject."

And at pp. 432-4 he points out how the concluding sweeping

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words of a certain curative section (110) set out on p. 429, providing that any tax-sale deed executed in a specified form "shall vest in the grantee therein named, his heirs and assigns, a full, absolute and indefeasible estate in fee simple to the land therein described," should be construed as "subservient to the preceding part" thereof. At pages 432-3 he says:

"In the first place it is to be remarked that we are bound, by well-settled principles governing the construction of statutes adready adverted to, to construe these words if possible in such a way as not to give them the violent and unjust operation contended for, according to which land which may have been illegally assessed for taxes might be sold and conveyed behind the back of the owner without the slightest notice having been given to him. If it is possible then to find any reasonable application of the language used which will avoid this, the Court is bound to adopt it, and it is also bound to be astute to find such an alternative construction and thus avoid doing a great wrong and violating the first principles of natural justice under a form of law."

And at p. 433:

"Further, these words 'a full, absolute and indefeasible estate in fee simple,' may well be construed as only intended to indicate the quantity of estate to be taken by the grantee in a tax deed, and as declaring that the land is from thenceforth irredeemable; and, therefore, to be only applicable to the case of a regular sale and a legal deed, and not as having any reference at all to the effect of a deed following a void sale made upon a void or irregular assessment. For such a purpose much stronger and more apposite and precise terms would have been indispensable."

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And Gwynne, J., with whom Taschereau, J. concurred, was even stronger, p. 454:

"Sections to which is attributed a construction so unjust and arbitrary as that insisted upon by the defendants, the effect of which is to work a forfeiture of the title of persons seized of real estate as for default in the payment of taxes which may never have been imposed at all according to the provisions of law in that behalf, or of the imposition of which, if attempted to be imposed, they may never have had any of the notices required by law to be given, should be criticized with the utmost possible acumen, so as to prevent such a construction being given to them, and to find a construction more conformable to justice."

The first of these alternatives applies to the present appellant, but it must also be remembered that if section 3 is to be given the full effect contended for it would also cover the latter, *i.e.*, no notice of any kind. At p. 464 he refers thus to the limitation that is to be placed upon section 110, the strong and unfettered language of which would, if construed literally, "cure" anything except fraud:

"As to the 110th section, I concur with the Chief Justice of the Supreme Court of Nova Scotia that it only refers to acts done subsequently to the issuing of the warrants towards effecting the sale under it, and that it has not the extraordinary effect contended for by the defendants, namely, to make good a sale absolutely null and void by reason of the non-fulfilment of conditions precedent to the coming into existence of any right to issue a warrant to sell the particular lands in question. It is only to a deed executed in pursuance of a valid sale that the section can be regarded as referring."

In *Whelan* v. *Ryan, supra,* where the sale was held to be void, and the unanimous decision of the Court of Queen's Bench for Manitoba [(1890), 6 Man. L.R. 565], to that effect was upheld, Strong, J. refers to the prior decisions of the Supreme Court on the point, and in justifying the placing of a very restricted, not to say strained, construction upon the words "preceding such sale," says at pp. 72-3, after reviewing the history of the decisions:

"I am carrying out the principle laid down by the Court in *McKay* v. *Crysler* (1879), 3 S.C.R. 436 (in which at the time I certainly did not concur), that the Courts are bound to place on such enactments as these the most restricted construction possible in order to prevent the gross violation of common right and justice which would follow if a comprehensive construction were adopted. At all events, *McKay* v. *Crysler* and *O'Brien* v. *Cogswell* (1890), 17 S.C.R. 420, have settled, so far as this Court is concerned, a principle of construction applicable to this section which makes it impossible to construe it as the appellant contends. If it is asked what scope or application can then be given to this clause, I answer that there is abundant room for its application, since it shuts out all objections on the ground of irregularity in the preliminaries of the sale such as irregular advertisements and other defects of a similar kind." MARTIN, J.A.

And Gwynne, J. at p. 74:

"It would, in my opinion, be a monstrous perversion of justice to construe those statutes either as enabling the head of the municipal institutions in the province to confiscate at their pleasure the lands of individuals by executing deeds as upon a sale for arrears of taxes during a period when the lands were not liable to be assessed, or when the land so purported to be sold had not been assessed as required by the law in order to subject lands to taxation by municipalities, or to make valid deeds which had been executed under such circumstances."

All the other members of the Court, except Patterson, J., reached the same result, the Chief Justice and Fournier, J. on the ground that there was "no authority to sell, and any such sale was void." The length of this decision becomes apparent when the sections in question therein are considered (given in the headnote and at pp. 80-1 in the dissenting judgment of Patterson, J.,

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and in the headnote in (1890), 6 Man. L.R. 565); they were held not to accomplish the desired "cure," though they "absolutely vested" the lands sold for taxes in the purchasers and "confirmed and declared valid and binding upon all persons and corporations affected thereby" all the "assessments made and rates struck by the municipality," and furthermore, enacted that unless questioned within one year, "every deed made pursuant to a sale for taxes shall be valid," "notwithstanding any informality or defect in or preceding the sale."

I also refer to the well-known case in Manitoba of *Tetrault* v. *Vaughan* (1899), 12 Man. L.R. 457, which has never been questioned, and wherein effect was given to prior decisions of the same kind therein mentioned at pp. 457 and 464, and the literally sufficient curative section there in point was restricted to the case of irregularities, and it was declared that said section "did not validate sales made on the basis of absolutely void proceedings." I also agree with what Perdue, J. says in *Alloway* v. *St. Andrews* (1906), 16 Man. L.R. 255 at p. 263, that:

> "A strict construction of the statute is, it appears to me, more urgently demanded where the municipality itself is seeking to claim ownership in the land, and to make the mere production of a document issued in its own favour conclusive proof of necessary steps and proceedings which the officers of the municipality may have neglected or abstained from taking."

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Here it is admitted that the Municipality sold the land to itself, and that sale is part of the other defendants' chain of title, as the certificate of title was issued to the Municipality on the 28th of September, 1903.

But special stress was, at this bar, laid on these words in our section 3: "All persons so served with notice shall be forever estopped and debarred from setting up any claim to or in respect of the land so sold for taxes, and the registrar shall register the person entitled under such tax sale as owner of the land so sold for taxes," and the inference was sought to be drawn from this that these words put the case on a different plane from, *e.g.*, those cases which restricted the effects of enactments purporting to "cure," *i.e.*, validate tax deeds and proceedings generally. But in my opinion there is no difference at all in principle. On the one hand we have, *e.g.*, as in *O'Brien* v. *Cogswell, supra,* p. 439,

"a full, absolute and indefeasible estate in fee simple," on which the purchaser was relying—and on the other we have this section whereby the purchaser relies on a registrar's notice, duly served, and default in filing a *lis pendens* filed thereafter, or of redemption. In the former case, if the indefeasible title sought to be conferred by statute had been upheld, the original owner was barred, as an indefeasible title means what it says, *i.e.*, a complete answer to all adverse claims, and the original owner would, on the production of such a certificate, be out of Court. That there is no magic in the form of words resorted to is shewn by this—that if section 3 had read that "in default of filing a *caveat* or *lis pendens* the registrar shall forthwith issue a certificate of indefeasible title to the person entitled under such tax sale and the original owner shall have no further claim to or interest in the said lands," then the tax purchaser would have been in the same position as he is alleged to be now, *viz.*: in a position to meet all claimants; indeed, in a better position, because as the holder of an indefeasible title, instead of a mere "registered owner," all he would have to do would be to produce one thing, *viz.*, his certificate, in answer to the original owner, instead of as now proving (as was done) four things, *viz.*: (1) service of said notice; (2) default thereunder; (3) no redemption; (4) registration as owner.

It is not denied, on the contrary it is conceded, that this section 3 is essentially a curative section, and if that is the case, then, whatever form it may take or from whatever statute it may be invoked, the principle of construction (based upon the established rule that legalized confiscation or forfeiture must be fought against) inevitably applies, and this principle cannot be evaded, by any variation in the form of the attempted remedy, and, as applied to the present case, we are thrown back upon the determining question of irregularity or nullity, and it is admittedly the latter. That is clearly shewn in *Whelan* v. *Ryan, supra,* particularly in the judgments below of Killam and Bain, JJ. at pp. 574 and 577, in which Dubuc, J. concurred, wherein it is laid down that the "same principles of construction" must be applied to the various enactments aiming at a like result, and the true interpretation of different forms of validat-

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ing sections ascertained thereby. If the object of any such section is to deprive the original owner of his property, what difference does it make if it takes the form of vesting the property absolutely in the tax purchaser as "a full, absolute and indefeasible estate in fee simple," without further ado (which after all is the simplest, most direct and strongest way the matter can be put, and was essayed to be done in *O'Brien* v. *Cogswell, supra*); or of barring the original owner and then simply registering the tax purchaser as "owner" merely, as in the case at bar; or of confirming the assessments and rates, and validating the deeds by various enactments, and by barring all actions to question the validity of tax deeds within one year, as was the case in *Whelan* v. *Ryan?* It seems to have been overlooked that the very feature which is relied on here to escape the application of the principle (*viz.*: the barring of the original owner unless he takes action within the time limited in the registrar's notice in section 3) is essentially present in *Whelan* v. *Ryan,* where the lands conveyed under the tax deed "shall become absolutely vested in such purchasers . . . . unless the validity thereof has been questioned . . . . before the 1st day of January, 1885," as it stood in the original section (6 Man. L.R. 565). In the statutes in *Whelan* v. *Ryan* and in the case at bar, the object sought to be accomplished is identical, *viz.*: to place the original owner in such a position as to compel him to take steps to assert his rights within a specified period, in default of which they would be automatically, so to speak, barred by the effluxion of time, and the deed already given to the tax purchaser in each case would, therefore, be unassailable, as the original owner had no longer any rights to set up against it. But, as has been seen, that attempted bar did not prevail in *Whelan* v. *Ryan, supra,* and why should it here? What difference can there be in principle between barring an owner by indefeasible deed and by a registrar's notice? The truth is, that these curative sections take almost inevitably so many forms and disguises, that unless care is taken to preserve the principle intact, inextricable confusion of decisions will result. No difficulty at all is experienced in giving section 3 due effect in the case of irregularities in the manner and to the extent indi-

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cated by Strong and Gwynne, JJ., in the extracts hereinbefore recited, and in my opinion, for all of said reasons, the section cannot be successfully invoked by the respondents. I have not overlooked the contention of appellant's counsel that the section in any event relates only to legally conducted tax sales, and not to mere *de facto* sales which have no legal foundation, *i.e.*, nullities. As I am with him on the former submission, it is unnecessary to consider the latter.

I only add, in the light of some remarks that were addressed to us on the hardship that would result from the application of said principles of construction to a clause which it was urged was intended to put an end to the constant litigation about tax titles, that I am unable to see any real hardship in the case, because tax titles have for long been notoriously of so hazardous a nature that no prudent man would invest in one, being speculations of the riskiest kind, almost tantamount, indeed, to buying a law suit. The remedy, moreover, was at hand by the intending purchaser requiring the holder to obtain an indefeasible title under the Land Registry Act.

Then as to the second point—under said sections 512-13. I confess I should have liked a fuller argument on the effect of these sections, as it is not easy to give them a wholly satisfactory construction, and we have been referred to very little authority on the question. But even assuming for the moment that under the very broad language of the sections it is too late to bring an action against the Municipality for anything they may have done to unlawfully deprive the plaintiff of his property by selling it, buying it in, and getting a certificate of title therefor, and then conveying it to others, yet this is an action for the recovery of possession of that property, and as against the other defendants, why should not it be successfully maintained if it can be shewn that the proceedings and deed upon which that adverse possession is based are void and of none effect? In *Whelan* v. *Ryan, supra,* Strong, J. says, at p. 68: "The tax sale . . . . was void and the deed made in pursuance of it was a nullity." And see Anglin, J. in the *Anderson* case, *supra,* at p. 46. The by-laws "were nullities. Proceedings to quash them were unnecessary." The limitation is clearly in terms only against

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the Municipality, and I can see no good reason why the principle should be extended to shield others. But the Municipality asks that effect to the limitation be given in its favour, and I am unable, after a careful consideration of the sections, to see why it is not entitled to rely upon them. No fraud is alleged to take the case out of their scope, nor have they been impressed with any principle of construction that would justify my refusing to give them application in the case of an action relating to tax sales. I therefore think that this action should be dismissed as against the Municipality, as it is within the spirit, as well as within the letter of the sections. It seems a somewhat anomalous result that a man could, as here, recover a piece of property after a municipality had transferred it, and yet not be able to do so if it had not, but I see no way to avoid it.

As regards the other defendants, the appeal, I think, should be allowed.

GALLIHER, J.A.: I do not see how the plaintiff can escape from the bar created by section 3 of chapter 31 of the Land Registry Act, 1901.

I have read all the cases cited to us, and while the curative sections relied on to support the sale in some of the cases are couched in explicit language, particularly in *Whelan* v. *Ryan* (1891), 20 S.C.R. 65, there seems to be this distinction that while in those cases the Legislatures are dealing with validating deeds made, and proceedings taken, and the distinction is drawn by the Courts between what are nullities and what are mere irregularities, that does not apply in the present case.

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In our Act, after making some provisions for the guidance of registrars upon applications to register tax-sale deeds, it directs the registrar to serve notice on all parties other than the tax purchasers who are interested in the lands, calling upon them within a time limited to contest the claim of the tax purchaser, and in default of a *caveat* or certificate of *lis pendens* being filed before registration, as owner or the person entitled under the tax sale, the person so served with notice is forever estopped and debarred from setting up any claim to or in respect of the lands sold for taxes.

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This language seems to me to be directed not so much to curing defects (although it has that effect), as to preventing the owner, or person interested, where he is served with notice and fails to comply, from setting up any claim to the property whatsoever; in fact, it is a statutory bar.

So regarded, the appeal must be dismissed.

Appeal dismissed, Martin, J.A. dissenting.

Solicitors for plaintiff: *Taylor, Harvey, Grant, Stockton & Smith.*

Solicitors for the various defendants: *Burns & Walkem; Russell, Mowat, Hancox & Farris; Bond & Sweet; Gwillim, Crisp & McKay; Daykin, Findlay & Burnett;* and *C. S. Arnold.*

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Company law—Misstatements in prospectus—Innocently made—Action by subscriber against certain directors—Liability of directors—Right of contribution—Proof of damages—Pleading—Companies Act, R.S.B.C. 1911, Cap. 39, Sec. 93, Subsecs. 1 and 4.

A subscriber for certain shares in an incorporated company, for which he had made certain payments, brought action and obtained judgment against the Company and certain of the directors for a refund of the moneys he had paid, on the ground of misstatements in the prospectus. The directors so sued paid the amount of the judgment and brought action against their co-directors for contribution. In their pleadings they confined themselves to a claim for contribution on account of the judgment the subscriber for shares had obtained against them, and which they had paid. The plaintiffs obtained judgment on the trial.

Held, on appeal, reversing the judgment of the trial judge, that under subsection (1) of section 93 of the Companies Act, the plaintiffs, in order to succeed, must make out the case that the subscriber for

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shares would have had to make out if he had sued the directors who were defendants in this action, and that, upon the evidence, the plaintiffs had not made out such a case.

Held, further, that the plaintiffs, instead of confining themselves in their pleadings to a claim for contribution on account of the judgment which the subscriber for shares had obtained against them, should have alleged the defendants' responsibility for the issue of the prospectus, that the subscriber took shares on the faith of it, and he suffered loss by reason of the untrue statements therein.

Per MACDONALD, C.J.A.: The statute enables the shareholder to recover damages for misrepresentation in a prospectus where there was no deceit, and places those directors who have been made liable at the suit of a shareholder in a position to recover contribution from other directors or promoters who were not sued with them, without being met by the defence that contribution cannot be claimed by one *tort feasor* from another, assuming the Act makes innocent misrepresentation a *tort*.

APPEAL by defendants from the judgment of HUNTER, C.J.B.C. at Vancouver on the 28th of March, 1913, in an action claiming contribution towards the payment of $5,148.45, which the plaintiffs, by reason of being directors, or being named or having agreed to become directors of the Salmon Arm Fruit Lands Company, Limited, or by reason of having authorized the issue of a prospectus of the said Company, became liable therefor to one James Clark, and for costs and expenses of an action brought by Clark against the plaintiffs and the Company for damages sustained by the said Clark by the issue of the said prospectus. A prospectus was issued in connection with the Company, by one of the directors, and on the strength of this prospectus, Clark purchased certain shares. It was afterwards discovered by him that there were statements in the prospectus which were misleading, and he brought an action for the recovery of the money paid for the shares, and obtained judgment. The action in this appeal was for contribution from certain of the directors, who disclaimed liability. The trial judge gave judgment in $3,541.45 with interest, but that each party pay their own costs.

Statement

Griffin, for plaintiffs.

W. A. Macdonald, K.C., for defendants Banks and Nicholson.

McCarter, for defendant Turner.

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HUNTER, C.J.B.C.: The matter has been argued out at such great length that I do not think I will gain any further light on the questions involved by reserving judgment. I may say first of all, that this case is one that strongly impresses the Court as belonging to that class of cases where the parties have got at arms' length, and instead of observing some kind of reasonable attitude to each other, have only succeeded in the end in swelling an originally comparatively small obligation to one which is, at least, more than double the amount. However lamentable that state of affairs may be, it is only for the Court to decide as well as it can, after hearing the evidence and the argument.

In the original action a judgment was recovered by Clark on account of misstatements contained in what was then adjudged to be, and what the further argument and evidence have shewn, was a false and misleading prospectus. He recovered judgment for the amount of the shares to which he had subscribed, and the one hundred shares upon the 4th of November, and a subscription of 400 shares on the 21st of November.

During the progress of that suit, which happened to be tried by myself, I came to the conclusion that while it was impossible to acquit certain of the then defendants of very considerable, and in fact, culpable negligence in connection with the issue and distribution of that prospectus, still I was unable to come to the conclusion that they had the *male amens* which is pointed out in *Derry* v. *Peek* (1889), 14 App. Cas. 337—the necessary foundation for an action of deceit. Although I have conceded to Mr. *Macdonald* in this action that my decision on that question in that action was not necessarily conclusive on him in this action, still, after hearing all he had to say on that point, I see no reason to change my opinion. The onus is distinctly on him to shew, in answer to this suit, that some one or other of these plaintiffs (if not them all) had the *male amens* in question, and I see no reason to depart from my original view with respect to that aspect of the litigation.

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Then, the present defendants being acquitted (at all events, it has not been shewn to the satisfaction of the Court that they have been guilty of fraudulent misrepresentation) in respect to the prospectus which led to the original action, the statute steps

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in, and as far as I see, grants the now plaintiffs (who were the defendants in the original suit) a cause of action for contribution.

As I have already stated during the argument, I think that that statute is altogether too inelastic to meet cases of this character. This very case shews that in order to do proper justice, full and adequate justice among the different directors in actions of this character, that there ought to be a free and unfederated discretion vested in the Court, after having heard all the evidence, to award contribution according to the degree of responsibility, or care or negligence, as the case may be, exhibited by the different directors. If one were to apportion the responsibility which these seven directors assumed, it would range from Leonard, in the first instance, to Turner in the last. I think it would be idle for anyone to suggest, who has heard this evidence, to say it is reasonable or fair to say that Turner, who was induced to go in, as an act of friendliness, in an undertaking, and had but a nominal interest in the company, should pay in the same proportion as a man who was as vigorous as Leonard, who was interested in promoting the company for his personal gain, he being the largest grantor of land to the company. The order of responsibility, I say, would range from Leonard, Johnson and Currie, who were the active promoters of this concern, down to Banks, who held a somewhat middle position, he having been offered a block of shares; and then Nicholson, who was promised a job in connection with the superintendence of the actual operations, down to Turner, whose only crime is his own negligence in allowing himself unwittingly to be dragged into the responsibilities of a director. I regret, however, as much as I have considered this statute, that I find it impossible to make any distinction between one director and another, assuming that the liability has been established. The statute says, in express terms, that when that is found, the Court is not to treat the matter from the point of view of *tort* at all, but is to treat the matter as if it were a contribution, arising as in the case of contract. That being the case, it only remains to say, whether or not, in the opinion of the Court, all of these directors are liable, on the ground that they

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could have been made liable in the original action. I see no reason to doubt that they are in the same position so far as the original plaintiff is concerned as the three men who were sued in the original action. There appears to be no doubt at all. In fact, it is not seriously urged in the case of Banks and Nicholson, that they stand in any different position to the three men originally sued. They were all named as directors, and they all agreed to become directors, and they were all mentioned as directors in the prospectus which did the damage in respect to which the original judgment was recovered.

It has been attempted to suggest that Mr. Turner did not know that he was in the position of a director, but I think the evidence referred to by Mr. *Griffin*—the evidence of Banks, Nicholson and Currie—goes to shew that Mr. Turner, perhaps without giving the matter the attention that he should have, did undertake to assume the position of director, and did, in fact, agree to become a director; and, therefore, he stands in the same position as the others with regard to the liability.

There were certain objections raised by Mr. *Macdonald,* to no one of which do I think I can give effect. He raised the objection that there was no evidence of loss; that there was not shewn that there were no assets of the company. I think the short answer to that is that it is not a question of whether the company had, or had not assets. The statutory action is a personal action given against the directors, in their personal capacity as directors, and had nothing to do with the question as to whether there have been assets (either present or past) in the possession of the company. He also maintained that the prospectus had never issued within the meaning of the term "issue" as contained in the statute; but I think that that contention is sufficiently answered by the fact that this prospectus was exhibited by Gore, who was the managing director of the concern, to whose hands the handling of this prospectus, and the issuing of it, had been committed. There is no suggestion that Gore exhibited that prospectus to the original plaintiff Clark.

Then it was suggested by Mr. *Macdonald* that there were misrepresentations made by Leonard, and that these misrepresentations really created the situation in respect to which he is

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now complaining. The answer to that, I think, is that the statute does give this cause of action, and I have already dealt with the question as to whether or not the statute should not be amended in order to allow the Court an unfettered discretion.

Then it was suggested, as there were misrepresentations made by the directors against whom judgment had been given to the directors whom it is now sought to make responsible, that that ought to be taken into account in considering the question of liability in this action. As to that, in my opinion, those issues, if they were properly brought in, were dragged in too late to be properly investigated in this action. In any event, I do not think it would be in the interests of justice to allow side issues of that kind to be threshed out in an action of this character. If there were these misrepresentations, if Mr. *Macdonald* wishes to insist upon them—if there were fraudulent misrepresentations made by Leonard, say, to Turner, or the other men who are being made responsible, there is nothing to prevent their instituting a separate action in reference to these misrepresentations. I do not think, in any event, that those issues could have been properly or adequately tried in this suit.

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Now, the question then being clear in my opinion, the defendants could have been made liable in the original action, the question then remains as to the extent of the amount. It has been strongly urged by Mr. *Macdonald* that in any event some one or more of these defendants should only be made liable in respect to the first subscription, which was made on the 4th of November, and as to which the sum of $250 was paid on the 4th of November, and another $250 paid on the 22nd of December. In my endeavour, if possible, to free these defendants from some or all of this liability, I was very strongly inclined to favour this view, but I do not think, after all, that I can really give effect to it. It will be absolutely impossible, I think, for any Court or judge to measure the amount of influence which the originally false prospectus had in inducing this man to subscribe for these shares. He himself was absolutely unable to segregate in his own mind the influence which the prospectus itself had, and which these interviews had, with some one or

more of these present plaintiffs. That being the case, the onus being upon Mr. *Macdonald* to shew affirmatively that the influence of the first prospectus was not still alive and a continuing poison in respect to the second subscriptions, I think I cannot give effect to that contention, and I find it impossible, as Clark's own evidence, in my mind, renders it impossible for the Court to come to a safe and sound conclusion on that; and I say, the onus being on Mr. *Macdonald* to shew that only the first subscriptions were induced by that prospectus, I think it is impossible to give effect to that contention.

Then that leaves the question of how much the amount recovered in the original action is recoverable in this action. As to that, I think the amount proportioned should be the sum of $3,541.45, which includes the principal and the interest to the date of judgment, and the interest from the date of the judgment and payment, and the taxed costs, and that the other portion of the amount claimed must be disallowed. That is to say, the three defendants will be held to contribute equally in respect to the sum of $3,541.45.

With respect to the costs, I do not think that I will be doing justice if I allowed the defendants to be mulcted in the costs of this action, because in the first place, the claim, in my opinion, has no intrinsic merit, and I am only giving effect to the statutory cause of action, and which is very much against my views as to what is the natural justice against these parties. In the first place, I think the present situation is created by the plaintiffs, who persuaded these defendants to come in as directors of this company. These plaintiffs were, as I have said, the active promoters of this concern, promoting it largely for their own personal advantage, whereas the present defendants were merely passive agents, and had no real active interest or concern in spreading or issuing that prospectus. Certainly they had not the same personal interest in the undertaking as had the three plaintiffs.

The next reason for disallowing costs, which I think is a good reason, is that there was no chance offered to these three defendants to come in when the original claim was made, or settle, or compromise the claim with Clark in the best way they could.

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Not only that, but there was not, as there should have been, a third party notice served in that original action, which would have saved all the costs of the present litigation, and in that action the question of their liability could have been settled once and for all. And I certainly think that whilst the judgment ought to go assessing the three defendants in an equal contribution to the amount of $3,541.45, that the plaintiffs and the defendants ought to pay their own costs.

The appeal was argued at Victoria on the 19th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

Bodwell, K.C., for appellant: The action is brought under section 93 of the Companies Act, relating to prospectuses. Judgment was first obtained by a subscriber against Leonard, Currie and Johnson. Leonard, on the evidence, was guilty of fraudulent misstatements; he is, therefore, precluded from recovering against a co-director, under subsection (4) of section 93 of the Act: *Gerson* v. *Simpson* (1903), 2 K.B. 197; *Shepheard* v. *Bray* (1906), 2 Ch. 235 at pp. 244-247. It is submitted the learned Chief Justice, in giving judgment at the trial, was guided by the evidence given in the first action, as there is not the evidence in this action to support his findings. These directors could only be liable if the prospectus was issued with their authority; if an agent uses evidence (such as a prospectus) to induce purchasers to buy, without the sanction of the directors, they are not liable under the statute. Gore, who was a director, took the prospectus to Clark (the plaintiff in the first action), after it was understood between the directors (including the defendants) that the prospectus was to be destroyed, owing to misstatements therein.

Argument

Griffin, for respondents: In order to relieve the defendants under subsection (4) of section 93 of the Act, they must shew that Leonard, Currie and Johnson were guilty of fraud or fraudulent representation. There is no evidence to support this. All that there is with relation to fraud deals with Leonard only: Bower on Actionable Misrepresentation (1911), paragraphs 360 and 365; *Twycross* v. *Grant* (1877), 2 C.P.D. 469 at p. 540;

Baley v. *Keswick* (1901), W.N. 167. As to the issuing of the prospectus by the board of directors, if Gore issued the prospectus, he made all his co-directors liable: *Gerson* v. *Simpson* (1903), 2 K.B. 197.

Bodwell, in reply: Even if the company met and passed resolutions approving the prospectus, the defendants are entitled to the protection of subsection 1 (*e.*) of section 93 of the Act.

Cur. adv. vult.

On the 4th of November, 1913, the judgment of the Court was delivered by

MACDONALD, C.J.A.: This action is founded on section 92 of the Companies Act, 1910.

The plaintiffs and one George Gore were the promoters of the Salmon Arm Fruit and Land Company, Limited, which was incorporated on the 14th of September, 1910. The prospectus (there were two, but only the first is in issue here) which gave rise to this action was drawn up about a month earlier. In November, 1910, one J. L. Clark subscribed for shares in the company, first for 100 shares, on the 4th, and again, on the 21st, for 400 shares of the par value of $10 per share. He paid half the subscription price ($2,500) in cash, and gave his promissory notes for the balance. About the beginning of 1911 he claimed to have discovered falsehoods in the prospectus, and repudiated his subscription, and later sued the company, and the plaintiffs herein as directors, but not the defendants, to recover the moneys he had paid. In that action he succeeded. The plaintiffs herein then paid the judgment, and subsequently brought this action for contribution. The defendant E. K. Johnson did not defend, so that only Nicholson, Banks and Turner are now resisting.

Judgment

The plaintiffs can only succeed by making out the case that Clark would have had to make out against these defendants under subsection (1) of said section 93. That section was originally enacted in England immediately after the decision of the House of Lords in *Derry* v. *Peek* (1889), 14 App. Cas. 337, in which it was held that a shareholder could not succeed

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in an action for damages against directors for innocent misrepresentations contained in a prospectus. The representations here, if they amount to such, were held by the learned trial judge to have been made innocently, and I accept that view of them.

The effect and intention of the statute appears to me to be two-fold; it enables the shareholder to recover damages for misrepresentations in a prospectus, where there was no deceit, and it places those directors who have been made liable at the suit of a shareholder, in a position to recover contribution from other directors or promoters who were not sued in the first instance, without being met by the defence that contribution cannot be claimed by one *tort feasor* from another, assuming that the said section makes the innocent misrepresentation a *tort,* which is a moot question: *Frankenburg* v. *Great Horseless Carriage Company* (1900), 1 Q.B. 504.

The appellants' counsel contended that no loss or damage had been proven in this case. I think it sufficiently appears from the evidence that the loss and damage suffered by Clark, assuming that he was entitled to succeed at all, was the amount of money he had paid for his shares, namely, $2,500. He is within the *Frankenburg* case above mentioned, and not *McConnel* v. *Wright* (1903), 1 Ch. 546, and *Shepheard* v. *Broome* (1904), A.C. 342, where the shareholders still held their shares and were suing for their losses without seeking cancellation.

Judgment

I now come to the consideration of the question of whether or not these plaintiffs have made out the case that Clark would have been bound to make out against these defendants.

It appears that the said three defendants were persuaded by the plaintiffs and the said Gore, as promoters, to consent to act as directors. They were reluctant to do so, as they were not willing to invest in the company. They were told that they need not purchase shares beyond the nominal number required to qualify them for the board; they were also told that the plaintiffs proposed to put their lands into the undertaking, which was one organized to acquire and utilize lands suitable for fruit culture. Their consent appears to have been given out of good nature and a desire to aid an enterprise which plaintiffs repre-

sented to them would be of advantage to the district in which they lived. The defendants had nothing to do with the preparation of the prospectus. Nicholson and Banks read it and noticed certain inaccuracies, but were assured by one or other of the plaintiffs, who came to them for their signatures, that it would not be used, but would be replaced by a corrected one. Nevertheless, it was used by Gore. Turner says that Johnson told him it was a paper relating to his becoming a director, that he did not read it, and had no knowledge of its contents, or that it was a prospectus. Their carelessness cannot excuse them to strangers, but the plaintiffs are not strangers. It is, therefore, not surprising that the learned trial judge deplored that the law, as he understood it, compelled him to decree contribution by these defendants for the relief of the plaintiffs, who by their inducements, innocent though they may have been, brought the defendants into their present predicament. Moreover, it appears that as soon as Clark recovered judgment, the three plaintiffs, who had actually deeded their lands to the company, procured, in some manner which is not made quite plain, the return of their deeds from the company's solicitors, or from the land registry office, where some of them at least had been deposited for registration, and which, on recovery, they at once destroyed, thus depriving the company of the only assets it had. The plaintiffs try to excuse this by saying they did not receive payment for their lands from the company, an excuse which will not bear examination. The consideration for these deeds agreed upon with Currie was shares in the company; with Leonard, shares in part and what were called "unit deeds" in part; and with Johnson, $700 in cash and the balance in "unit deeds." The cash was actually paid to Johnson out of the moneys received from Clark. At a meeting of the board held on the 16th of December, 1910, at which, among others, two of the plaintiffs were present, the following resolution was passed by the board:

Judgment

"That the necessary shares and unit deeds be issued to Messrs. W. V. Leonard, S. H. Currie, and John Johnson in connection with the transfer of their various properties to the Company."

Another matter to be observed in connection with this case is that while Leonard appears as a plaintiff and has been

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awarded contribution, at the trial he denied that he had been joined as a plaintiff with his consent, but added:

"Well, I am down here now, right in Court, so that it is immaterial if his Lordship puts me in as a plaintiff—I go in willingly."

Then, again, Johnson's land, which was deeded to the company, was subject to a mortgage of $700. The moneys already mentioned, which he received from the company out of the payment made by Clark, was given him to pay off this mortgage, which was done. When he recovered back his deed he retained the land free from the mortgage.

These matters have not been taken into account in the decree made in the Court below, nor have they been made the subject of appeal or of argument in this Court, perhaps for undisclosed reasons which deprive them of significance. I do not mention them for the purpose of making them the grounds of my decision, but as adding to what has already been said as to the relative positions, in equity at all events, of the parties to this action. In these circumstances, I think I should be most careful to see that the plaintiffs have fully made out their case.

Turning to the statement of claim in the Clark action, which was put in at the trial, and which presumably contained his real complaint, I find that the only misrepresentations in the prospectus of which he complained were with two exceptions, which I shall presently mention, not representations of fact at all, but of the objects and intentions of the company. The said exceptions are: (1) "Trustees—Dominion Trust Company, Limited, Vancouver, B.C." This statement, if it can be called such, was true. (2) That fifty shares of the company had been allotted and paid for. The only foundation for that statement appears to be that shares to that number had been taken by the directors to qualify them for the board. These were not paid for in cash, but that might be a matter of adjustment with at least the three plaintiffs in connection with the lands which they were conveying to the company. When asked, as witness for the plaintiffs in this case, what representations he complained of, Clark made no reference to either of the above alleged misrepresentations. I therefore eliminate these as having neither been pleaded in this action nor made issues in the course of trial.

Judgment

Whether the judgment in Clark's action was right or wrong, it cannot, it is conceded, affect the rights of the defendants in this. The liability of directors or others in their position is strictly limited. It is:

"To pay compensation to all persons who subscribe for any shares or debentures on the faith of the prospectus for any loss or damage they may have sustained by reason of any untrue statement therein."

Now, instead of alleging, as I think they ought to have done in their statement of claim, the defendants' responsibility for the issue of the prospectus, that Clark subscribed for the shares on the faith of it, and that he suffered loss by reason of one or more untrue statements therein, the plaintiffs confined themselves to a claim for contribution on account of the judgment which Clark had obtained against them, and which they had paid. The initial issues were not raised at all, and in this way the action went to trial.

I think I should be quite justified were I to allow this appeal and dismiss the action on the ground that the statement of claim discloses no cause of action. I shall not, however, do so in this case, but I wish to make this observation, that the doctrine of *Scott* v. *Fernie* (1904), 11 B.C. 91, was not intended to dispense with pleadings, but only to meet exceptional cases when it was manifest that the issue not pleaded was by the tacit consent of both parties clearly and unequivocally fought out at the trial. I think greater care should be taken to confine the evidence at trials to the issues raised in the pleadings, and if it should be found proper, as it often may, to broaden those issues, it should be done by formal amendment.

Judgment

The following, from Clark's evidence, read with the rest of his testimony, and bearing in mind his case as disclosed in his own statement of claim, and applying the principles adopted in *Nash* v. *Calthorpe* (1905), 2 Ch. 237; and *Macleay* v. *Tait* (1906), A.C. 24, leads me to the conclusion that the plaintiffs have failed to make out a case under the statute. Giving evidence, not in his own, as the first question might suggest, but in this action, he, referring more particularly to the 400 share subscription, said:

"Now, what were the misrepresentations on which you founded this

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(your) action? Well, the principal misrepresentation was that the land did not (*sic*) belong to the company.

"And where was that contained in? In the prospectus, I think, and in this little folder here."

And on cross-examination:

"Mr. Clark, you stated you were induced to subscribe for this stock by the statements made to you by Gore and others? Yes.

"Who were the others referred to in that answer? Well, the only ones that I can remember distinctly were Leonard and Gore.

"Did Leonard tell you whether he had or had not already transferred his land to the company? Well, he gave me the impression that they had all deeded the land to the company, and the deeds were held by these solicitors."

Before referring to the following evidence I may state that Clark was elected a member of the board of directors, and elected vice-president of this company on the 18th of November, three days before he subscribed for the 400 shares.

About that time—the exact date is not made certain—he signed what is called the second prospectus, which is not attacked, and with reference to it he was asked:

"Well, on the faith of what did you sign the second prospectus? Well, I signed it on the faith of assets that I was led to believe the company had in the way of lands and deeds, and another thing, on account of the directors telling me that the Dominion Trust Company had offered to loan them $50,000 on the property."

That he had read that prospectus, which differed from the first, appears from this:

Judgment

"Now I think you stated before, at the previous trial you made the following statement: 'I might state when I signed that I drew the directors' attention to the fact that the prospectus was not the same as the one handed to me, and they said that they had made some changes in the memorandum of association, and had also left out some cuts in that prospectus that were in the first one.'"

It, therefore, in my view of the evidence, comes to this: Clark's only substantial complaint, and the only issue in this action developed by the evidence, though not pleaded in either action, was that the following statement:

"We might here say that property A., of 200 acres, had already been taken up, and also part of property B."

was untrue, and that the statement about the proposed loan was untrue. Nothing need be said about the latter statement, as it was not contained in the prospectus.

Some reference has been made to a statement in the prospec-

tus that there were 20,000 acres of land in the district suitable for orchard purposes which the company controlled. It appears that the company did not control that acreage of land, but Clark did not complain of that statement, either in his statement of claim in his own action, or in his evidence in this case.

Now, coming back to the only complaint left—that respecting properties A. and B., that is to say, that they had already been *taken up,* it seems to me that that statement was true in the proper sense of the words, and in the sense in which they were understood by Clark.

"If as matter of expression, the language of a prospectus is to be absolutely true, the most prolix language that conveyancers ever knew would not suffice so to qualify any but the most simple statement as to make it absolutely true": Buckley on Companies, 9th Ed., p. 186.

The company, on the 4th of November, the day on which Clark first subscribed for shares, had acquired options to purchase from Leonard, Currie and Johnson, and others, more than 600 acres of land. These were the lands the plaintiffs anticipated acquiring for the company when the first prospectus was drawn up. The acquisition of these options was followed by conveyances by the three plaintiffs of lands to the extent of 200 acres, thus making up "property A."; and these conveyances were in the hands of the solicitors of the company as early as the 21st of November, 1910, not, as was suggested by one of the plaintiffs, to be held in escrow, but for registration.

Judgment

As to "property B.": If I understand aright the scheme of the prospectus, this was to be the second property of 200 acres. The options already mentioned covered more than would be required for this parcel. At the time he subscribed for the 400 shares, Clark was quite aware of the state of the company's titles, or at all events, had notice that the company had not acquired registered titles to their lands.

This evidence also relieves me of a doubt as to whether or not the first subscription is to be treated in the same way as the second. The evidence as to dates of meetings of Clark and Leonard and other directors is so vague that I am unable to learn just when they first did meet. But it does not now seem to be material, in view of the fact that Clark was made aware

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of the condition of these titles before the 21st of November. That was the time for repudiation of the first subscription if he felt he had been misled, and the fact that he did not do this, but, on the contrary, took a further and larger block of shares, is the best evidence that he did not feel that he had been misled, at all events to his prejudice.

I think the plaintiffs have failed to make out their claim, and that the appeal should be allowed, and the action dismissed, with costs here and below.

Appeal allowed.

Solicitor for appellants: *G. S. McCarter.*
Solicitors for respondents: *Martin Griffin & Co.*

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DESPOINTES v. ALMOND

DESPOINTES v. ALMOND *ET AL.*

Negligence—Pit unguarded under elevator—Licensee—Knowledge of danger—Contributory negligence.

The plaintiff, an employee of a milk vendor, in the course of his duties, carried milk up and down an unguarded freight elevator in the defendant Company's quarters, used for the storing and pasteurizing of milk. The floor of the elevator, when down, was used in conjunction with the other floor space where it stood, in going from one side to the other, there being a pit below the elevator floor about 15 feet deep, of which the plaintiff claimed to have no knowledge. The plaintiff had been at the building, in the usual course of his business, about ten times previous to the evening of the accident. When he entered the building about eight o'clock, there were no lights. In crossing the floor space where the elevator shaft was (the elevator being at an upper storey), he fell in the pit and was injured.

Held, affirming the judgment of the trial judge taking the case from the jury and dismissing the action, that the plaintiff had knowledge of the *locus in quo*, and he was guilty of contributory negligence in attempt-

ing to cross the elevator floor without knowing whether the elevator was down or not.

Indermaur v. *Dames* (1867), 36 L.J., C.P. 181, followed.

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APPEAL by plaintiff from the decision of CLEMENT, J. at the trial, on the 20th of May, 1913, withdrawing the case from the jury at the close of the plaintiff's case, and dismissing the action. The defendant Company, the City Dairy and Produce Company, whose manager was the defendant Almond, carried on the business of buying, selling and pasteurizing milk, on their premises on Pender street, Vancouver. The plaintiff, a boy 19 years old, was employed by one Wright, a milk vendor. In the course of his duties he went each evening to the premises of the defendant Company, when he would get his employer's milk that was stored in a cold-storage room on the ground floor, and after taking it to the top floor by means of an unguarded freight elevator, where it was pasteurized, he would bring it down the elevator again, place it in a waggon, and bring it to his employer's premises. The elevator was in about the centre of the building, and when down, its floor was used for passage from one part of the room in which it was situated to the other part. Underneath was a pit about 15 feet deep. The plaintiff had been on the premises about ten times before the accident, two or three times during the day, and six or seven times in the evening. He had always found the elevator down and did not know there was a pit below. On arriving at the building about eight o'clock on the night of the accident he found no lights. After going to the cold-storage room he proceeded to cross to the south side of the building (thereby having to cross the floor of the elevator) to look into a lane adjoining the building on that side, and the elevator being at an upper floor, he fell into the pit, breaking his collar bone and fracturing his skull, which resulted in deafness.

Statement

F. M. McLeod, for plaintiff.

S. S. Taylor, K.C., for defendant.

CLEMENT, J.: I am going on the boy's own evidence. I think I need not explain myself further, beyond saying this: I

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think, on the uncontradicted testimony of the boy himself, he is the author of his own wrong; he has been using this elevator several times in connection with his work; his evidence is, that he deliberately turned through what he said was a dark passage, deliberately turned through where the elevator was. I think it was an act of gross carelessness, impossible for any jury to say that he was not the author of his own wrong. I think the action must be dismissed, with costs.

The appeal was argued at Vancouver on the 11th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

F. M. McLeod, for appellant (plaintiff): The plaintiff was a licensee and was invited to go in the building to get his milk and have it pasteurized. There should be a proper system to protect those who come on the premises: *Bridges* v. *Directors, &c., of North London Railway Co.* (1874), L.R. 7 H.L. 213. The Court below was not justified in finding contributory negligence in this case: see *Shaw* v. *St. Thomas Board of Education* (1911), 18 O.W.R. 165. It has been held that mere knowledge of danger is not sufficient: *Scott* v. *Fernie* (1904), 11 B.C. 91; *Smith* v. *Baker & Sons* (1891), A.C. 325; *Osborne* v. *London and North Western Railway Co.* (1888), 21 Q.B.D. 220; *Brooke* v. *Ramsden* (1890), 63 L.T.N.S. 287; *Braddeley* v. *Earl Granville* (1887), 19 Q.B.D. 423; *Greenhalgh* v. *Cwmaman Coal Company* (1891), 8 T.L.R. 31; *Sanders* v. *Barker & Son* (1890), 6 T.L.R. 324; *Indermaur* v. *Dames* (1867), L.R. 2 C.P. 311 at p. 313. It is also contended that this case comes under the Factories Act.

S. S. Taylor, K.C., for respondents (defendants): There is evidence that the plaintiff knew there was a pit below the elevator, as he had to walk up past the hole when the elevator was up. The question is: Could the jury reasonably absolve the plaintiff of contributory negligence?

McLeod, in reply: The jury has the right to determine whether the plaintiff was the cause of his own injury or not.

MACDONALD, C.J.A.: I think the appeal must be dismissed and the judgment below sustained. The only point upon which there can be doubt is on that of contributory negligence. I think there is abundant evidence upon which the jury could find negligence on the part of the defendants in not guarding the elevator shaft in question, but unfortunately for the plaintiff's right to recover in this case, he had knowledge of the *locus in quo;* he had been back and forth in the neighbourhood of that elevator, and up and down in it for a period of two months, according to his own testimony. The most that he can say is that he did not know the depth of the shaft under the floor level of the elevator. He appears to me to have been an intelligent young man, judging by his evidence. I cannot credit him with intelligence any greater than that of a child, and therefore we must assume, and the jury, I think, was bound to assume that having knowledge of the elevator, and having notice of its unguarded condition, he must be taken to have known that if he walked into the place where the platform ought to be, when he was at that level, without making sure that the platform was actually there, he ran the risk of being injured, as he was in the event. The situation is outlined by the Court in *Indermaur* v. *Dames* (1867), 36 L.J., C.P. 181 at p. 183:

"And with respect to such a visitor, at least, we consider it is settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know, and that where there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding or otherwise, and whether there was contributory negligence in the sufferer must be determined by a jury as matter of fact."

Now, in this case, there was notice of the danger; there was knowledge of the elevator and knowledge of its unguarded condition, and it seems to me, in the circumstances of the case, if the jury had made a finding that the plaintiff was not guilty of contributory negligence that that finding could not be supported, and if that be so, then our duty is quite clear in this case —that is, to sustain the finding of the judge that the jury could come to no other conclusion than that the plaintiff was guilty of contributory negligence.

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IRVING, J.A.: I agree, for the reasons given by the Chief Justice, and I only desire to call attention to the judgment of Lord Justice Hamilton in *Latham & Nephew, Limited* v. *R. Johnson* (1913), 1 K.B. 398 at p. 411, 82 L.J., K.B. 258 at p. 264, delivered in the Court of Appeal, in which he says:

> "The rule as to licensees, too, is that they must take the premises as they find them, apart from concealed sources of danger; where dangers are obvious they run the risk of them. In darkness where they cannot see whether there is danger or not, if they will walk, they walk on at their peril,"

and he cites many cases, including *Indermaur* v. *Dames* (1866), L.R. 1 C.P. 274, (1867), L.R. 2 C.P. 311.

IRVING, J.A.

The only question we have to decide in this case is whether the evidence is so clear that the judge was justified in taking it away from the jury. I think if the case had been permitted to go to the jury, and the jury had found that the defendant was not guilty of contributory negligence, we would have been bound to have come to the conclusion that their verdict would be against the evidence, because he says: "I thought it was down, and that is all there is to it." He, having elected to walk ahead in the darkness, did so at his own risk.

MARTIN, J.A.

MARTIN, J.A.: Assuming negligence on the defendant's part, I am of the opinion that the judge below was right in withdrawing the case from the jury, as no jury could reasonably acquit the plaintiff of contributory negligence on the evidence before them.

GALLIHER, J.A.

GALLIHER, J.A.: I agree.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree, for the reasons given by the Chief Justice.

Appeal dismissed.

Solicitor for appellant: *F. M. McLeod.*
Solicitor for respondents: *R. P. Stockton.*

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Contract—Sale of shares in companies—Coal mining properties—Construction of documents—Evidence to explain—All articles and things used in connection therewith—Earnings—Meaning of—Ships and water craft.

D. gave E. an option to purchase all the shares in a coal company and 51 per cent. of the shares in another, the sale to include all D.'s properties in British Columbia or in California in anywise relating to coal or coal mines and fire-clay and all machinery, articles or things used, or which might be used in connection therewith. The agreement provided that the sale should be free from contracts for sale and delivery of coal except such as had been made in the ordinary course of business before the date of the option and such current cargo contracts as might be subsisting at the time of the completion of the sale, D. to retain possession until the purchase price be paid, he then to assign the shares and transfer the properties free from liability. The properties, during the existence of the option were to be kept intact, subject only to sale and shipment of coal in the ordinary course of business, D. to pay all expenses of operation and upkeep and to retain for his own use all the earnings of the properties up to the date of giving up possession. The purchase price was paid in full on the 16th of June, 1910. The parties could not agree on the interpretation of the option.

Held, that the mine being sold as a going concern, all the coal mined and undisposed of, and the coke manufactured and undisposed of, were to be considered as stock in trade, not earnings, but that D. was entitled to all the earnings, both of cash and outstanding obligations, pertaining to the business at the time of the completion of the sale.

Held, further, that the word "used" meant "ordinarily used," and all ships ordinarily used for transporting the product of the mines were "things" within this clause.

Held, further, that the agreement must be construed in accordance with the language used read in the light of the circumstances in which it was made, and that oral evidence to explain what was intended was inadmissible.

Under a five-year contract with a railway company, D. undertook to keep a certain quantity of coal in a stock pile at a certain place for the use of the company, who were to pay for the coal as they took it away from the stock pile.

Held, that the obligations under the contract passed to the vendee, and the stock of coal so kept was part of the properties which the vendor was to keep intact, and were not "earnings."

Judgment of HUNTER, C.J.B.C. varied.

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Statement

APPEAL from the judgment of HUNTER, C.J.B.C. in two actions tried at the same time at Victoria on the 12th and 13th of September, 1911. The actions arose over the interpretation of an agreement for sale entered into on the 3rd of January, 1910, between James Dunsmuir and one Richard Thomas Elliott in the words and figures following:

"Agreement made this third day of January, in the year of our Lord one thousand nine hundred and ten, between James Dunsmuir, of Victoria, British Columbia, capitalist, who for himself, heirs, executors, administrators and assigns is hereinafter called the vendor, of the one part; and Richard Thomas Elliott, of Victoria, aforesaid, barrister-at-law, his heirs, executors, administrators and assigns, hereinafter called the purchaser, of the other part:

"Witnesseth

"1. In consideration of the sum of one dollar ($1.00) of lawful money of Canada paid by the purchaser to the vendor, and other valuable considerations moving from the purchaser to the vendor, which the vendor acknowledges, he, the vendor, contracts and agrees to sell to the purchaser, his executors, administrators and assigns, all the shares in the share capital of the Wellington Colliery Company, Limited, and fifty-one per centum (51%) in par value of the shares in the share capital of Robert Dunsmuir Sons Company of California, together with all the benefits, rights, advantages, claims and demands of him, the vendor, under and by virtue of every existing contract between the vendor and the Canadian Pacific Railway Company respecting or relating to or affecting lands, coal and fire-clay lying and being within the Esquimalt and Nanaimo Railway Belt, with the right to use the name of the vendor (upon effectual indemnity to him) for the securing and carrying out of every such contract; and free from any contract for the sale and delivery of coal except such as have been heretofore made in the ordinary course of business and current cargo contracts at time of completion of the purchase hereunder, for the sum of eleven million dollars ($11,000,000) to be paid to the vendor at the Bank of Montreal, in the City of Victoria aforesaid, or at such other place in Canada as the vendor may direct, but always at the office of the chartered bank by deposit to the credit of the vendor, and either (a) In one payment on or before the fifteenth day of May, A.D. 1910, without interest, or (b) in five (5) payments as follows:—One fifth, being two million two hundred thousand dollars ($2,200,000) on or before the fifteenth day of May, A.D. 1910, and the balance in four (4) equal monthly instalments computed from the fifteenth day of May, A.D. 1910, with the privilege to pay off in full at any time.

"2. The Wellington Colliery Company, Limited, is the owner of the following properties, which pass under the sale of the shares at the above price.

"(a) The coal and fire-clay under the tract of land known as the Esquimalt & Nanaimo Railway Belt, which was created by section 3 of the statute of the Legislative Assembly of the Province of British Columbia,

passed on the 19th day of December, 1883, and being 47 Victoria, chapter 14, intitled 'An Act relating to the Island Railway, the Graving Dock and railway lands of the Province,' excepting thereout tracts held under settlers' rights acquired prior to the passing of the said Act, leaving an area of coal and fire-clay estimated at one million eight hundred and fifty thousand (1,850,000) acres.

"Surface rights in fee in addition to coal and fire-clay rights in twenty thousand (20,000) acres, more or less; (c) The Extension colliery, with railway to Ladysmith and waterfront terminals, wharves, and bunkers at Ladysmith; (d) The Union colliery, with railway at Union bay, and waterfront terminals, wharves and bunkers at Union bay; (e) The Alexandra mine not now being worked; (f) A mortgage of three hundred thousand dollars ($300,000) upon the properties of the Robert Dunsmuir Sons Company of California hereinafter mentioned.

"It being the intention of the parties hereto that the vendor shall transfer to the purchaser all his properties in British Columbia or in California in any wise relating to coal or coal mines and fire-clay and all machinery, articles or things used, or which may be used in connection therewith, by proper conveyance in law, so as to vest in purchaser a good title thereto, free from all encumbrances upon the completion of this agreement. It is hereby for greater certainty declared that all such properties shall be deemed to be included in this agreement whether specifically mentioned, or not so mentioned, and that the companies (the shares of which are to be so transferred) shall be free and clear of all debts and liabilities at the time of such transfer, except only a mortgage of three hundred thousand dollars ($300,000.00) over certain properties of the Robert Dunsmuir Company, Limited, which is to pass with the assets of such companies to purchaser upon completion hereof.

"3. The Robert Dunsmuir Sons Company of California owns the yards and bunkers in the City of San Francisco in the State of California.

"4. The vendor will afford to the purchaser or to the purchaser, his executors, administrators or assigns, and to persons duly authorized by the purchaser in this behalf, full opportunity of examining the properties above mentioned and the records and data in the possession of the Wellington Colliery Company, Limited, in reference thereto.

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"5. The vendor will not give up possession of the properties owned by the said companies until paid in full.

"6. When paid in full the vendor will assign the shares and turn over the properties of the said companies to the purchaser, his executors, administrators and [or] assigns.

"7. The vendor will pay all expenses of operation and upkeep up to the day of giving up possession, and shall be entitled to retain for his own use all the earnings of the properties up to the day of giving up possession.

"8. The shares and properties will be assigned and turned over free from all liabilities.

"9. The properties of the two companies will be kept intact by the vendor during the continuance of this option subject only to shipment of coal in the ordinary course of business.

"10. If the vendor establishes his title to all the shares in the share

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capital of Robert Dunsmuir Sons Company, or if the purchaser secures a release to the vendor in respect of any claims against him or against such shares, the vendor will assign all the said shares to the purchaser without any increase in price.

"11. Time is of the essence of this agreement, and if the purchase price is not paid either in the one payment or in the instalments aforesaid this agreement and all the rights of the purchaser, his executors, administrators and assigns hereunder, shall absolutely cease and determine without any right to recover any part of the payment heretofore made."

On the following 12th of January, R. T. Elliott assigned the said option to the defendant William Mackenzie, who assigned to the plaintiffs the Canadian Collieries (Dunsmuir), Limited. The purchase price set out in the option was paid in full on the 16th of June, 1910, when the shares of the two defendant Companies were assigned by James Dunsmuir in pursuance of the agreement. The plaintiffs in the first action claimed that James Dunsmuir refused to transfer to them the benefits arising from existing contracts between himself and the Canadian Pacific Railway; that between the date of the agreement and of the final payment he distributed assets of the Wellington Colliery Company to the shareholders of said Company, nearly all of which were received and appropriated by himself; that between the said dates he appropriated certain quantities of coal of said Company; that he never conveyed to the plaintiffs certain ships and water craft that should have been transferred under the option, and that the properties of the two defendant Companies were not kept intact during the continuance of the option, as provided in section nine of the option. In the second action, in which James Dunsmuir was plaintiff, he claimed that the words "all the earnings of the properties" in paragraph seven in the agreement of the 3rd of January, 1911, included: (1) the moneys owing to the Wellington Company, less the cost of operation, on the 16th of June, 1910; (2) the moneys in the hands of agents or employees of the said Company on that date; (3) the gross proceeds of all coal mined and then ready for shipment at the mines of said Company at Cumberland and Extension on said date; (4) the gross proceeds of coke manufactured and ready for delivery at Union Bay on said date; (5) the gross proceeds of coal delivered to the Canadian Pacific Railway Company at the stock pile at Vancouver; and (6) any other moneys receiv-

Statement

able by the Wellington Company from their business operations up to said date. He prayed that an inquiry be had as to the amount of coal on hand on the 16th of June, 1910, at Cumberland and Extension and in the stock pile in Vancouver, and for a declaration that he was entitled to all moneys received by the defendants from the sale of the same.

The case narrowed down to two main questions: first, as to what properties passed to the purchaser under the words in the second clause of the option:

"All his properties in British Columbia or in California in any wise relating to coal or coal mines and fire-clay and all machinery, articles or things used or which may be used in connection therewith."

Second, what the vendor was entitled to retain as earnings under the seventh clause of the option, on giving up possession when paid in full.

The purchasers claimed under the clause in the first question certain coal areas, a number of vessels, barges and scows alleged to have been used in the business, and the surface rights to a property known as the Wellington farm, all of which had not been transferred at the time of the completion of the sale. Under the second question the chief contention arose over a stock of coal deposited in Vancouver by the Wellington Colliery Company under an agreement with the Canadian Pacific Railway, whereby the Colliery Company was to keep a reserve of coal in a stock pile in Vancouver for the use of the railway company, the reserve not at any time to be less than 20,000 tons or more than 40,000; the railway company were to pay for the coal as they took it from the pile. The trial judge held that the vendor was entitled to retain the surface rights of the Wellington farm, as it was vested in him personally and had no connection with the coal business, and the stock pile of coal at Vancouver must be considered as earnings and the vendor was entitled to the proceeds of the sale thereof. The matter of the coal areas and the ships and barges was referred to the registrar, and upon his finding, a final order was made directing that the coal areas be transferred to the purchasers and that the purchasers were entitled to the scows Tzar No. 1 and Czar No. 1, and the barges Barola and Oregon, but that the ship Wellington be retained by the vendor.

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The Canadian Collieries, Limited (the purchasers), appealed on the ground that the learned trial judge had erred in holding that the properties of the defendant Companies had been kept intact during the continuance of the option; that the moneys due from the Canadian Pacific Railway for coal taken from the stock pile in Vancouver was the property of James Dunsmuir; that the lands referred to as the "Wellington farm" should be retained by James Dunsmuir; and that the ship Wellington should be retained by James Dunsmuir, and on other grounds. James Dunsmuir cross-appealed, contending that the learned trial judge had erred in holding that any surface rights should pass under the agreement other than what were specifically mentioned, that the barge Oregon should not have passed under the agreement, and for other reasons.

Bodwell, K.C., for James Dunsmuir.

Davis, K.C., for Canadian Collieries and Mackenzie *et al.*

HUNTER, C.J.B.C.: I do not think that I will gain anything by reserving judgment, in view of the fact that everything has been said, as far as I can see, that can be of any assistance to the Court in coming to a conclusion. With respect to a transaction of this magnitude, there are, of course, two ways in which the parties may reduce into writing their intention with respect to the various matters dealt with—one by a short and compendious agreement such as we have before us, and the other by a much more elaborate agreement, which would have made all necessary provisions about all matters in detail. Of course, with respect to a transaction of this kind, it would have almost been impossible, I think, for the parties to have covered, by means of an elaborate detailed agreement, everything which it was the intention of the parties to deal with, and so, necessarily, from the character of the transaction, I think that they did the best thing that they could have done, namely, to reduce the agreement into a short and compendious scope.

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Now, that being the case, and there being no itemized list of the properties which were intended to be passed, but only a general description of them, it is, in the nature of things, necessary that parole evidence should be received in order to identify

the subject-matter of the agreement, at all events, with respect to the property which it is intended shall be transferred. I say that is in the nature of the thing because if that were not so, and if parties were driven in dealing with transactions of this magnitude, to carefully elaborate everything that they intended to pass, it would, of course, obviously be a serious impediment to the transaction of business. And, therefore, I think the law is quite reasonable in permitting parties to express their intention in a short and compendious fashion; and so it becomes necessary to allow parole evidence to be given in case of dispute, to identify the subject-matter of their bargain.

Dealing with the agreement in question, I think that two things stand out very clearly. The first is that there was an intention on the part of one party to sell and of the other to buy, all the coal *in situ* and all the mining machinery and appliances that were used in connection with the coal areas or mines which were to be sold by one and purchased by the other. The language reads, "all his properties in British Columbia or in California in any wise relating to coal or coal mines and fire-clay, and all machinery, articles or things used, or which may be used in connection therewith."

It is necessary, of course, for the Court to determine, either at once, or by means of a reference, there being a dispute, as to what properties did pass under that description. In the event of a dispute there must, I think, be a reference to find out what properties were of the character described in this sentence.

The second thing that stands out very clearly as well, I think, in the agreement, is that the vendor was to remain in the beneficial enjoyment of the property until he was paid in full. These paragraphs deal with that, *viz.*:

"5 The vendor will not give up possession of the properties owned by the said companies until paid in full.

"6 When paid in full the vendor will assign the shares and turn over the properties of the said companies to the purchaser, his executors, administrators and [or] assigns.

"7. The vendor will pay all expenses of operation and upkeep up to the day of giving up possession, and shall be entitled to retain for his own use all the earnings of the property up to the day of giving up possession.

"8. The shares and properties will be assigned and turned over free from all liabilities.

"9. The properties of the two companies will be kept intact by the

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vendor during the continuance of this option subject only to shipment of coal in the ordinary course of business."

Now these five clauses seem to me to make it very clear that if there was anything clearly intended by both parties and agreed to by both parties it was that until the purchasers paid the full amount which the agreement called upon them to pay, the vendor was to remain in the absolute beneficial enjoyment of the property, subject only to the limitations that he was not either to alienate or encumber the properties, but was to hand them over on the full payment of the money, unencumbered, and intact so far as alienation is concerned. With respect, then, to the properties which have passed, there being apparently a dispute as to some of the coal areas that have not as yet been transferred, I think that it is necessary to have a reference, if the parties are unable to agree, to find out what properties relating to coal mines and fire-clay have not yet been transferred.

With respect to the ships, I find no mention of ships in the agreement; and unless there are vessels, such as barges or scows, which can fairly be characterized as machinery, articles or things which were used in connection with the coal mine or coal mines, I do not think that those were intended to pass by the agreement. It will, however, be necessary, I suppose, to have a reference to find out which vessels or barges or scows, if any, were ordinarily used in connection with any of these mines. Such vessels or scows or barges would, I take it, pass under this agreement. But no vessel which was not ordinarily used in connection with the business of the mine would, I take it, have passed under this clause.

With respect to the farm, all I can say about it on the evidence is that that farm is vested in the vendor personally, that according to him, sales were made of the proceeds of the farm to the Wellington Colliery Company in the usual course of business, that the employees of that farm were not paid by the Colliery Company, but by himself; and so far as I can see, there is nothing proved to me that the farm could be said to be in any way appurtenant to the mine. I therefore think that the farm belongs to the defendant.

With respect to the question of the earnings, I take it that the

ordinary meaning of the word "earnings" is income derived from the carrying on of the business; which income, of course, may be in the nature of cash or of either written or unwritten money obligations. Now, the agreement expressly says that the vendor is to retain for his own use all earnings of properties up to the day of giving up possession. He is not, I think, as urged by Mr. *Davis*, entitled only to the earnings up to the 3rd of January, 1910, the date of the agreement. The language in the agreement is express; it says that he is entitled to retain all the earnings up to the day of giving up possession. It is only another way of saying, as I have already said, that he is entitled to the full beneficial enjoyment of the property until the last cent is paid. According to his evidence, and the evidence of Mr. Lindsay, the $700,000 which he withdrew arose wholly, at all events practically wholly, from the sales of the coal which had been mined. There was no evidence which I recollect which would suggest that any portion of the money, at all events any portion of the money worth considering—because I think Mr. *Davis* admitted that there might be an inconsiderable portion arising from some other source—for practical purposes there was no evidence which I recollect tending in any way to rebut the statement of the defendant that this money arose practically wholly out of the sales of the coal. From that point of view, I think they were clearly earnings. And to my mind it makes no difference whether he went through the form of declaring a dividend to possess himself of this money, or whether he did not. I therefore think it is not necessary to have any reference with respect to the question of the earnings, at all events, that $700,000, unless Mr. *Davis* is of opinion, on reflection, that there is a considerable portion of this money arising from some other source than the sales of coal.

Now, with respect to the coal and coke, I had some little doubt as to the true view to take of the rights arising with respect to these coal heaps. But the best conclusion I can come to is, with respect to the one that has been sold to the Canadian Pacific Railway, is that under the terms of the agreement which has been produced here, this coal now belongs to the Canadian Pacific, and has so belonged since the time of its delivery; that

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in other words, there is now only a debt due with respect to that coal to the Wellington Colliery Company. And if that is so, then the moneys arising from that sale must clearly be earnings. With respect, however, to the other coal which has not been sold, and the coke, I do not think that the ordinary meaning of the word "earnings" would be wide enough to sweep such coal and coke within the purview of the expression. As I say, I think the term "earnings" means income derived from the carrying on of the business, which income may be in the shape of cash or written or unwritten money obligations. The coal and the coke, other than the coal that has been delivered to the Canadian Pacific Railway, has never been sold or agreed to be sold; and, therefore, I do not think that it has been converted into earnings. I therefore think that those heaps of coal and coke, other than delivered to the Canadian Pacific Railway, belong to the purchasers.

I do not know that there is anything else.

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Mr. *Bodwell*: The book debts which they have collected come under the same head. They took over these book debts and collected them.

The Court: If those book debts are money obligations arising out of the sales of coal, I should say they are earnings.

The appeal was argued at Vancouver on the 13th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Argument

W. J. Taylor, K.C., for Canadian Collieries and Mackenzie *et al.*: The action arises out of the sale of mining property. There are two agreements, the interpretation of which are before the Court, the first being an agreement, or option, between James Dunsmuir and one Elliott, which is the original agreement and the interpretation of which is the main question in the action, and the second between the Wellington Colliery Company and the Canadian Pacific Railway Company. As to the second, we contend that, under section 5 thereof, the coal does not pass to the Canadian Pacific Railway until taken away from the pile, so that the pile becomes the property of the purchasers at the time the sale was completed.

Under the original agreement, we contend we are entitled to all vessels used in any way in connection with coal mining. The property known as the Wellington farm is on the surface of the old Wellington mine and is a blood relative of the coal seams. It is true that these mines have not been worked for some time, but we take the good with the bad, and this property was originally purchased by Mr. Dunsmuir for its coal.

Davis, K.C., (on the same side): Dealing only with clauses 6 and 9 of the original agreement, they contend they were only selling the real estate and the plant. The earnings can only be figured at the end of the year. Stocktaking takes place at the beginning of the year and then at the end, and the difference is the earnings. In this case the vendors declared a dividend between January and June, in spite of the fact that under the agreement they were to keep the property "intact." We contend that the agreement does not entitle them to the book debts. The trial judge gives no effect whatever to section 9 of the agreement. As to the $700,000, the question is what earnings this includes; the earnings to which the vendors are entitled should be confined to what was earned between the date of the agreement and of the final payment thereunder, *i.e.,* between the 3rd of January and the 16th of June, 1910.

Bodwell, K.C., for James Dunsmuir: This was a sale of the tangible assets. According to the judgment of the trial judge, the word "property" is confined to the "tangible assets." On the construction of documents, the grammatical and ordinary sense of the word must be taken, unless repugnant to the agreement: *Caledonian Railway Co.* v. *North British Railway Co.* (1881), 6 App. Cas. 114 at p. 131. The words "during the continuance of the option" is specially mentioned in clause 9, but does not apply to clause 7: *De Gendre* v. *Kent* (1867), L.R. 4 Eq. 283 at p. 285; *Wheeler* v. *Northwestern Sleigh Co.* (1889), 39 Fed. 347; Wigmore on Evidence, sections 2,462, 2,465, 2,470; *Bank of New Zealand* v. *Simpson* (1900), A.C. 182. The principle must be admitted that the word "earnings" must be interpreted as intended by the contracting parties: *Hudson's Bay Company* v. *Hazlett* (1896), 4 B.C. 450. Dunsmuir paid all charges to the date of the carrying out of the

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agreement, and the coal on hand, for the production of which he had paid, should be considered as earnings. Under the agreement between the Coal Company and the Canadian Pacific Railway, the property in the coal was in the Canadian Pacific Railway upon its being delivered on the Canadian Pacific Railway wharf. The question of how it was to be paid for does not affect the case. With relation to the surface rights, evidence of negotiations before the agreement was executed cannot be allowed in. The Wellington farm was held by the trial judge to belong to Dunsmuir, except such coal seams as there are underlying it.

Taylor, in reply: We are entitled to all the assets of the Wellington Company, as we own all the stock of the Company. With relation to the coal pile in Vancouver, under the agreement with the Canadian Pacific Railway, he referred to Beal's Cardinal Rules of Legal Interpretation, 2nd Ed., 59 and 60; *Ryckman* v. *Carstairs* (1833), 5 B. & Ald. 651; *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser & Co.* (1887), 12 App. Cas. 484.

Cur. adv. vult.

22nd July, 1913.

MACDONALD, C.J.A.: By an agreement dated the 3rd of January, 1910, James Dunsmuir gave to R. T. Elliott an option to purchase all the shares in the capital stock of the Wellington Colliery Company, Limited, and 51 per cent. of those of the R. Dunsmuir Sons & Company, for the sum of $11,000,000. Subsequently, Elliott assigned the option to William Mackenzie, whose rights thereunder the appellants have since acquired.

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The parties are unable to agree upon the interpretation of this agreement. We were told by counsel for the respondent Dunsmuir that he and Elliott, who was very familiar with Dunsmuir's affairs, understood the agreement perfectly, and we were invited to give the agreement the meaning which they say they meant it to bear. I cannot accede to the suggestion that we should give the agreement a meaning other than that which is to be found in the document itself, read in the light of the circumstances in which it was made. I do not doubt that the familiarity of both these gentlemen with the subject-matter

they were dealing with was responsible for what appears to me to be an unhappy phrasing of the document. James Dunsmuir being the owner of all the shares in the Wellington Colliery Company, the parties appear to have regarded the several properties and assets owned by it as the properties and assets of James Dunsmuir. What the vendor was selling was not, in strictness, the shares, but all the properties appertaining to the business, whether owned by the Company or James Dunsmuir. The agreement provided that the sale should be free from contracts for sale and delivery of coal except such as had been made in the ordinary course of business before the date of the option, and such current cargo contracts as might be subsisting at the time of the completion of the sale, which afterwards became fixed as of the 16th of June, 1910; the vendor should retain possession of the properties until the purchase price should be paid, and should then assign the shares and turn over the properties free from liability, the properties to be kept intact subject only to sale and shipment of coal in the ordinary course of business. Then section 7 provides that:

"The vendor will pay all expenses of operation and upkeep up to the date of giving up possession and shall be entitled to retain for his own use all the earnings of the properties up to the date of giving up possession."

It seems to me to be as if James Dunsmuir had said to the vendee: "I am the owner of all the mines, real estate, coal rights and appurtenances, and all machinery, articles and things used in connection with the same, or with the business I have been carrying on, and on the payment of $11,000,000 they shall be yours. I am not to alienate any of them except by sales of coal in the ordinary course of business. I am to pay the upkeep of the property and to take all the earnings which shall accrue up to the date of completion." If this be the right view of the transaction, then James Dunsmuir was, in my opinion, entitled to all the earnings, both of cash and outstanding obligations, belonging to the Company at the said date. In this respect I concur in the finding of the learned Chief Justice, who tried the action.

The mine was sold as a going concern, and all the coal mined and undisposed of, and the coke manufactured and undisposed

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of are, I think, to be considered as stock in trade, not earnings. The vendor was under a five-year contract with the Canadian Pacific Railway to keep a stock of coal at Vancouver to which the railway company could resort from time to time for its supply, on the terms mentioned in a written contract between them. That was a contract the obligations of which passed to the vendee, and was, I think, part of the properties of the company which the vendor was to keep intact. In any event, in my opinion, stock piles were not earnings.

I now come to the second branch of the case, namely, what properties or things were included in the following provision of the agreement:

"The vendor shall transfer to the purchaser all his properties in British Columbia or in California in anywise relating to coal or coal mines and fire-clay and all machinery, articles or things used, or which may be used in connection therewith."

It is obvious that that language must embrace properties and things beyond those actually belonging to the companies. In other words, properties and things belonging to James Dunsmuir personally. I am unable to agree with the judgment below that ships are not within that provision. They easily enough fall within the meaning of things, and I can find nothing in the context to exclude them. The suggestion is that if things of such consequence as ships were intended to pass to the purchaser, the parties would have mentioned them specifically. But in a transaction of the magnitude of this one, the ships and barges used in connection with the business were comparatively of little consequence, and when it is borne in mind that the whole undertaking was being sold as a going concern, I think it will not be difficult to conclude that all craft ordinarily used for transporting the product of the mines would be quite within the contemplation of the parties as things which would go with the rest.

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The question then arises as to what ships were "used or may be used in connection with the business." "May be used" is a wide term, but I think it must have been intended in the connection in which it was used to be restricted to things brought into use between the date of the option and the completion of

the sale. In other words, what the parties meant, speaking at the date of the option, were things then used, or which may between now and the completion of the sale be used, in connection with the business. I am also of opinion that the term "used" means ordinarily used. In my opinion, the ship Wellington was ordinarily used in connection with the business, and was, therefore, intended to pass to the purchaser. On the other hand, I think the ship Oregon was not ordinarily used in connection with the business, and was not intended to pass to the purchaser.

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The result is that I would vary the judgment below and the registrar's report by declaring that the appellants, the Canadian Collieries and William Mackenzie, are entitled to the stock pile, etc., and the ship Wellington, and that the respondent Dunsmuir (appellant in the cross-appeal), is entitled to the ship Oregon.

Success and failure being divided, I would allow no costs.

IRVING, J.A.: I concur with the reasons for judgment of my brother GALLIHER.

IRVING, J.A.

MARTIN, J.A.: The agreement before us is out of the common, and one to which it is not altogether easy to apply ordinary rules of construction, but in my opinion the judgment in the main appeal should be affirmed for the reasons there given, except as regards the coal heaps (stock pile) in Vancouver, which cannot, I think, on the true construction of the agreement between the Canadian Pacific Railway Company and the Wellington Colliery Company be held to "belong to the Canadian Pacific and has so belonged since the time of its delivery," as the learned trial judge puts it. To me, at least, it is clear that if that coal should be destroyed, the loss would not fall on the Railway Company.

MARTIN, J.A

The appeal should be allowed to that extent. The cross-appeal, I think, should be allowed as regards the Oregon.

GALLIHER, J.A.: I would allow the cross-appeal as to the barge Oregon. It would appear from the evidence of Lindsay

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that this barge was not regularly connected with the business of the Company, in fact, was used chiefly by the Pacific Freighting Company. In my opinion it is not within the term in clause 2 of the agreement.

As to the other matters cross-appealed against, I would dismiss.

On the main appeal, dealing first with the ships: The only one of the ships now in question to which I think the plaintiffs are entitled is the ship Wellington. This seems to have been built expressly for, and used almost exclusively in connection with the mines, and as I view it, falls within clause 2, "all articles or things used in connection therewith." There is evidence which, if admissible, would cause me to come to a different conclusion.

I have read the case of *Bank of New Zealand* v. *Simpson* (1900), A.C. 182, 69 L.J., P.C. 22, 16 T.L.R. 211, where the whole principle is discussed, and certain cases referred to, but I do not think the principle laid down in the cases can be applied here. The facts here, as appears from the evidence, are that one R. T. Elliott held a written option from Dunsmuir containing the very words we now find in clause 2 of the agreement sued on. Mr. Phippen, who was acting on behalf of Mackenzie while negotiations were going on to take over this option, drafted a number of clauses varying the option in some respects, and among them one which by express mention included ships. This was rejected by Mr. Elliott, who claimed that as between Mr. Dunsmuir and himself it was always understood that the ships were not to be included, and this clause was dropped, leaving clause 2 as it originally was in the option, and the deal was put through. In view of what took place as just stated, it may be that Mackenzie would be estopped as against Elliott, and possibly as against Dunsmuir (though as to this I express no opinion), from setting up any claim to the ships in question, and in that respect the evidence might be admissible, but that could not apply to the present plaintiffs, and as to them we are, I think, confined to an interpretation of the words themselves as they appear in the contract, and evidence of the character sought to be adduced here cannot be

received. In the cross-appeal I have already expressed my view as to the Oregon.

As to the ship Leelanaw, and the tug Pilot, I think there can be little question that these did not pass under the agreement.

I agree with the learned trial judge as to the disposition of the moneys in the treasury at the time of the option, and amounts since collected for coal and coke sold previous thereto, and for coal or coke sold up to the time of handing over the properties.

With regard to the stock of coal in the Canadian Pacific Railway bunkers, I, with respect, take a different view to that taken by the trial judge. I think Mr. *Taylor* applied the true test. If the coal in the bunkers was destroyed by fire, on whom would the loss fall? On my construction of the agreement between the Company and the Canadian Pacific Railway, this coal, and the benefit of the agreement passes to the plaintiffs.

As to the Wellington farm, this does not pass.

I would allow no costs of appeal to either party.

Appeal allowed in part.

Solicitors for Canadian Collieries (Dunsmuir), Limited: *Eberts & Taylor.*

Solicitors for James Dunsmuir: *Bodwell & Lawson.*

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MACGILL v. DUPLISEA *ET AL.*

Practice—County Court judgment in default of dispute note—Application to set aside—Terms—Costs.

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The plaintiff brought action for rent due under a lease of certain land given to the defendants, and for an account of gravel removed from the land and payment therefor. Prior to the commencement of the action the plaintiff had demanded security from the defendants for the amount due and they delivered over certain bonds as security, on the understanding that if satisfactory it was to be accepted and time given for payment of the indebtedness, but if unsatisfactory, was to be returned before action was brought. The plaintiff was not satisfied with the security, but he held the bonds and commenced action, and upon the default of the defendants in filing a dispute note, he entered judgment. An application by the defendants to set aside the judgment was dismissed.

Held, on appeal (*per* MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.), that the judgment be set aside and the defendants be allowed to defend upon their paying the costs of the application to re-open and of entering judgment, and that the plaintiff hold the bonds pending the final determination of the action.

Per IRVING and GALLIHER, JJ.A.: That the terms upon which the judgment should be set aside and defendants allowed to defend should be the payment of the costs of entering judgment and of the application to set same aside, also the payment into Court within a given time the money or other security to cover the plaintiff's claim.

Royal Bank v. *Fullerton* (1913), 17 B.C. 11, distinguished.

Statement

APPEAL from an order of MCINNES, Co. J. made at Vancouver on the 27th of September, 1913, dismissing the defendants' application for leave to defend after judgment had been entered by the plaintiff on a specially indorsed writ on default of dispute note on the 27th of August, 1913. On the 28th of August, 1913, by special leave, notice of motion was made to set aside the judgment and for leave to allow the defendants to defend the action. The default of the defendants' solicitor was due to a misunderstanding of the rule as to the time within which a dispute note must be filed.

The appeal was argued at Vancouver on the 5th of December,

1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

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Steers, for appellant (defendant): The judgment was irregular, or a nullity, on the ground that the plaint was not numbered in compliance with section 78 of the County Courts Act, Revised Statutes of British Columbia, 1911, chapter 53, and on these grounds the judgment should be set aside and the defendants allowed to defend.

We have a good defence, inasmuch as the action was on a covenant which read: "The lessees covenant with the lessors." The plaintiff in this action being only one of the lessors, non-joinder could be pleaded; non-joinder of parties plaintiff is a good defence: see *Roberts* v. *Holland* (1893), 1 Q.B. 665; *Hoodless* v. *Smith* (1912), 7 D.L.R. 280.

Before the action the plaintiffs had demanded security from the defendants, which had been furnished on the understanding that the security was to be examined, and if found satisfactory it was to be accepted and time given for payment of the claim; if unsatisfactory, the security was to be returned before action brought. As this was a question to try, the judgment should be opened on payment of costs of signing judgment and of the application to open.

Argument

W. P. Grant, for respondent (plaintiff): The defendants admit that the amount of the judgment is due, and they have not shewn any reason for not paying what was due except that they did not have the money.

MACDONALD, C.J.A.: The rule in cases of this kind is laid down in Holmested and Langton, citing some English cases, the terms usually imposed being payment of costs of the application; sometimes the bringing of the money into Court. That is to say, under some circumstances, when the Court thinks it would be equitable to require the defendant to bring the money in dispute into Court, that is done. But that is not the universal rule. In fact, it seems to be the exception. Now, in this case, defendant is willing to accept the terms of allowing the bonds to remain in the hands of the plaintiff

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as security, pending the final determination of the action. I think that this appeal should be allowed on those terms, that is to say, the defendants should pay the costs of the application below, and the costs of entering judgment, they undertaking that the plaintiff should hold the bonds in question pending the final determination of the action. Costs of this appeal shall follow the event.

There is this distinction between *Royal Bank* v. *Fullerton* (1913), 17 B.C. 11, and this case: In that case the trial judge set aside the judgment, and exercising his discretion, he imposed terms that the defendant should bring the money into Court or give security. In this case the learned judge below has refused the application, and when it comes before us, if we think the defendants ought to be allowed in the circumstances to defend, we have then to exercise our discretion as to the terms to be imposed. In *Royal Bank* v. *Fullerton, supra,* all three judges expressed the opinion that the terms imposed, that the defendants should give security for the debt, were rather harsh. I do not see any conflict between that case and the present one, in that aspect of it, except perhaps that this is a case in which we should give perhaps less consideration to the plaintiff because of the fact that he retained the bonds which he had no right to retain, and perhaps in so doing, incapacitated the defendants from paying the debt.

MACDONALD, C.J.A.

IRVING, J.A.: The common practice when setting aside a judgment obtained by default is well set out in a judgment of Bramwell, L.J. in *Collins* v. *Vestry of Paddington* (1880), 5 Q.B.D. 368 at p. 379, where he states the rule observed by him in cases of this kind for over twenty years.

The rule is this: wherever money will compensate, to open up a case; that is, where the Court is satisfied that there has been a slip, as there has been in this case.

IRVING, J.A.

Where the defendant puts in an affidavit of merits, the usual terms are that he pay the costs occasioned by the signing of judgment and the costs of the application to set aside the judgment, but there are cases in which the Courts have ordered the defendant, in addition to payment of those costs, to bring the

money into Court, or otherwise secure the plaintiff's claim. I think that this falls within that class of case. Each case must be decided upon its own merits, and must to a certain extent be in the discretion of the Court below. In this case the judge below, having regard to the offer made by the solicitor for the plaintiff, came to the conclusion that those were the terms he would impose. The defendant having rejected that offer, he therefore decided that the judgment should stand. I think there is no real defence in this case, and when I say that I think there is no real defence in this case, I do not wish to determine the action, but there are very peculiar circumstances. The defendants have set up several defences, some of which are technical. In the course of argument we have weeded one or two of them out. Coming to the fifth ground, the ground upon which they chiefly rely, they admit they are indebted to the plaintiff. They say the plaintiff agreed with them after the said indebtedness became due, that is to say, after the plaintiff's cause of action had accrued, that the plaintiff would accept security of certain bonds. Those bonds were submitted, but have not been accepted. There has been no settlement of the cause of action sued upon, by accord, satisfaction, merger, release, payment, or acceptance of negotiable instrument.

The defendants may have a cause of action for detention of the bonds, and they are claiming them in their counterclaim. I should allow them to proceed with that. I would order that judgment should be set aside on these terms: that the plaintiff should have his costs of the application and costs of setting aside the judgment, and that the defendant should within a given time bring into Court either the money or otherwise secure the plaintiff's claim, and if that is not done within a given time, then I should say that the order of the learned judge should stand.

IRVING, J.A.

I would like to point out that in the *Royal Bank* v. *Fullerton* (1913), 17 B.C. 11, we expressed the opinion that it was a hard case, and also that we expressed the opinion that it is good practice that the judgment should be set aside on the terms stated in *Collins* v. *Vestry of Paddington, supra.*

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MARTIN, J.A.: There is a meritorious defence to this action provided it can be substantiated. That is shewn by the fact that bonds were submitted to the plaintiff, and accepted by him, for investigation, and those bonds are still in the possession of the plaintiff; therefore, this action was prematurely brought. For the purpose of this application we must consider the merits of the defence, and, if having a meritorious defence, and judgment has been obtained by a slip, it is quite clear that the general rule is that no terms are imposed, but that judgment is set aside upon the payment of the costs of the entering of judgment and the application. The general rule is to be found in the Yearly Supreme Court Practice (1913) at p. 140, and it is clearly recognized as such in *Smith* v. *Dobbins* (1877), 37 L.T.N.S. 777.

MARTIN, J.A.

The imposition of any terms such as were suggested by counsel for the respondent, that there should be security given, or that the costs of the whole action should be payable forthwith, or the money paid into Court, was stated by this Court (of which I was not a member) in *Royal Bank* v. *Fullerton* (1913), 17 B.C. 11, to be too severe.

I think the order should be that the defendants be given leave to defend upon payment of costs of obtaining judgment and of the application to set the judgment aside.

GALLIHER, J.A.: The only defence that the defendants really have to this action is one that the action was premature; that there was an understanding that no action should be brought while those bonds were retained by the plaintiff. Now there is no pretence that if the bonds were in the hands of the defendants they would have a good defence to the action. I asked that question of counsel for the defendants, and that was admitted.

GALLIHER, J.A.

I think we must set aside the judgment, and on the question of terms I agree with my brother IRVING. As to the imposition of terms, I would say that the judgment of this Court should be that if within a given time security for the payment of the rent is forthcoming, or the money for the rent, the bonds should be delivered up; otherwise, the judgment to stand; costs of

the judgment and the application below, to the plaintiffs; costs of the appeal herein to the defendants.

It seems to me, as to the question of whether or not the action below was prematurely brought, it being admitted that there is no defence so far as any merits are concerned, that the only result of sending it back would simply be another trial below, in which more costs would be added, and supposing it is decided against the plaintiff, on the ground that it was prematurely brought, the plaintiff could deliver the bonds back to the defendants and immediately commence another action.

GALLIHER, J.A.

In regard to the case of the *Royal Bank* v. *Fullerton* (1913), 17 B.C. 11, I expressed myself as being of the belief, in that case, that those were pretty hard terms that were imposed by the judge in that particular case, but I do not view that case in the same light as this, because there the liability was disputed, but here there is no dispute as to the liability.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree with the reasons for judgment of the Chief Justice and my brother MARTIN, but wish to add this further, that as between practitioners, I think it is good practice, where a judgment is signed, and the dispute note is ready so soon after judgment has been signed, and where there is ability, as there apparently was in this case, to make an affidavit of merits, that practitioners would do well to try to make terms, but this Court has nothing to do with that.

The case comes before us in the form of judgment being entered regularly. Now, should we impose terms—other than in my opinion ought to be imposed, as indicated by the Chief Justice—what are the facts? Is there any element in the evidence before us that we disapprove of? I might say that the fact that these bonds were retained contrary to agreement is something I disapprove of; retained, as the plaintiff stated, to be handed to the sheriff when execution issued. That is something the Court must disapprove of. Every litigant is entitled to have the matter adjudicated upon by the Court, and there should not be premature execution. The retaining of the bonds by the plaintiff, and his stating that he would hand them to the sheriff to be realized upon when execution issued, is some-

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thing that a Court could not approve of. In this case, I think there are reasons for refraining from making such terms as would require the defendants to give any security or to pay the money into Court.

Appeal allowed on terms.

Solicitor for appellant: *Wm. Steers.*

Solicitors for respondent: *MacGill & Grant.*

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REX v. SPINTLUM

Criminal law—Stated case—Practice—Number of grand jury necessary to concur in finding true bill—Instructions from trial judge as to—Change of venue—Order as to—Criminal Code, Secs. 884 and 921.

In a county where twelve grand jurors are required to concur in the finding of a true bill, the Court of Appeal must assume, in the absence of evidence to the contrary, that a true bill returned by the grand jury was so found by the requisite number.

The entry in his book by the clerk of assize is a sufficient authorization of a change of venue, and can be proved by an exemplification of the proceedings.

When a judge is seized of facts from which it can properly be inferred that it is expedient to the ends of justice to make a change of venue, his decision becomes one of fact and not of law, and is not open to review by way of case stated.

On an application for change of venue when judge and counsel are seized of the facts, the usual practice of putting forward the facts by affidavit may, with the consent of counsel for the defence, be dispensed with.

Where a juror asks a question of a witness in order to ascertain if he has a fact already deposed to rightly in his mind, there can be no cross-examination on the answer made.

A prisoner on trial for murder cannot try on a pair of boots in the presence of the jury in order to shew that he cannot put them on his feet, under the pretext of making a statement.

Statement

CRIMINAL APPEAL by way of case stated from MORRISON, J. and the verdict of a jury in a trial for murder held at New Westminster spring assize on the 24th of June, 1913. The accused Paul Spintlum, with one Moses Paul, Indians, were

arrested at Ashcroft in December, 1912, for the murder of Alexander Kindness, near Clinton, in the county of Cariboo, May 3rd, 1912. From the evidence it appeared that one White had been found murdered on July 7th, 1911, about three miles from Clinton. Subsequently, at the inquest, a Chinaman named Ah Wye gave evidence, in consequence of which Moses Paul was arrested for the murder of White, and was lodged in gaol in Clinton in the latter part of August. About three weeks later he broke gaol, the accused Spintlum, who was a close friend of Moses Paul, having been seen on the same day loitering in the vicinity of the gaol. On September the 29th, Ah Wye, the Chinaman, was found killed, his head having been split open with an axe. Warrants were then issued for the arrest of Spintlum and Moses Paul, but they disappeared for some time and were not finally located until the 3rd of May, 1912, near Clinton, when a posse was organized in Clinton, consisting of seven men, including the deceased Kindness, who went in search, proceeding along the old Cariboo road. On reaching a point about six miles in a northerly direction from Clinton, three shots were suddenly fired at them from behind a log, the first hitting Kindness and killing him. A man was then seen behind the log, who got up and ran back into the woods. One of the men (Boyd) recognized him as Spintlum, but the others, although saying he was an Indian, and that he looked like the prisoner, could not identify him. Both Spintlum and Moses Paul were committed for trial at Kamloops on the 15th of March, 1913.

Statement

On motion of the two accused men, before GREGORY, J., an order was made on the 19th of May, 1913, changing the venue from Clinton to Vernon, in the County of Yale, and fixing the date of trial the 26th of May. At Vernon the total number summoned for the grand jury was thirteen; twelve only attended and were sworn, the said jury having been summoned under Schedule B, Revised Statutes of British Columbia, 1911, chapter 121.

HUNTER, C.J.B.C., who held the assize, did not advise or instruct the grand jury so summoned either that seven or any number was sufficient to find a true bill. The grand jury found

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a true bill against Paul Spintlum for the murder of Kindness and against Moses Paul as accessory, and against Moses Paul for the killing of White. Upon the trial the jury disagreed. Counsel for the Crown then applied for change of venue to New Westminster, on the grounds that the panel as originally summoned only consisted of 36 jurors, that 20 were challenged and 12 empanelled on the jury, leaving four names upon the list; that these four and whoever else might be summoned must have heard more or less of the evidence, and that they should not, therefore, go on with the second trial at Vernon at the present time; that there would be an assize at New Westminster in twelve days and the danger of losing witnesses in the meantime should be a bar to the trial being allowed to stand over until the fall assize at Vernon. An order was made changing the venue to New Westminster, where the trial came on for hearing before MORRISON, J. on the 27th of June, 1913.

The questions submitted were as follows:

"1. Ought the learned Chief Justice to have instructed the grand jury as to the number sufficient to find a true bill at Vernon, May 26th, 1912?

"2. Ought the order made June 4th, changing venue, to have contained the full signature of the Chief Justice instead of his initial and the signature and designation of the registrar and the seal of the Court?

"3. Ought said last-mentioned order, as well as the one by Mr. Justice GREGORY, to have been adduced as part of the evidence after the petit jury was empanelled at the trial at New Westminster, as well as the information as part of the case for the prosecution?

Statement

"4. Had the learned Chief Justice the jurisdiction to make the said order, or ought it to have been made?

"5. Was I right in permitting exhibit 1 as evidence?

"[A photograph of the scene of the murder, taken after the event, with the figure of a man shewing behind the log from which the shots were fired, was submitted in evidence by the Crown. After argument, the photograph was allowed in as exhibit 1, the figure behind the log having first been erased.]

"6. Moses Paul having been brought into Court:

"Ought these questions to have been allowed?

"'The Court: What do you say to this, Mr. *Henderson?*

"'*Henderson*: I have no objection to his putting in Moses Paul as an exhibit.

"'*MacNeill*: It is not an exhibit; you must talk seriously.

"'*Henderson*: It is just the same position as I am taking.

"'The Court: But you are not an exhibit.

"'755. Do you recognize this other man? Yes.

"'756. That is Moses Paul? Yes.

"'*MacNeill*: Let this man and the other stand side by side.

"'*Henderson*: I object.

"'The Court: I asked you and you said you did not.

"'*MacNeill*: Turn them round and let the jury see their backs. (This was done.)

"7. Having regard to questions 563, 564, 565, 566, 567 and 568 and answers:

"'563. Were you asked the question? I don't remember being asked the question.

"'564. Mr. W. W. Kelly was foreman of the jury? He was, but I will not be sure whether he was foreman or not.

"'565. Will you swear he did not ask you that question? I have no recollection of his doing so if he did.

"'566. Was that question asked of anyone else than you; was it asked by anybody, the coroner, or the jury, or Mr. Kelly? I don't remember.

"'567. Did he ask it of Ritchie? I expect he did.

"'The Court: Now, why do you say that; do you remember or not? A. I don't remember.

"'568. How would they come to say that they didn't identify the Indian? They might have said that perhaps without being asked.'

"Also having regard to question 729 and answer:

"'729. Was any question asked by anybody whether it was Paul Spintlum or Moses Paul that did the shooting? Not that I remember.'

"Was I right in making the following statements:

"'The Court: He said the reason was because he was afraid really because a Chinaman had been killed and he didn't take the coroner's inquest as a serious criminal trial.

"'*Henderson*: I want to put this question: Did the coroner or any of the jury ask if you could identify Spintlum?

"'The Court: He has answered you already, and my recollection is that he said no, and the other witness says the same thing.

"'*Henderson*: I have to ask that question, my lord.'

Statement

"8. Ought I to have told the jury to disregard question 1,095 and the discussion following same?

"[On the examination of the chief of police, the Crown sought to put in as evidence a printed notice of reward, copies of which had been sent to the witness in a Government envelope without covering letter. These were distributed for posting among the local policemen in the vicinity. After argument, the objection of counsel for the prisoner to the notice going in was sustained.]

"9. Ought I to have allowed question 1,111:

"'1,111. From your experience in the district, can you say whether there are any special 32 rifles in use? Whilst working on this case for more than a month last winter I made strict enquiry for this rifle and I think I only heard of three.'

"10. Was I right in allowing questions in the evidence of John MacMillan, and in the evidence of Joseph William Burr, dealing with alleged

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offences of Moses Paul and Paul Spintlum, other than this crime charged in this indictment?

"11. Was I right in sustaining the objections when cross-examination of witness Burr was attempted on the information laid?

"12. Was I right in refusing to permit Mr. *Henderson* to examine witness Burr upon a question put by a juror and answered?

"13. Were my rulings right in the circumstances related to the following circumstances:

"A pair of boots found some distance beyond the scene of the tragedy by a second posse, tracking the supposed murderers, was identified by an expert tracker as the boots that made the tracks in the ground behind the log from which the shots were fired. They were put in by the Crown as an exhibit, and the foreman of the jury said they would like some information as to the size of the prisoner's boots. Prisoner's counsel suggested the boots should be tried on the prisoner in the presence of the jury. The jury retired while the question was discussed as to whether boots could be tried on by the prisoner in the way of making a statement, or whether he could only do so by going into the box and subjecting himself to cross-examination. The Court held that the rule as to prisoners making a statement would not apply in a case such as this.

"14. Was I right, in summing up to the jury, in stating:

" 'Culpable homicide is also murder in certain special cases enumerated in section 260 of the Code. There are a number of these not of importance in this case, but included in the section are: escape from prison or from lawful custody, or resisting lawful apprehension; and in those cases culpable homicide is murder where the offender knows that death is likely to ensue, if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences named, or the flight of the offender . . . . and death ensues from such injury.'

"15. Was I right in stating in my summing up to the jury:

Statement

" 'Take all the circumstances into consideration, and can you say that Boyd is perjuring himself? Where is he contradicted? A great deal has been said about the coroner's inquest; and are you or are you not satisfied with Boyd's statement? He is a plain rancher living in this district, which we may reasonably assume was terrorized by the misdeeds of certain people there.'

"16. Was I right in stating in my summing up to the jury:

" 'He has now told it twice on oath. Do you think if there was any reason to believe that this man was perjuring himself that he would not have been incarcerated and would not be at large? There is a remedy for men doing this kind of thing. It is no use being mawkish about this thing; and if the defence say he is perjuring himself, then there is the remedy. It is the most serious piece of evidence in the case. His counsel says that Boyd's evidence is the only real evidence in the case, and if it were not for Boyd's evidence the case must fail—then why does not the defence get after Boyd? It is a very serious matter to question the oath of a man in this country.'

"17. Ought I to have told the jury, too, that Boyd might, of course, have been mistaken?

"18. Was I right, in my summing up, in making the statement:

"'Then, coming along to Mr. Fernie's evidence. Do you believe that Mr. Fernie and those under him were going on that expedition to attempt at any cost to pin this thing on somebody? Do you believe that for one moment? It is only my opinion, and it must not have the slightest effect upon you; it must not have any influence upon your own. But my opinion is that Mr. *Henderson* has not any such opinion as he expressed at all, and if he has, he is the only man who has; and he, perhaps, really would not so express himself except in the heat of his ardour in defending his client. Is there not a suggestion all through the defence that these men were engaged in concocting evidence? It may be that this charge affects me more than some people; but to my mind it is of the utmost gravity to suggest that a man is not telling the truth. If under certain circumstances it is suspected that a man is not telling the truth, there is a bounden duty to take certain action.'

"19. Was I right, in my summing up, in making the statement:

"'These two men were fugitives from justice in a sparsely populated community. Take this circumstance and couple it with certain evidence. Consider all the circumstances, and is it not a marvel that the fugitives did not know the police were following them up? The trackers actually saw their camp fires at several places.'

"20. Was I right, in my summing up, in making the statement:

"'It is for you to say whether you can accept McMillan's evidence. You heard it. Have you any reason to question it? Even if you disregard it and disregard the evidence of Boyd, what is there left? If you believe the rest of the evidence, what does it point to; in what direction is it constantly pointing? Gentlemen, you may retire and consider your verdict.'

"21. Was I right, in my summing up, in making the statement:

"'*Henderson*: With regard to what I said about Mr. Fernie, I did not wish to infer that he was deliberately concocting evidence. At the same time, I did say he was going ahead with a preconceived notion as to the crime, and acting accordingly. They took it for granted who had done it. The proclamation shows that; and now when they come to prove it, it is different altogether.'

Statement

"The Court: That is the statement from counsel, and if counsel wishes to put this before you in this way, it is not for me to prevent him. Now, Mr. *Henderson* has repeated this, and the responsibility is upon him. It is for you to say what justification Mr. Fernie had for the supposition that these were the guilty men—the proclamation is issued accordingly. I did not go so far into this, but Mr. *Henderson* has put it before you plainly. I said that Mr. *Henderson* did not wish to reflect upon Mr. Fernie, he knows him too well for that, and I thought he meant what he said perhaps in a Pickwickian sense. We all know that Mr. *Henderson* would do his best in trying to do his duty to his client. But I always feel it is not proper to go to great lengths in reflecting upon our constables, without whose care our community would be in a very unfortunate condition indeed, yet respecting whom reflections are so often made. I suppose it might be said that if you and I came into conflict with policemen often we might dislike them.'

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"'*Henderson*: There is no evidence that everybody believed what was in the proclamation.

"'The Court: I have been referring entirely to this posse. Mr *Henderson* says they went out with this preconceived notion, but I did not say that. I told you all along not to take the extreme statement of counsel. There is no evidence upon which to base that altogether, except the statement of Mr. *Henderson*, and I say he is responsible for that; I am not. You may retire.'

"22. Ought I not, in the light of my address, to have told the jury more fully that they were the sole judges as to the facts, and that my statements were made merely to aid them in coming to a conclusion?

"Ought, for any of these reasons, the accused to get a new trial, or the indictment be quashed?"

Statement

The appeal was argued at Vancouver on the 26th of November, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Argument

Stuart Henderson, for prisoner: Question 1: Owing to the recent change in the law as to the number of grand jurors required to find a true bill, the trial judge should have told the jury the law required that twelve should agree on finding a true bill: see *Sproule* v. *Regina* (1886), 1 B.C. (Pt. 2) 219. A man is presumed to know the law only in regard to himself: Halsbury's Laws of England, Vol. 9, pp 346-7, paragraphs 669-70, and Vol. 18, p. 242, paragraph 589. On the fourth question we contend there were no proper preliminary steps taken: see *Rex* v. *Gaffin* (1904), 8 Can. Cr. Cas. 194, and the change was not made on a right principle: see *Reg.* v. *Ponton* (1898), 2 Can. Cr. Cas. 192; Tremeear's Criminal Code, 2nd Ed., p. 700, section 884; Crankshaw's Criminal Code, 3rd Ed., section 884, pp. 957-9. On question 10, as to allowing in evidence, to shew that accused was guilty of criminal acts other than that covered by the indictment, see *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57; *Rex* v. *William Henry Ball* (1911), A.C. 47; *Rex* v. *Chitson* (1909), 2 K.B. 945; *Rex* v. *Dyson* (1908), 2 K.B. 454. Taking questions 10 and 11 together, it is prejudicial to the accused to connect him with Moses Paul, either in connection with the murder charged against Moses Paul or in connection with his breaking gaol: see Russell on Crimes, 7th Ed., Vol. 3, pp. 2,097, 2,111, 2,113. There is no evidence to connect Spintlum and Moses Paul: see

Reg. v. *Chasson* (1876), 16 N.B. 546; *Rex* v. *Ellis* (1910), 5 Cr. App. R. 41; *Griffits* v. *Payne* (1839), 11 A. & E. 131; *Reg.* v. *Geering* (1849), 18 L.J., M.C. 215. As to question 13, we submit the prisoner can try on the boots found to be those worn by the man who was behind the log from which the shooting took place. He can do this by way of a statement without becoming a witness. With reference to the last question, the jury were not properly instructed as to their being the sole judges of the facts: see *Rex* v. *Coulter* (1910), 5 Cr. App. R. 147; *Rex* v. *Beeby* (1911), 6 Cr. App. R. 138.

A. H. MacNeill, K.C., for the Crown, under direction of the Court, confined his argument to questions 1, 4, 10, 11, 14 and 19: On the first question, objection should have been taken before the grand jury found a true bill at Vernon. On question 4, see *Rex* v. *Roy* (1909), 14 Can. Cr. Cas. 368. The Court will not interfere with the discretion exercised by the trial judge. On question 10, the evidence that accused was charged with other crimes should be let in to rebut the allegation of the defence that accused shot in self-defence: *Makin* v. *Attorney-General for New South Wales* (1894), A.C. 57 at p. 65; *Rex* v. *William Henry Ball* (1911), A.C. 47. On question 11, as to disallowing the cross-examination of Burr on the information he laid against Moses Paul for the murder of White, this was properly refused on the ground of public policy: see Phipson on Evidence, 3rd Ed., pp. 163-4; Roscoe's Nisi Prius Evidence, 16th Ed., p. 171.

Argument

Henderson, in reply.

Cur. adv. vult.

4th December, 1913.

MACDONALD, C.J.A.: The crime of which the prisoner was convicted was committed in the County of Cariboo. The place of trial was changed at his instance to the County of Yale. A true bill was found at the assizes at Vernon, in the latter county, by a grand jury consisting of twelve. As the law applicable to that county then stood, twelve jurors were required to concur in the finding. The learned Chief Justice of British Columbia, who presided, gave the grand jurors no instructions on this point.

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The first question submitted to us in the reserved case is:

"Ought the learned Chief Justice to have instructed the grand jury as to the number sufficient to find a true bill at Vernon on the 26th of May, 1912?"

There is no evidence before us that twelve did not concur in finding the bill. In the absence of such evidence, I think I must hold that what was done by the grand jury was regularly done and that when they returned a true bill it was a bill found by the requisite twelve jurors.

The trial at Vernon having resulted in a disagreement of the jury, application was made on behalf of the Crown to change the place of trial from Vernon to New Westminster, in the County of Westminster. The application was made to the presiding judge at the assize in rather an informal way. The circumstances justifying the change were not set forth on affidavits, but this was not objected to by prisoner's counsel. The learned judge and the counsel on both sides were already seized of the facts upon which the application was based. They were, shortly: that there was not a sufficient panel of jurors from which to obtain a new jury at that assize; that to traverse the case to the next assize at Vernon would result in several months' delay in bringing the accused to trial, with the consequent danger of loss of evidence by the death or disappearance of Crown witnesses; and that an assize was to be held in New Westminster within two weeks of that date. There were also other special circumstances in the case peculiar to it, which developed during the trial and were known to the trial judge and to counsel. Counsel for the accused opposed the change of venue, although he recognized the propriety of not trying the accused at the then sittings. The learned Chief Justice, considering that is was in the interest of justice that the place of trial should be changed, ordered the place of trial to be changed to New Westminster.

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I state these facts more especially with reference to the fourth question, but they also have a bearing upon the second question, which is:

"Ought the order made on the 4th of June, changing the venue, to have contained the full signature of the Chief Justice instead of his initial and the signature and designation of the registrar and the seal of the Court?"

My answer to that question is: No. No formal order at all was necessary. The entry in his book by the clerk of assize was sufficient without a formal order, and could, if necessary, have been proven in the ordinary way by an exemplification of the proceedings.

The third question was abandoned.

The fourth question is:

"Had the learned Chief Justice jurisdiction to make the said order, or ought it to have been made?"

The order referred to is the order changing the venue from Vernon to New Westminster. It is a question as to whether, on the trial and conviction of the accused at New Westminster, the learned judge who presided there (MORRISON, J.) could properly state that question for the opinion of this Court, under the provisions of sections 1,013 and 1,014 of the Criminal Code. Prisoner's counsel strongly objected to the change, not only before the judge at Vernon, but as well before the prisoner was arraigned for trial at New Westminster. In the view I take on another phase of the question, it becomes unnecessary to express an opinion as to whether or not the question of the validity of the said order can be reviewed on a stated case in the manner attempted here. I base my answer to this question on this: that by section 884 of the Criminal Code the judge is given power to change the place of trial whenever it appears to him to be expedient to the ends of justice to do so. When he is seized of facts from which it could properly be inferred that it is expedient to the ends of justice to make the change his decision becomes one of fact, not one of law, and hence not open to review by way of case stated to this Court. As I have already said, the circumstances under which the place of trial was changed were exceptional, and the usual practice of putting the facts forward on affidavit was not adopted. That, however, is a matter of practice and, besides, was assented to, properly enough, under the peculiar circumstances of the case, by counsel for the prisoner, the learned judge being seized of the facts.

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While what was done was proper under the circumstances of this case, I nevertheless think that, as a matter of practice, the course adopted and the class of evidence required in such cases

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as *Reg.* v. *Carroll,* cited in 2 Can. Cr. Cas. at p. 200; *Reg.* v. *Ponton* (1898), *ib.* 192; *Reg.* v. *McEneany* (1878), 14 Cox, C.C. 87; and *Reg.* v. *Phelan, ib.* 579, and many others, ought to be adhered to.

I would answer the other questions submitted, namely, questions 5 to 22, both inclusive, by saying that the course adopted by the learned judge was not wrong.

MARTIN, J.A.: In my opinion the questions reserved should be answered as follows:

Question 1: In the negative. No precedent has been cited in support of an objection to a charge to the grand jury. In the eye of the law that body occupies a very high position, and, as the grant inquest of the county, is supposed to and should comprise the "wisest and best" of its residents, including, in England, at least, "a number of magistrates" (*cf. In re The Sheriff of Surrey* (1860), 2 F. & F. 238), in short, those who would presumably thoroughly understand their duty. While I agree that it would have been a proper thing to have explained to them any change in regard to the performance of their duties (and I may say that when I used to go on circuit I adopted that course), yet other judges may well take the view that I did so *ex abundanti cautela,* and I am quite unable to say that the omission to do so carries with it any legal consequences. The maxim *Omnia præsumuntur rite et solenniter esse acta* (Broom's Legal Maxims, 8th Ed., 737) is specially applicable to the acts of such a tribunal, particularly in a change in their own body which they would almost inevitably take cognizance of and inquire into.

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Question 2: In the negative. This is an order of the Court, under the seal of the Court, and verified by the signature of the proper officer, the district registrar (who acted as clerk of assize), after being initialled by the judge. Different Courts have different ways of authenticating their orders. For example, those of this Court are initialled by a judge thereof and sealed and signed by the registrar. Orders made by one of us in chambers are signed by the judge who made them. In the Admiralty Court all orders are signed by the registrar, except those for

payment out of money, which are signed by the judge and witnessed by the registrar. In the Court below (*i.e.,* Supreme Court of British Columbia), orders are signed as they are in this Court. In the County Courts, it has been held by the old Full Court in *Martin* v. *Brown,* 21st June, 1905, that in general the mere entry of judgment in the registrar's book at the trial is a sufficient record of the judgment without taking out any formal order, and the formal judgment at the trial, which was in fact taken out in that case, and held valid, was tested "By the Court," by the registrar, and sealed.

Question 3: This was abandoned.

Question 4: In the affirmative. This is the most substantial of the questions raised, and after a careful, I may even say anxious, consideration of it, I can only reach the conclusion that, assuming the prisoner's counsel is right in his contention that we can review the exercise of discretion by the trial judge at the Vernon assizes, I find myself unable to say that the course adopted by the Court was not, on all the facts which were fully within its cognizance, "expedient to the ends of justice." A discretion of this nature, exercised under the wide language of the statute, must be reviewed with great care, but I am free to admit that had it appeared on the facts before the Court, which were all in its own cognizance (and, therefore, in this case, not necessary to be placed upon affidavit, as they should otherwise be), that the exercise of the discretion had proceeded upon a mere matter of convenience either to the parties or to the Court, that would not, on the authorities, have been a sufficient ground upon which the Court could have founded its "satisfaction" in a legal sense. But the reference of the Court and counsel to the chances of witnesses disappearing is an additional and weighty element which the Court was entitled to estimate in the exercise of its discretion to bring on the case for trial at the earliest possible date, particularly in the light of the fact that during the trial it clearly appeared that a reign of terror had for a considerable time existed in the district where the crime was committed, which admittedly had an effect upon the evidence of the chief witness of the Crown in his testimony before the coroner's jury, owing to the fact that a Chinaman, who

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recently had given damaging evidence at a coroner's inquest against an Indian associated with the prisoner, had been murdered.

Many of the leading cases on change of venue have been cited to us, and the rest are to be found noted in the text books, *e.g.*, Roscoe's Criminal Evidence, 13th Ed., 220; Archbold's Criminal Pleading, 24th Ed., 142-3; Short & Mellor's Crown Office Practice, 2nd Ed., 106-7; Halsbury's Laws of England, Vol. 9, p. 350; Bowen-Rowland's Criminal Proceedings, 2nd Ed., 49, 77; and Crankshaw's Criminal Code, 3rd Ed., 957; and I have consulted a great number of them in the endeavour to find one which had the unusual feature in the case at bar, *viz.*: that the venue was changed twice, first at the request of the prisoner, and second, of the Crown. I have been trying to find some decision to support the very plausible view that once an accused had been removed from his original county it would not require so strong a case to remove him again into another, on the theory that his newly-acquired rights in the county of his selection would not be so deeply rooted as those in the county of his origin, because, as is said in Chitty's Criminal Law, 2nd Ed., 1826, Vol. 1, p. 177:

> "In the earlier periods of our history it was even necessary that the offence should be tried by a jury of the visne or neighbourhood, who were then regarded as more likely to be qualified to investigate and discover the truth than persons living at a distance from the scene of the transaction"

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—a reason which could have no application once the trial had been removed from that visne. Apparently the point has not come up for decision before now, so I am free to express my view thereon, and it is that it is not necessary to shew so strong a case for a second change, since it cannot be presumed that a jury of a third county would even theoretically be any less qualified to do justice than a jury of a second, and therefore, the accused should be prepared with some definite and substantial answer to such an application when properly grounded. But he has shewn nothing of the kind here, consequently his objection to the course adopted cannot prevail.

Questions 5, 6 and 7: In the affirmative.

Question 8: In the negative.

Question 9: Abandoned.

Questions 10 and 11: In the affirmative, having regard to the relevant points at issue.

Question 11: In the affirmative, on the ground of public policy.

Question 12: In the affirmative, in the circumstances. But if the learned judge intended to lay down the general rule that there could be no cross-examination upon an answer made to a juror, that cannot be supported. Here, however, the juror was simply trying to ascertain if he had got a fact, already deposed to, rightly in his mind.

Question 13: In the affirmative. Assuming that the prisoner had the right to make a statement, short or long, as he chose, that does not entitle him to give a mere demonstration in dumb show. You cannot make a statement by stating nothing; that is obviously an attempt to get in evidence under the guise of making a statement. Of course, even a dumb person may make, in effect, an oral statement (as well as a written one) by well-known means, but that is only in reality another form of speech by employing a different agency to attain that object.

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Questions 14 to 21: All in the affirmative. These relate to the charge, and it is sufficient to say that reading it as a whole, (which must be done: *Jones* v. *Canadian Pacific Railway Company* (1913), 29 T.L.R. 773), in the light of the relevant issues and the evidence adduced, no valid objection can be taken thereto.

Question 22: In the negative. The jury could only understand from what was said to them that they were the sole judges of the facts. Whenever the learned judge expressed an opinion he coupled it with that direction.

It follows that all the questions reserved should be answered in favour of the Crown.

GALLIHER, J.A.

GALLIHER, J.A. agreed with MACDONALD, C.J.A.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: Crown case reserved by MORRISON, J. Under the Criminal Code as it now stands, any question of law may be reserved for the opinion of the Court of Appeal, and no proceeding in error shall be taken in any criminal case. Twenty-two questions in all have been submitted, upon all of which my

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opinion is that no miscarriage of justice occurred and no mistrial took place.

The only question which has given me concern is No. 4, dealing with the change of venue from the County of Yale to the County of Westminster. The change of venue was made by HUNTER, C.J.B.C. at Vernon, in the County of Yale, and as submitted, reads in this way:

"4. Had the learned Chief Justice the jurisdiction to make the said order, or ought it to have been made?"

This question is answered by me as all the other questions are, that no error has taken place—or, specifically, I answer yes.

The change of venue, in my opinion, in any view of it, was essentially a matter of procedure, and, if the order made did not proceed upon proper material, it is only a matter of irregularity, and cannot avail now to implement or bring about a new trial. That it is within the category of an irregularity I refer to *Clerk* v. *The Queen* (1861), 31 L.J., Q.B. 175, a decision in the House of Lords.

It may be of interest to, at this point, observe that at the motion of the accused the venue was changed from the county in which the offence was committed, that is, the County of Cariboo, to Vernon, in the County of Yale, and the challenged change of venue was at the instance of the Crown, to New Westminster, in the County of Westminster. The accused being out of his county at his own instance—even under the earlier cases—was without the environment of insistence upon trial in the locality where the offence was committed; further, the proceedings shew he was given the opportunity to return to the original venue. There is no suggestion that the trial itself worked any prejudice to the accused in being held at New Westminster, and I think it can be well stated that admittedly the accused has been in no way prejudiced by being tried in New Westminster.

MCPHILLIPS, J.A.

In approaching matters of this kind, Courts must always give the closest attention to the statute law. Parliament is the highest Court, and it must be assumed that public policy, if contained in express words in the statute law, is the declared public policy, not impairing of course—save where abrogated—

the inherent power of the Court to act upon well-understood principles of public policy. Now, what is the duty cast upon the Court of Appeal? It is to be found in section 1,019 of the Criminal Code, as follows:

"1,019. 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: Provided that if the Court of Appeal is of opinion that any challenge for the defence was improperly disallowed, a new trial shall be granted."

In my opinion no substantial wrong or miscarriage was occasioned on the trial. Further, in my opinion, no question of law arising either on the trial or on any of the proceedings, preliminary, subsequent or incidental thereto in fact took place, because, in my opinion, even if the change of venue was a question of law—which I deny—the Court of Appeal, acting under section 1,019, has a plain duty, and that is, if no substantial wrong has ensued, the conviction stands, and examining the language of section 1,019 it will be seen that it is most precise in its terms "something not according to law was done at the trial." Can it be said that the order made affecting the change of venue "was done at the trial"? I would unhesitatingly say: No. If authority is needed to support this view, I would refer to *Faderman, Laurio, and Gordon's Case* (1850), 1 Den. C.C. 565. The change of venue was all anterior to the trial of the accused. In the case above cited, Parke, B. at pp. 567-8 said:

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"Properly, there is no trial till issue is joined. 'Convicted' in the statute means 'convicted on the trial.'"

Alderson, B. at p. 568:

"You say the trial begins with the arraignment; how then do you explain the question which is put to the prisoner after arraignment: How will you be tried? At what point in the proceedings did the trial by battle begin? Trial is a very technical word."

In further support of the opinion to which I have come, see *Reg.* v. *Clark* (1866), L.R. 1 C.C. 54; *Reg.* v. *Gibson* (1889), 16 Ont. 704 at pp. 710-11, Armour, C.J.; *Brisebois* v. *The Queen* (1888), 15 S.C.R. 421; *Morin* v. *The Queen* (1890), 18 S.C.R. 407.

The Court of Appeal, in acting under section 1,019, has to

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address itself to what was done "at the trial" and "on the trial." Ritchie, C.J. in the *Morin* case, at p. 415 said:

> "Until a full jury is sworn there can be no trial, because until that is done there is no tribunal competent to try the prisoner. The terms of the juryman's oath seem to shew this. As it is to be inferred as we have even from what Lord Campbell says that all that takes place anterior to the completion and swearing of the jury is preliminary to the trial."

I am not unmindful of section 1,014 of the Criminal Code, which admits of there being reserved "any question of law arising either on the trial or any of the proceedings preliminary . . . . thereto," but in my opinion, change of venue is not a question of law, and, if, contrary to my view, it is a question of law, it is a mere irregularity, as before stated, and upon the evidence before us has worked no injustice, and no "substantial wrong or miscarriage was thereby occasioned on the trial" (section 1,019), and I refer to the language of Sir Charles Fitzpatrick, C.J. in *Allen* v. *Rex* (1911), 44 S.C.R. 331 at p. 339:

> "I cannot agree that the effect of the section is to do more than, as I said before, give the judges on an appeal a discretion which they may be trusted to exercise only when the illegal evidence or other irregularities are so trivial that it may safely be assumed that the jury was not influenced by it."

Here we have no question of influence upon the jury, nothing which goes to the merits; a mere matter of procedure, and nothing established that the accused, duly tried by a jury—by a Court—which I hold to be one of competent jurisdiction, was in any way prejudiced by being tried at New Westminster. The language of Gwynne, J. in the *Morin* case, *supra,* at pp. 452-4, seems to me to be particularly in point in this case.

MCPHILLIPS, J.A.

The evidence before this Court is that a condition of terrorism existed in the neighbourhood where the crime was committed; that is, witnesses who could give relevant and material evidence were intimidated by the fact that they were in peril of their lives, and the evidence is that a material witness in one case of murder was recently done to death. It was owing to the strong feeling existent—of resentment to this condition of things—that the accused applied for a change of venue, believing that he would not receive a fair trial; therefore, the ends of justice admittedly would be best served by a removal as far as possible from the scene of the offence.

Reverting to the order made by the Chief Justice changing the venue from the County of Yale to the County of Westminster, I have this further to say, that his decision, discretionary in its nature, which must be admitted, founded, as the evidence shews, upon cogent evidence—the peril that unless the trial be had at an early date the witnesses of the Crown would not be forthcoming; that upon the particular facts of this case the Chief Justice had evidence before him that entitled him to make the order, and were his decision reviewable, I would hold that the order was rightly made. Whilst I say this, I pause to observe that it is perhaps the better practice to insist upon the usual formal evidence being adduced that a long course of practice has called for—not that I in any way hold that it is essential—where the ends of justice have been attained, as in this case.

On the whole, I am of opinion that no substantial wrong or miscarriage was occasioned by reason of any of the matters called in question and reserved for the consideration of this Court, that is, there being no miscarriage of justice, the conviction should stand. This opinion, arrived at by me, was only arrived at after the consideration of the foregoing authorities, together with the following, amongst other authorities: *Reg.* v. *Murphy* (1869), L.R. 2 P.C. 535, 38 L.J., P.C. 53; *Rex* v. *Meyer* (1908), 24 T.L.R. 621; *Rex* v. *Bertrand* (1867), 16 L.T.N.S. 752; *Rex* v. *Christie* (1913), 30 T.L.R. 41; *Rex* v. *Westacott* (1908), 25 T.L.R. 192; *Reg.* v. *Palmer* (1856), 5 El. & Bl. 1,024; *Clark* v. *Reg.* (1860), 29 L.J., Q.B. 232, (1861), 31 L.J., Q.B. 175, 9 H. L. Cas. 184; *Rex* v. *Michaelson* (1912), 19 R. de J. 49. MCPHILLIPS, J.A.

Conviction affirmed.

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1913

Nov. 24.

COOK v. NEWPORT TIMBER COMPANY.

Negligence—Damages—Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (1), and Sec. 7, Subsecs. (1) and (3)—Pleadings—Defect in statement of claim—May be cured by defence.

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A specific denial in the defence of an allegation that the plaintiff should have, but neglected to plead in an action for damages under the Employers' Liability Act, cures the defect, if the issues are thereby defined in the pleadings with sufficient clearness for the trial.

APPEAL by defendant Company from the judgment of MORRISON, J. and the verdict of a jury in an action tried by him with a jury on the 19th and 20th of March, 1913, for injuries sustained by the plaintiff while in the employ of the defendants at their logging camp. The plaintiff had charge of a donkey-engine by which logs were hauled to a skidway, or landing, from which they were loaded on to cars on the defendants' logging railway, the skidway consisting of five skids about nine feet apart. The logs were hauled from a distance of about 800 feet by a main cable line from the donkey-engine, joined to one end of a tag-line, the other end of which was attached to a choker hooked on the end of the log. The main cable line and the tag-line were joined by a link. About an hour before the accident, the centre (or third) skid in the skidway, or landing, having become loose and out of position, was taken out altogether, by order of the defendants' superintendent. Work continued, and after a number of logs had been hauled to the landing, a log, in coming up, dropped in the space caused by the removal of the centre skid and jammed against the fourth skid. The link connecting the main line and tag-line broke and the main line flew back, striking the plaintiff, breaking his arm and causing other injury. The plaintiff claimed damages by reason of the negligence of the defendants in allowing the skidway to remain in an unsafe condition, in not providing a proper means of signalling the plaintiff as the logs came to the skidway, and for improperly using a link instead

Statement

of a swivel between the main cable line and the tag-line. Plaintiff also pleaded the Employers' Liability Act, but simply alleged that the accident was caused by negligence. The defendants, in addition to the usual defence, set up that the alleged defective condition of the ways, machinery, plant and appliances used in connection therewith, did not arise from the neglect of the defendants, or some person entrusted by them with the duty of seeing that the condition of the ways, machinery, plant and appliances were proper and fit for the purposes for which the same were used, and the failure to discover or remedy the defective condition (if any) was not owing to the neglect of the defendants or of any person entrusted by the defendants.

Statement

The appeal was argued at Vancouver on the 24th of November, 1913, before MACDONALD, C.J.A., IRVING, MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

Ritchie, K.C., for appellant Company: There is no common law liability, no defective system or negligence. The only question is whether there is liability under the Employers' Liability Act, section 3, subsection (1), read with section 7, subsection (1). *Dublin, Wicklow and Wexford Railway Co.* v. *Slattery* (1878), 3 App. Cas. 1,155, applies here. See also *Fairweather* v. *Owen Sound Quarry Co.* (1895), 26 Ont. 604. If a defect arises in the works, ways, etc., the defect must be brought before the governing body: see *Brooks, Scanlon, O'Brien Co.* v. *Fakkema* (1911), 44 S.C.R. 412 at p. 417; *Fralick* v. *Grand Trunk Ry. Co.* (1910), 43 S.C.R. 494 at p. 521. In this case the system was properly installed in the first place and a defect arose later that did not come to the knowledge of the governing body: see *Lovegrove* v. *London, Brighton, and South Coast Railway Co.* (1864), 16 C.B.N.S. 669; *Gallagher* v. *Piper, ib.* 677; *Cribb* v. *Kynoch, Limited* (1907), 2 K.B. 548; *Young* v. *Hoffmann Manufacturing Company, Limited, ib.* 646; *McFarlane* v. *Gilmour et al.* (1884), 5 Ont. 302. Under the Employers' Liability Act a case has not been made out, as the plaintiff only pleaded that there was negligence, without stating any further facts.

Argument

Martin, K.C., for respondent (plaintiff): There is an action

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at common law: *Ainslie Mining and Ry. Co.* v. *McDougall* (1909), 42 S.C.R. 420; and under the Employers' Liability Act there is no doubt that there is a case, as the issues are clearly defined on the pleadings as a whole.

Ritchie, in reply.

MACDONALD, C.J.A.: I would dismiss the appeal. Without expressing any final opinion as to whether a case was made out at common law or not, I am satisfied that a case was made out under the Employers' Liability Act. The plaintiff's pleading was not as specific as it ought to have been, but the defendants, in their statement of defence, pleaded what the plaintiff ought to have pleaded, and therefore, when the case went to trial, the issues were clearly enough defined on the pleadings. When I say that, I am not to be taken as approving of this manner of pleading. I think I pointed out a short time ago that sufficient attention was not being paid by practitioners to the question of pleading, and sufficient attention is not being paid, I am sorry to say, to keep the parties within their pleadings at trial, or to amend, if an amendment should be necessary. I think the course of the trial also shews that the parties intended to fight it out under the Employers' Liability Act. The evidence is sufficient to justify the conclusion which the jury have come to, both on the question of negligence of the defendant in not maintaining the skidway in a proper and safe condition, and also on the question of alleged contributory negligence on the plaintiff's part.

MACDONALD, C.J.A.

IRVING, J.A.: In this case I feel some doubt. The statement of claim was drawn very badly, but the defendants, however, have done their best to cure the defects that the draftsman of the statement of claim had created. On the whole, I think that there was a case on the pleadings made out, either under section 3, subsection (1), or under section 7, subsection (1). The point upon which I entertain doubt is this: I am satisfied that Norton was the person who had superintendence entrusted to him within the meaning of section 7, subsection (1), but the question, "Was there negligence on the part of

IRVING, J.A.

Norton in not having the defect remedied at once?" was not put to the jury as fully as it ought to have been put.

I would dismiss the appeal.

MARTIN, J.A.

MARTIN, J.A.: I quite agree that the appeal should be dismissed. I have read through the whole charge. It is not as satisfactory as it ought to have been, but at the same time I think it sufficiently raises the real issues in the case. I do not think there is any other course open to us, upon the evidence, which is certainly ample to sustain the verdict, than to adopt the course of dismissing the appeal.

GALLIHER, J.A.

GALLIHER, J.A.: I agree that the appeal should be dismissed. I entertain no doubt that the plaintiff could not succeed at common law, and that he should succeed under the Employers' Liability Act. Taking the pleadings as a whole, and taking the course pursued at the trial, right up to the end, this Court cannot say that that question was not tried out, and that the jury has not passed upon that question.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree that the appeal should be dismissed, for this reason: In the first place, I do not consider that the action has been established at common law. I think the defendants are not liable at common law. I think, however, it is clear that liability has been established under the Employers' Liability Act. And when I say that, I would like to observe that in this particular case this Court would have been greatly assisted if questions had been submitted to the jury, and, speaking for myself, I think that it would be in the interest of and advancement of justice if the trial judge would always submit questions, especially when either counsel before him requests it.

In this particular case, I feel myself bound to say that my opinion of the evidence is that there was a person in superintendence coming within the Employers' Liability Act, section 7, subsection (1), also, of course, considering section 3, subsection (1); that is, you have to take both enactments together; that there was a person in superintendence, a person who was charged with seeing that the ways were in proper condition. That person would have been said to be Norton, if the jury

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had answered a question directed to who was in superintendence. That being so, then this plaintiff is excused from section 7, subsection (3), which he would not be excused from if there was not there present at the time, somebody in superintendence who knew of the condition of things. Norton was that person. He undertook to go on and work, with the knowledge that there was that defect, with the knowledge that there was that risk. Under section 3, subsection (3), that excuses this plaintiff. Unquestionably Norton was the plaintiff's superior, and the plaintiff knew that Norton knew of the condition, because it was brought promptly to his knowledge by Norton saying: "This will be remedied tonight." It seems to me one could not obtain a case where the facts made it more clear that the employer had taken the risk, and that risk was the imminence, or probability, or likelihood of an accident. In my opinion there is liability, but it is only under the Employers' Liability Act.

MCPHILLIPS, J.A.

Appeal dismissed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *Taylor & Hulme.*

C. W. STANCLIFFE AND COMPANY, LIMITED v. THE CORPORATION OF THE CITY OF VANCOUVER.

COURT OF APPEAL

1912

Nov. 28.

Practice—Appeal—Evidence—Duty of party desiring to appeal.

It is the duty of a party who may want to carry a case further to have the evidence at the trial so taken that on appeal it can be properly and clearly brought before the Court.

Ex parte Firth; In re Cowburn (1882), 19 Ch. D. 419, adopted.

C. W. STANCLIFFE & CO. v. CITY OF VANCOUVER

APPEAL by plaintiff Company from the judgment of GRANT, Co. J. of the 9th of May, 1912, in an action for the price of a concrete mixer. The defence was a denial of any contract to purchase, or in the alternative, that the article was unsuitable and that there was no acceptance. At the trial there was no stenographer present, but the judge took notes of the evidence for the plaintiffs, and reserved a motion for nonsuit at the close of the plaintiffs' case. The case for the defence was then proceeded with, but the judge took no notes of the evidence. At the close he dismissed the action, with costs. Plaintiffs appealed.

Statement

The appeal was argued at Vancouver on the 21st of November, 1912, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Whiteside, K.C., for appellant.
Hay, for respondent.

28th November, 1912.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by my brother IRVING.

MACDONALD, C.J.A.

IRVING, J.A.: There were no notes of evidence whatever. The objection was taken, and in support of the objection Mr. *Hay* cited *Ex parte Firth; In re Cowburn* (1882), 19 Ch. D. 419, a decision of the Court of Appeal, in which the rule is laid down that where solicitors expect to appeal, it is their business to have the evidence taken, so that the evidence can be

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brought before this Court. That rule, laid down in 1882 by the Court of Appeal, has been copied into the text books, and there it has remained—a permanent warning for the guidance of the profession ever since. Speaking for myself, I think that we ought to adhere to it.

MARTIN, J.A.

MARTIN, J.A.: I agree. The notes of evidence taken by the learned trial judge are admittedly defective in essentials, but he is unable to supplement them, though applied to for that purpose, and it is admitted that counsel are unable to supply the deficiency by "such other materials as the Court may deem expedient," as provided by marginal rule 875, subsections (*b*) and (*c*), which I draw attention to, and also to *Rendell* v. *McLellan* (1902), 9 B.C. 328, which should have been cited to us. In such circumstances it would be hopeless to attempt to set aside this judgment, which depends on findings of fact.

GALLIHER, J.A.

GALLIHER, J.A.: I concur.

Appeal dismissed.

Solicitor for appellant: *A. M. Whiteside.*
Solicitor for respondent: *J. G. Hay.*

MOMSEN v. RUDOLPH.

CLEMENT, J.

1913

Jan. 9.

COURT OF APPEAL

June 17.

MOMSEN v. RUDOLPH

Malicious prosecution—Charge of theft of boat from assignee for benefit of creditors of builders—Acting on solicitor's advice—Malice—Damages.

A person who institutes a criminal proceeding, honestly believing in his case, is entitled to act on the advice of his counsel, but the duty is placed upon him to put before counsel everything, including all circumstances in mitigation of the accused's action.

APPEAL by defendant from the judgment of CLEMENT, J. in an action claiming $25,000 damages for malicious prosecution, tried at Vancouver on the 27th and 28th of November, 1912. The plaintiff was arrested at 5 o'clock in the morning, at his hotel, upon a warrant charging him with the theft of a boat, the property of the defendant. He was taken to the police station and detained there until the opening of the Court, when, the case being adjourned until the next day, he was released on bail. On the charge coming on for hearing, it was dismissed. The facts out of which the prosecution arose were that the Woodman Baxter Company assigned to the defendant for the benefit of their creditors. This company, a boat-building concern, had at the time of their assignment a motor boat under construction for Momsen & Rowe, of which firm plaintiff is a member. The boat was being built under a contract which provided for payments from time to time as construction progressed, and at the date of the assignment the builders had received some $1,540 on account, but the boat, in her then state, was not worth more than $1,000. The day before the assignment, one of the building firm, named Woodman, informed Rowe that they had better take the boat back and finish her themselves, at the same time inviting him to attend a meeting of the creditors. Rowe attended this meeting, and informed the creditors of the position of affairs, and also of the suggestion of Woodman. He also asked the creditors if they would complete the contract, but submitted that the

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June 17.

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boat, as she stood, was the property of his firm. The creditors did not agree in this, and nothing was done in the way of an arrangement about completing the boat. Plaintiff went to the builders' yard, took possession of the boat, and affixed two notices on her: "Trespassers, keep off; Momsen & Rowe." Later, defendant went to the yard to take possession under the assignment, and found plaintiff in possession of the boat. He did nothing in the direction of taking possession of the boat for the creditors, nor of asserting their right to it then, but subsequently negotiations took place between the parties as to the right to the boat, and defendant offered to relinquish all claim for $300, which was refused. Defendant, being about to sell the boat, plaintiff's firm issued a writ, and an injunction was obtained restraining the defendant from dealing with the boat pending the trial of the action. The injunction was subsequently dissolved, but in the meantime Momsen & Rowe had purchased most of the equipment of the bankrupt builders, and were proceeding to finish the boat, using said equipment in doing so. The judge, in dissolving the injunction, expressed some opinion as to the possession of the boat passing to the defendant under the assignment. He thereupon renewed his claim, increasing his demand to $500. By this time the vessel was ready for launching, and was in premises held by plaintiffs' firm. After the boat was launched, and tied up to the float, defendant consulted his solicitors, with the result that plaintiff was prosecuted, as mentioned. The learned trial judge gave judgment for plaintiff for $1,000 and costs. The defendant appealed.

E. A. Lucas, for plaintiff.

M. A. Macdonald, for defendant.

9th January, 1913.

CLEMENT, J.

CLEMENT, J.: At 3 o'clock in the morning of the 11th of September last, the plaintiff was arrested at his room, occupied by him for some months previously, in a hotel on Seymour street, Vancouver, upon a warrant charging him, upon an information laid by the defendant, with the theft of a boat, the property of the defendant as assignee of Woodman Baxter Com-

pany. He was taken to the police station and there detained in custody until the opening of Court on the morning of the 11th, when his case was adjourned until next day, the plaintiff being released on bail. On the 12th the case was dismissed.

The plaintiff alleges that this prosecution of him by the defendant was undertaken maliciously and without reasonable or probable cause; and in this action he seeks damages accordingly.

The facts out of which the prosecution arose, as I find them on the evidence, are as follows: on the 10th of August, 1912, the Woodman Baxter Company assigned to the defendant all their property liable to be taken in execution for the benefit of their creditors. They were boat-builders, and previous to the assignment they had under construction a 45-foot motor boat for the firm of Momsen & Rowe, of which firm the plaintiff is a member. There was a written contract which provided for payment from time to time as construction advanced. At the date of the assignment for the benefit of creditors the Woodman Baxter Company had received $1,540 on account, but the boat, as she then stood, was worth not much more than $1,000. Under those circumstances, on the day before the assignment to the defendant was executed, Woodman informed Rowe, the plaintiff's partner, that they, Momsen & Rowe, had better take the boat and finish her themselves, asking him at the same time to attend a meeting of the creditors, which was to be held that day to discuss the situation. Rowe did attend at this meeting, at which the defendant, who is also secretary of the British Columbia Credit Association, was also present. When the question was raised as to the boat in question, Rowe informed the creditors of his firm's position, informed them of what Woodman had told him, *viz.*: that it would be better to take the boat and finish it themselves and asked them if they, the creditors, would like to take up the contract and finish the boat. He claimed the boat, as she stood, as the property of his firm, but the creditors did not acquiesce in that view, and nothing in the way of any arrangement was arrived at. On the same day the plaintiff Momsen went to the builders' yard and took possession of the boat, affixing to her two notices, one on each

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side: "Trespassers keep off; Momsen & Rowe." The premises occupied by the builders were held by them as lessees at a monthly rental and there were on the property a large open-roofed shed, an open tank, and two or three smaller sheds or shacks, in which paints and tools were kept. After the assignment to defendant, he went to the premises to take possession. He found the plaintiff in possession of the incompleted motor boat, and saw notices which plaintiff had put up. He said nothing and did nothing to indicate any intention on his part to take possession of the boat in particular. He did not even go aboard. He locked up the shacks and took away the books, remarking to Woodman, after looking about the premises, that there was not much, apparently, for the creditors. The next material date is the 20th of August, but between the date of the assignment and the 20th of August there were interviews between the defendant and Rowe, Rowe insisting that the boat was the property of his firm, and the defendant taking the stand that it had passed to him under the assignment; if so, the moneys advanced by Momsen & Rowe would, he claimed, be a claim against the estate. Working it out roughly along these lines, he offered to relinquish all claim on the boat for $300, which offer Rowe persistently refused to entertain. During one of these interviews the defendant intimated that he would sell the boat, and Rowe asked him how he could make delivery. I

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should have mentioned that during all this time the defendant had not, so far as Momsen & Rowe were aware, any one in actual possession of any part of the assets on the builders' premises, but it appears that the defendant, about the 12th of August, engaged the night watchman at an adjoining mill to keep an eye upon the premises, presumably, of course, at night. With this exception, the defendant did nothing to or upon the premises and did not attempt to interfere with the plaintiff's possession of the motor boat. But when the defendant spoke of selling the boat, Rowe consulted his firm's solicitors with the result that on the 20th of August a writ issued claiming specific performance of the agreement for the construction of the boat, or in the alternative, for delivery of her to Momsen & Rowe, the plaintiffs in that action, and for an injunction to restrain defendant from

selling, disposing of or otherwise dealing with the boat. This claim for delivery would throw doubt on the question of possession. It would seem to be in the nature of an admission of the defendant's possession, and were it not for what occurred a few days later, would be a strong point in defendant's favour. An interim injunction was obtained *ex parte* on the 20th of August, which continued operative until the 3rd of September, when it was dissolved, the learned judge, MURPHY, J. expressing, it is said, a strong opinion that the property in the boat had passed to the defendant under the assignment. But while this injunction was in force, further interviews took place between Rowe and the defendant, neither receding from his position as to the legal point involved. As to the possession of the boat, however, there was a decided strengthening of Momsen & Rowe's position. On the 24th of August they paid the arrears of rent due by the builders to their landlord and took a lease to themselves for another month, paying the rent in advance. On the 26th of August the defendant, as assignee, sold to Momsen & Rowe the "stock, building, fittings, etc., of Woodman Baxter Company, excepting one painted row boat, band-saw machine and electric motor," for $130; and about the same time dispensed with the services of the night watchman, of whose employment he had never told the plaintiff. Momsen & Rowe were proceeding to finish the boat, but apparently not much was done to her before the 24th of August, but on the 26th of August the sale by the assignee to Momsen & Rowe, as above mentioned, was made, with full knowledge on defendant's part that Momsen & Rowe were going on to finish the boat, and, indeed, the band-saw machine and electric motor (excepted from the sale) were left with Momsen & Rowe to be used by them in their work upon the boat. A clearer case of actual possession than Momsen & Rowe's possession of the motor-boat in question it would be difficult to imagine. True, the defendant did not relinquish his claim to a right of property in her, and he did, on the 28th of August, notify Momsen & Rowe that they would put further work upon her at their own risk. On the 3rd of September, as above mentioned, the injunction was dissolved, and defendant

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received notice of this from his solicitors, who also told him of the learned judge's expression of opinion on the question of the property passing to him under the assignment. He thereupon saw Rowe and increased his claim to $500 (Rowe says $700), for which amount he was willing to relinquish all claim upon the boat. Rowe again declined to pay anything. By this time the boat was ready for launching. She was in Momsen & Rowe's possession, upon premises also in their possession, and in order to her completion in the way of interior fittings she was in the most open way, in broad daylight and after two or three days' open preparatory work, launched on the 5th of September and taken to the premises of Momsen & Rowe in Coal harbour, tied to their wharf or float, where she remained for about two weeks. The defendant learned on the 6th that the boat had been launched and apparently jumped to the conclusion that she had been taken away by Momsen, the plaintiff, and at once turned over to the ultimate buyer (one Keith). At all events, without seeking information from Momsen & Rowe, and after speaking to the inspectors, he consulted his solicitors on the 10th of September, and was advised to prosecute Momsen for theft. I feel constrained to say that a grosser outrage upon a respectable citizen it is difficult to conceive. I cannot imagine how any solicitor, on the facts known to the defendant, as I have set them out above, could advise such a prosecution. I do not believe that the real facts were laid before the solicitor. The defendant swore that

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> "Otto A. Momsen on or about the 5th of September, 1912, at Vancouver, B.C., did fraudulently and without colour of right, convert to his own use a boat, the property of the informant as assignee of Woodman Baxter Company."

How the defendant, with his knowledge of the facts, could honestly swear to such an information, passes my comprehension. The whole thing was a glaring misuse of the criminal law as a step in a civil proceeding, and I am quite satisfied that the defendant's answer, first given on his examination for discovery, that his principal idea was to get the boat back, represents his real state of mind. It was, he thought, the right thing to "do next" in the litigation then pending. Without warrant and without enquiry he, as I have intimated,

jumped to the conclusion that the boat had been placed in hiding, when a telephone message to Momsen & Rowe would have disclosed that she was still in their possession at their own float, with Momsen & Rowe's sign over it in Coal harbour. He knew Momsen & Rowe as respectable business men in a large way of business, and he knew that the whole amount at issue was a few hundred dollars. If it is permissible in any case to infer malice from want of reasonable and probable cause, this, in my view, is pre-eminently that case; and the defendant, moreover, in my opinion, acted upon indirect and sinister motives, as I have already held.

CLEMENT, J.

There will be judgment for the plaintiff for $1,000, with costs.

The appeal was argued at Victoria on the 17th of June, 1913, before MACDONALD, C.J.A., IRVING and GALLIHER, JJ.A.

M. A. Macdonald, for appellant (defendant): The boat passed to the estate under the assignment: see *Longdon* v. *Bilsky* (1910), 22 O.L.R. 4; *Prentiss* v. *Anderson Logging Co. and Jeremiason* (1911), 16 B.C. 289; and assuming the boat did not pass, the defendant's position would be the same: see Halsbury's Laws of England, Vol. 3, p. 260; *Sir James Laing & Sons, Limited* v. *Barclay, Curle & Co., Limited* (1908), A.C. 35. The defendant must see that he has all material facts and that they are all submitted to counsel before he undertakes a prosecution, and his action was a practical compliance with this: see *Truesdell* v. *Holden* (1913), 25 O.W.R. 419; *Hicks* v. *Faulkner* (1882), 46 L.T.N.S. 127.

Argument

E. A. Lucas, for respondent (plaintiff): The facts were not fully disclosed to counsel by the defendant. He did not disclose the fact that Momsen was in actual possession of the boat and that he had men working on the boat; the defendant is, therefore, liable: see *Ford* v. *Canadian Express Co.* (1909), 21 O.L.R. 585; *Brown* v. *Hawkes* (1891), 2 Q.B. 718; Halsbury's Laws of England, Vol. 19, p. 684.

Macdonald, in reply.

MACDONALD, C.J.A.: I would dismiss the appeal. I think

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there was a great deal of fault on both sides. Whether the boat was in possession of the assignee or not, it is clear that upon the assignment being made, it became the property of the assignee; what was the property of the assignor at the date of the assignment undoubtedly became the property of the assignee. The rights of the parties—if there was any doubt about them—could have been tried in the civil Courts. Mr. Momsen was not entitled to take the law into his own hands and take possession in the way he did after warning that the assignee would insist upon his rights.

The assignee, I think, acted in a manner which is not to be criticized up to a certain point. He first consulted his inspector. His inspector suggested he should consult the solicitor of the estate. Had he stated to the solicitor all the facts known to himself, or which he ought to have ascertained, he could shelter himself behind the advice of his solicitor. Unfortunately, he did not state all the facts—that is to say, all the material facts, *i.e.*, the fact that he had sold part of the gear to the plaintiff, while the plaintiff was in possession, perhaps wrongfully, but at all events in possession, of the boat, and was putting in the gear, and the fact that he had lent other gear and machinery to the plaintiff knowing that that was to be used in the completion of the boat by the plaintiff. Those were the matters which might very well have influenced the advice of counsel, but they were not disclosed. I do not suggest they were fraudulently withheld or with any bad motive, but they were withheld. Therefore I am afraid the defendant must take the consequences. He is not entitled to rely upon the advice he received from the solicitors to the estate.

MACDONALD, C.J.A.

IRVING, J.A.: In this case the judge found the defendant had some indirect motive in bringing the prosecution. I do not see how we can say that he was wrong on the facts.

IRVING, J.A.

People who set the law in motion are to a certain extent favoured by those in charge of the administration of justice. Instead of submitting the case wholly to the jury, the finding of the judge is required. This reference to the judge acts as a safeguard to the person laying the information. The result

is a peculiar trial, the anomaly being that it is partly by judge and partly by jury.

It has been laid down that a man honestly believing in his case proceeding criminally is entitled to act on the advice of his counsel. A man of reasonable prudence would consult his counsel, and if he follows his advice he ought to be protected. While that shield is thrown about him, on the other hand, there is placed upon him the duty of putting before counsel everything, including all circumstances in mitigation of the accused's action. In this case it seems to me that the defendant did not put these circumstances before counsel; the judge has found he did not. If he did place them before counsel he could not have put them before him clearly. In either case he must accept the responsibility of not having stated his case to counsel fully. I would dismiss the appeal.

IRVING, J.A.

GALLIHER, J.A.: I agree in dismissing the appeal. I do not think I can add anything useful to what I have said in the course of the hearing.

GALLIHER, J.A.

Appeal dismissed.

Solicitors for appellant: *Russell, Macdonald & Hancox.*
Solicitors for respondent: *Lucas & Lucas.*

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Dec. 3.

PRETTY v. DODD

PRETTY v. DODD *ET AL.*

Master and servant—Contract with non-resident of Province for service within Province—Servant treating contract as legal for portion of term — Estoppel — Money advanced for transportation — Right of recovery—Master and Servant Act, R.S.B.C. 1911, Cap. 153, Sec. 19.

P. entered into an agreement with D. in London, England, whereby D. was to go to British Columbia and enter into possession of and work P.'s farm for at least a year at a salary of $700 a year. P. was to advance £100 for D.'s transportation expenses, which was to be repaid from D.'s salary as it came due. P. advanced the £100 and D. went to British Columbia, where he lived upon and worked P.'s farm for two and a half months, when he left. In an action by P. for the return of the money advanced for transportation, it was held by the trial judge that the agreement being void under section 19 of the Master and Servant Act, the action should be dismissed.

Held, on appeal, that there should be a new trial.

Ashmore v. *Bank of British North America* (1913), 18 B.C. 257, followed.

Statement

APPEAL from the judgment of GRANT, Co. J. in an action tried at Vancouver on the 27th of May, 1913. The plaintiff entered into an agreement with the defendant in London, England, in May, 1912, whereby the defendants were to go with their families to British Columbia and enter into possession of the plaintiff's farm at Harrison river, they undertaking to work the farm for one year at a salary of $700, the plaintiff to provide a house and accommodation and to allow the defendants the use of the products of the farm as far as were necessary for the household. The plaintiff also agreed to pay the transportation of the defendants from England, which was to be repaid out of the first year's wages. The plaintiff then advanced £100 for the defendants' transportation and they went to British Columbia and entered into possession of the plaintiff's farm. After remaining on the farm for two and a half months, the defendants left. The plaintiff brought action for the recovery of the money advanced for the defendants' transportation from England. The defendants pleaded the Statute of Frauds, in that the payment was part of the consideration of an agreement

that could not be performed within a year, also that the claim was barred by the Master and Servant Act, and that there was gross misrepresentation on the part of the plaintiff as to general conditions on and about the farm that relieved the defendants from service under the contract. It was held on the trial that the contract was void under section 19 of the Master and Servant Act, and the action was dismissed.

The appeal was argued at Vancouver on the 3rd of December, 1913, before MACDONALD, C.J.A., MARTIN, GALLIHER and MCPHILLIPS, JJ.A.

E. M. N. Woods, for appellant (plaintiff): This is not a void contract under the Master and Servant Act. In any event, we are not trying to enforce the contract; we are suing for the moneys advanced to the defendants: *Ashmore* v. *Bank of British North America* (1913), 18 B.C. 257. The contract being adopted by the defendants, they cannot turn and say it was void, and even if it is a void contract, that only applies to the performance of labour or services. The fact of paying the £100 to the Canadian Pacific Railway Company on the defendants' behalf, and at their request, carries with it the obligation to pay it back.

Argument

Griffin, for respondents: The evidence of the contract should not be allowed in under the Statute of Frauds, as the contract would not be performed within a year: *Harris* v *Dunsmuir* (1897), 6 B.C. 505.

MACDONALD, C.J.A.: I think the appeal should be allowed and that the case should go back for a new trial. It is unnecessary to give reasons respecting the application of the Master and Servant Act, because this Court has already expressed its opinion on that point in the case of *Ashmore* v. *Bank of British North America* (1913), 18 B.C. 257, and the learned trial judge will have that opinion before him when it comes up again. He did not have it at the time he gave judgment.

MACDONALD, C.J.A.

I think the appellant should have the costs thrown away in the Court below, as well as the costs of this appeal.

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MARTIN, J.A.: I agree that the case should go back for a new trial, and I think there is no doubt that as the legal result of the evidence which has been brought before us, and which a jury would believe, the plaintiff will recover, at least so far as concerns the payment of the money advanced for the passage here. As to the other phase of the case, under the Master and Servant Act, it is governed by *Ashmore* v. *Bank of British North America* (1913), 18 B.C. 257.

GALLIHER, J.A.

GALLIHER, J.A.: I do not think we should dispose of the case here, because we have not the whole of the facts before us. In taking into consideration what the terms were between the parties, you have to take the whole arrangement; and one of the matters that has not been brought to our attention is, as my learned brother MCPHILLIPS has just mentioned to me, that part of the wages were to be paid back by the children when they got work in Vancouver. On the whole case, I do not see how it can be determined until all the evidence has been gone into and passed upon by the Court.

MCPHILLIPS, J.A.

MCPHILLIPS, J.A.: I agree.

Appeal allowed, and new trial ordered.

Solicitors for appellant: *Brydone-Jack & Woods.*
Solicitors for respondents: *Martin Griffin & Co.*

ANDERSON *ET AL.* v. KOOTENAY GOLD MINES *ET AL.*

FORIN, CO. J.

1913

Sept. 22.

ANDERSON v. KOOTENAY GOLD MINES

Mechanic's lien—Mine—Mortgagors—Lien holders—Increased value through lien-holder's labour—Must be ascertained to take precedence—Work of taking out ore—Mechanics' Lien Act, R.S.B.C. 1911, Cap. 154, Secs. 9 and 10.

The provisions of section 9 of the Mechanics' Lien Act do not give relief to lien holders as against prior mortgagees, unless, from the proceedings at the trial, the increase in the value of the mortgaged premises can be ascertained.

Lien holders for work consisting entirely of the taking out of ore from a mine, cannot, except when it is strictly development work, enforce their liens as against a prior mortgagee.

Statement

ACTION to enforce mechanics' liens; tried by FORIN, Co. J. at Nelson on the 22nd of September, 1913.

Argument

A. M. Johnson, for plaintiffs: Section 9 of the Mechanics' Lien Act does not apply to a mine, as it is impossible to value works or improvements in a mine, and the statute being unworkable, it could not have been the intention of the Legislature to include mines under the words "mortgaged premises," and further, to absolve a mortgagee's interest from liability, notices, under section 10 of the Act, should have been posted.

Wragge, for first mortgagee: In a large majority of cases where a mine is improved by work, such improvement is quite capable of being valued, for instance, general development, blocking out of ore, the erection of buildings, tramways, and the construction of mills, power plants, etc., and in the present case the evidence shews that the value of the property has decreased by the work done. In order to give effect to the plaintiffs' contention, section 9 must be read out of the Act, and there is nothing in the Act, or in the existing conditions at the time of the passing of the Act, that would warrant this.

The general words of section 10 cannot govern the special exception of the mortgagee as set out in section 9, as the mort-

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gagee, far from being required to post notices, must, under section 9, actually authorize the work in writing, unless the work increases the value. Section 10 is limited to works or improvements constructed, and must be construed strictly. Construction cannot be stretched to cover stoping of ore.

Moffat, for second mortgagees and defendant Company.

FORIN, CO. J.: There is no doubt that the main object of the Mechanics' Lien Act was to give every person a lien for work and services upon or in a mine, building, etc., but where prior mortgages existed, the provisions of the section dealing with mortgages (section 9) are quite inadequate to give relief to lien holders of the class before us, unless in the proceedings at the trial the increase in the value of the mortgaged premises can be ascertained. It is not contended that the work done in this instance increased the value of the premises, and section 9 would have to be read out of the Act before judgment could be given as against the mortgagee's interests.

In *Salmon* v. *Duncombe* (1886), 11 App. Cas. 627, in delivering the judgment of the Court, Lord Hobhouse at p. 634, said:

Judgment

"It is, however, a serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law."

I must hold, however, that in so far as work in taking out ore, unless in strictly development work, the miner and other employees at a mine cannot enforce their liens against the premises or property as against the interest of the mortgagees.

MURPHY, J.

1913

Dec. 4.

KIRK AND MUSGRAVE v. HARVEY *ET AL.*

KIRK AND MUSGRAVE *v.* HARVEY

Vendor and purchaser—Mortgage for part of purchase price—Non-registration of under Companies Act—Second mortgagee's knowledge of prior unregistered mortgage—Effect of—Vendor's lien—R.S.B.C. 1911, Cap. 39, Sec. 102.

A person (knowing that a first mortgage, given by a company to secure the unpaid portion of the purchase price, is held by the original vendor) who obtains a mortgage on the same land subsequently, is not entitled to priority by reason of prior registration under the Companies Act.

Where the original vendor and the ultimate purchaser are the real parties to a sale of property, the vendor's lien is not destroyed by the interposition of a nominal purchaser as vendor to the ultimate purchaser.

ACTION tried by MURPHY, J. at Victoria on the 17th of November, 1913.

Statement

The plaintiffs, the owners of Pier Island, B.C., gave an option to purchase to one Smart for $60,000, the terms being $20,000 cash, and balance secured by a $40,000 mortgage. Smart notified the plaintiffs of his intention to exercise his option, and that he had sold to the George Lloyd Company, Limited, for $75,000. Owing to the additional consideration the plaintiffs did wish to convey direct to the Company, and it was therefore arranged that they should convey to one Criddle, who in turn was to convey to the Company, the plaintiffs receiving a mortgage from the Company for $40,000. This transaction was carried out on the 28th of April, 1911. The mortgage was registered at once in the registry office at Victoria, but through inadvertence was not registered as required by section 101 of the Companies Act. On the 14th of September, 1911, the George Lloyd Company sold to the Pier Island Company. A conveyance was executed but was never registered. After the execution of this conveyance the Pier Island Company always paid the interest on the mortgage until they were in default in the payment of the mortgage itself on the 26th of July, 1912, when the plaintiffs went into possession,

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and they had been in continuous possession until action brought. On the 18th of October, 1912, the George Lloyd Company gave a mortgage to the defendant Harvey on the property for $35,000 as collateral to secure Harvey, who had indorsed for the benefit of the mortgagor a bill of exchange on one de Winton for $35,000; this mortgage was not registered in the land registry office, but was registered under the Companies Act on the 6th of November, 1912. On the 14th of November, 1912, the plaintiffs obtained an order under section 105 of the Companies Act extending the time for registration of their mortgage until the 21st of November, 1912. They then registered the mortgage with the order on the 15th of November, 1912. The defendant Harvey was, in the first instance, authorized by the plaintiffs to give the option to Smart, and knew the history of the transaction.

Statement

The plaintiffs' claim was for a declaration that their mortgage was a first mortgage, and charge against Pier Island, or in the alternative, that they were entitled as against the defendants to a vendor's lien for $40,000.

The defence was that the plaintiffs had waived their lien by accepting the mortgage, and that the mortgage was void as against *bona-fide* mortgagees under the Companies Act.

Bodwell, K.C., and *Harold B. Robertson,* for plaintiffs.
S. S. Taylor, K.C., for defendant Harvey.
F. C. Elliott, for defendants George Lloyd Company.
C. G. White, for defendants Pier Island Syndicate.

4th December, 1913.

MURPHY, J.: I think the plaintiffs are entitled to succeed on several grounds.

First, inasmuch as Harvey's mortgage was taken with knowledge of the existence of plaintiffs' mortgage and of the fact that plaintiffs' mortgage was for part of the purchase price, I hold that plaintiffs are entitled to priority by reason of their vendor's lien. I do not think that the fact that Criddle is the nominal vendor destroys such lien. The essential thing, I consider, under the authorities, is knowledge on the part of defendant Harvey that plaintiffs' mortgage represented a por-

Judgment

tion of the unpaid purchase money and was given to them, as the real vendors, to secure such unpaid purchase money. The introduction of one or more names and transfers for conveyancing purposes cannot, I think, alter the real essentials of the transaction. The case would be different, of course, if such introductions were made to perpetrate a fraud. Fraud, however, involves moral turpitude, and I cannot, on this record, find either of the plaintiffs guilty of such a charge. In fact, whilst something was said in argument under this head, and whilst evidence was introduced which would have been entirely irrelevant except as going to substantiate such contention, it is, I think, clear that defendants themselves did not hope for any such finding, else this action would have been met by a defence or counterclaim looking to the rescinding of the whole deal instead of a record such as I have here presented. Nor do I think it important that Musgrave stated in evidence that he relied on the mortgage solely to secure such unpaid purchase money. Not being a lawyer, he would fail to appreciate the difference between a mortgage and a vendor's lien. The evidence, I think, shews that plaintiffs regarded the mortgaged land as their security into whatsoever legal form such security might be cast.

Second, I think the objection that the property was at the time of the giving of defendant Harvey's mortgage vested in the Pier Island Syndicate fatal to defendants' case. I cannot agree, on the evidence, that this transaction was only a transfer *sub modo,* which could be annulled by simply destroying the deed. I think the conveyance to the Pier Island Syndicate was, and was intended to be, an operative, valid transfer of all the estate, legal and equitable, of the George Lloyd Company, Limited.

Judgment

Finally, I hold, on the evidence, that this case falls within the principles laid down in *Chapman* v. *Edwards, Clark and Benson* (1911), 16 B.C. 334, and *Loke Yew* v. *Port Swettenham Rubber Company, Limited* (1913), A.C. 491, 82 L.J., P.C. 89. Judgment for plaintiffs.

Judgment for plaintiffs.

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Nov. 18.

THE KING v. THE BOARD OF LICENCE COMMISSIONERS OF THE MUNICIPALITY OF POINT GREY.

THE KING v. LICENCE COMMISSIONERS OF POINT GREY

Municipal law—Intoxicating liquor—Liquor licence—Resolution of the board of licence commissioners—Removal by writ of certiorari—Practice—Affidavits on information and belief—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 355—Land Registration Amendment Act, 1912, Cap. 15, Sec. 19, Subsec. (3).

A resolution granting a licence for the sale of intoxicating liquors in a hotel, passed by the board of licence commissioners for a municipality, was attacked upon the grounds that the requisite number of qualified persons did not sign the petition for the licence, and that the premises were not such as could be licensed under the Municipal Act.

Held, that the proceedings were such as might be brought up on *certiorari*.

Per IRVING, J.A.: Procedure by *certiorari* applies in many cases in which the body whose act is criticized would not ordinarily be called a Court, and whose acts would not be ordinarily termed "judicial acts."

Held, further, that affidavits in which the deponents state the essential matters on belief only, should not be read, unless the Court can ascertain not only the source of information and belief, but also that the deponent's statement is corroborated by some person who speaks from his own knowledge. The material before the Court therefore did not establish a *prima facie* case in support of an order *nisi* to quash the resolution.

In re J. L. Young Manufacturing Company, Limited (1900), 2 Ch. 753, 69 L.J., Ch. 868, followed.

Held, further, that the expression "registered townsite" in section 355 of the Municipal Act includes a *de facto* townsite having a duly registered subdivision of town lots.

Statement

APPEAL by licence commissioners from an order made by MURPHY, J. at chambers, in Vancouver, on the 6th of May, 1913, whereby it was ordered that a writ of *certiorari* do issue directing them to remove into the Supreme Court all proceedings in connection with their granting of a certain hotel licence.

The appeal was argued at Victoria on the 5th and 6th of June, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Ritchie, K.C., for the appellants: No person can apply for and receive a writ of *certiorari* unless he is aggrieved. We cannot go so far as to say that there must be a personal injury to the applicant, but he must shew that he has a private grievance in addition to shewing that there was a general grievance suffered by the public: *Boulter* v. *Kent Justices* (1897), A.C. 556; *The Queen* v. *Justices of Surrey* (1870), L.R. 5 Q.B. 466, and *Reg.* v. *Nicholson* (1899), 2 Q.B. 455 at p. 470. A writ of *certiorari* will issue only in the case of want of jurisdiction: *The Colonial Bank of Australasia* v. *Willan* (1874), L.R. 5 P.C. 417; *Rex* v. *Woodhouse* (1906), 2 K.B. 501.

They had the requisite 50 per cent. of the landowners and residents required by section 355 of the Municipal Act, according to the report of the inspectors: *Prudhomme* v. *Licence Commissioners of Prince Rupert* (1911), 16 B.C. 487; *The King (M'Swiggan)* v. *Justices of Londonderry* (1905), 2 I.R. 318; *Biggs* v. *Hansell* (1855), 16 C.B. 562; Halsbury's Laws of England, Vol. 10, pp. 192-194; *Reg.* v. *Bolton* (1841), 1 Q.B. 66.

There is no record in this case that there is a board of commissioners and a licence: *Brittain* v. *Kinnaird* (1819), 1 Br. & B. 432; *In re Melina Trepanies* (1885), 12 S.C.R. 111; *The King* v. *Justices of York* (1827), 1 N.B. 108 at p. 110.

Argument

A. G. Harvey, for respondents: On the proceedings before the commissioners they did not comply with section 356 of the Municipal Act; this is an illegality on the face of the proceedings that is a ground for a writ of *certiorari.* They did not have stable accommodation and they had no bedroom furniture. Their own affidavits shew they did not spend any money in furnishing the hotel until they got the licence.

Savage (on the same side): The inspector's statement was taken by the commissioners, he not being sworn. The trial judge found they had not complied with the Act as to this: Craies's Statute Law, 2nd Ed., 167 to 172; *Regina* v. *Sharman* (1898), 67 L.J., Q.B. 460. There was no "registered townsite." This is a district municipality: Paley on Summary Convictions, 8th Ed., 472; *Regina* v. *Farmer* (1892), 1 Q.B. 637; *Regina* v. *Evans* (1850), 19 L.J., M.C. 151. The Court

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should review the evidence, and if it does, it will find that on the face of it the statute has not been complied with, and *certiorari* should issue.

Ritchie, in reply: As to this being a "registered townsite," the burden is not on us: *Reg.* v. *Walsh* (1897), 29 N.S. 521. There is no fact collateral to the actual matter which the Court below us has to try. It is within the power of the commissioners to apply common knowledge, and get information: Halsbury's Laws of England, Vol. 10, p. 192; *Regina* v. *Farmer* (1891), 65 L.T.N.S. 736.

Cur. adv. vult.

18th November, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: The respondents' case is that the requisite number of qualified persons did not sign the petition for the hotel licence in question, and, secondly, that the premises are not such as could be licensed under the Act. I agree with my brother IRVING that the proceedings are such as may be brought up on *certiorari*; but granting this, I think the material before us fails to make out a *prima facie* case in support of the order *nisi*.

The affidavits offered to shew that the petition for the licence was informal cannot be accepted as evidence for this reason: that the deponents state essential matters on belief only and do not state the grounds of that belief. Statements founded on mere belief are not evidence. There is, therefore, no evidence that the petition was insufficiently signed. With respect to this class of affidavit I should like to quote some of the observations of the judges in *In re J. L. Young Manufacturing Company, Limited* (1900), 69 L.J., Ch. 868. Lord Alverstone, C.J. said:

> "I notice that in several instances the deponents make statements on their 'information and belief,' not only without saying what is the source of the information and belief, but in many respects what they so state is not confirmed in any way. In my opinion, so-called evidence on 'information and belief' ought not to be looked at at all unless the Court can ascertain not only the source of the information and belief, but also that the deponent's statement is corroborated by some person who speaks from his own knowledge. It should be understood that such affidavits, in case they should be made in future, are worthless, and ought not to be received as evidence in any shape whatever. The sooner that affidavits are drawn so as to avoid stating matters that are not evidence, the better it will be for the administration of justice."

Rigby, L.J. at p. 869 said:

"Every affidavit of that kind is utterly irregular; and, in my opinion, the only way to bring about a change in that practice is for the judge, in every case of the kind, to give a direction that the costs of the affidavit, so far as it relates to matters of mere information or belief, shall be paid by the person responsible for the affidavit."

Vaughan Williams, L.J. observes that:

"The only satisfactory remedy would be that no one should pay for such affidavits at all, and that the solicitor who has drawn them and made copies of them should be left out of pocket in respect of them."

I think the hotel is situate in a registered townsite within the meaning of section 355 of the Municipal Act. There are no such things, strictly speaking, as registered townsites, but it is a matter of common knowledge that subdivisions are made for townsite purposes and registered in the land registry office. There is such a subdivision at the place in question here. Such subdivisions are the only things which the Legislature could have had in mind when enacting section 355. Therefore, the signatures of the majority of qualified persons within the prescribed area was all that was necessary to the petition. Hence the report of the licence inspector, if indeed it could be considered as evidence in this case at all, does not help the respondents. I am also against the respondents on the other grounds of their attack on the licence.

MACDONALD, C.J.A.

The appeal should be allowed and the order *nisi* discharged, with costs here and below.

IRVING, J.A.

IRVING, J.A.: The applicants (George Grauer and Joseph Dumaresq), on the 31st of March, 1913, obtained a liquor licence for the sale of liquors in a hotel, under the alleged authority of section 355 of the Municipal Act and By-law No. 15, Point Grey, 1911. On the 7th of May, 1913, an order was made that a writ of *certiorari* should issue, directed to the commissioners, to remove into the Supreme Court the application for the licence, together with the petition, evidence and all proceedings relating to the application, the ground of the judgment being that the board had no jurisdiction to grant the said licence, as the applicants had not complied with the provisions of the Municipal Act and the said by-law governing the granting of such a licence.

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Mr. *Ritchie* argued before us that *certiorari* was not the method by which the proceedings before the licensing board could be reviewed. A clear understanding of the nature of the cases in which the writ will lie will, I think, assist in the determination of that question.

In the case of *Rex* v. *Woodhouse* (1906), 2 K.B. 501, the question of whether or not a *certiorari* would lie to quash a provisional licence to sell liquor and a subsequent order referring the matter to the compensating board under the Licensing Act, 1904, was discussed very fully by Vaughan Williams and Fletcher Moulton, L.JJ., who differed in the result, but both agreed that a *certiorari* would lie. The earliest case cited, *Rex* v. *Lediard* (1751), Say. 6, 96 E.R. 784, settled the point that a *certiorari* does not lie to remove any other than judicial acts; *Rex* v. *Lloyd* (1783), Cald. 309, was the next in point of date. There the Court of Quarter Sessions had ordered Mr. Edward Jones, an attorney, to bring an information against the defendant for several misdemeanours committed by him in his office of Justice of the Peace. A rule *nisi* for a *certiorari* had issued to bring up this order, but later the rule was discharged and the *certiorari* quashed. The next case referred to was decided in 1788 (*Rex* v. *King et al.*, 2 Term Rep. 234). That case, although cited as an authority for the proposition that common-law Courts had no jurisdiction to examine into rates by *certiorari,* is really an authority the other way, because the refusal to grant the writ there was based on reasons of expediency, and not on account of the want of jurisdiction. *In re Constables of Hepperholme* (1847), 5 D. & L. 79, the Court held that the order of two justices appointing a constable under the powers of 5 & 6 Vict., c. 109, s. 19, and in *Regina* v. *Aberdare Canal Co.* (1850), 14 Q.B. 854, where the canal company being "bound to make such bridges . . . . and other conveniences . . . . as the commissioners shall from time to time judge necessary and appoint," a *certiorari* was allowed to issue to bring up an order approving the making of a bridge. In *Rex* v. *Woodhouse* (1906), 2 K.B. 501, the House of Lords did not express any opinion on the question of *certiorari* being the proper remedy. Counsel assumed that it was, and the argument proceeded on that basis.

IRVING, J.A.

The result of these cases is to shew that the procedure by *certiorari* applies in many cases in which the body whose act is criticized would not ordinarily be called a Court, nor would its act be ordinarily termed a "judicial act." That phrase must be taken in a very wide sense. Fletcher Moulton, L.J. says at p. 535:

"The true view of the limitation would seem to be that the term 'judicial act' is used in contrast with purely ministerial acts. To these latter the process of *certiorari* does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by *certiorari*. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of *certiorari* at common law."

Boulter v. *Kent Justices* (1897), A.C. 556, did not decide that in no case will a *certiorari* lie to bring up the determination of the licensing justice, or that it will not lie in cases where the justices have no jurisdiction, because of either their personal want of qualification, or of the subject-matter being outside the jurisdiction, some of the conditions on which the right to exercise jurisdiction depended has not been satisfied, there *certiorari* would lie. The compliance with these conditions goes to the jurisdiction, and no Court of inferior jurisdiction can give itself jurisdiction by proceeding on an assumed fact which is not a fact; and, in my opinion, you cannot, by drawing an order or record with no defects on its face, escape the consequences of acting without jurisdiction.

In *Bunbury* v. *Fuller* (1853), 9 Ex. 109, in delivering the judgment of the Exchequer Chamber, Coleridge, J., at p. 140, said:

"Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the Superior Court. Then to take the simplest case—suppose a judge with jurisdiction limited to a particular hundred, and a matter is brought before him as having arisen within it, but the party charged contends that it arose in another hundred, this is clearly a collateral matter independent of the merits, on its being presented, the judge must not immediately forbear to proceed, but must inquire into truth or falsehood, and for the

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time decide it, and either proceed or not with the principal subject-matter according as he finds that point; but this decision must be open to question, and if he has improperly either forborne or proceeded on the main matter in consequence of an error, on this the Court of Queen's Bench will issue its *mandamus* or prohibition to correct his mistake."

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On these grounds, I think *certiorari* was the proper method by which the proceedings could be reviewed. But, for the reasons given by the learned Chief Justice, the writ cannot be allowed.

The appeal will, therefore, be allowed.

MARTIN, J.A.: It is necessary to decide at the outset whether or no the hotel in question is "in any registered townsite," because upon the answer to that question depends the application of section 355.

It is stated in the respondents' notice of motion for an order *nisi,* and also in the appellants' notice of appeal, that the hotel is on a lot

"situate at the corner of Fourth street and River road, being the land and premises known and described as lot six (6) in subdivision of block 'A' in district lot 318 in the Municipality of Point Grey, said land and premises being at Eburne, in the said Municipality,"

and in the affidavits of the appellants, Eburne is described as "the Town of Eburne," and on the argument, respondents' counsel admitted that the said subdivision, with lots of the ordinary town size, was duly registered in the Vancouver land registry office as "subdivision map number 3068," but contended that as it was not "designated by any name indicating the land to be a city, town, townsite," etc., under section 19, subsection (3) of the Land Registry Act Amendment Act, 1912, it cannot be said to be a registered townsite under said section 355. But said subsection (3) only in effect directs that in future no map or plan which is so designated shall be deposited "unless the Attorney-General directs," and it has no application to maps or plans already deposited, or to those which are not designated as aforesaid. The expression "registered townsite" is a loose one, and is not defined in the Act, but I do not doubt that it includes such a *de facto* one as that in question—commonly known as the "Town of Eburne"—having a duly registered subdivision of town lots. Such being the case, section 355

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applies, and the respondents undertook to shew that the licence commissioners had no jurisdiction, because there was before them no

"petition signed by a majority of the resident landowners and resident householders (not being Chinese, Japanese, other Asiatics or Indians) within a radius of three miles . . . ."

It is objected that they have not done this because their affidavits are based on the bald statements of belief, the exact words used being "I verily believe," without disclosing the grounds thereof, as required by rule 523.

I recently considered and cited the authorities on this point in *In re United Buildings Corporation and City of Vancouver* (1913), 18 B.C. 274, where the same words were used, and it is the settled practice that "such statements are worthless and ought not to be received." But it is further objected that even if they could be received, they only depose that the petition was not signed by "at least three-fifths" of said landowners and residents "and their wives living with them," which is something required by section 354, and not by section 355, which only requires a majority of said owners and residents without their wives. This objection also is fatal on the face of it, and therefore it must be held that section 355 governs the case and that the board had jurisdiction.

Then, with respect to the objection taken under section 356, that the premises were not provided with and did not contain "at least twelve bedrooms, hotel accommodation for at least six travellers, and stabling and provender for at least six horses," I am satisfied on the evidence, assuming that we can review it on these *certiorari* proceedings, that there was a substantial compliance with the Act. So far as regards the stabling, the premises were clearly provided with what was necessary, and at the hearing we informed the appellants' counsel that we would not call upon him to answer that point, the temporary accommodation adjoining the hotel, which was provided for that purpose, being ample and adequate.

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As to the bedrooms and accommodation, there was no evidence of any kind before the board of commissioners at the hearing (as the minutes thereof shew) to raise any doubt as to the

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accuracy of the report of the licence inspector (the proper officer appointed by by-law No. 15, section 22, to report on all applications), which was submitted to them at the final meeting pursuant to the resolution passed at the first meeting, and although both the applicants and their opponents were represented by counsel at the hearing, no objection was taken to the proposal to obtain the report nor to the reception of it at the final meeting, which was held for the express purpose of receiving and considering it. That report states that

"To the best of my knowledge all the provisions of section 355 of the Municipal Act are complied with,"

and as no one had anything to say in answer or opposition to it, it was formally adopted and the licence granted. In such circumstances, apart from any question of evidence at all, the relevant statements in the report must be regarded as equivalent to admitted facts between the litigants on which any tribunal would be justified in acting. If authority were wanted on such a point, it will be found in *The King* v. *Licensing Justices of Farnham* (1902), 18 T.L.R. 614, wherein, at p. 616, no one questioned the right of commissioners to act upon "admissions made in open Court during the hearing." As the matter came before it, I am at a loss to conceive how the board could act in any other manner than it did, and it had no more reason than any other tribunal to suppose that parties before it would endeavour to play fast and loose with its procedure, or escape the consequences of their open and formal acts before it with respect to the issues being fought out.

MARTIN, J.A.

In this view it is really unnecessary to decide what kind of evidence the board is restricted to receiving under section 337 (2), and I shall content myself by observing that the section obviously must be read with section 447 (as applied by section 362), and if it is to be held to mean that "the party or witnesses" can only be examined "on oath," that means *viva voce* and nothing else, and therefore the contention of the respondents' counsel as to "sworn evidence" only being allowed in is a self-destructive one, because the statutory declarations which he relied upon and are stated in the respondents' affidavits

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to have been filed with the board are unquestionably not *viva voce* evidence, and, therefore, were wholly inadmissible.

The appeal, I think, should be allowed.

GALLIHER, J.A. concurred in allowing the appeal.

Appeal allowed.

Solicitors for appellants: *Bowser, Reid & Wallbridge.*
Solicitors for respondents: *Harvey & Goetz.*

ATLANTIC REALTY AND IMPROVEMENT COMPANY, LIMITED *ET AL.* v. JACKSON.

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Vendor and purchaser—Agreement of sale—Clause restricting assignment thereof—Vendor's approval required—Assignment of to two different parties—First assignee not obtaining approval of until original vendor files caveat—Right of second assignee, approved by original vendor, to set aside caveat.

The plaintiff Company, under an agreement of sale, agreed to sell land to A. By a clause in the agreement, no assignment thereof was to be valid unless approved by the vendor. A. agreed to assign the agreement of sale to the defendant and wrote the vendor advising him of the assignment and requesting formal approval thereof, but the approval was never obtained. Before the assignment to the defendant was finally executed, A. made another assignment to B., with the approval of the vendor. B. paid the balance due the vendor and secured a deed of the land without actual notice of the defendant's claim. The plaintiff succeeded on the trial of an action for the withdrawal and cancellation of a *caveat* and *lis pendens* filed by the defendant.

Held, on appeal, that an assignee of an agreement for sale of land containing a restriction against assignment, without the approval of the registered vendor, has no status to file a *lis pendens* or *caveat* without obtaining such approval.

Per MARTIN, J.A.: Such an assignee cannot be said to have an interest in land; he merely has a personal right against his own vendor.

Judgment of GREGORY, J. affirmed.

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Statement

APPEAL by the defendant from the judgment of GREGORY, J. at the trial of the action at Victoria on the 7th of February, 1913. The plaintiff Company, being the registered owner of a lot in Prince Rupert, entered into an agreement for sale of the lot to John W. Bell. The agreement contained a clause that no assignment of the agreement should be valid unless approved of by the vendor. Bell completed a bargain with the defendant by correspondence for the sale of the lot, it being agreed that the defendant should receive an assignment of Bell's agreement and pay Bell the amount of his equity in cash. Bell drew on the defendant for the amount of his equity by 30 days' draft, attaching forms of assignment of agreement signed by him. The defendant accepted the draft, but on telegraphic request from Bell to return the papers for correction, sent them back to Montana, where Bell lived, to have the corrections made. The assignment had not, in fact, been completely executed, the seal being omitted. On Bell obtaining possession of the papers he retained them. He in the meantime had arranged for another sale of the land at a better price. Defendant immediately lodged a *caveat* with the registrar of titles, claiming a right to the purchase, and commenced an action against Bell for specific performance. Bell, at the time of executing the assignment of agreement and sending it forward attached to the draft, had written the plaintiff Company notifying them of the sale to the defendant and asking them to send forward the necessary papers for approval. Defendant relied on this notice, but not hearing from the plaintiff Company, wrote them asking for a statement of their account for the deed, and intimating his intention to pay the plaintiff Company the balance due on the lot in full. No reply having been received by the plaintiff, he wrote again to the same effect some time later, when, in reply, he was informed that the plaintiff Company had approved of the sale to the second purchaser from Bell. Subsequently the plaintiff Company received from the plaintiff Bonneau, the second purchaser, the full balance which they claimed under the Bell agreement, and issued a deed to Bonneau, which he applied to register, but

could not do so owing to the *caveat* in question. The action was brought for the withdrawal of the *caveat* and *lis pendens* and the cancellation of the registration thereof.

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J. N. Ellis, for plaintiffs.
W. J. Taylor, K.C., for defendant.

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GREGORY, J.: Assuming that the defendant has a valid contract by correspondence with Bell for the purchase of the land in question, and that it is not such an instrument as may be registered under the Land Registry Act, and so is unaffected by section 154 of that Act, the whole question is: which of the parties has the better equity? It seems to me that this question must be answered in favour of the plaintiff Bonneau. He is a *bona-fide* purchaser for value, without actual notice of the defendant's claim. All the original title papers are in his possession, including the contract between the plaintiff Company and Bell, and the assignment thereof has been duly approved by the plaintiff Company; he has a conveyance from the Company, and has only been prevented from registering it because the registrar refused to do so until defendant's *caveat* and *lis pendens* have been removed. The defendant, on the other hand, has, at best, only an agreement by correspondence for sale to him, and he has filed a *caveat* and *lis pendens,* but he has not paid even one cent of his purchase money. To prefer him in these circumstances simply because Bell wrote to Benson, the plaintiff Company's attorney, and told him he had sold his lot 47 to the defendant and asking him (Benson) to send the necessary assignment of contract, would seem to be a great injustice to Bonneau, who knew nothing of this, and has paid his full purchase price. It is perhaps worth noting that there is not a tittle of evidence even suggested to establish the defence that Bonneau is only a nominal purchaser and holds the property for the benefit of Bell, and the plaintiff Company, or that defendant ever obtained the plaintiff Company's assent to Bell assigning his agreement to him.

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There will be judgment for the plaintiffs.

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Argument

The appeal was argued at Victoria on the 23rd of June, 1913, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

W. J. Taylor, K.C., for appellant, contended that although the assignment to the appellant had not received the approval of the vendor, under the terms of the agreement of sale, the subsequent purchaser had notice of the sale that was made to the appellant, and the appellant therefore had a valid claim upon his equity: *White* v. *Neaylon* (1886), 11 App. Cas. 171.

W. C. Brown, for the respondents: There was no contract enforceable. He must have a completed contract, and the correspondence does not disclose one: *Williams* v. *Hamilton* (1908), 14 B.C. 47; *Sawyer-Massey Co.* v. *Bennett* (1909), 12 W.L.R. 249; *McKillop & Benjafield* v. *Alexander* (1912), 45 S.C.R. 551; *Rice and others* v. *Rice and others* (1853), 2 Drew. 73 at p. 80; *Cave* v. *Cave* (1880), 15 Ch. D. 639. The whole matter turns on whether the conveyance to the appellant was good without the consent of the original vendor: see *Alexander* v. *Gesman* (1911), 17 W.L.R. 184.

Cur. adv. vult.

4th November, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I would dismiss the appeal for the reasons given by my brother IRVING.

IRVING, J.A.

IRVING, J.A.: I would dismiss this appeal.

By a term of the contract between the plaintiff and Bell, it was provided that:

"No assignment of this contract shall be valid unless the same shall be for the entire interest of the purchaser and approved and countersigned by the president, vice-president and secretary, or any other duly authorized person, and no agreement or condition or relations between the purchaser and his assignee, or any other person acquiring title or interest from or through the purchaser, shall preclude the Company from the right to convey the premises to the said purchaser on the surrender of this agreement and the payment of the unpaid portion of the purchase money which may be due hereunder, unless the assignment hereof be approved and countersigned as aforesaid."

Jackson omitted to press the Company for this approval, and I think he has no status to file a *lis pendens* or *caveat.*

Lord Cairns, in *Shaw* v. *Foster* (1872), L.R. 5 H.L. 321, has pointed out that although a vendor of real estate is a trustee

for the purchaser, he is not a mere dormant trustee, but he has a right to protect that personal and substantial interest which still remains in him. The plaintiffs having seen fit to guard their interest by inserting in their agreement for sale the above clause, I am unable to see how Bell can confer on Jackson any greater right than he (Bell) had himself.

The plaintiffs who are invoking the condition in restriction of the assignment of Bell's agreement are the original vendors.

MARTIN, J.A.: After a careful consideration of the authorities cited to us I am of the opinion that this appeal should be dismissed, because, even assuming that the lodging of the *caveat* was notice to Bonneau of the defendant's claim, and that the defendant had a valid contract with Bell, yet here at least we have the case of the original owner of the legal estate, the plaintiff Company, setting up and relying on its rights under the clause in the contract to approve any assignment thereof. The decision of the majority of the Court in *McKillop & Benjafield* v. *Alexander* (1912), 45 S.C.R. 551, 3 Sask. L.R. 111, was based on the assumption that the said owner had waived that right, p. 584, and, therefore, their co-defendants could not do so. Mr. Justice Duff did not take that view, and his judgment is founded upon the assumption that the clause could be invoked by a purchaser as well as the owner of the legal estate, and he proceeds to consider the question from that standpoint, and to hold, p. 561, that the clause, if it could be invoked, gave to the obligation of the owner

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"the character of rights which should be personal to the contracting parties to the extent at least that they should be enforceable against the company only by the purchaser or his representatives, or by such persons as with the consent of the company should become invested with the purchaser's rights and should become bound to assume his obligations under the agreement."

He goes on to discuss (pp. 569-70) the result of this in a manner with which I am in entire accord, the result of which, as relevant to this case, is that an assignee who has not obtained said approval has not

"acquired any right which he could compel the registered owner to recognize, and, therefore he never had a right which in any lawyerly use of the words could be described as an interest in land. His right was and

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remained a personal right against Gesman, enforceable no doubt by equitable remedies, both against Gesman and against others who might be implicated in Gesman's breach of faith, but still only a personal right because of the special provisions of the contract with the company, under which Alexander could acquire no claim against the registered proprietors until they had assented to his assignment. It is argued that Gesman was the owner of the land in equity, but this seems really to be an abuse of language (see Fry, Specific Performance, p. 675, sec. 1,382; and *Ridout* v. *Fowler* (1904), 1 Ch. 658, at pp. 661 and 662, *per* Farwell, J.). The company, it may be admitted, was a trustee in a limited sense. It is inaccurate to say that the company held the land in trust for the purpose of fulfilling the agreement of sale. But, as I have pointed out, that trust is defined by the agreement; and only those can in any admissible sense of the words be said to have acquired a beneficial interest in the land who have acquired, or in other words, are entitled to enforce some rights under the agreement. In this Alexander fails; his right (in the sense indicated), though in process of consummation, was never consummated."

And as to the effect of a *caveat* in such circumstances, p. 566:

"A *caveat* prevents any disposition of his title by the registered proprietor in derogation of the caveator's claim until that claim has been satisfied or disposed of; but the caveator's claim must stand or fall on its own merits. If the caveator has no right enforceable against the registered owner which entitles him to restrain the alienation of the owner's title, then the *caveat* itself cannot and does not impose any burden on the registered title."

MARTIN, J.A.

And at p. 569 he shews that the maxim *qui prior est tempore potior est jure* has no application to those who have no legal or equitable interest in the land which was the subject of the dispute.

These views of the learned judge as to the effect of the clause, if it could be invoked, were not considered by the other members of the Court, owing to the fact that they held the clause had been waived, but in my opinion they cover the point which is now clearly raised, and it should, I think, be determined in favour of the respondents.

Appeal dismissed.

Solicitors for appellant: *Eberts & Taylor.*

Solicitors for respondents: *Ellis & Brown.*

BRITISH COLUMBIA CANNING COMPANY, LIMITED v. McGREGOR *ET AL.*

HUNTER, C.J.B.C.

1913

April 21.

COURT OF APPEAL

Nov. 4.

B.C. CANNING CO. *v.* McGREGOR

Shipping — Charter-party — Special contract — Construction of terms — Approval of engineer—At owner's risk—Liability for injury—Reasonable precautions.

The boiler of a steamer chartered by the defendants from the plaintiff Company was injured through the carelessness of the engineer. Under the terms of the charter-party the master and engineer were subject to the approval of the owners, and the vessel was at owner's risk, but the charterers were to take all reasonable precautions regarding her safety. The owners had approved of the engineer in charge.

Held, in an action for damages by the owners, that the defendants were not liable under the express provisions of the contract. The engineer must be held to be competent, because his appointment was approved by the owners, and the charterers were not bound to have some person superintend his work.

Per MARTIN, J.A.: The words "owner's risk" protect the defendants from all liabilities, except wilful misconduct.

Dixon v. *Richelieu Navigation Co.* (1889), 18 S.C.R. 704, followed.

Judgment of HUNTER, C.J.B.C. affirmed.

APPEAL from the judgment of HUNTER, C.J.B.C. on the 21st of April, 1913, at Victoria, dismissing the action, with costs. The claim arose out of the charter of a steamship by the defendants, a term of the charter being that the steamer should be at the risk of the plaintiffs, but that the defendants should take all reasonable precautions regarding its safety. The vessel's boiler was burnt through the action of the engineer in attempting to get up steam when the boiler was practically empty. The defence was that the accident occurred when the boilers were being washed out, and while she was in control of the plaintiffs. It was admitted that the accident occurred through the negligence of the engineer, and it became a question of whose servant he was at the time. The trial judge was of opinion that the defendants were exonerated from liability under the terms of the contract.

Statement

Bodwell, K.C., for plaintiff Company.

Davis, K.C., for defendants.

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HUNTER, C.J.B.C.: Thanks to the way in which this case has been handled by the learned counsel engaged, the points have been reduced to a very small compass.

The negligence of the engineer is admitted; that is to say, the negligence which was the cause of the damage which is the subject-matter of the action. It is also indisputable that the old crew were taken on, and I think also indisputable that they were taken on with the approval of the Company; that is to say, the captain, and the engineer whose conduct it was that brought about the damage. I think the right conclusion, also on the evidence is, that not only was this crew taken on with the approval of the Company, but that the services of the captain and the engineer were also retained at the express request of the plaintiffs. I am satisfied from the evidence of McGregor that there was an interview between him and Johnson, and also between him and Mess, in which the matter was brought up as to the retention of the services of these officers, and the crew. And I see no reason to doubt that the services of these two were not only approved by the Company, but that they were taken on by the express request of the Company, and that the charter-money was reduced in consideration of that arrangement. Those being the facts, it seems to me that the plaintiffs were equally responsible with the defendants for the situation which was created.

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I think after the conversation that McGregor had with Mess and Johnson he might very well have been led to believe that this engineer was reliable and competent, even though he may not have had a certificate. At all events, it seems to me impossible for the plaintiffs to be heard to object that he was not reliable, or not trustworthy, or not competent. Having stamped the retention of his services with their approval, it seems to me impossible now for them to come forward and blame the other party for retaining him.

I think the action falls within the principle of what is known as estoppel *in pais;* the plaintiff having created the estoppel, they cannot be heard now to complain that this man was in point of fact negligent. Not only that, but I think the contract itself shews that such consequences were not to be visited on the defendants. There is an express arrangement to the effect that

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the vessel was to be at the owner's risk, but that the charterers should take all reasonable precaution regarding her safety. I am satisfied, having heard what law there was cited in the case —in fact, I would be satisfied if no law had been cited in the matter—that that expression "owner's risk" is intended to exclude such liability as liability for unforeseeable negligence; that it is really intended to be confined to the case where the liability arises from the wilful misconduct, or from such wilful negligence as amounts to wilful misconduct.

I think, on the two grounds, that there is an estoppel *in pais* and that the express provision of the contract itself exonerates the defendants. The action should be dismissed, with costs.

The appeal was argued at Victoria on the 23rd of June, 1913, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

Bodwell, K.C., for appellants: The interpretation of the articles is that the charter-party is first to be considered: see *Donovan* v. *Laing, Wharton, and Down Construction Syndicate* (1893), 1 Q.B. 629; *Rourke* v. *White Moss Colliery Co.* (1877), 2 C.P.D. 205; *Dixon* v. *Richelieu Navigation Co.* (1888), 15 A.R. 647, (1890), 18 S.C.R. 704. The chief question is the interpretation of the words "at owners' risk." These words do not by themselves exclude the defendants from negligence. The master is liable for the acts of his servant unless he contracts himself out of it: *Compania la Flecha* v. *Brauer* (1897), 168 U.S. 104; *Price & Co.* v. *Union Lighterage Company* (1903), 1 K.B. 750, (1904), 1 K.B. 412. Argument

Harold B. Robertson, for respondents: The words "at owners' risk" have a well-defined meaning. We did everything in the way of precaution that we could do and took the same care that they would have themselves taken had they been in charge. He relied on *Dixon* v. *Richelieu Navigation Co.* (1890), 18 S.C.R. 704, and referred to *Cordey* v. *Cardiff Pure Ice and Cold Storage Company, Limited* (1903), 19 T.L.R. 256, and *McCawley* v. *Furness Railway Co.* (1872), L.R. 8 Q.B. 57 at p. 59.

Bodwell, in reply: The contractor must get himself out of liability by express words, and he has not done so: see *Graham*

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v. *Belfast and N. Counties Railway Co.* (1901), 2 I.R. 13 at p. 19, and *Forder* v. *Great Western Railway* (1905), 2 K.B. 532 at p. 536.

Cur. adv. vult.

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MACDONALD, C.J.A.: I would dismiss the appeal.

IRVING, J.A.: In the absence of special terms in the charter-party to the contrary, everything would have been at the risk of the charterers, who would have the right to appoint a master and engineer without reference to the owners. Recognizing this, the parties determined to insert in the charter certain special terms, and so they reached the agreement as presented to us. Under it, the master and engineer are to be approved by the owners, the ship is to be at owner's risk, but the "charterers shall take all reasonable precautions regarding her safety." What further or other reasonable precaution they could take than allow the engineer approved of by the owners to have absolute control of the engineroom, I cannot imagine.

IRVING, J.A.

It seems to me absurd to say that under the terms of a charter-party of this kind the charterers were bound to have some person to superintend the work of the engineer approved of by the owners. Had they done so, had they employed some one else, and an accident happened in consequence of their following the advice of such person, in preference to that given by the master or engineer approved of by the owners, that, to my mind, would be some evidence that they had neglected to take reasonable precautions. In my opinion, the defendants are not liable under the express provisions of the contract.

I would dismiss the appeal.

MARTIN, J.A.: So far as the expression "at owner's risk" *solus* is concerned, we must adopt the meaning given to it by the Supreme Court of Canada in *Dixon* v. *Richelieu Navigation Co.* (1888), 15 A.R. 647, (1890), 18 S.C.R. 704, which is, as laid down by Hagarty, C.J.O. at p. 649:

MARTIN, J.A.

> "It seems conceded that the words 'owner's risk' alone would protect the carriers against all but wilful neglect or misconduct or unreasonable delay."

And Burton, J.A. at p. 654:

"The cases fully establish that the words 'owner's risk' protect the defendants from all liabilities, except wilful misconduct."

This would relieve the defendants, but we have the additional words: "but the charterers shall take all reasonable precautions regarding her safety," and the point is as to the meaning to be attached to them. In my opinion, in the absence of any authority, they should receive that "reasonable" construction which business men would be assumed to have in mind in the circumstances, and the owners themselves would not do more in a matter relating to the engines than employ a competent man to take charge of them. It would be a very unusual and, I think, "unreasonable" precaution for them to take, not only to employ a competent man, but to literally stand over him to see that he was doing his work properly. Can it be said that the charterers should do more than would be expected of the owners? The engineer must be held to be competent because his appointment was approved by the owners.

The appeal, I think, should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Bodwell & Lawson.*

Solicitors for respondents: *Robertson & Heisterman.*

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SCOTT-ELLIOTT v. HATZIC PRAIRIE CO.

SCOTT-ELLIOTT *ET AL.* v. HATZIC PRAIRIE COMPANY, LIMITED, *ET AL.*

Practice—Costs—Settlement of matters in dispute before action—Grounds for appeal unsubstantial—Discretion of trial judge—Repression of unnecessary litigation—Application to move case from day's list of appeals, when to be made.

Plaintiff sought for a declaration that the resolutions at a meeting of shareholders of a company were illegal in that they were passed through the votes of three shareholders (who held certain shares in trust for the plaintiff Scott-Elliott, and one of the defendants), and that in voting against the plaintiff's interests they were guilty of a fraud upon him. It was disclosed at the trial that the parties had agreed to the company going into liquidation. The trial judge concluding that there was no material question remaining at issue, struck the case from the list, making no order as to costs.

Held, on appeal, that the three defendants holding the shares in trust, being charged with merely a technical breach of trust, were not entitled to go to trial for the purpose merely of having their characters vindicated.

Held, further, that the defendant Carmen Kenworthy, having been charged with inducing the said three defendants to commit a breach of trust, could not set up that on the face of the proceedings no cause of action had been disclosed as against her and that she was therefore entitled to have the action as against her dismissed, with costs.

Held, further, that in dealing with costs, it is the duty of the Court to repress unnecessary litigation.

An application to take a case off the peremptory list of appeals for the day will be refused. The proper time to apply is when the peremptory list is arranged at the close of the day, for the following day.

Statement

APPEAL from the judgment of CLEMENT, J. in an action tried by him at Vancouver on the 26th and 27th of November, 1912. The defendants, the Hatzic Prairie Company, Limited, was incorporated in 1906, under the Companies Act, Revised Statutes of British Columbia, 1897, chapter 44. The capital stock of the Company consisted of 6,000 shares of $10 each. Of this, 5,005 shares were issued, 5,000 being held by Harold Kenworthy and his wife, Carmen Kenworthy, and one each by J. H. Senkler, R. C. Spinks, B. J. Jayne, A. C. Watkins and

E. Bloomfield. Shortly after the formation of the Company Bloomfield re-transferred his share to the Company. Harold Kenworthy acted as manager of the Company continuously from its inception to the commencement of this action. In August, 1909, Mr. and Mrs. Kenworthy sold to the plaintiff one-half of the issued capital stock, and subsequently the Kenworthys and the plaintiff, under agreement, each sold a portion of their holdings to Mr. and Mrs. John Kenworthy, when the remainder of the capital stock of the Company, with the exception of one share was issued, and the parties then held the Company's shares as follows: Mr. and Mrs. Scott-Elliott, 2,372 shares; Mr. and Mrs. Harold Kenworthy, 2,372 shares; Mr. and Mrs. John Kenworthy, 1,251 shares, and Senkler, Spinks, Jayne and Watkins, one each. Owing to differences arising amongst the shareholders, a special meeting of the shareholders was held on the 20th of June, 1912, when all the shareholders except Watkins were present. All the resolutions of the meeting, including the appointment of Harold Kenworthy as manager for three years, were passed by the votes of Harold Kenworthy, Mrs. Harold Kenworthy, Senkler, Spinks and Jayne, in all of which resolutions they were opposed by the votes of Mr. and Mrs. Scott-Elliott and Mr. and Mrs. John Kenworthy. The plaintiff then brought this action, suing on behalf of himself and the other shareholders, for a declaration that the resolutions passed at the meeting on the votes of Mr. and Mrs. Harold Kenworthy, Senkler, Spinks and Jayne were illegal and void and a fraud on the plaintiff, and that they be set aside, and for an injunction restraining the Company from acting on said resolutions; for the appointment of a receiver, and for a declaration that the shares of Senkler, Spinks and Jayne, as to a half interest, were held in trust for the plaintiff, and for an injunction restraining said defendants from voting on said shares. An interim injunction was obtained by the plaintiffs on the 29th of July, restraining the defendants from acting on the resolutions of the meeting of June 20th, and restraining the defendants Senkler, Spinks and Jayne from voting on their shares at any meeting until the trial of the action. Upon the hearing at the trial it appeared that the large shareholders had all agreed

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Statement

to the Company being wound up and to the appointment of a receiver. The trial judge, concluding that there was nothing material at issue, struck the case from the list and held that there should be no order as to costs. The defendants appealed on the grounds that the action should have been dismissed with costs; that the learned trial judge erred in not trying the case to a conclusion; that by the undertaking of the plaintiff in the interim injunction the appellants' damages should have been assessed as against the plaintiff; that the appellants Senkler, Spinks and Jayne being accused of fraud, the charge should have been adjudicated upon; that there was no cause of action disclosed on the pleadings as against the defendant Carmen Kenworthy and that she was therefore entitled to have the action as against her dismissed with costs, and upon other grounds.

The appeal was argued at Vancouver on the 24th of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Application was made for the case to be taken off the day's list.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I do not think it is fair to counsel to re-arrange the list. As far as we are concerned, we are only too anxious to meet the convenience of counsel, but there is a proper time for such applications to be made, *i.e.*, when, at the close of the day, the peremptory list is being arranged for the following day.

IRVING, J.A.

IRVING, J.A.: What has been said is for the protection of the profession who are waiting here in silence. If we should reach *Scott-Elliott* v. *Hatzic Prairie* about three o'clock in the afternoon and found it could not go on, then counsel in the next case would say he was not expecting to be called upon so soon, and in trying to accommodate him we would have confusion all around. It is in the interest of the profession that this rule should be adhered to.

MARTIN, J.A.

MARTIN, J.A. concurred.

Sir C. H. Tupper, K.C., for appellants Senkler, Spinks and Jayne: An order for an injunction was taken out restraining us from voting at the meetings of the defendant Company until the trial of the action. The formal judgment of CLEMENT, J., by which the case was struck off the list, and from which we are now appealing, does not deal with the injunction in any way. We submit it should be finally disposed of. We are charged with fraud and conspiracy; we have a right to have this charge carried to an issue. The action should have been dismissed with costs. He cited *Brand* v. *Martin* (1869), 16 Gr. 566; *Covert* v. *The Bank of Upper Canada* (1852), 3 Gr. 246 at p. 275; Encyclopædia of the Laws of England, Vol. 3, p. 510; *In re Bradford* (1883), 15 Q.B.D. 635; *Stevens* v. *Metropolitan District Railway Co.* (1885), 29 Ch. D. 60 at p. 73; *Archibald* v. *de Lisle* (1895), 25 S.C.R. 1 at p. 14; *Yeo* v. *Tatem* (1871), 40 L.J. Adm., 29 at pp. 31-2; *Wilde* v. *Wilde* (1862), 31 L.J., Ch. 558; *Sivell* v. *Abraham* (1846), 8 Beav. 598; *Dicks* v. *Yates* (1880), 18 Ch. D. 76; *Newcomen* v. *Coulson* (1878), 7 Ch. D. 764; *Goodwin* v. *Cremer* (1852), 18 Q.B. 757 at p. 760; *Sonnenschein* v. *Barnard* (1887), 57 L.T.N.S. 712.

Ritchie, K.C., for appellant Harold Kenworthy: The injunction order is not disposed of by the action being struck out. Under section 238 of the Companies Act, Revised Statutes of British Columbia, 1911, chapter 39, there still exists the right to call a meeting of the shareholders. Where an action is struck out it is not a final disposition of the action: *Landed Estates Company* v. *Weeding* (1871), W.N. 148; *Storr* v. *Corporation of Maidstone* (1878), W.N. 219; *Burgess* v. *Hills* (1858), 26 Beav. 244. If there is a question of principle or of proper practice involved, although the only practical point to be decided is who shall pay the costs, the appeal should be heard. If there is something to be tried, then the litigants are entitled to have the matter adjudicated upon: see *Wilde* v. *Wilde* (1862), 10 W.R. 503; *Goodwin* v. *Cremer* (1852), 18 Q.B. 757 at p. 760.

Argument

S. S. Taylor, K.C., for appellant Carmen Kenworthy: There is no cause of action disclosed in the proceedings as against my

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client. The trial judge should therefore have adjudicated on the question as to whether Mrs. Kenworthy should have been made a party to the action. She did not consent to the liquidation and was not a party to it.

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Davis, K.C., for respondents: As to the defendants Senkler, Spinks and Jayne, they are charged with merely a technical breach of trust; their characters are in no way affected by the charge. When parties arrange or come to an agreement which is practically a settlement of the action, they cannot go to appeal for the purpose of settling costs; there was absolutely nothing else to settle: *Moir* v. *The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363; *McKay* v. *The Township of Hinchinbrooke* (1894), 24 S.C.R. 55; *Roberts* v. *Roberts* (1822), 1 Sim. & S. 39.

Tupper, in reply: Though a settlement had been made, when we were charged with misconduct we are entitled to a judgment on the issue.

Ritchie, in reply: The judge did not go far enough into the action to decide the question of which party was entitled to costs: see *Civil Service Co-operative Society* v. *General Steam Navigation Company* (1903), 2 K.B. 756; *Elsey* v. *Adams* (1864), 2 De G.J. & S. 147. There must be a full inquiry to settle the question of costs, and if there is a question of fraud it should be tried out: *Seaton* v. *Grant* (1867), 36 L.J., Ch. 638; *World P. & P. Co.* v. *Vancouver P. & P. Co.* (1907), 13 B.C. 220. The Court cannot stop the action before a decision is arrived at and before the injunction order, which is still in force, is adjudicated upon.

Argument

Taylor, in reply: It is right to strike the case off when the subject-matter of the action is disposed of, but the subject-matter of the action was not disposed of, as we had nothing to do with the liquidation, and our interests were in no way dealt with.

Cur. adv. vult.

30th June, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A.: I agree that the appeal should be dismissed.

IRVING, J.A.: I would dismiss this appeal.

So far as *Sir Hibbert Tupper's* clients are concerned, there was no charge against them of anything but a technical breach of trust. They, therefore, are not entitled to go to trial for the purpose of having their characters vindicated. Before us, Mr. *Davis* disclaimed any intention of attacking the character of any of these gentlemen in any way.

Mrs. Carmen Kenworthy, it was urged on us, was not a proper party to the action, as no relief was sought against her, and that, therefore, she was entitled to receive her costs or have the action proceed to trial. In the pleadings she was charged with fraud and conspiracy, so I read the 15th paragraph of the statement of claim. There would, or rather there might be, a cause of action against her on the principle that if Z., by wilfully deceiving Q., induces him to do an act injurious to A., this may give A. a cause of action against Z.: see *National Phonograph Company, Limited* v. *Edison-Bell Consolidated Phonograph Company, Limited* (1908), 1 Ch. 335. There is, it is true, no specific relief asked against her in the prayer to the statement of claim, but that omission, if commented upon, would be remedied at any time by amendment. I do not say that the omission is fatal, as, under the prayer for general relief, I doubt if it would be necessary to amend. The gist of the action against her was the damage done by reason of her persuading the trustee to take her side in the dispute. If the plaintiff had succeeded in making his case out against her, she would have been liable to have an order made against her for costs. See, on this subject, remarks of BEGBIE, C.J. in *Kootenay Mining Appeals* (1884), 1 B.C. (Pt. 2) 39 at p. 44, and a number of cases cited in *Re Sturmer and Town of Beaverton* (1912), 25 O.L.R. 566, 3 O.W.N. 613, 21 O.W.R. 55.

IRVING, J.A.

In *Landed Estate Company* v. *Weeding* (1871), W.N. 148, it was held that where the subject-matter of the estate was gone by statute, the case must proceed to trial, but not when by a settlement by the parties themselves. That case seems to me to recognize the jurisdiction the learned judge professed to exercise in the present instance, and as the decision was one of a discretionary nature, I think we should uphold his order.

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In *Millington* v. *Fox* (1838), 3 Myl. & Cr. 338 at p. 353, Cottenham, L.C., in dealing with costs, pointed out that it was the duty of the Court to repress unnecessary litigation. If ever there was a case where that duty could properly be exercised, in my opinion it is the case now in question.

MARTIN, J.A.: I have reached the conclusion in this matter that we should not interfere with the discretion that the learned trial judge exercised when he made the order appealed from dismissing the action and "not seeing fit" to make any order as to costs. It was said in *Elsey* v. *Adams* (1864), 2 De G.J. & S. 147, before the Lords Justice, at p. 152, that

> "Where a judicial discretion has been exercised consistently with the course of the Court as to costs alone, the Court of Appeal is very reluctant to interfere with that discretion, and does not interfere, unless in a case of principle, or a case very clear on the merits."

The cases of *Moir* v. *The Corporation of the Village of Huntingdon* (1891), 19 S.C.R. 363, and *McKay* v. *The Township of Hinchinbrooke* (1894), 24 S.C.R. 55, shew the attitude of the Supreme Court of Canada on the point, and I am satisfied that in this case also, as Mr. Justice Taschereau said in the latter, at p. 57:

> "Under colour of an appeal on the merits this is virtually but an appeal for costs."

MARTIN, J.A.

Both of those cases in the Supreme Court were based on the fact that further litigation in the matter had become useless, as the subject-matter had disappeared or been placed beyond the region of controversy, in the first of them by the repeal of a by-law, *pendente lite,* and in the second by the operation of a statute which rendered a valuation roll unassailable; in this second case reference was made to *Martley* v. *Carson,* an appeal from this Province, wherein their Lordships of the Privy Council dismissed the appeal "without consideration of the merits, on it appearing that the appellant Clark had parted with his interest in the property": (1889), 20 S.C.R. 634 at p. 694. It has long been held that this is the result that follows a settlement or disposition of the subject-matter by the parties: *Roberts* v. *Roberts* (1822), 1 Sim. & S. 39; *Seaton* v. *Grant* (1867), 36 L.J., Ch. 638 at p. 645, *per* Cairns, L.J. "Thirdly, when the

subject-matter of the litigation has perished or been removed": *Landed Estates Company* v. *Weeding* (1871), W.N. 148; *Storr* v. *Corporation of Maidstone* (1878), W.N. 219; but I note that the statement of the Vice-Chancellor in *Landed Estates Company* v. *Weeding, supra,* that the principle does not extend to a case where the controversy has been settled by an Act of Parliament is at variance with the reason for the decision of the Supreme Court of Canada already noted; indeed, in the first of these, *Moir's* case, the passing of a municipal by-law, repealing the one in question, was sufficient to invoke the principle. A good illustration of Lord Justice Cairn's third exception would be the case of a ship which has foundered, without any insurance, during the course of an action between the owners to rectify the book of registry on the ground that a bill of sale in favour of one of her owners had been procured by fraud. In such circumstances the total loss or "removal" of the subject-matter would put an end to the litigation, unless the determination of that question were necessary to apportion other liabilities as regards cargo, wages, or otherwise.

In considering the action taken by the learned trial judge, we must view the matter as it was presented to him by those concerned, and it appears that he was given to understand that all the parties had consented to wind up the Company voluntarily, except the defendants Jayne, Senkler and Spinks, who, their counsel said, "were not consulted," but why they should have been it is difficult to imagine, since they had no personal interest in the matter, and simply held for the purpose of formal qualification one $10 share each, and were trustees for either the plaintiff, or the defendant Harold Kenworthy, or both of them, as that fact might be determined. I agree entirely with the trial judge that to allow these trustees, in such circumstances, to force on this litigation, against the deliberate action taken by their *cestui que trusts* to put an end to it, would be "a public scandal." In any event their interest, had they a personal one, would be so insignificant as to come within the *de minimis* rule: *Seaton* v. *Grant, supra,* at p. 644. With respect to the point taken on behalf of Harold Kenworthy that he suffers loss by being deprived of his office of manager of the defunct Com-

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pany at $3,000 per annum, the answer to that is that he himself has been the prime mover in abolishing his own office, and cannot complain of his self-extinguishment.

As to Mr. *Ritchie's* argument on the words in the injunction, "until the trial of this action," it is, to my mind at least, clear, that for a judge to strike a case before him off the list is a "trial" in the broad sense contemplated by the injunction, as it involves a final disposition of the litigation so far as a tribunal of first instance is concerned.

The only point on which I experienced any doubt was as to the defendant Carmen Kenworthy, whose case was presented to us as differing from the rest of the defendants in that, it was submitted, on the face of the proceedings, no cause of action was disclosed against her, and, therefore, the disappearance or settlement of the subject-matter made no difference to her, and she was entitled to have the action against her dismissed, with costs. But, on further consideration, I find myself unable to take this view, because of the following allegation in the statement of claim:

MARTIN, J.A.

"15. The defendants Harold Kenworthy and Carmen Kenworthy in bad faith, and for the purpose of preventing the plaintiff passing the resolutions to be proposed by him, before the said meeting, wrongfully induced the defendants John Harold Senkler, Richard C. Spinks and Basil John Jayne, to attend the said meeting and vote as aforesaid, well knowing that the said defendants were thereby committing a breach of trust against the plaintiff."

This sets up a charge against her which would, if sustained, be actionable, and a remedy would be applied, I think, in favour of the plaintiff under the general prayer for "further relief"; in any event she would be open to an adverse order for costs, and, therefore, her position is not in principle distinguishable.

All the appeals should, consequently, be dismissed.

GALLIHER, J.A.

GALLIHER, J.A.: I concur.

Appeals dismissed.

Solicitors for appellants: *Hamilton Read & Company.*
Solicitors for respondents: *Craig, Bourne & McDonald.*

LAURSEN v. McKINNON (No. 2).

GREGORY, J. (At Chambers)

1913

Feb. 24.

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May 9.

LAURSEN v. McKINNON

Practice—Notice of appeal—Application to extend time for service of—Made after statutory period had elapsed—Right to so apply—Marginal rule 967—Court of Appeal Act, B.C. Stats. 1907, Cap. 10, Secs. 23 and 25.

The Supreme Court, or a judge thereof, has the power, under Order LXIV., r. 7, of the Supreme Court Rules, to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed.

Until notice of appeal is given, the case is in the Supreme Court.

APPEAL from an order of GREGORY, J. at Chambers in Vancouver on the 24th of February, 1913, on an application by the defendant to extend the time for giving notice of appeal from the judgment given by GREGORY, J. on the trial of the action, the application being made after the time for giving the notice of appeal had elapsed and after a similar application to the Court of Appeal had been refused. Statement

Ritchie, K.C., for the application.
L. G. McPhillips, K.C., contra.

24th February, 1913.

GREGORY, J.: This is an application by the defendant to extend the time for giving notice of appeal against a judgment of my own, notwithstanding the fact that the time for giving such notice has elapsed, and a similar application to the Court of Appeal has been refused.

It is urged in opposition that I am bound by the decision of the Court of Appeal in *Laursen* v. *McKinnon, ante*, p. 10, (1913), 3 W.W.R. 717. Although it was there held only that the Court of Appeal had no jurisdiction to grant the extension, I would certainly feel bound by it if the reasons given could be applied to the Supreme Court, but it seems to me quite clear that they cannot. The right of a judge of the Supreme Court to grant such extension is governed by Order LXIV., GREGORY, J.

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rule 7 of the Rules of 1906. At the time of the passing of those rules the Supreme Court Act of 1903-04 was in force, and sections 94 and 98 of that Act had to be considered in connection with that rule. These sections have since been taken out of the Supreme Court Act by the Court of Appeal Act of 1907, and the rule now stands alone, and alone governs the question; and standing alone, there is no room for doubt that the Supreme Court, or a judge thereof, has the right to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed—for the rule expressly and in terms confers this right. The position of the Court of Appeal is different, for sections 94 and 98 of the Supreme Court Act of 1903-04 are still in force so far as it is concerned, for they have in effect been re-enacted in the Court of Appeal Act (chapter 10, 1907) as sections 23 and 25, and the Court of Appeal based its judgment on the restrictive effect of section 23, feeling that it was better to follow the previous decisions of the old Full Court, which had similarly interpreted a similar restriction contained in section 12, chapter 8 of the statutes of 1897.

Shortly, the right of the Supreme Court to extend the time is wholly found in Order LXIV., rule 7 (which, by the way, is more explicit, in this respect, than the old marginal rule 743 of the Rules of 1890); while the right of the Court of Appeal, even if Order LXIV., rule 7, applies to it, is also affected by sections 23 and 25 of the Court of Appeal Act.

GREGORY, J.

Having jurisdiction, it seems to me that this case is one in which such jurisdiction should be exercised. The point involved is extremely important to the community at large, affecting, as it does, the practice in the Crown land office and of surveyors generally. There has been no doubt from the beginning of the intention of the defendant to appeal, and I do not think he should, in these circumstances, be prejudiced because his counsel interpreted the Rules of Court differently from the majority of the Court of Appeal. It is worthy of comment that the many cases in our own Courts to which I have been referred as shewing that he is not entitled, were decided under rule 684 of the Rules of 1890, and those cases in reality

decided that the words "special leave," etc., meant that special circumstances should be shewn. I think they have been shewn here, but in any case those words are not now in our rule, which is the same as the English rule, Order LXIV., rule 7, and under which the former practice has been materially modified: see *Rumbold* v. *London County Council and Scott* (1909), 100 L.T.N.S. 259, and *Baker* v. *Faber* (1908), W.N. 9.

The time for giving the notice of appeal will be extended until the 11th of March, 1913.

On the hearing, the question of costs was not discussed. I think the defendant should pay them, but if counsel cannot agree they may be spoken to.

The appeal was argued at Vancouver on the 18th and 21st of April, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

L. G. McPhillips, K.C., for appellant (plaintiff): This order was made under Order LXIV., rule 7 (marginal rule 967). Under the Supreme Court Act, 1903-04, sections 94 and 98 thereof had to be considered with this rule. On the formation of the Court of Appeal these sections were taken out of the Act and put in the Court of Appeal rules. When the power to appeal in the Supreme Court Act was repealed, the rules thereunder were repealed (including Order LXIV., rule 7). The mere copy of a section of the Act into the rules does not constitute that section a rule; it is only put there for convenience.

Argument

Ritchie, K.C., for respondent (defendant): Order LXIV., rule 7, is a rule of 1906, and the Rules of 1906 were confirmed by statute, and it gives a judge of the Supreme Court the right to extend the time for appeal. The point in this case is when a section of the Act is brought into the rules, does it become a rule? See *Koksilah* v. *The Queen* (1897), 5 B.C. 600; *Savoy Hotel Company* v. *London County Council* (1900), 1 Q.B. 665. The revised statutes gave the Supreme Court the right to extend the time, and that was confirmed by the Supreme Court Rules Act: see *In re Oliver and Scott's Arbitration* (1889), 43 Ch. D.

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310. The appellant relies on the Court of Appeal Act, section 23, but this cannot be construed as prohibiting the Supreme Court from extending the time under the Supreme Court Act. The Court of Appeal Act only applies after the case has got into the Court of Appeal. He relied upon marginal rule 967. The respondents had been informed of the intention to appeal, but counsel fell into the error of supposing they were in time. Special circumstances were required in order to obtain leave to extend, but now it is the same as in other cases: see *Baker* v. *Faber* (1908), W.N. 9; *In re Coles and Ravenshear* (1907), 1 K.B. 1; *Rumbold* v. *London County Council and Scott* (1909), 100 L.T.N.S. 259. The words "special leave" mean the giving of relief where the Courts had been too harsh: see *International Financial Society* v. *City of Moscow Gas Company* (1877), 7 Ch. D. 241; *In re Manchester Economic Society* (1883), 24 Ch. D. 488; Cameron's Supreme Court Practice, 2nd Ed., 437.

GREGORY, J.

McPhillips, in reply: This Court having already decided the question, there is no jurisdiction to make the order in the Supreme Court. In matters of procedure the Court is bound by the English cases as it is in other cases. Where a rule is made under an Act, if that Act is repealed, then the rule is repealed, so in this case, when the Supreme Court Act was repealed, the rule was repealed; the Act cannot be taken away and the rule left standing.

Cur. adv. vult.

9th May, 1913.

MACDONALD, C.J.A.

MACDONALD, C.J.A. concurred with IRVING, J.A. in dismissing the appeal.

IRVING, J.A.

IRVING, J.A.: The order appealed from was made on the 18th of February, 1913, at a time when this Court had no power to extend the time for appealing after the time limited by statute for that purpose had expired.

The question is as to the jurisdiction of a judge of the Supreme Court to make the order under marginal rule 967, which, on coming into force was, by chapter 14 of the statutes of 1906, to regulate practice and procedure in the Supreme Court. Until a notice of appeal is given and the appeal

brought, the case is in the Supreme Court. There is nothing extraordinary in permitting the Court appealed from to extend the time. Compare the Yukon Act, Revised Statutes of Canada, chapter 63.

This action remained in the Supreme Court until after the 18th of February, 1913. Mr. *McPhillips* argues that by the establishment of a Court of Appeal the statutory authority of the rule vanished, but it seems to me that argument is based on the theory that the extension of time for appealing is an appellate power or something connected with appellate jurisdiction; but the extension of time has nothing to do with the hearing and determination of the appeal. Unless the opening words of the rule, "Save as otherwise provided by these rules, or an Act," prevent the rule applying to an extension of this nature, I think the words must be given their natural meaning and the judgment upheld, particularly in view of the words "including the giving notice of appeal."

In *Savoy Hotel Company* v. *London County Council* (1900), 1 Q.B. 665, 69 L.J., Q.B. 274, 82 L.T.N.S. 56, 64 J.P. 262, 19 Cox, C.C. 437, the Court (Channell and Bucknill, JJ.) were dealing with a section defining a "shop" and which section provided that shop was "to include licensed houses and refreshment houses of any kind." This was to bring into the Act as a "shop" something that ordinarily was not regarded as a shop. The insertion of the words "including the giving notice of appeal" puts beyond doubt the application of the rule to extending time for appealing, unless the rules or some Act provide otherwise.

IRVING, J.A.

The only provision I see to the contrary is to be found in section 87 of the Act of 1903-04, where it is enacted that if any appeal arises under the provisions of any Act, *i.e.*, other than the Supreme Court Act, 1903-04, such appeal shall be brought within the time prescribed by that Act, but the appeals given by the Supreme Court Act were expressly subject to the Rules of Court.

On the whole I can see no satisfactory reason for deciding that the result reached by the learned judge is wrong, although I must say that the question as to what is included by the words "save as otherwise provided" is by no means clear.

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MARTIN, J.A.: I entertain doubt about the matter, but not to the extent to justify me in dissenting from the conclusion reached by my learned brothers.

GALLIHER, J.A. concurred with IRVING, J.A.

Appeal dismissed.

Solicitors for appellant: *McPhillips & Wood.*
Solicitors for respondent: *Bowser, Reid & Wallbridge.*

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LAURSEN v. MCKINNON (No. 3).

Trespass—Timber berth—Misdescription of in licence—Uncertainty of ground in dispute being within berth—Survey—Acceptance of by Surveyor-General—Land Act, R.S.B.C. 1911, Cap. 129.

An action for trespass will not lie, where, through a misdescription in the timber licence, it cannot be clearly shewn that the timber cut by the defendant was within the limits of the plaintiff's claim.

Where the boundaries of a timber berth are so misdescribed in the licence that by following the boundaries the finishing point does not connect with the point of commencement, a surveyor undertaking to close the gap must do so in such a way as not to take in any additional territory, but rather by curtailing from that which, under a correct description, might have been within the boundaries of the location lines.

APPEAL from the judgment of GREGORY, J. in an action tried by him at Vancouver on the 23rd of February, 1912. Timber berth number 353, on Thurlow island, Coast district, was located by one Thickens on the 24th of April, 1907, to whom a timber licence was issued. On the 30th of November, 1907, he assigned the berth to one Heisterman, who then assigned to the plaintiff. The description of the berth in the licence was as follows:

Statement

"Commencing at a stake planted at the extreme southwest corner of P.C.L. Co.'s location 111; thence north 40 chains; thence east 60 chains;

thence north along the line of location 111, 20 chains; thence west 85 chains; thence south 40 chains; thence west 40 chains, thence south 45 chains to shore of Johnstone Straits; thence along shore about 45 chains; thence north 10 chains; thence east about 38 chains to the point of beginning."

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By following the description, a surveyor would finish at a point about 15 chains to the south and 18 chains to the east of the point of commencement. The berth was surveyed in the fall of 1909, when the surveyor included in the survey certain vacant Dominion land to the south of the southern boundary line of berth No. 111 and of said line produced west, a portion of which land was undoubtedly outside the description of the berth in the licence and a portion of which it was questionable whether it was outside or not. The plan and field notes of the survey were subsequently filed with and accepted by the surveyor-general's department. The defendant, who was the owner of timber berth No. 111, cut certain timber in the summer of 1909 beyond his southern and western boundary lines, and within the plaintiff's berth as so surveyed, and although warned by the plaintiff's men, he removed the timber after the survey had been made. The plaintiff brought action against the defendant for $20,000 for cutting and removing from his berth 2,500,000 feet of timber. The trial judge held that the survey of berth No. 353 was substantially correct and that the acceptance of the survey by the surveyor-general gave the plaintiff at least a right to the property by which he could defend himself against admitted trespassers. From this judgment the defendant appealed.

Statement

Armour, for plaintiff.
Ritchie, K.C., for defendant.

26th February, 1912.

GREGORY, J.: This is an action to recover damages for trespassing upon timber limits and cutting and carrying away timber therefrom.

GREGORY, J.

The defendant was the only witness called on his behalf. He did not attempt to deny that he had cut upon the land lying to the south of his own claim, lot 111, but he swore positively that

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no timber had been cut west of his westerly side line, or a prolongation of it, in a southerly direction; and I cannot accept his statement in the face of the satisfactory evidence of King and Maloney. His evidence was, in fact, very unsatisfactory, and I am unable to place any reliance upon it. When asked to explain a contradiction in one important particular between his answers given on discovery and his answers given on the witness stand, he denied having made the statements attributed to him in the discovery. The discovery was such as to leave no room, I think, for misunderstanding. I find as a matter of fact that there was a trespass upon the plaintiff's limits, plotted on the official map as lot 353, and also on that portion of his limits lying immediately to the west of lot 111, and which it is not disputed belong to the plaintiff; also on the land lying immediately to the west of the prolongation of the western boundary of lot 111.

Defendant admits having cut upon that portion of the lands claimed by the plaintiff bounded by the lines and letters F, E, C, D on exhibit 1, but attempts to justify by saying that the same are not included in the area described in the plaintiff's licence, that they were vacant Crown lands, and if he had not cut there the timber thereon would have been wasted. Strangely enough, he never reported his cutting to the Crown lands office. As to a portion of it, he also attempted to justify by shewing that it was necessary to do so in order to get access to the sea from lot 111, but that contention was very weakly put forward —was not proved—and King swore that the little piece of road running through the north-easterly corner of it was not required for the operation of lot 111, and a glance at the map seems to amply sustain this statement. He also entirely overlooks the fact that this land was reserved by notice published in the British Columbia Gazette, 26th September, 1907, p. 8,695—a reservation established only a few months after plaintiff's limits were staked, and so far as appears in this case, is still in force.

GREGORY, J.

Defendant further says that upon an accurate plotting of the lands described in the plaintiff's licence the land F, E, C, D will not be included within it, and so the plaintiff cannot main-

tain this action, because there is no provision in the Land Act permitting the correction of any inaccuracies in the description of timber limits. If this were so, it would mean that applicants would, at their peril, have to describe with mathematical accuracy any limits they proposed to take up before they are surveyed, which is an impossibility.

Owing to previously accepted applications interfering, the plaintiff could not get all the land included in his licence, and in attempting to follow the description set out in plaintiff's application there is some difficulty in making the ends meet. The surveyor swears that the usual practice was adopted of following the same as clearly as possible, and if the ends do not meet, of bringing them together in the shortest possible way, and in doing so, F, E, C, D must be included. Defendant's counsel suggests another way of bringing the ends together, but his plan would have the double disadvantage of dividing the plaintiff's limits into two parcels, and of unnecessarily depriving him of an additional portion about equal in area to F, E, C, D. The surveyor appears to me to have adopted the least inconvenient and most natural method, if it is permissible to do this at all. The Government, through its land department and surveyor-general, have accepted the plaintiff's survey and placed it upon the official map as the land belonging to the plaintiff's limits. Whatever effect this may have, it at least seems to me that it gives the plaintiff some right to it which he can defend against admitted trespassers such as the defendant, who has not the shadow of right of any kind. The pre-emption record of William Hughes, offered in evidence, is not, I think, admissible, but if it were, I do not think it would help the defendant.

GREGORY, J.

The plaintiff took possession. His representatives warned the defendant's foreman before any, or, at least, much timber was cut, and again before any of it was removed, but notwithstanding this, he cut and removed practically all of the timber, stating that defendant told him to disregard the lines. The defendant personally knew of his foreman's acts, and although the plaintiff was living in Vancouver, he did nothing. If he had searched the land office he would, in January, 1910, before the timber was removed, have found the field notes of plaintiff's

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survey on file there. Instead, he relied upon his own interpretation of the description in plaintiff's application. I am not convinced that he even made an innocent mistake as to this.

In these circumstances, he must be found guilty of wilful and deliberate trespass, for which he will have to pay damages. There will be judgment for the plaintiff for the trespass as claimed, and a reference to the registrar to ascertain the damages, and in fixing the damages the registrar will find the value of the timber after it was severed and manufactured, so far as it was manufactured while on the plaintiff's limits. I do not recall any evidence that will justify damages under any other head, but there will be liberty to apply in case I have overlooked any such evidence.

For the rule as to damages, see the case cited by Mr. *Davis* of *Union Bank* v. *Rideau Lumber Co.* (1902), 4 O.L.R. 721.

The appeal was argued at Vancouver on the 19th of May, 1913, before MACDONALD, C.J.A., IRVING, MARTIN and GALLIHER, JJ.A.

Ritchie, K.C., for appellant (defendant): The logs in question were cut south of berth No. 111, on land to which he is not entitled under his location. The plaintiff had his berth surveyed in November, 1909, and there is no proof by the plaintiff when the cutting in question took place. The cutting was all done in the summer of 1909, and the plaintiff must fail, first, because when we cut the timber the ground had not been surveyed; second, the survey in November, which includes the ground in dispute, is not correct, as it is not in accordance with the description of the berth in the licence, which does not, on its own shewing, include the ground in dispute.

Argument

If their title commenced from the time of the survey, then they must shew that the cutting was done subsequently to the acceptance of the survey. When this plot of ground upon which the timber was cut is not included in the licence, but is subsequently included in the survey and accepted by the surveyor-general, that officer goes beyond his jurisdiction.

L. G. McPhillips, K.C., for the respondent (plaintiff): The statute does not require that we give a definite description of the

land. We place our post and give the best possible description of the location of the post. The consent of the department to our having possession of the property in the plan is all we require. The question is whether the trespass was within the limits of the berth as staked.

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MACDONALD, C.J.A.: I think the appeal should be allowed. The plaintiff claims a timber berth which is shewn as located on exhibit 1, the limits of it being there drawn in red. The location post is at E. The final line was to end at the place of beginning, *viz.*, E, but as appears by the line laid down on exhibit 1, it ends at D, a considerable distance to the east and a very considerable distance to the south of E. The complaint of the plaintiff is that the defendant cut timber in the area which may be roughly described as being within D, C, E and F, and also to the west of E and F, but not west of the point H, extended north. Our statute is silent as to any supervision over the survey by either the minister of lands or by the surveyor-general, that is to say, there appears to be nothing which enables either of these officials to adjudicate in case of dispute in boundaries. The plaintiff's surveyor, in making the survey, did not follow the lines of original location as indicated by the red marks. He was unable to follow those lines because of overlapping prior claims. When he came to D, before mentioned, he proposed to close the gap between D and E by running a line from D to C and then from C to E. We have been referred to no authority which permits the gap to be closed in that way, or, in fact, in any way. It may be that such a gap ought to be closed, but, without expressing a final opinion one way or the other, I think if it can be legally closed, it ought not to be so by taking additional territory, but by curtailing some of the territory which might otherwise have lain within the boundaries of the location lines. I am not prepared to say absolutely that the contention of Mr. *Ritchie* is correct, that the final line should be from H north to a point produced from E westerly. If that be the correct limit of those final lines, then the area over which the trespass is alleged to have been committed clearly lies without the plaintiff's claim. All I need say, I think, is that the

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plaintiff has not satisfied me that any timber has been cut within the limits of his claim as located and as assigned to him by his licence. He has not satisfied me that the lines from H to E, or from D to E, perhaps, have been correctly run by his surveyor. In other words, there is an uncertain quantity of land or timber that is not clearly shewn to be within the limits of the plaintiff's claim, and hence, in an action for trespass, he is not entitled to succeed against a person who has cut timber in that indefinite area. I think that disposes of the whole case, because it is practically admitted that any trespass or alleged trespass that has been committed has been in that area. The fact that the defendant may have trespassed on Crown lands does not, of course, entitle the plaintiff to complain.

IRVING, J.A.: I agree in allowing the appeal. It is quite evident that the plaintiff made a mistake in describing his original location. Looking at the map (exhibit 1) and adding two more identification figures, *viz.*, H2 and H3, to the line running north from H, H2 being at the end of the 10 chains and H3 at the same distance as E, I can state my view better with the help of these letters. It appears, according to the plaintiff's original location notice, that the plaintiff, when he arrived at point H, went north 10 chains, then east 38 chains to the point of beginning, that is, to E. He could not reach the point of beginning by going that way, therefore, it seems to me that he made an error in his courses, or that he left his description incomplete. It is quite obvious that he intended to carry it right down to the place of commencement. Therefore, I would say his real line was from H, north to H3 and from H3 to E, the point of commencement. All the area within H3, E, C, D, and H2 would be outside the plaintiff's location. It seems to me that the plaintiff cannot maintain an action for trespass when he himself has committed the initial error. I do not think he is entitled to this area I have just described, but as the judge has found he is entitled to the timber cut on the land lying to the west of line E and the westerly boundary of lot 111. If the plaintiff wants a reference to determine that, he ought to have an opportunity of having his claim under that head investigated.

IRVING, J.A.

MACDONALD, C.J.A.: I am quite of the same opinion as my brother IRVING if there was timber cut in there, which is admittedly the plaintiff's claim, he should have damages for it; he should have a reference to find out what the amount of damages should be, and I simply want to add that to my judgment. If, on consideration, you think you could prove damages there, then, of course, the learned trial judge found in your favour, and if you can prove damages, you may have a reference.

IRVING, J.A.: I thought that is what Mr. *Ritchie* meant when he said they conceded that his client would be responsible for anything taken in there.

MARTIN, J.A.: This case is reduced simply to a question of fact, *viz.*: What is a reasonable definition of the boundaries of plaintiff's timber licence? In my opinion, from the evidence before us, the survey has left the matter so indefinite, so uncertain, that an action of trespass cannot be maintained upon it. No officer of Crown lands had authority to rectify the error, and the uncertainty of the lines here is so great that I feel quite unable to supply it, or attempt to say what should be the true boundaries of the disputed area.

MARTIN, J.A.

GALLIHER, J.A.: The way I view this case, the defendant should succeed in his appeal in so far as any timber within E, F, D and C is concerned, and that there should be a reference as to any timber cut in the admitted space west of E, and also as to any timber, using my brother IRVING's figures, but adding another figure, H4, using H2, H3 and H4 in that boundary. The intersection of the heavy red line and the light line extending E, I call H4, so that, in my opinion, there should be a reference not only as to what is the admitted area up there, but as to what is included in H2, H3, H4 and E. My reason for taking that view with regard to this last-mentioned piece of ground is this: In the description given, it says, "starting from the point H, thence north 10 chains," and immediately proceeds to say "thence east some 38 chains to a point E, the point of beginning." When the surveyor follows out the description, which turns at a point 10 chains north of H, he

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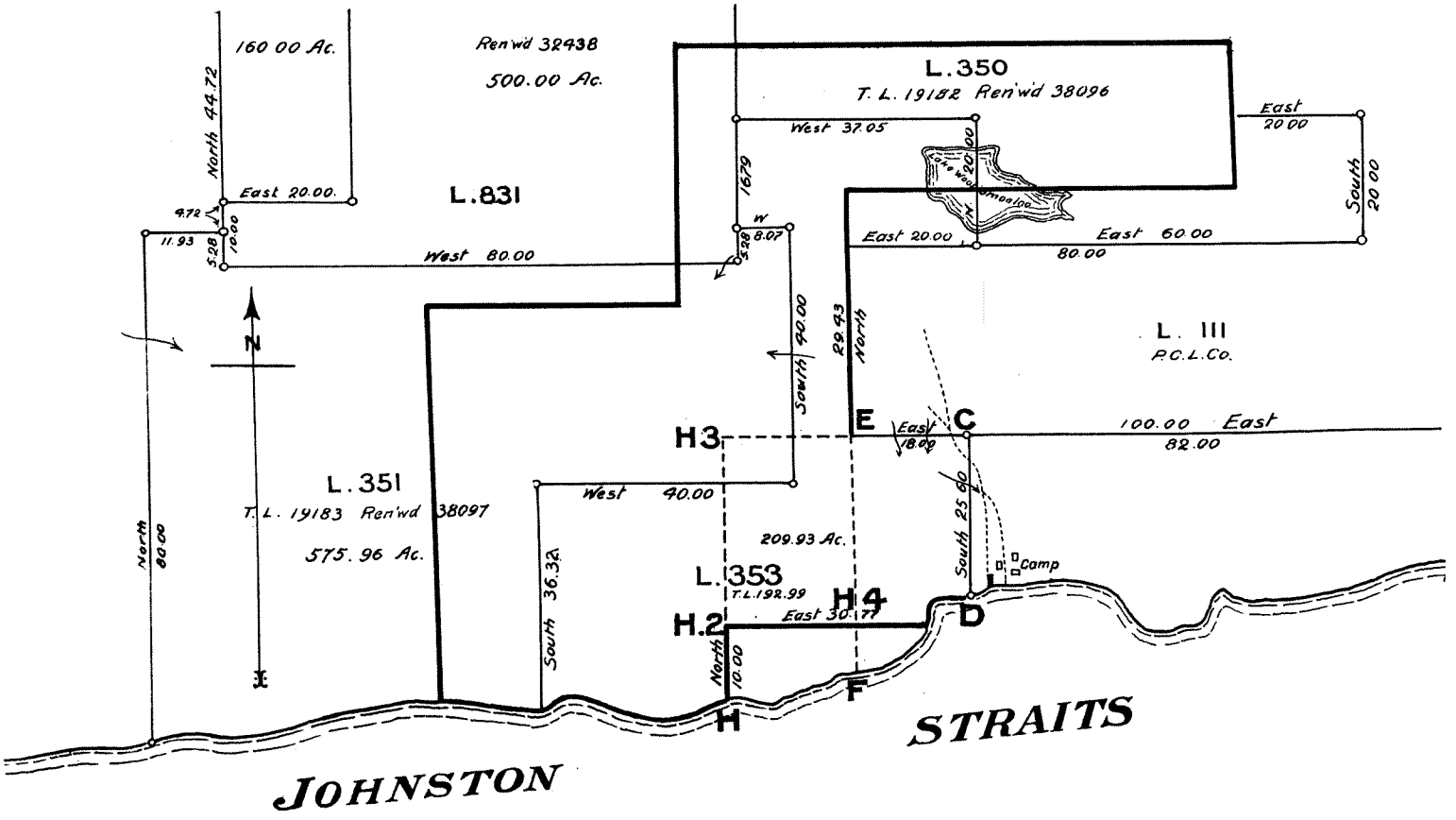

EXHIBIT I NOTE:- THE HEAVY BLACK LINE IS SUBSTITUTED FOR THE RED LINE IN THE ORIGINAL EXHIBIT

finds that will take him to a point some 18 chains east of the starting point E. In my opinion, he is not entitled to that. But I think he is entitled to this: There is ground that is unoccupied, Crown lands, and he takes his direction, and when he comes immediately south of E, that is, at the point H4, he is entitled to stop there and connect up H4 with E. That is the view I take of it. The boundaries are not, in my opinion, correctly fixed at D, C and E there, but if it had been properly and correctly surveyed, in my opinion it would have gone from H2 to H4, and from that directly north to E.

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Per curiam: The appellant will be entitled to costs of this appeal. There will be a reference back to the registrar to take the account on the new basis, or rather, to find the amount of damage on the new basis now established by the judgment of this Court.

The costs of the reference which have been thrown away by reason of the damages having been ascertained on a wrong basis will go to the defendant, and the other costs, the costs in the reference and the costs of the action will be disposed of by the judge when it comes before him for final judgment.

Judgment

Appeal allowed.

Solicitors for appellant: *Bowser, Reid & Wallbridge.*
Solicitors for respondent: *McPhillips & Wood.*

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OGLE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED.

Negligence—Personal injuries—Struck by street car while crossing street—Evidence to justify finding for plaintiff.

OGLE v. B.C. ELECTRIC RY. CO.

The plaintiff, running from the northwest corner towards the southwest corner of Granville and Davie streets in Vancouver (Granville street running north and south, and Davie street east and west), to catch a Granville street car on the south side of Davie street, reached a point just beyond the track that curved into Davie street from the north on Granville street, when, on turning sharply to the left towards his car, he was struck by the fender of a car rounding the curve into Davie street and was injured. There was evidence that the motorman did not sound his gong while making the turn. The jury returned a verdict for the plaintiff.

Held, on appeal (MACDONALD, C.J.A. dissenting), that the case was one in which the jury could properly find a verdict for the plaintiff.

Statement

APPEAL from the judgment of MORRISON, J. in favour of the plaintiff, upon the verdict of a jury, in an action for damages for personal injuries resulting from negligence. It appeared from the evidence that the plaintiff was crossing on the street crossing from the northwest corner of Granville and Davie streets, in Vancouver, to the southwest corner, when he was struck by a street car while it was turning from Granville street into Davie street. The plaintiff alleged that the motorman was negligent in failing to sound the gong and in not waiting for the plaintiff to get out of the way of the car, and he alleged that he was not aware of the approach of the car at the time he was struck. The jury brought in a general verdict in favour of the plaintiff, and the defendants appealed.

The appeal was argued at Vancouver on the 14th of November, 1912, before MACDONALD, C.J.A., IRVING and MARTIN, JJ.A.

L. G. McPhillips, K.C., for appellants (defendants).

Baird, for respondent (plaintiff).

Cur. adv. vult.

7th January, 1913.

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OGLE v. B.C. ELECTRIC RY. CO.

MACDONALD, C.J.A.: The appeal should be allowed and the action dismissed. I think the plaintiff's own evidence puts him out of Court. He admits that he knew that the Davie street car was standing at the corner opposite him, where it would stand in taking on or discharging passengers before rounding the curve into Davie street. The plaintiff wished to catch the Granville street car at the opposite corner, that is to say, he would have to cross Davie street to catch his car. He had either to cross ahead of the Davie street car, which would round the corner as aforesaid, or behind it. He took the former course and then appears in his haste, and with his mind concentrated on his own errand, to have become oblivious to the oncoming Davie street car. After crossing the tracks on Davie street he appears to have swerved sharply to the left, to reach the Granville street car, and was then struck by the fender of the Davie street car aforesaid. Whether the car ran into him or he ran into it is not disclosed in the evidence. It was not dark, and he must have been partly facing the Davie street car, and within a few feet of it when he swerved towards it as already mentioned. That he did not see it is only to be accounted for on the assumption that he was so entirely engrossed with his object, which was to catch his own car, that he lost thought of everything else.

MACDONALD, C.J.A.

Under these circumstances I cannot think that a jury could properly find a verdict in his favour.

IRVING, J.A.: I would dismiss this appeal. The time, place and circumstances all make the case one particularly for a jury. Having regard to the degree of light, the number of people on the street, the time allowed by the Company for people to transfer from one car to another, the custom of the motormen in Vancouver with reference to sounding their gongs, the sworn statement that the gong was not rung as the car made the turn into Davie street—all these were matters for consideration of the jury.

IRVING, J.A.

As to when and upon what evidence in any action for negligence a judge is justified in taking the case from the jury has always been a troublesome question. Lord Coleridge, in *Finegan*

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v. *London and North Western Railway Company* (1889), 5 T.L.R. 598, 53 J.P. 663, being of opinion that on the plaintiff's own evidence, he (the plaintiff) had been guilty of contributory negligence, nonsuited the plaintiff: but the Queen's Bench Division, Denman and Charles, JJ., thought there was not such clear evidence of contributory negligence as to justify a nonsuit, particularly as there was clear evidence of negligence on the part of the defendant's driver.

Ruddy v. *London and South-Western Railway Company* (1892), 8 T.L.R. 658, was tried before Grantham, J., who, being in doubt, let the case go to the jury, who found for the plaintiff. The judge afterwards gave judgment for defendant on the ground that there was no evidence of negligence in the driver, and that on the plaintiff's own shewing, he walked right into the danger. But the Court of Appeal, Lord Esher, M.R., Bowen, and A. L. Smith, L.JJ., thought in view of the pace, admittedly fast, at which the van was going, the case was a proper one for the jury.

IRVING, J.A.

Toronto Railway v. *King* (1908), A.C. 260, 77 L.J., P.C. 77, points out that to entitle the defendants to a direction from the judge, the evidence of folly and recklessness must be clear.

The moral of the decision is, that where it is a question of degree, or whether the accident has arisen wholly from the fault of one or the other, it is better to leave the question to the jury.

The jury having found for the plaintiff, I do not think we can interfere.

MARTIN, J.A.

MARTIN, J.A. concurred in dismissing the appeal.

Appeal dismissed, Macdonald, C.J.A. dissenting.

Solicitors for appellants: *McPhillips & Wood.*

Solicitors for respondent: *Taylor, Harvey, Baird, Grant & Stockton.*

APPENDIX.

Cases reported in this volume appealed to the Supreme Court of Canada or to the Judicial Committee of the Privy Council:

BARK FONG *et al.* v. COOPER (p. 271).—Reversed by Supreme Court of Canada, 10th November, 1913. See 49 S.C.R. 14; 16 D.L.R. 299; 27 W.L.R. 174; 5 W.W.R. 633, 701.

DISHER v. DONKIN (p. 230).—Reversed by Supreme Court of Canada, 27th October, 1913. See 49 S.C.R. 60; 16 D.L.R. 610; 27 W.L.R. 428; 5 W.W.R. 870.

FORT GEORGE LUMBER COMPANY, *In re* (p. 473).—Affirmed by Supreme Court of Canada, 3rd November, 1913. See 48 S.C.R. 593; 16 D.L.R. 175; 5 W.W.R. 982.

GENTILE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 307).—Affirmed by the Judicial Committee of the Privy Council, 16th June, 1914. See 28 W.L.R. 795; 6 W.W.R. 1,342.

HINRICH v. THE CANADIAN PACIFIC RAILWAY COMPANY (p. 518).—Affirmed by Supreme Court of Canada, 30th October, 1913. See 48 S.C.R. 557.

HOUNSOME v. VANCOUVER POWER COMPANY, LIMITED (p. 81).—Affirmed by Supreme Court of Canada, 23rd February, 1914. See 49 S.C.R. 430; 6 W.W.R. 670.

KERR *et al.* v. CANADIAN PACIFIC RAILWAY COMPANY (p. 389).—Affirmed by Supreme Court of Canada, 10th November, 1913. See 49 S.C.R. 33; 14 D.L.R. 840; 16 D.L.R. 191; 5 W.W.R. 782.

LONGMAN *et al.* v. COTTINGHAM (p. 184).—Affirmed by Supreme Court of Canada, 16th October, 1913. See 48 S.C.R. 542; 15 D.L.R. 296; 5 W.W.R. 969.

MCPHEE v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (p. 450).—Reversed by Supreme Court of Canada, 24th November, 1913. See 49 S.C.R. 43; 27 W.L.R. 444; 5 W.W.R. 926.

OGLE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 692).—Affirmed by Supreme Court of Canada, 2nd March, 1914. See 6 W.W.R. 683.

SLATER v. VANCOUVER POWER COMPANY *et al.* (p. 429).—Affirmed by Supreme Court of Canada, 3rd November, 1913. See 48 S.C.R. 609; 16 D.L.R. 225; 5 W.W.R. 1,080.

TEMPLE v. MUNICIPALITY OF NORTH VANCOUVER *et al.* (p. 546).—Affirmed by Supreme Court of Canada, 3rd February, 1914. See 6 W.W.R. 70.

TRAWFORD v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 132).—Affirmed by Supreme Court of Canada, 23rd February, 1914. See 49 S.C.R. 470; 6 W.W.R. 288.

UNITED BUILDINGS CORPORATION, LIMITED *et al.* AND THE CORPORATION OF THE CITY OF VANCOUVER (p. 274).—Affirmed by the Judicial Committee of the Privy Council, 15th June, 1914. See 28 W.L.R. 787; 6 W.W.R. 1,335.

VELASKY v. WESTERN CANADA POWER COMPANY (p. 407).—Reversed by Supreme Court of Canada, 23rd February, 1914. See 49 S.C.R. 423; 6 W.W.R. 813.

WINTER *et al.* v. GAULT BROTHERS, LIMITED (p. 487).—Affirmed by Supreme Court of Canada, 23rd March, 1914. See 6 W.W.R. 608.

Cases reported in 17 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:

BERGKLINT v. CANADA WESTERN POWER COMPANY, LIMITED (p. 443).—Reversed by Supreme Court of Canada and a new trial ordered, 1st June, 1914. See 6 W.W.R. 1,236.

COOK v. THE CORPORATION OF THE CITY OF VANCOUVER (p. 477).—Affirmed by the Judicial Committee of the Privy Council, 23rd June, 1914. See 28 W.L.R. 801.

DAYNES v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED (p. 498).—Reversed by Supreme Court of Canada and a new trial ordered, 2nd March, 1914. See 49 S.C.R. 518; 6 W.W.R. 512.

MAHOMED v. ANCHOR FIRE AND MARINE INSURANCE COMPANY (p. 517).—Reversed by Supreme Court of Canada, 22nd October, 1913. See 48 S.C.R. 546; 15 D.L.R. 405.

Cases reported in 16 B.C., and since the issue of that volume appealed to the Judicial Committee of the Privy Council:

CUDDY AND BOYD v. CAMERON (p. 451).—Reversed by the Judicial Committee of the Privy Council, 7th August, 1913. See (1914), A.C. 651; 83 L.J., P.C. 70; 110 L.T.N.S. 89; 5 W.W.R. 56.

POINT GREY ELECTRIC TRAMWAY BY-LAW, *In re* (p. 374).—Reversed by the Judicial Committee of the Privy Council, 23rd July, 1913. See (1913), A.C. 816; 83 L.J., P.C. 53; 109 L.T.N.S. 771; 14 D.L.R. 8; 5 W.W.R. 25.

Case reported in 15 B.C., and since the issue of that volume appealed to the Supreme Court of Canada:

PATERSON TIMBER COMPANY, THE v. THE CANADIAN PACIFIC LUMBER COMPANY (p. 225).—Affirmed by Supreme Court of Canada, 9th December, 1910. See 47 S.C.R. 398.

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Act, 1861, when a creditor finds a ship, or the proceeds thereof are under arrest of the Court in pursuance of its valid process, he may bring his action, and the Court acquires immediate jurisdiction over any claim for building, equipping or repairing the ship. The burden is not cast upon the litigant to shew that the original action under which the ship was arrested must eventually succeed. MOMSEN *et al.* v. THE AURORA. **353**

4.——*Misleading defence — Costs — Rule 132—Discretion.*] Although the plaintiff fails in his action, if the defence is so misleading as to invite unnecessary controversy and prolong the trial, the Court, exercising its discretion under rule 132, will make no order for costs. MCARTHUR v. THE JOHNSON. - - - - - - - - - - **94**

5.——*Necessaries — Repairs—Alteration in structure and equipment—The Admiralty Court Act, 1861 (24 Vict., Cap. 10, Sec. 5).*] Alterations in the structure and equipment of a fishing vessel for the purpose of making her fit to engage in fishing with dories, instead of as a trawler, are "necessaries" under section 5 of The Admiralty Court Act, 1861 (24 Vict., chapter 10). *Williams* v. *The Flora* (1897), 6 Ex. C.R. 137, and *The Riga* (1872), 1 Asp. M.C. 246, L.R. 3 A. & E. 516, followed. VICTORIA MACHINERY DEPOT COMPANY, LIMITED v. THE CANADA AND THE TRIUMPH. (No. 2). - **515**

6.——*Practice—Action in rem—Wages—Judgment in default of appearance—Waiver of proceedings.*] In an action *in rem* for seaman's wages wherein no appearance has been entered, and the ship is in the marshal's hands for sale in another cause, all preliminary proceedings may be waived and the judgment entered forthwith. NOSLER v. THE AURORA. - - - - - - **449**

7.——*Practice—Affidavit leading to warrant—Rules 35, 36 and 37—Allowing in supplemental affidavits to shew jurisdiction—Domicile of company—Mortgagees—Material men—Statutory lien—Priority—Promissory notes in part payment—Notes dishonoured.*] Upon an application to vacate warrants issued against a ship under arrest in an action *in rem* for necessaries, although it appeared that on the facts disclosed in the affidavits filed before the registrar, the Court would not have jurisdiction to issue the warrant for arrest, the plaintiffs were allowed to file supplementary affidavits to shew that there was jurisdiction to issue the warrants and that the case was one in

which the discretion of the registrar could be properly exercised. A company whose head office is in England and is licensed and registered to carry on business in British Columbia is not "an owner domiciled within Canada" within the meaning of subsection (*b*) of Rule 37 of the procedure in Admiralty cases. A plaintiff who has supplied necessaries in British Columbia to a ship which is away from its home port and has no owner domiciled in British Columbia, has acquired a statutory lien for such necessaries when the ship is arrested under the warrant of the Court, and the lien may be enforced either upon the trial or on a subsequent motion. A party supplying necessaries to a foreign ship, and taking promissory notes in payment, is entitled, if the notes are dishonoured, to sue the ship for the original debt; if the notes are in part payment only, he may sue the ship for the balance owing. VICTORIA MACHINERY DEPOT COMPANY, LIMITED v. THE CANADA AND THE TRIUMPH. - - - - - **511**

8.——*Re-arrest of ship after judgment—Bail—Costs—The Admiralty Court Act, 1861 (24 Vict., Cap. 10), Secs, 15 and 22—Rule 39.*] A warrant will be issued for the re-arrest of a ship, released on bail, to answer the amount of the claim and costs for which judgment has been recovered and remains unsatisfied. MOMSEN *et al.* v. THE AURORA. (No. 2). - - - - - **355**

9.——*Salvage — Meritorious service — Award—Value of res—Percentage of yearly depreciation—Practice.*] The O., a freight steamer, fully laden with coal, had gone ashore on Danger reefs, at the northerly end of Thetis island, and about seven and a half miles, by ship's course, from Ladysmith, B.C. She had sprung aleak and the water had put out her fires. About 10 feet of her forefront was on the rock, while her stern was in deep water. The P. sighted the stranded vessel in the night time and went to her relief, taking in a hawser passed to her by the O., and waiting for the tide and daylight. Just before 6 o'clock in the morning the P. started to pull straight ahead at full speed, and shortly succeeded in getting the O. off the reef. The P. then cut the O.'s hawser, so as to lose no time, backed up to the O. and made fast to her with the P.'s hawser, and succeeded in towing her under forced draft into Ladysmith, where the O. was tied up to a wharf in a position of acknowledged safety. *Held*, that the services performed by the P., while without the specially meritorious features of saving

ADMIRALTY LAW—*Continued.*

human life or danger to herself and crew, were as skilfully conducted as the nature of the case permitted, and valuable, and as such were entitled to corresponding recognition, even though they were or short duration. Salvave awarded in an amount of $2,200. In finding the value of the ship and cargo, the district registrar allowed a yearly depreciation in the value of the ship of 7 per cent., following a practice with reference to wooden vessels said to prevail in British Columbia. *Held*, that whatever may be said of the allowance of such a depreciation in the case of wooden vessels as a rule, it must always very largely depend upon the manner in which the vessel was originally constructed and the care she had subsequently received but, in any event, it could not be applied to the ship in respect of which salvage services were rendered in this case, as she is a better built ship than the average, and has been well cared for and maintained. DUNSMUIR *et al.* v. THE OTTER. - - - - - - - - - **435**

10.——*Shipping—Collision between vessel and bridge—Negligence—Regulations—Obstructions placed across navigable waters—Right to damages—"Railway bridge."*] Apart from any statutory regulations as to lights, those who place obstructions across navigable waters, though lawfully authorized to do so, cannot complain if damage is done to their works by collision brought about by the fact that a prudent navigator, proceeding with due care, was unable at a crucial moment, because of the absence of lights, to define his exact position in relation to such obstructions. *Bank Shipping Co.* v. *City of Seattle* (1908), 10 B.C. 513, distinguished. *Quaere*, whether a bridge not originally built for railway purposes, but over which rails were laid (it was not known by whom) and used by a street railway company occasionally for construction purposes, is to be regarded as a "railway bridge" under the provisions of the order in council of the 29th of June, 1910 (Statutes of Canada, 1911, cxii.). CITY OF NEW WESTMINSTER v. STEAMSHIP MAAGEN. **441**

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2.——*Notice of—Application to extend time for service of—Made after statutory period had elapsed—Right to so apply—Marginal rule 967—Court of Appeal Act, B.C. Stats. 1907, Cap. 10, Secs. 23 and 25.*] The Supreme Court or a judge thereof, has the power, under Order LXIV., r. 7, of the Supreme Court Rules, to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed. Until notice of appeal is given, the case is in the Supreme Court. LAURSEN v. MCKINNON. (No. 2). - - - - - - - - **677**

3.——*Notice of—Power of Court to extend time.* - - - - - - - **10**
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2.——*Award.* - - - - - - **129**
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3.——*Award—Grounds for setting aside—Mistake in law—Waiver—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 394, 396—Arbitration Act, R.S.B.C. 1911, Cap. 11, Sec. 22.*] An award being good on its face, cannot be set aside on the ground that the arbitrators have made a mistake in law. The parties to an arbitration, even by mutual consent, cannot re-open the matter before the Court to review rulings on points of law after the arbitrators have made and published their award. Section 396 of the Municipal Act limits the grounds upon which an award can be set aside for misconduct and compensation on a wrong principle. *In re* LAURSEN AND CORPORATION OF THE DISTRICT OF SOUTH VANCOUVER. (No. 2). - - - - - - - - - **532**

4.——*Award—Streets—Damage to property by change of grade—Remedy of owner.* - - - - - - - - - - - - **480**
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3.——*Case stated by magistrate—Right of magistrate to take a view of the locus—Criminal Code, section 1,014.*] Accused was charged with obtaining a cheque for $500 unlawfully, in that he sold a particular town lot for a certain sum, but on inspection the purchaser discovered that the lot actually sold was a different lot. The evidence for the prosecution and defence was closed and argument thereon was being proceeded with, when the question arose as to the necessity of a view of the lot by the Court. It being doubtful whether there was power to hold such view, the learned magistrate submitted a case for the opinion of the Court of Appeal. *Held*, that there was no authority, statutory or otherwise, empowering the magistrate to take a view. REX v. CRAWFORD. - - - - - - **20**

4.——*Habeas corpus — Intimation by Crown that a bill of indictment would not be preferred at the then assizes—Effect of as to traversing the case—Right of accused.*] The applicant was extradited to Canada on account of stealing a large sum of money from the Bank of Montreal at New Westminster. He had a preliminary hearing before the magistrate and was committed, in September, 1912, to the gaol at New Westminster, until discharged by due process of law. The assizes for the County of Westminster were held in the month of October following. During the assizes an application was made to the presiding judge regarding the position taken by the Crown that it did not propose to prefer a bill of indictment to the grand jury against the accused at the said assizes. On this application it was contended by the Crown that in effect an order was made by the judge traversing the case to the next assizes. This was disputed on behalf of the accused. The present application was for the discharge of the accused on the ground that the warrant of commitment lapsed at the end of the assizes, and that the Crown had obtained no traverse of the proceedings to the next assizes. *Held*, that the warrant of commitment was still valid and subsisting, and that the only application which the prisoner could make in the circumstances was for an order to be released on bail. REX v. DEAN. - - - - - - - - - - **18**

5.——*Perjury — Case stated — Stenographer's report of evidence taken through interpreter—Voluntary statement of prisoner to constable after arrest—Admissibility.*] A transcript of the stenographer's notes of what an interpreter said was the testimony of the witness must govern in the absence of evidence to the contrary. A voluntary confession made by a prisoner to a constable after arrest is admissible in evidence. REX v. BOGH SINGH. - - **144**

6.——*Prosecution under section 111 of the Criminal Code—Justification under section 16—Wilful use of explosives—Colour of right—Grand jury—Jurors Act, R.S.B.C. 1911, Cap. 121, Schedule B—Number of jurors to be summoned.*] Upon the sheriff summoning thirteen grand jurors, Schedule B of the Jurors Act is complied with in that portion of the Province to which it applies. *Per* MACDONALD, C.J.A.: The schedule was passed not only for the purpose of permitting the sheriff to summon aliens and those without property qualification, but to summon less than the customary number. *Per* MARTIN, J.A.: Assuming the existence of a *bona-fide* belief in a claim of right, that does not justify the employment of the means prohibited by section 111 of the Code in an attempt to exercise that right, and section 16 did not justify or excuse the accused in what he did. REX v. BONNER. - - - - - - - - - - **454**

7.——*Stated case—Practice—Number of grand jury necessary to concur in finding true bill—Instructions from trial judge as to—Change of venue—Order as to—Criminal Code, Secs. 884 and 921.*] In a county where twelve grand jurors are required to concur in the finding of a true bill, the Court of Appeal must assume, in the absence of evidence to the contrary, that a true bill returned by the grand jury was so found by the requisite number. The entry in his book by the clerk of assize is a sufficient authorization of a change of venue, and can be proved by an exemplification of the proceedings. When a judge is seized of facts from which it can properly be inferred that it is expedient to the ends of justice to make a change of venue, his decision becomes one of fact and not of law, and is not open to review by way of case stated. On an application for change of venue when judge and counsel are seized of the facts, the usual practice of putting forward the facts by affidavit may, with the consent of counsel for the defence, be dispensed with. Where a juror asks a question of a witness in order to ascertain if he has a fact already deposed to rightly in his mind, there can be no cross-examination on the answer made. A prisoner on trial for murder cannot try on a pair of boots in the presence of the jury in order to shew that he cannot put them on

FIRE—*Destruction of timber—Origin of fire—Railway—Sparks from engine—Effect of windcurrents in a mountainous country—Spread of fire—Railway Act, R.S.C. 1906, Cap. 37, Sec. 298—Modern appliances—Damages—Inferences from evidence—Right of pre-emptor, and applicant to purchase, under Land Act, to recover damages.*] The timber on the plaintiffs' property was destroyed by a fire that started close to the tracks of the defendant Company's railway. The fire was first seen about two o'clock in the afternoon, about half an hour after a freight train had passed. The engine of this train had started the day before from Cranbrook for Crow's Nest, and had undergone the usual examination and was found in good condition before starting. There was no evidence that the engine was again examined at Crow's Nest before leaving on the return trip. *Held*, on appeal, affirming the judgment of CLEMENT, J., that the fire which destroyed the plaintiffs' property was caused by sparks from an engine of the defendants. *Per* MACDONALD, C.J.A.: it is difficult for persons living in a level country to realize the frequent shifting and varying currents and cross-currents of the winds in localities where there are mountains, valleys, streams and canyons. *Per* IRVING, J.A.: On an appeal from the findings of fact of the trial judge, without a jury, the case must be tried as it was tried by the judge. *Beal* v. *Michigan Central R.R. Co.* (1909), 19 O.L.R. 502, approved. A pre-emptor in good standing has a right of action for the destruction of timber on his land. A prospective purchaser under the Land Act, R.S.B.C. 1911, Cap. 129, Sec. 34, who had staked the ground he intended to purchase before the fire had destroyed the timber thereon, but had not made his application until after the fire, has no right of action for the timber destroyed. KERR *et al.* v. CANADIAN PACIFIC RAILWAY COMPANY. **389**

FIRE INSURANCE — *Fire Insurance Policy Act, R.S.B.C. 1911, Cap. 114—"Just and reasonable" conditions—Onus of proof.*] The onus of proof that a condition is not just and reasonable within the Fire Insurance Policy Act, R.S.B.C. 1911, chapter 114, lies on the assured. An assurance policy contained a condition that the insurer should not be liable for loss caused by forest fires, and a further condition as follows: "This policy will not cover vacant or unoccupied premises . . . . and if the premises insured shall become vacant or unoccupied . . . . this policy shall cease and be void unless the company shall by indorsement on the policy allow the policy to be continued." *Held*, that these were just and reasonable conditions. THE HALL MINING AND SMELTING CO., LTD. v. THE CONNECTICUT FIRE INSURANCE CO. - - - - - - **113**

FLOATING CHARGE — *Receiver and manager—Holder of a floating charge which has crystallized, whether affected by contracts of the mortgagor.*] The defendant Company had entered into a contract with the Corporation of the City of Victoria for the construction of certain works. By one of the clauses of the contract the Corporation was empowered to determine the contract and complete the work, and by another clause the Corporation was given power upon such determination "to take possession of and use any of the materials, plant, etc., provided by the (defendant Company) for the purpose of the work." Subsequently to this contract the defendant Company gave to the plaintiff Bank a floating charge over all its property and assets. On the 11th of April, 1913, the defendant Company commenced an action against the Corporation to set aside the contract, or in the alternative for damages for its breach. On the 23rd of April, 1913, the Corporation gave notice to the defendant Company determining the contract. On the 30th of April, 1913, a receiver and manager was appointed in this action at the suit of the plaintiff Bank. By the order appointing him, the receiver and manager was directed to take possession of the defendant Company's assets, which he accordingly proceeded to do. The Corporation then claimed the material and plant of the defendant Company, which the receiver refused to deliver. The Corporation then moved *pro interesse suo* in the action, for an order directing the receiver and manager to deliver possession of the materials and plant to the Corporation, who claimed it under the above clause in the contract. Judgment had been obtained in this action, declaring the plaintiff Company to have a

as to prevent any person from engaging under contract or agreement skilled workmen not resident in British Columbia, to perform labour in British Columbia in or upon any new industry not at present established in British Columbia, or any industry at present established, if skilled labour for the purpose of the industry cannot be otherwise obtained, nor shall the provisions of this section apply to teachers, professional actors, artists, lecturers or singers." The trial judge gave judgment for plaintiff and dismissed the counterclaim. *Held*, on appeal, varying the judgment of MCINNES, Co. J., that plaintiff have judgment for salary due at time of leaving, and also the "risk money," but that defendant Bank have judgment on the counterclaim. *Held*, further, however, that while the contract came within the statute, yet, plaintiff having elected to accept the contract as valid for two years of the term, he could not be allowed to approbate and reprobate. *Semble*, *per* IRVING, J.A.: That defendant Bank should have pleaded this estoppel. *Held*, further, that it was within the power of the Provincial Legislature to pass the Master and Servant Amendment Act, 1899, as coming under the head of civil rights. ASHMORE v. BANK OF BRITISH NORTH AMERICA. **257**

4.——*Contract—Severable—Breach of—Dismissal—Measure of damages.*] The defendant employed the plaintiff under a written agreement in the following terms: "As a draughtsman and generally in survey work for three months or until the drafting and survey work in connection with a certain contract to survey certain Canadian Northern Pacific Railway Company's rights of way held by the employer, at $165 per month, and thereafter to complete a term of three years from the date of this agreement in the said employment at the rate of $125 per month." Plaintiff worked under the $165 wage for nine and a half months, when the defendant told him that the contract with the Canadian Northern Pacific Railway was completed and he (plaintiff) would in future work under the $125 wage. The facts were that, although the defendant had been paid in full for his work under the contract, the drafting had not been completed. On the following day the defendant asked the plaintiff to make certain changes in this drafting, which plaintiff refused to do under the $125 wage. He was dismissed. *Held*, that there was a breach of contract and that the measure of damages be $165 per month from the date of plaintiff's discharge to the time of his new employment. POS v. JOHNSON. - - - - - - **159**

5.——*Contract to strengthen poles and string wires—Independent contractor—Lineman employee of contractor—Injured while stringing wires—Liability of owners—Negligence.*] The defendant Company had erected a line of poles for stringing electric wires. A contract was entered into with L. to string the wires, but before this work was commenced the defendants, finding that the poles had become unsafe chiefly through the action of water in a ditch that ran parallel with and close to the line of poles, made an additional contract with L. to have the poles strengthened. It appeared that L. was an experienced and competent man in the work which he contracted to do, and it was admitted that he was an independent contractor. The plaintiff was employed by L. as a lineman to string the wires. After he had climbed one of the poles, it fell, and he was injured. In an action for damages the jury brought in a verdict for the plaintiff. *Held*, on appeal, *per* MACDONALD, C.J.A. and IRVING, J.A. (following *Murray* v *Currie* (1870), L.R. 6 C.P. 24), that the plaintiff had no cause of action against the defendant Company. *Per* MARTIN and GALLIHER, JJ.A. (following *Marney* v. *Scott* (1899), 1 Q.B. 986): The defendants owed a duty to those who came upon their property for the purpose of work in which they were entrusted, to see that the property and appliances were in a safe condition, and the duty was not discharged by contracting with a competent person. The Court being equally divided, the appeal was dismissed. VELASKY v. WESTERN CANADA POWER COMPANY. - - - - - - - - - - **407**

6.——*Contract with non-resident of Province for service within Province—Servant treating contract as legal for portion of term—Estoppel—Money advanced for transportation—Right of recovery—Master and Servant Act, R.S.B.C. 1911, Cap. 153, Sec. 19.*] P. entered into an agreement with D. in London, England, whereby D. was to go to British Columbia and enter into possession of and work P.'s farm for at least a year at a salary of $700 a year. P. was to advance £100 for D.'s transportation expenses, which was to be repaid from D.'s salary as it became due. P. advanced the £100 and D. went to British Columbia, where he lived upon and worked P.'s farm for two and a half months, when he left. In an action by P. for the return of the

negotiated with C., who paid him $5 to obtain an option for ten days. The defendant saw W., who gave the option in C.'s name, for which he was paid $5. Two days later W.'s principals sold the property to other parties. The defendant and W. then came to a settlement whereby W. paid the defendant $250, and he received back the option given C. The defendant then paid C. $250, less $15, which he withheld for his own services. The plaintiffs claimed that the $250 was paid as a commission to which they were entitled, the defendant being in their employ, the defendant on the other hand claiming that the money was paid in consideration for the return of the option. *Held*, on appeal, *per* MACDONALD, C.J.A. and MARTIN, J.A., affirming the judgment of the tiral judge, that the $250 was paid for the defendant's services, to which his employers were entitled. *Per* IRVING and GALLIHER, JJ.A.: That the plaintiff's claim did not fall within the defendant's retainer, the money being paid in settlement of the claim of the option holder. The Court being equally divided, the appeal was dismissed. CANADIAN LOAN AND MERCANTILE COMPANY, LIMITED v. LOVIN. - - - - - **236**

11.—— *Negligence — Injury — Common employment—Prima facie case for submission to jury.*] The plaintiff, under the direction of a foreman of the defendant Company, took a wheelbarrow of cement on an open elevator platform at the basement of a building under construction for use on the upper storeys. The platform was six feet one inch in length, four feet eight inches wide at one end and three feet at the other. After the elevator had gone from the basement to the ground floor other workmen got on, and when it had again started up there were two wheelbarrows, two boxes, two feet by 18 inches, and seven men on the elevator. The plaintiff was crowded over to one side, the heel of one of his feet protruding beyond the edge of the floor. Upon the elevator continuing up his heel was caught on a bolt that was projecting from the side of the elevator shaft and his foot was crushed between the bolt and the floor of the elevator. *Held*, on appeal (GALLIHER, J.A. dissenting), reversing the finding of the trial judge, who took the case from the jury and dismissed the action, that a *prima facie* case was made out by which a jury might find negligence and absence of contributory negligence. CHARLES v. NORTON GRIFFITHS COMPANY, LIMITED. - **179**

12.——*Negligence—Injury to servant—Defective system—Volenti non fit injuria—Withdrawal of case from jury.*] The defendant Company, in carrying on blasting operations after drilling, first blasted the bottom of the holes with a small amount of powder in order to widen them for the reception of sufficient powder for the main blast. This operation is known as "springing" holes. After the springing operation the hole is charged with powder for the main blast. While the plaintiff, a workman employed by the defendants, was engaged in the final loading of a hole, the "springing" of other holes was being carried on close to where he was working. An explosion in the springing operation caused the blast at the hole where the plaintiff was working to go off, and he was injured. There was evidence of a warning of the blast for "springing" being given, which the plaintiff, who was a foreigner, did not hear. The trial judge took the case from the jury and dismissed the action. *Held*, on appeal (MACDONALD, C.J.A. dissenting), that the trial judge properly withdrew the case from the jury and dismissed the action, that the particular thing that caused this accident was the failure of the plaintiff to hear the warning (if given), and if not given, it was the neglect of a fellow servant. *Per* IRVING, J.A.: The plaintiff was not only *sciens*, but *volens*, in that he undertook the risk as part of his business. The Court is justified, under certain circumstances, in withdrawing a case from the jury, even although the defence of *volens* be raised. *Smith* v. *Baker & Sons* (1891), A.C. 325, discussed. *Per* MACDONALD, C.J.A.: The opinion of the jury should be taken as to whether the plaintiff consented to run the risk, knowing the danger, he being a young foreigner, with a limited knowledge of English. BECK v. GUTHRIE, MCDOUGAL & CO. - - **482**

13.—— *Practice — Arbitration — Award —Filing under paragraph 8, Second Schedule, Workmen's Compensation Act, 1902—Action to set aside—Jurisdiction—Workmen's Compensation Rules, 1904, r. 63—New trial, refusal of.*] Where the award of an arbitrator under the Workmen's Compensation Act is filed under paragraph 8 of the Second Schedule, and thereby becomes enforceable as a County Court judgment, an action to set aside the judgment and execution issued thereon is properly brought in the Supreme Court (GALLIHER, J.A. *hesitante*). Judgment of HUNTER, C.J.B.C. reversed. THE BRITISH COLUMBIA COPPER

MORTGAGE — *Mortgagor's right of redemption—Limitations of in mortgage or by contemporaneous agreement—Mortgagee in possession—Improvements.*] Defendant held a mortgage, payable in three months, on a sawmill plant, to secure an advance of $30,000. He allowed the mortgage to run for nearly a year, when, owing to further advances, the indebtedness had increased to some $51,000. The mortgagee then served notice on the mortgagor that unless the indebtedness were paid in ten days he would enter into possession and sell, etc., under the provisions in the mortgage. This notice was accompanied by a letter, in which the mortgagee proposed that the parties should come to an arrangement whereby he (the mortgagee) should enter into possession forthwith and operate the mill on his own account for nine months, during which time the mortgagor should have the right to redeem, subject to the further agreement that the mortgagor should forthwith execute a conveyance of the property to the mortgagee, to be placed in escrow and to be taken therefrom only on certain conditions, one of which was that in case any suits were brought against the mortgagor, the mortgagee would be at liberty to register the conveyance. The mortgagor agreed to the terms of this letter. The mortgagor was sued before the expiration of the nine months, whereupon the mortgagee registered the conveyance and held himself out as the absolute owner of the property. Upon entering into possession the mortgagee expended $30,000 in improvements during the first nine months and $65,000 subsequently. *Held*, on appeal, in an action for redemption, that the parties could not, in the instrument of mortgage itself or by a contemporaneous agreement, limit the mortgagor's right of redemption. *Held*, further, that the costs of improvements made by the mortgagee in possession, chargeable to the mortgagor, are

MORTGAGE—*Continued.*

limited to moneys expended in necessary and reasonable repairs. Judgment of GREGORY, J. at the trial, varied. MANITOBA LUMBER COMPANY, LIMITED v. EMERSON. - **96**

MUNICIPAL LAW — *Assessment and taxation—Meetings of council—Court of revision—Meetings held outside limits of municipality—Sale for arrears of taxes—Construction of statutes—R.S.B.C. 1897, Cap. 144, Secs. 243 and 244—B.C. Stats. 1901, Cap. 31, Sec. 3—Statutory relief—Limitation of action.*] The plaintiff's land was sold for taxes by the Municipality of North Vancouver in 1897, for arrears 1894 to 1897. The defendant Municipality bought in the property at the sale, and in 1903 sold to the defendant Ross. On Ross applying for registration of the tax-sale deed from the Municipality to itself and the further deed from the Municipality to himself, the registrar, after serving the plaintiff with notice of the application, as required by the Land Registry Act, and he not appearing, issued a certificate of title to Ross. The plaintiff brought action in 1911 to set aside the sale, on the grounds that the meetings of the Council and of the court of revision, without the required authority of a resolution of the Council, were held outside the limits of the municipality (*i.e.*, in the City of Vancouver); that no resolutions were passed by the court of revision passing and confirming the assessments, and no assessment by-law was passed for the year 1897. The main defences were, first, that the plaintiff not having taken action when served with notice by the registrar on the defendant Ross's application for a certificate of title, he was barred from asserting any claim by section 3, chapter 31, British Columbia Statutes, 1901; second, that he not having brought action within one year from the time the cause of action arose, he was barred by sections 243 and 244 of the Municipal Clauses Act, Revised Statutes of British Columbia, 1897, chapter 144. *Held* (MARTIN, J.A. dissenting), that the appellant was estopped and debarred from asserting any claim whatever to the land in question by section 3, chapter 31 of the statutes of 1901. *Per* IRVING, J.A.: The Corporation having taken the land over under the authority of the statute which enabled it to bid the property in, they would be necessary parties to the action. The

plaintiff's cause of action arose at the latest in 1903; the writ was issued in 1911. Under sections 243 and 244 of the Municipal Clauses Act, actions must be commenced against a municipality within one year from the time the cause of action arose. *Anderson* v. *Municipality of South Vancouver* (1911), 45 S.C.R. 425, distinguished. TEMPLE v. MUNICIPALITY OF NORTH VANCOUVER *et al.* - - - - - - - - - - **546**

2.——*Assessment and taxes—Tax sale—Action to set aside—Onus—Certificate of title—Pleading—Want of authority to sell—Particulars.*] Where it appears that one who holds a certificate of title to land has obtained it upon a sale and conveyance for taxes, the burden is upon the certificate holder to establish the regularity of the tax sale. *Kirk* v. *Kirkland et al.* (1890), 7 B.C. 12, affirmed in *Johnson* v. *Kirk* (1900), 30 S.C.R. 344, and *Turner* v. *Municipality of Surrey* (1911), 16 B.C. 79, 349, followed. *Semble*, that the plaintiff, in his statement of claim, instead of setting up the tax sale and alleging that it was made without authority, should have simply set out his title and alleged that the purchaser at the tax sale (a defendant) had wrongfully taken possession of his property. *Held*, however, that the plaintiff, having alleged the tax sale and its invalidity and asked for a declaration accordingly, was not bound to furnish particulars of the defects in the authority of the municipality to sell. Order of MORRISON, J. reversed. BEAVIS v. TOWNSHIP OF LANGLEY AND JENNY STEWART. **30**

3.——*By-law closing public lane—Validity—Vancouver Incorporation Act, B.C. Stats. 1900, Cap. 54, and amending Acts—Municipal Act, R.S.B.C. 1911, Cap. 170—public interest—Erection of business block.*] The Hudson's Bay Company, the owner of lots on each side of a lane, which, with the lane, made a block facing on three streets, desiring to erect a large business block covering the lots and the lane between, petitioned the Council to close such portion of the lane and to lease it to the Company for 25 years, the Company agreeing to convey to the City a lot and two important easements to be used as an outlet from the lane in substitution for the portion closed. In pursuance of this petition the Council passed a by-law closing the portion of the lane in question and providing for its lease to the Company. Certain owners of the lots adjoining that portion of the lane that was closed applied to CLEMENT, J. to quash the by-law. The application was dismissed. *Held*, on appeal, *per* IRVING and MARTIN, JJ.A., that the appeal should be dismissed. *Per* MACDONALD, C.J.A., and GALLIHER, J.A., that the appeal should be allowed, and that the by-law should be quashed. *Per* IRVING, J.A.: Where bodies of a public representative character, entrusted by Parliament with delegated authority, are acting *bona fide* and within the limits of the powers conferred upon them by Parliament, they are not to be interfered with by the Courts. *Slattery* v. *Naylor* (1888), 13 App. Cas. 446, approved. *Per* MARTIN, J.A.: The question of public interest is one of degree, dependent upon the particular circumstances of each case, and where present in any appreciable degree, the Court should not interfere with the *bona-fide* exercise of municipal powers. *Per* MACDONALD, C.J.A., and GALLIHER, J.A.: The erection of a costly private building in a city is not a matter of public interest in the legal sense of the term. The Court being evenly divided, the appeal was dismissed. Directions as to maps and plans not being bound in the appeal book. *In re* UNITED BUILDINGS CORPORATION, LIMITED, *et al.* AND THE CORPORATION OF THE CITY OF VANCOUVER. - - - - - - - **274**

4.——*By-law—Reasonableness of—Application to quash—Council exceeding powers—Confiscatory legislation—Equity—Estoppel—Municipal Act, R.S.B.C. 1911, Cap. 170, Secs. 208, 209, 210.*] In exercising its legislative powers dealing with public utilities, wherein considerable money has been invested over a long period of years, a municipal council cannot ignore the equities which have thus arisen. Where, therefore, powers were exercised for over 25 years under a by-law granting privileges to a gas company, and on a dispute arising over an alleged irregularity, the municipal council repealed the by-law:—*Held* that, in the circumstances, it could not be considered that the Legislature contemplated conferring upon municipal councils the power to pass confiscatory legislation such as that complained of. CUNNINGHAM v. THE CORPORATION OF THE CITY OF NEW WESTMINSTER. - - - **188**

5.——*Intoxicating liquor—Liquor licence—Resolution of the board of licence commissioners—Removal by writ of certiorari—Practice—Affidavits on information and belief—Municipal Act, R.S.B.C. 1911, Cap. 170, Sec. 355—Land Registration Amendment Act, 1912, Cap. 15, Sec. 19, Subsec. (3).*] A resolution granting a licence for

brought against them for any damage or injury sustained by reason of the tramway or railway or works or operations of the Company. *Held*, that the provisions of the Families Compensation Act do not come within the scope of the Consolidated Railway Company's Act, 1896, and that the plaintiff had therefore, under section 5 of the Families Compensation Act, one year from the death of deceased within which to bring the action. *Green* v. *B.C. Electric Ry. Co.* (1906), 12 B.C. 199, followed. GENTILE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - **307**

7.——*Damages — Employers' Liability Act, R.S.B.C. 1911, Cap. 74, Sec. 3, Subsec. (1), and Sec. 7, Subsecs. (1) and (3)—Pleadings—Defect in statement of claim—May be cured by defence.*] A specific denial in the defence of an allegation that the plaintiff should have, but neglected to plead in an action for damages under the Employers' Liability Act, cures the defect, if the issues are thereby defined in the pleadings with sufficient clearness for the trial. COOK v. NEWPORT TIMBER COMPANY. - **624**

8.——*Death of independent contractor—Defect in machinery—Evidence of knowledge of defendants.*] Deceased, while working on a building as an independent contractor, was struck and instantly killed by the falling of the boom of a derrick that had been erected on the building by the defendants, who were the building contractors. The evidence shewed that the machine was of the best type and in good repair, and was operated by a competent man, who was not guilty of any negligence or misconduct. The plaintiffs alleged that there was a defect in the machine, in that the dog did not fit properly in the cog-wheel and at times slipped. The only evidence of knowledge of the alleged defect by the defendants was that of two witnesses, one of them stating that the operator of the hoist told him, after the accident, that the machine was defective and that he had notified the defendants of the defect prior to the accident, and that this statement was made by the operator 15 or 20 feet from the defendant W. (one of the members of the defendant firm), who did not contradict the statement. The other witness, who stood beside W. at the time the statement was made, testified that he heard what the operator said. The plaintiffs contended that when W. did not contradict the operator's statement, the evidence was admissible as an acquiescence by W. in the statement. The evidence was allowed in on the trial and the jury returned a verdict for the plaintiffs. *Held*, on appeal, reversing the judgment of the trial judge and setting aside the verdict of the jury, that the evidence that W. heard the statement was of the vaguest character; that the remark was not addressed to him; that the allegation was not that he, but the firm (of which he was a member), had been notified, as to which he may have had no knowledge, so that even if he heard what the operator said, he may not have been in a position to contradict it. In view, therefore, of the loose character of all this evidence, it should not have been admitted, and without it the plaintiff should not succeed. WATSON *et al.* v. BOOKER *et al.* - - - - - - **538**

9.——*Destruction of building by fire—Electricity—Excessive voltage—Two wires strung on same line of poles—Evidence—Inference.*] The plaintiff M., the owner of a sawmill in which was installed a complete electrical system, properly insulated, was supplied with electric power by the defendants. The power was supplied over a low potential wire carrying a maximum of 2,300 volts, which was strung below a high potential wire, carrying 40,000 volts, on the same line of poles from the power house to within a short distance of the sawmill. There was no fuse for protection at the point where the wire ran from the service line into the mill. About 4 o'clock in the afternoon of the 22nd of August, 1911, lightning struck and shattered one of the defendants' poles, causing the upper wire to fall on the lower. The damage was repaired and the current again turned on about 7.30 in the evening; at 9 o'clock the mill took fire. Shortly before 9 o'clock the wires above the switchboard in the mill were observed to become incandescent, and immediately afterwards there was an explosion in the oil-switch in the mill, from which the fire resulted. In an action for damages for destruction of the mill by the defendants' negligence, the jury returned a verdict for the plaintiff, upon which judgment was entered. *Held*, on appeal, that there was evidence which could not properly have been withdrawn from the jury, and that the jury's verdict for the plaintiff should not be disturbed. *Per* MACDONALD, C.J.A.: Expert evidence shewed that what happened in the mill might happen by reason of very high voltage in the wires, and it did not matter whether it was destruction of the insulation or defective insulation in the mill which caused the fire

if, but for the abnormal voltage, that result would not have been brought about. The jury were entitled also to find that a fuse at the point where the wires ran from the service line into the mill was required for the plaintiff's protection, and that had there been a fuse there, the fire would not have occurred. *Per* IRVING, J.A.: It is unnecessary for the trial judge to invite the jurors to decline to answer questions he is about to submit to them. Jurors are a part of the Court, and it should be assumed that they desire to do their duty and assist the Court in rightly deciding the case. MCELMON *et al.* v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - - - - - **522**

10.——*Employer and workman—Engineer on steam-shovel—Risk voluntarily incurred—Volenti non fit injuria—Employers' Liability Act, R.S.B.C. 1911, Cap. 74.*] The plaintiff had been engaged on a steam-shovel of the defendant Company for six years, during the latter two and a half of which he had acted as engineer. The steam-shovel, which travelled by its own power on the track at about three miles an hour, had a cab in front for operating the engine and another at the back for firing. The boiler stood between the cabs and its back portion was between two water tanks about seven inches from its outer bulge four feet above the deck, the engine being below the boiler. A break staff stood about 15 inches in front of the tank to the right of the boiler, and about two feet out from a pinion that was connected with a gear-wheel in front, by which the machine was moved on the tracks. The lubricator was about three and a half feet back of the pinion, between the boiler and the water-tank. In order to get to the lubricator from the front cab, the engineer had to pass between the gear-wheel and the break staff and then between the boiler and the water-tank. While the steam-shovel was in motion, the plaintiff went from the front cab to the lubricator and after adjusting it was backing out, when his overall caught between the pinion and the gear-wheel, and his arm being pulled in, it was crushed between the wheels, necessitating amputation. It was the duty of the engineer to report what was necessary in the way of repairs or improvements to the steam-shovel, but the plaintiff had never requisitioned for a guard or other protection on the gear-wheel. On the trial the jury found in favour of the plaintiff for $5,000 damages, for which judgment was entered. *Held*, on appeal, that the defence arising

from the maxim *Volenti non fit injuria* applied in this case, and the plaintiff was not entitled to recover. Appeal allowed and verdict set aside. MCPHEE v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY. - **450**

11.——*Injury—Common employment.* **179**

See MASTER AND SERVANT. 11.

12.——*Injury to person on track by train—Contributory negligence.* - **518**

See RAILWAYS. 2.

13.——*Injury to servant—Defective system.* - - - - - - - - - - **482**

See MASTER AND SERVANT. 12.

14.——*Liability of owners.* - **407**

See MASTER AND SERVANT. 5.

15.——*Personal injuries—Struck by street car while crossing street—Evidence to justify finding for plaintiff.*] The plaintiff, running from the northwest corner towards the southwest corner of Granville and Davie streets in Vancouver (Granville street running north and south, and Davie street east and west) to catch a Granville street car on the south side of Davie street, reached a point just beyond the track that curved into Davie street from the north on Granville street, when, on turning sharply to the left towards his car, he was struck by the fender of a car rounding the curve into Davie street and was injured. There was evidence that the motorman did not sound his gong while making the turn. The jury returned a verdict for the plaintiff. *Held*, on appeal (MACDONALD, C.J.A. dissenting), that the case was one in which the jury could properly find a verdict for the plaintiff. OGLE v. BRITISH COLUMBIA ELECTRIC RAILWAY COMPANY, LIMITED. - **693**

16.——*Pit unguarded under elevator—Licensee—Knowledge of danger—Contributory negligence.*] The plaintiff, an employee of a milk vendor, in the course of his duties, carried milk up and down an unguarded freight elevator in the defendant Company's quarters, used for the storing and pasteurizing of milk. The floor of the elevator, when down, was used in conjunction with the other floor space where it stood, in going from one side to the other, there being a pit below the elevator floor about 15 feet deep, of which the plaintiff claimed to have no knowledge. The plaintiff had been at the building, in the usual course of his business, about ten times previous to the evening of

fore entitled to have the action as against her dismissed, with costs. *Held*, further, that in dealing with costs, it is the duty of the Court to repress unnecessary litigation. An application to take a case off the peremptory list of appeals for the day will be refused. The proper time to apply is when the peremptory list is arranged at the close of the day, for the following day. SCOTT-ELLIOTT *et al.* v. HATZIC PRAIRIE COMPANY, LIMITED, *et al.* - - - - - - **668**

10.——*County Court judgment in default of dispute note—Application to set aside—Terms—Costs.*] The plaintiff brought action for rent due under a lease of certain land given to the defendants, and for an account of gravel removed from the land and payment therefor. Prior to the commencement of the action the plaintiff had demanded security from the defendants for the amount due and they delivered over certain bonds as security, on the understanding that if satisfactory it was to be accepted and time given for payment of the indebtedness, but if unsatisfactory, was to be returned before action was brought. The plaintiff was not satisfied with the security, but he held the bonds and commenced action, and upon the default of the defendants in filing a dispute note, he entered judgment. An application by the defendants to set aside the judgment was dismissed. *Held*, on appeal (*per* MACDONALD, C.J.A., MARTIN and MCPHILLIPS, JJ.A.), that the judgment be set aside and the defendants be allowed to defend upon their paying the costs of the application to re-open and of entering judgment, and that the plaintiff hold the bonds pending the final determination of the action. *Per* IRVING and GALLIHER, JJ.A.: That the terms upon which the judgment should be set aside and defendants allowed to defend should be the payment of the costs of entering judgment and of the application to set same aside, also the payment into Court within a given time the money or other security to cover the plaintiff's claim. *Royal Bank* v. *Fullerton* (1913), 17 B.C. 11, distinguished. MACGILL v. DUPLISEA *et al.* - - - **600**

11.——*Discovery—Examination for—Conduct money—Rules 370f, 370g and 370k.*] It is essential, where the evidence on discovery is sought of a party resident some distance from the registry in which the action is brought, that the proper conduct money should be tendered. PARSONS v. FRANCIS. - - - - - - - - - **157**

12.——*Lease—Non-payment of rent—Relief from forfeitures—Laws Declaratory Act, R.S.B.C. 1911, Cap. 133, Sec. 2, Subsecs. 14 and 17.*] In an action to recover possession of leased premises for non-payment of rent, the defendant brought into Court all arrears of rent and applied for relief under subsection (14) of section 2 of the Laws Declaratory Act. Under the lease the rent was payable monthly, but defendant was in the habit of paying for several months at a time, to which the plaintiff raised no objection. Defendant was served with notice of re-entry when five months in arrear. He immediately tendered plaintiff all rent due, which was not accepted. *Held*, that the lessee was entitled to relief. On the contention that the Court had no jurisdiction to grant relief under subsection (17), as in every case where the rent became due and was not paid there was a forfeiture which the lessor waived by taking no action:—*Held*, that there is no forfeiture until the lessor re-enters and declares the lease forfeited. BALAGNO v. LE ROY. - - - - - **127**

13.——*Money in Court—Payment out—Application for—Fraudulent Preferences Act, R.S.B.C. 1911, Cap. 94—Creditors' Trust Deeds Act, R.S.B.C. 1911, Cap. 13—New trial.*] On an appeal from a judgment in favour of the plaintiff a new trial was ordered upon the defendants paying into Court $4,000 to abide the result of the new trial. On the new trial judgment was again given in favour of the plaintiff, the judge adding that the payment out of moneys must be spoken to. Subsequently the defendants assigned for the benefit of creditors. On application for payment out:—*Held*, that as the money was paid in as against the happening of a contingency which eventuated before the assignment, namely, the securing of a judgment, the plaintiff was entitled to payment out. Neither the Fraudulent Preferences Act nor the Creditors' Trust Deeds Act applies in this case. DOCTOR v. PEOPLE'S TRUST COMPANY. - - - - - - - - - **111**

14.——*Motion to strike out plaint.* **149**
See COUNTY COURT. 2.

15.——*Notice of appeal—Application to extend time for service of——Made after statutory period had elapsed—Right to so apply—Marginal rule 967—Court of Appeal Act, B.C. Stats. 1907, Cap. 10, Secs. 23 and 25.*] The Supreme Court, or a judge thereof, has the power, under Order LXIV., r. 7, of the Supreme Court Rules, to enlarge the time for giving notice of appeal, although the application is not made until the time for giving such notice has elapsed. Until

STATUTES—*Continued.*

STATUTES—*Continued.*